Fordham International Law Journal

Volume 33, *Issue* 5 2011 *Article* 3

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John L. Murray*

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Abstract

This Article examines the operation of the European Convention on the Protection of Human Rights and Fundamental Freedoms system (”European Convention on Human Rights” or “Convention”) (i.e., the Council of Europe’s system for human rights protection, based on the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, as distinct from the unique system of the European Union). The system is examined in an effort to discern the enhanced impact the Convention may have on Community law under the Lisbon Treaty, and the difficulties this may present.

THE INFLUENCE OF THE EUROPEAN CONVENTION ON FUNDAMENTAL RIGHTS ON COMMUNITY LAW

Hon. Mr. Justice John L. Murray[*]

INTRODUCTION

As a consequence of World War II, Europe suffered not only material but moral devastation. Its post-war leaders, aghast at what had occurred, sought to establish structures that would act as ramparts against future degradation of human dignity and human rights. At the national level, constitutional courts were established to enforce new constitutional protections for such rights, particularly from arbitrary state activities.[1]

At the international level, the European Convention on the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights" or "Convention") came into force in 1953.[2] The contracting states undertook to respect and observe the rights guaranteed in the Convention. Those states were answerable to supervisory organs[3] based in Strasbourg, conferred with the jurisdiction to interpret the Convention and to determine cases brought before them where a

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* Chief Justice of Ireland. Member of the Court of Justice of the European Communities 1991–99. The Author wishes to acknowledge the valuable assistance of Tom Daly, Executive Legal Officer to the Chief Justice, in the preparation of this Article.

1. Ireland and Austria were the only two Western European countries which had, prior to the Second World War, courts empowered to judicially review state action and in particular legislation. *See* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 46–47, 46 n.5 (1971).

2. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights] (entered into force Sept. 3, 1953).

3. The two part-time supervisory organs—the European Commission of Human Rights ("Commission") and the European Court of Human Rights—were replaced by a full-time European Court of Human Rights in 1998, following adoption of the Eleventh Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 1, May 11, 1994, 2061 A-2889 U.N.T.S. 7 [hereinafter Convention Protocol 11].

contracting state had breached its provisions. More or less parallel with this development, steps were taken to establish the European Communities ("Community"), the precursors of the now denominated European Union ("EU"), with a view toward closer union, particularly in the economic and social fields, of the peoples of (Western) Europe.

If the post-war movement for the judicial protection of human rights enjoyed concrete success, it apparently escaped the attention of key players such as Jean Monnet in the construction of the treaties, particularly the Treaty of Rome,[4] from which the European Communities blossomed into its present state as the European Union. For example, no reference was made to the protection of fundamental human rights in the founding treaties, and the Court of Justice of the European Communities ("Court of Justice"),[5] in interpreting and applying the treaties, initially considered itself without power to judicially review Community measures with regard to their compatibility with fundamental human rights.

The idea that the Treaty of Rome implicitly conferred jurisdiction on the Court of Justice to review Community measures and actions for their compatibility with respect for fundamental human rights had a difficult but successful birth in the *Internationale Handelsgesellschaft*[6] and *Nold*[7] cases, a story that is well documented in legal literature. This development was nurtured and developed in subsequent case law. The recognition by the Court of Justice of the European Communities that fundamental rights and their protection were integral parts of the system of law of the European Communities, and now the EU, was hailed as adding a legitimacy to the rule of law in the EU which had been absent, reducing the democratic deficit that

4. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

5. It may be noted that, following enactment of the Lisbon Treaty, the court system of the European Union ("EU") is now known as the Court of Justice of the European Union. It comprises three courts: the Court of Justice; the General Court (formerly the Court of First Instance); and the Civil Service Tribunal. In this Article, references to the "Court of Justice" are to that Court, unless otherwise indicated.

6. Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, ¶¶ 3–4.

7. Nold v. Commission, Case 4/73, [1974] E.C.R. 491, ¶ 13.

existed in its legal framework, and as being a major step in the constitutionalization of the treaties as a whole.[8]

Since those early days, the formal or textual basis in the treaties for the protection of human rights has advanced considerably, often by the member states of the EU playing catch-up on the case law of the Court of Justice by inscribing formally in the treaties (for example, the Treaties of Amsterdam and Maastricht) the legal or constitutional basis for the protection of human rights within the sphere of EU law as already established in the court's case law.

While the Convention, as an international convention to which the member states of the EU are contracting parties (along with twenty other non-EU states), has long served as a source of inspiration, in the comparative law sense, for decisions of the Court of Justice in the field of human rights, that Convention is now, by virtue of the Lisbon Treaty,[9] fairly firmly absorbed as part of the internal rubric of law of the European Union and due to be fully so when the European Union itself becomes a signatory to the Convention as the Lisbon Treaty mandates.

This might be said to be the culmination of the evolution and development of human rights protection in the vast areas of government now occupied and ruled by EU law, including justice and security affairs. As a result, the jurisprudence of the European Court of Human Rights is destined to play a dominant role in the interpretation and protection of fundamental human rights in the legal order of the EU.

It is ironic that this major step should give rise in many quarters once again to fears concerning the future legitimacy of trans-European judicial decisions governing sensitive, social, ethical, and political issues in the member states of the EU. Accordingly, it appears a worthwhile exercise to examine the operation of the Convention system (*i.e.*, the Council of Europe's system for human rights protection, based on the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights, as distinct from the unique system of the EU) in an effort to discern the enhanced impact

8. *Id.*

9. Having been ratified by all member states of the European Union, the Lisbon Treaty entered into force on December 1, 2009. The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1 [hereinafter Reform Treaty] (entered into force Dec. 1, 2009).

the Convention may have on Community law under the new treaty, and the difficulties this may present.

I. *EUROPEAN CONVENTION ON HUMAN RIGHTS*

The Convention sets out a substantial catalog of civil and political rights[10] and forms the heart of a pan-European regime of human rights protection to which all member states of the sixty-year-old Council of Europe are parties. It is worthwhile to briefly contrast the nature of the convention system with that of the European Union, as they differ fundamentally in both nature and membership.

The primary aim of the EU is to further economic, social, and political integration among its member states. It is a *sui generis* autonomous legal system with law-making powers vested in its institutions, to which its member states have consciously transferred a significant proportion of their sovereign governmental powers. EU law is characterized by the principles of direct effect and primacy of Community law in relation to national law, and thus forms an integral part of national law in each member state, which is relied upon and enforced by national courts. Thus, EU law and the decisions of the Court of Justice may be relied upon by individuals before national courts in all Member States. The ability to do so applies in a uniform manner in all Member States and is not dependant on, or governed by, national legislation. Reflecting the high degree of integration at the EU level, the decisions of the Court of Justice have a direct impact on domestic legal systems as they are binding *erga omnes*, and strong mechanisms exist for their enforcement.[11]

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10. *See generally* European Convention on Human Rights, *supra* note 2, arts. 2–3, 5–6, 8–10 (guaranteeing the right to life, the prohibition of torture, the right to personal liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, and freedom of assembly and association). Other rights, such as the right to property and the right to education, are guaranteed by additional protocols to the convention. *See* Protocol to the Convention of the Protection of Human Rights and Fundamental Freedoms arts. 1, 2, Mar. 20, 1952, 213 U.N.T.S. 262 [hereinafter Convention Protocol 1].

11. National courts at all levels will apply and enforce EU law, including decisions of the Court of Justice, as part of domestic law, and individuals may obtain damages against governments should direct loss be sustained as a result of a clear failure to ensure that there are legal measures in place to protect all legal rights under EU law (economic, social and so forth). In addition, the European Commission can bring

By contrast, the objective of the Council of Europe is to develop and protect common democratic principles throughout Europe, such as the rule of law and respect for human rights, based primarily on the European Convention on Human Rights.[12] While it is a highly developed system for human rights protection that allows individual petitions to be brought against states for violation of Convention rights, it is also an intergovernmental organization that remains anchored in the realm of international law and operates within its limits.

Elaboration of the rights enshrined in the European Convention on Human Rights is the responsibility of the European Court of Human Rights, which sits in Strasbourg ("Strasbourg Court"). Unlike the EU's Court of Justice, which ensures the uniform application of the entire corpus of Community law in each of the EU member states, the Strasbourg Court focuses exclusively on interpretation of the Convention. Unlike judgments of the Court of Justice, the decisions of the Strasbourg Court are binding only on the state to which they are addressed and there is no strong or uniform enforcement mechanism,[13] although, in practice, it is rare that a state fails to comply with a decision of the court. The Convention cannot be directly invoked before national courts in the same manner as EU law and decisions of the Court of Justice. While many countries have made the Convention directly applicable in their legal systems, others have made it applicable to a much more limited extent. Thus, the Convention can be relied upon by individuals before national courts only to the extent provided by national law. Otherwise, they are left to seeking a remedy before

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infringement proceedings against member states for failure to comply with their obligations under Community law, and the Court of Justice has the power to fine member states for failing to comply with the court's decisions.

12. Other Council of Europe instruments for the protection of individual rights include the European Social Charter, Oct. 18, 1961, Europ. T.S. No. 35; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, Europ. T.S. No. 126, *reprinted in* 27 I.L.M. 1152; and the European Convention on Extradition, Dec. 13, 1957, Europ. T.S. No. 24.

13. As the Federal Constitutional Court of Germany has observed, there is no "schematic way" of enforcing decisions of the European Court of Human Rights. *See* Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Oct. 14, 2004, docket no. 2 BvR 1481/04, 111 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 307 (323); *see also* Clemens Rieder, *Protecting Human Rights within the European Union: Who is Best Qualified to Do the Job—the European Court of Justice or the European Court of Human Rights?*, 20 TUL. EUR. & CIV. L.F. 73, 100 (2005).

the European Court of Human Rights by bringing separate proceedings against their government.

Given its continent-wide membership of forty-seven states, stretching from Iceland in the west to Azerbaijan in the east, there is a much greater level of political and cultural diversity among the member states of the Council of Europe than exists within the twenty-seven member EU itself.

All twenty-seven member states of the EU are contracting parties to the Convention, as this is a condition of EU membership.[14] However, the EU itself is not yet a contracting party to the Convention, and thus Community law measures are not yet subject to review by the Strasbourg Court. The Lisbon Treaty now requires the EU to accede to the Convention, which is discussed more fully in Part III.

II. *THE INFLUENCE OF THE EUROPEAN CONVENTION ON COMMUNITY LAW TO DATE*

Until the 1970s, the Convention and European Community systems operated on parallel tracks: the organs of the Convention system were the sole arbiters of fundamental rights on the European stage,[15] while the European Communities focused on the construction of a common market. For a variety of reasons,[16] the founding treaties of the European Communities initially contained no reference to fundamental rights (apart from the

14. Conditions for membership of the EU, known as the "Copenhagen criteria," were set out by the European Council in Copenhagen in 1993 and added to by the Madrid European Council in December 1995. *See* Cophenhagen European Council, Presidency Conclusions, E.U. BULL., no. 6, at 7 (1993); Madrid European Council, Conclusions of the Presidency, E.U. BULL., no. 12, at 9 (1995).

15. The Convention system originally contained two part-time organs which were replaced by the current, full-time European Court of Human Rights with the entry into force of Protocol 11 to the European Convention on the Protection of Human Rights and Fundamental Freedoms on November 1, 1998. *See supra* note 3 and accompanying text.

16. First, at the establishment of the European Communities the Convention had already come into force and was to provide the basis for the protection of human rights and fundamental freedoms across Europe. Second, there was a widely-held belief that the process of economic integration envisaged by the Community treaties could not lead to a violation of human rights. Third was the fear of the original Member States that including a "Bill of Rights" in the EC Treaty would facilitate an unwelcome expansion of Community powers, in leading the institutions of the then-European Economic Community to interpret their competences as constituting anything *not* explicitly prohibited by the enumerated guarantees therein.

four freedoms and the prohibition of discrimination)[17] and the Court of Justice evinced considerable reluctance to tread into this area.[18]

However, faced with the possibility of member states' constitutional courts reviewing the compatibility of Community law with national constitutional rights prior to its implementation, which would greatly undermine the uniform application of Community law, the Court of Justice recognized in *Internationale Handelsgesellschaft*,[19] in 1970, and *Nold*,[20] in 1974, that respect for fundamental rights forms an integral part of the general principles of Community law. The court was to protect the fundamental rights within the sphere of Community law according to an unwritten catalogue of rights inspired by the constitutional traditions of the member states and the guidelines supplied by international human rights treaties on which the member states had collaborated or to which they were parties. The choice of these sources being those to which the member states were inextricably linked was designed to give legitimacy to the court's decisions on issues as sensitive as those relating to human rights.

In practice, the Court of Justice's reference to national constitutions as a source of rights has been sporadic, and while reference has been made to other rights instruments, such as those of the United Nations or the International Labor Organization, the European Convention on Human Rights has provided the only clear point of agreement as to a whole raft of rights commonly recognized by all EU member states.

Since the mid-1990s in particular, the Court of Justice has increasingly looked to the European Convention on Human Rights for inspiration as to the nature and scope, or even existence, of fundamental rights in Community law, having

17. *See* Consolidated Version of the Treaty Establishing the European Community art. 12, 2006 O.J. C 321 E/37, at 15 [hereinafter EC Treaty]. The four freedoms refer to the free movement of goods, capital, services, and people, as guaranteed by Community law. *See* EEC Treaty, *supra* note 4, art. 3.

18. *See, e.g.*, Stork v. High Authority, Case 1/58, [1959] E.C.R. 43.

19. Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, ¶ 4.

20. Nold v. Commission, Case 4/73, [1974] E.C.R. 491, ¶ 2.

recognized the preeminent position of the Convention by 1991.[21] In doing so, the Court of Justice has adopted a somewhat deferential position to the Strasbourg Court in the interpretation of fundamental rights that are contained in the Convention.[22]

A clear example of such deference is the Court of Justice's case law on searches of business premises. In a 1989 judgment, *Hoechst AG v. Commission*,[23] the Court of Justice held that business premises were not protected by article 8 of the Convention guaranteeing the inviolability of the home. However, it revised its position in the 2002 decision of *Roquettes Frères SA v. Commission*,[24] in light of an intervening decision of the European Court of Human Rights,[25] in which the Strasbourg Court held that business premises did come within the protection of article 8 of the Convention.[26]

The Court of Justice has also demonstrated an increasing willingness to review legislation in light of Convention standards, which is demonstrated most clearly in family reunification cases. In *Demirel v. Stadt Schwäbisch Gmünd*,[27] a 1987 decision concerning the reunification of a Turkish national with his family, the Court of Justice evinced considerable reluctance to engage with fundamental rights arguments based on the Convention on the basis that it had "no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law" in the absence of Community regulations specifically concerning family reunification for Turkish workers residing in the Community.[28]

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21. *See, e.g.*, Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis, Case C-260/89, [1990] E.C.R. I-2925, ¶ 41.

22. This is not to say that the Court of Justice has interpreted fundamental rights at all times in line with the European Court of Human Rights; there are certainly cases of divergence but these are, on the whole, infrequent. *See, e.g.*, Frederic van den Berghe, *The EU and Issues of Human Rights Protection: Same Solutions to More Acute Problems?*, 16 EUR. L.J. 112, 119–22 (2010).

23. Hoechst AG v. Commission, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, ¶ 18.

24. Roquette Frères SA v. Directeur-Général de la Concurrence, de la Consommation et de la Répression des Fraudes, Case 94/00, [2001] E.C.R. I-11.

25. *See* Société Colas Est v. France, 2002-III Eur. Ct. H.R. 133 (2002).

26. *Roquette*, [2001] E.C.R. I-11, ¶ 29.

27. Demirel v. Stadt Schwäbisch Gmünd, Case 12/86, [1987] E.C.R. 3719.

28. *Id.* ¶ 28.

However, later decisions of the Court of Justice display a lesser degree of caution. Most notably, in its 2003 decision in *Secretary of State for the Home Dep't v. Akrich*,[29] the Court of Justice instructed a British court that it was required to have regard for a spouse's right to respect her family life guaranteed by article 8 of the Convention in assessing the application of her husband, a Moroccan (and therefore non-EU) national, to remain in Britain, provided the marriage was genuine.[30] The *Akrich* decision has been viewed as a virtually direct application of article 8 of the Convention by the Court of Justice, rather than the use of article 8 as an interpretive guide: the court held that the provision is a general principle of Community law, set out the Strasbourg Court's test for review of restrictions on that right, and stipulated that the national court was bound to uphold the right as interpreted by the Strasbourg Court.[31] The decision has also been characterized as a sign that even matters that appear *prima facie* as purely internal to a member state (e.g., immigration) may be subject to review by the Court of Justice;[32] in essence, as one commentator put it, the United Kingdom's wish to exclude Mr. Akrich from its territory was "thwarted" by article 8 of the Convention applied via Community law.[33]

The special position accorded to the Convention in Community law by the Court of Justice has been enshrined in successive treaties,[34] which have formally endorsed the approach taken by the Court of Justice in its case law. Article 6(2) of the Maastricht Treaty of 1992, as amended by the Amsterdam Treaty of 1997, provides that "the Union shall respect fundamental rights, as guaranteed by [the European Convention on Human

29. Sec'y of State for the Home Dep't v. Akrich, Case C-109/01, [2003] E.C.R. I-9607.

30. *Id.* ¶¶ 59, 61.

31. *See id.* ¶¶ 59–61.

32. *See* Xavier Groussot, *UK Immigration Law Under Attack and the Direct Application of Article 8 ECHR by the ECJ*, 3 NON-ST. ACTORS & INT'L L. 187, 200 (2003).

33. Carole Lyons, *Human Rights Case Law of the European Court of Justice, January 2003 to October 2003*, 3 HUM. RTS. L. REV. 323, 330 (2003).

34. *See* Single European Act pmbl., 1987 O.J. L 169/1, at 2, corrected by 1987 O.J. L 304/46 (amending the Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11) (stating that the member states are, "[d]etermined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the member states, in the [Convention] and the European Social Charter, notably freedom, equality and social justice."); *see also infra* Part III (discussing the fundamental rights provisions of the Lisbon Treaty).

Rights] and as they result from the constitutional traditions common to the Member States, as general principles of Community law."[35]

The evolution has therefore generally been in one direction: the status of the Convention in the Community legal order has been enhanced as the jurisprudence of the Court of Justice has developed, and with the enactment of each successive treaty. As a consequence, fundamental rights in Community law have become infused with the case law of the European Court of Human Rights, and decisions of that court, which do not have *erga omnes* effect, have been accorded such effect when applied by the Court of Justice. In this way the case law of the European Court of Human Rights, by virtue of being incorporated as part of EU law, in principle, gains precedence over the laws and constitutions of EU Member States, further limiting their sovereignty.

Nevertheless, the Court of Justice has also placed limits on the influence of the Convention on Community law, repeatedly stressing that the nature and ambit of fundamental rights in Community law must be determined autonomously and according to Community aims,[36] and that it may interpret international agreements (including the Convention) according to the Community's objectives.[37] The Court of Justice also ruled, in Opinion 2/94,[38] that accession of the EU to the Convention would require treaty amendment, implicitly rejecting the notion of external control by the Strasbourg machinery.

The resulting disquiet regarding the perceived danger of divergence between the convention system and the Community legal order with respect to fundamental rights protection, and concern regarding the uncodified catalogue of rights in Community law, have been addressed by the Lisbon Treaty.

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35. Consolidated Version of the Treaty on European Union art. 6(2), 1997 O.J. C 340/145, at 151.

36. *See, e.g.*, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, Case 11/70, [1970] E.C.R. 1125, ¶¶ 2–4 (stating that the protection of fundamental rights in the Community legal order "must be ensured within the framework of the structure and objectives of the Community").

37. *See* Opinion 1/91: Draft Agreement Between the Cmty., on the One Hand, and the Countries of the Eur. Free Trade Assoc., on the Other, Relating to the Creation of the Eur. Econ. Area, [1991] E.C.R. I-6079.

38. Opinion 2/94: Accession by the Cmty. to the Convention for the Protection of Human Rights and Fundamental Freedoms, [1996] E.C.R. I-1759, ¶¶ 34–35.

III. *THE LISBON TREATY*

The Lisbon Treaty, enacted in place of the ill-fated Constitutional Treaty,[39] amends previous treaties in order to reform the EU's organizational rules and expand the Union's competences.[40] The treaty inserts a new article 6 into the Maastricht Treaty that has the potential to transform the fundamental rights landscape of Community law, as it greatly enhances the status of the European Convention on Human Rights in Community law.[41]

The new article 6(3) of the Maastricht Treaty, inserted by the Lisbon Treaty, simply reiterates the old article 6(2) of that Treaty, referred to in Part II. However, by formally providing that fundamental rights "as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law," the new articles 6(1) and 6(2) are of greater moment.[42]

Article 6(2) mandates accession of the EU to the Convention.[43] It appears beyond doubt that, once effected, accession will render Community measures subject to some form of review by the Strasbourg Court for the first time, even though the precise nature of the EU's relations with the control

39. The reforms introduced by the Lisbon Treaty were originally put forward in the grander form of a Constitutional Treaty, signed on October 29, 2004, which was intended to create a Constitution for the European Union to replace the existing Treaties. *See* Draft Treaty Establishing a Constitution for Europe, 2004 O.J. C 304/1. However, having been ratified by eighteen of the (then-twenty-five) Member States, the Constitutional Treaty was rejected by referenda held in France and the Netherlands in May and June 2005. The Treaty was subsequently resurrected in the somewhat humbler form of the Lisbon Treaty, which contains all of the essential features of the Constitutional Treaty, but amends the existing Treaties instead of replacing them. The Lisbon Treaty entered into force on December 1, 2009, having been ratified by all Member States. *See* Reform Treaty, *supra* note 9, art. 6(2), 2007 O.J. C 306, at 135. On this occasion, no referendum was held in France or the Netherlands. Ireland was the only country to hold a referendum on the Lisbon Treaty (although it may be noted that the Constitutional Treaty had been ratified by Spain and Luxembourg following consultative referenda).

40. Reform Treaty, *supra* note 9, 2007 O.J. C 306, at 1.

41. *Id.* art. 1(8), 2007 O.J. C 306, at 13.

42. Consolidated Version of the Treaty on European Union, art. 6(3), 2008 O.J. C 115/13, at 19 [hereinafter TEU post-Lisbon].

43. *Id.* art. 6(2), 2008 O.J. C 115, at 19 ("The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.").

mechanisms of the convention system under accession are as yet undecided.[44]

Accession will plug a considerable *lacuna* in the system of European human rights protection, whereby the laws of EU member states have been subject to the Strasbourg Court's jurisdiction, while Community measures have not, thus creating significant difficulties for member states where obligations under Community law and the Convention have clashed. This is illustrated most vividly by the case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*.[45] In *Bosphorus*, the Strasbourg Court adopted a deferential approach to the autonomy of the Community legal order by holding that a presumption exists that measures taken by an EU member state in compliance with Community law are compatible with the Convention, rebuttable only where it has been shown that the protection of Convention rights has been "manifestly deficient."[46] This is not a deference the Court has shown to contracting states to the Convention who have a highly developed constitutional and judicial system for protecting human rights, at least equal to that of the EU. Once the EU has acceded to the Convention, it may be expected that the

44. *See generally* European Convention on Human Rights, *supra* note 2. The Council of Europe has made provision for the EU's accession to the Convention by ratifying Protocol Fourteen to the Convention, which entered into force on July 1, 2010, and inserts a new paragraph in article 59 of the Convention, stating: "The European Union may accede to this Convention." Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention art. 17(1) , May 13, 2004, Europ. T.S. No. 194. However, there remain a host of legal and practical steps that require agreement in the EU and the EU member states in order for accession to proceed, not least questions such as how to differentiate, post-accession, between actions against the EU for violations of the Convention and actions against member states when applying Community law. On July 7, 2010, official talks commenced between the European Commission and the Council of Europe concerning the European Union's accession to the Convention.

45. Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, 2005-VI Eur. Ct. H.R. 107. The clash in this case was between a European Council Regulation imposing a trade embargo on the Federal Republic of Yugoslavia, which implemented a United Nations sanctions regime, and the right to property in article 1 of Protocol 1 to the Convention. *See* Hon. Mr. John L. Murray, Chief Justice of Ireland, Fundamental Rights in the European Community Legal Order, Address at the Fifty Years of European Community Law Conference (Feb. 28–Mar. 1, 2008), *in* 32 FORDHAM INT'L L.J. 531, 545–47 (2009).

46. *Bosphorus*, 2005-VI Eur. Ct. H.R., at 158.

Strasbourg Court will feel empowered to take a more strident stance on the protection of Convention rights.

The new article 6(1) of the Maastricht Treaty accords legally binding status to the EU Charter of Fundamental Rights, which is a syncretic compilation of all rights protected in Community law, including those derived from the Convention.[47] Having previously had an ambiguous legal status since its proclamation in 2000,[48] the charter, since enactment of the Lisbon Treaty, has "the same legal value as the Treaties."[49] The charter therefore now provides a Bill of Rights that is legally binding on the institutions and bodies of the European Union and on EU member states when they are implementing Community law.

Notably, article 52(3) of the Charter of Fundamental Rights provides that charter rights corresponding to those contained in the Convention shall be interpreted in line with Convention rights,[50] while the preamble to the charter states that it reaffirms rights derived from, *inter alia*, the case law of the European Court of Human Rights.[51]

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47. TEU post-Lisbon, *supra* note 42, art. 6, 2008 O.J. C 115, at 19. The Charter of Fundamental Rights contains rights recognized by the treaties and in the case law of the Court of Justice, which draws on various international instruments including the Convention, other international conventions emanating from the Council of Europe (*e.g.*, the European Social Charter), as well as instruments of the United Nations and the International Labor Organization ("ILO"). *See* Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/389 [hereinafter Charter of Fundamental Rights].

48. As no agreement could be reached regarding the legally binding status of the charter, a compromise solution was solemnly proclaimed by the Presidents of the European Parliament, the Council, and the Commission at the Nice European Council on December 7, 2000. *See* Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. C 364/1; *see also* Nice European Council, Presidency Conclusions, E.U. BULL., no. 12, at 8 (2000). This led to its having an unusual legal status: it could be used as an interpretive guide by the judicial organs of the EU and as a yardstick by which the other organs could review legislation, but was not legally binding. *See* E.U. BULL., *supra*, at 8 (concluding that the force of the charter will be determined at a later point in time).

49. TEU post-Lisbon, *supra* note 42, art. 6(1), 2008 O.J. C 115, at 19.

50. Charter of Fundamental Rights, *supra* note 47, art. 52(3), 2010 O.J. C 83, at 402 ("In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.").

51. *Id.* pmbl., 2010 O.J. C 83, at 391 ("This Charter reaffirms . . . the rights as they result, in particular, from the constitutional traditions and international obligations common to the member states . . . the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . *and the case-law of* the Court of Justice of

In addition, while the charter has been presented as merely clarifying and crystallizing the catalogue of rights developed in the jurisprudence of the Court of Justice, it contains numerous innovations, such as the reference to the open-ended concept of the dignity of the individual;[52] provisions regarding human cloning and biotechnology;[53] and a right to marriage which does not contain the specific reference in article 12 of the Convention to "men and women."[54] Many of the rights are given more extensive protection and are set out in greater detail than their counterparts in the Convention; for example, article 21 of the charter prohibits discrimination on fifteen grounds, almost twice that of the corresponding article 14 of the Convention.[55]

It is important to note that under the EU's accession to the Convention, Community measures will only be subject to review by the Strasbourg Court against the Convention, not the EU Charter, which provides more extensive rights protection.[56] Yet, it is quite possible that the innovations in the charter will not only influence the Court of Justice when interpreting rights in the Community sphere, but also influence the Strasbourg Court's interpretation of Convention rights, which, under article 52(3) of the charter, the Court of Justice will be bound to follow. Indeed, in the 2002 decision of *Goodwin v. United Kingdom*[57] the Strasbourg Court took account of the wording of the right to

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the European Communities and of *the European Court of Human Rights*.") (emphasis added).

52. *Id.* art. 1, 2010 O.J. C 83, at 392 ("Human dignity is inviolable. It must be respected and protected.").

53. *Id.* art. 3(2), 2010 O.J. C 83, at 392 (prohibiting "eugenic practices," "making the human body and its parts as such a source of financial gain," and "reproductive cloning of human beings" in the field of medicine and biology).

54. *Id.* art. 9, 2010 O.J. C 83, at 393 ("The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.").

55. *Compare id.* art. 21, 2010 O.J. C 83, at 393, *with* European Convention on Human Rights, *supra* note 2, art. 14. For an analysis of the differences between the EU Charter and the Convention, see Eve Chava Landau, *A New Regime of Human Rights in the EU*, 10 EUR. J. L. REFORM 557, 564–65 (2008).

56. *See* Charter of Fundamental Rights, *supra* note 47, art. 14, 2010 O.J. C 83, at 394; *see also* Landau, *supra* note 55, at 565 (indicating that, for example, article 14 of the charter guarantees, *inter alia*, a right to vocational and continuing education that is not found in the right to education in the First Protocol to the Convention).

57. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 3.

marriage in the EU Charter[58] when finding that the United Kingdom's blanket prohibition on marriage by a transsexual violated the applicant's right to marry under article 12 of the Convention.[59]

Taken together, the provisions of article 6 of the Lisbon Treaty therefore significantly reduce the interpretive autonomy of the Court of Justice of the European Communities when construing the wide range of civil and political rights in Community law that correspond to those in the Convention.

Prior to the entry into force of the Lisbon Treaty, the Court of Justice, as indicated above, enjoyed a considerable degree of autonomy as to the meaning and scope of rights falling within the ambit of Community law, even though it has demonstrated considerable deference to the Strasbourg Court. The court has been able, as Toth observes, to "enjoy the best of both worlds" by relying on the Convention without formally being bound by it.[60] However, under the fundamental rights regime introduced by the Lisbon Treaty, the court will be more formally constrained to follow the jurisprudence of the European Court of Human Rights regarding rights covered by the Convention.

Thus, the Lisbon Treaty will lead to a situation where ever more decisions of the Strasbourg Court, which do not have direct or *erga omnes* effect on EU member states, will be accorded such effect when followed by the Court of Justice in its judgments. Accession by the EU to the Convention, rendering Community law subject to review in Strasbourg, will also have particularly direct effects on Community law and, by extension, on the law of EU member states, far in excess of the current situation whereby rulings of the Strasbourg Court have a direct impact only on the respondent state.[61] It seems inevitable that this will lead to greater scrutiny of the decisions of the Strasbourg Court as to

58. *Id.* ¶ 100 ("Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.").

59. *Id.* ¶ 103–04.

60. Advocate General Toth, *The European Union and Human Rights: The Way Forward*, 34 COMMON MKT. L. REV. 491, 492 (1997).

61. This is not to say that decisions of the Strasbourg Court do not have an indirect impact on the law of states to whom a ruling is not directly addressed; a ruling may effectively put a state "on notice" where its law, due to its similarity to that in the respondent state, appears to be clearly in violation of a Convention right.

their legitimacy, having regard in particular to the interpretive methodologies employed by that court.

IV. *INTERPRETIVE METHODS OF THE EUROPEAN COURT OF HUMAN RIGHTS*

In the system of human rights protection provided by the European Convention on Human Rights, recourse to the European Court of Human Rights is a measure of last resort; contracting states undertake to secure Convention rights within their territory, and the court's role is essentially supervisory and subsidiary to that of the states.[62] Accordingly, an individual must exhaust all domestic remedies before he or she may bring a petition before the Strasbourg Court. The Strasbourg Court employs two key interpretive principles that reflect its supervisory and subsidiary function: (1) the margin of appreciation doctrine; and (2) the so-called consensus doctrine.[63]

A. *The Margin of Appreciation Doctrine*

Through the margin of appreciation doctrine, the Strasbourg Court recognizes that, by reason of their "direct and continuous contact with the vital forces of their countries," the domestic authorities in each state are, in principle, better placed than an international court to interpret domestic law, assess the facts of a case, or decide on the measures necessary in a particular area, and will, depending on the circumstances, accord a state a certain degree of latitude in balancing rights and interests.[64] However, the court has also repeatedly stated that the margin of appreciation "goes hand in hand with European supervision,"[65] which leaves the final determination of obligations under the Convention to the court itself.

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62. European Convention on Human Rights, *supra* note 2, art. 35, *amended by* Protocol No. 11, *supra* note 3, art. 1. While the convention system also allows for inter-state applications to the court, the vast majority of applications to the court are made by individuals.

63. The Court also employs a number of other interpretive principles, such as proportionality, which are not discussed here.

64. *See generally* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 22 (1976).

65. *Id.* at 23.

The Strasbourg Court has held that the margin will vary according to the nature of the Convention right in issue, its importance for the individual, and the nature of the activities restricted, as well as the nature of the aim pursued by the restriction on a given right.[66] In practice, this makes the margin of appreciation a rather indeterminate standard, which is the source of diverging views: for some, it is a necessarily imperfect attempt to negotiate the tension between national sovereignty and international supervision;[67] for others, it is no more than an escape clause, allowing the Court to avoid difficult sensitive, issues which it does not wish to confront in a particular case. As such, it is described as a doctrine so flexible that it is "as slippery and elusive as an eel," used by the court in place of "coherent legal analysis" of Convention rights.[68]

B. *The Consensus Doctrine*

Similar controversy attends the court's use of the consensus doctrine, which is of central importance given that it often constitutes the primary determining factor as to whether a right is protected by the Convention, or to what extent it is protected, which in turn influences the margin of appreciation accorded to a state party against whom a violation of a Convention right is alleged. The doctrine operates on the basis that, as the Convention is a living document requiring an evolutive interpretation, and "the Convention is first and foremost a system for the protection of human rights,"[69] the court can depart from its previous judgments "in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions,"[70] which is to be determined by reference to the existence or otherwise of a European consensus on the matter at issue.

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66. *See, e.g.*, Coster v. United Kingdom, App. No. 24876/94, 33 Eur. H.R. Rep. 479, 506 (2001); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 21 (1981).

67. *See* Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine*, 7 GERMAN L.J. 611, 615 (2006).

68. Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 5 (1998) (referring to a speech by Lord Lester to the Council of Europe's human rights colloquium in September 1995).

69. Chapman v. United Kingdom, 2001-I Eur. Ct. H.R. 43, 66.

70. Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 14 (1990); Inze v. Austria, 126 Eur. Ct. H.R.(ser. A) at 18 (1987).

Ostensibly, the consensus doctrine is one of self-restraint, keeping the scope of Convention obligations tethered to practices in the contracting parties to the Convention. Thus, for example, there was little surprise in 1986 when the court read into the Convention right to property,[71] an obligation on states to provide compensation to individuals whose property is compulsorily acquired, as it merely reflected national practice.[72] In the absence of a European consensus, the court in the past has tended to accord a wide margin of appreciation to a respondent state, effectively applying a lowest common denominator standard.[73] The consensus doctrine has also allowed the court to adopt a more activist approach, expanding the protection given to a right—or, indeed, to an asserted right which was not hitherto considered to be protected by the Convention—where it has discerned a consensus between the contracting parties on a given issue.[74]

However, the consensus doctrine in recent years has been applied in such a way as to excessively trammel the autonomy of the contracting states.[75] This is problematic, as both the meaning of "consensus" and the methods employed to divine its existence have become increasingly opaque in the jurisprudence of the Strasbourg Court. Two key difficulties arise from the Strasbourg Court's application of the doctrine: (1) the nature of the consensus to be discerned is unclear: is it consensus among the contracting parties or international consensus on a broader scale? Must it be an established consensus, or will a mere trend suffice?; and (2) the objective indicia used to determine the existence or otherwise of a consensus are so varied as to leave the court with unfettered discretion as to the sources to which it may refer and, ultimately, the matters to which the Convention applies.

71. Convention Protocol I, *supra* note 9, art. 1.

72. *See* James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) at 34 (1986).

73. *See* DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10 (1995).

74. *See infra* notes 82–83 and accompanying text.

75. *See infra* notes 78–80 and accompanying text.

1. The Nature of the Consensus to be Discerned

One would expect that the necessary consensus to be determined would be that existing between the contracting parties to the Convention. This is suggested by earlier cases involving application of the doctrine[76] and the court continues to refer to the standard as a "European consensus."[77] However, possibly due to the major expansion of the Council of Europe's membership since the collapse of the Soviet Union and a perceived dilution of common standards, the Strasbourg Court has, in the present decade, taken a more flexible approach to the meaning of consensus.

This is most marked in the 2002 decision in *Goodwin v. United Kingdom,*[78] in which the court found that transsexuals have the right to marry under article 12 of the Convention despite the absence of a European consensus on the issue. While previous applications by transsexuals alleging violation of their Convention rights by U.K. law had foundered on the absence of a European consensus,[79] in *Goodwin* the court decided to attach less importance to the absence of a consensus among the (then forty-three) contracting parties "to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a *continuing international trend* in favor not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."[80]

The full significance of *Goodwin* is as yet unclear; the court in that case spent little time justifying the application of the entirely new standard applied. It is notable that since *Goodwin,* it has not repeated the phrase "continuing international trend,"

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76. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. Rep. (ser. A) at 22 (1976) (referring to the "Contracting States"); *see also* Jeffrey A. Brauch, *The Dangerous Search for an Elusive Consensus: What the Supreme Court* Should *Learn from the European Court of Human Rights*, 52 HOWARD L.J. 277, 287 (2008).

77. *See, e.g.*, Zaunegger v. Germany, App. No. 22028/04, 50 Eur. H.R. Rep. 952, 50 EHRR 38, [60] (Dec. 3, 2009) (as yet unpublished); Jäggi v. Switzerland, App. No. 58757/00, 47 Eur. H.R. Rep. 702, 714 (2006) (Hedigan, J., dissenting); Fretté v. France, 2002-I Eur. Ct. H.R. 347, 367.

78. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 1.

79. *See* Sheffield v. United Kingdom, 1998-V Eur. Ct. H.R. 2011; Cossey v. United Kingdom, App. No. 10843/84, 13 Eur. H.R. Rep. 622 (1991); Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) (1987).

80. *Goodwin,* 2002-VI Eur. Ct. H.R. 3, 29–30 (emphasis added).

articulating the standard variously as "European consensus,"[81] "European and international consensus,"[82] and "emerging international consensus amongst the contracting states of the Council of Europe."[83] However, two things are evident: the court's continual references to "emerging consensus"[84] indicate that trends in a particular direction will suffice as evidence of consensus, and the court has continued, where it wishes, to place considerable emphasis on the laws of non-contracting states.

For example, in *Hirst v. United Kingdom (No.2)*[85] in 2005, the court found the United Kingdom's blanket denial of voting rights to prisoners a violation of the Convention right to vote[86] despite the absence of any "common European approach" to the issue.[87] This prompted a dissenting opinion from five Judges decrying the majority judgment's extensive reference to two recent judgments of the Supreme Court of Canada and the Constitutional Court of South Africa but which, they noted, "unfortunately contains only summary information concerning the legislation on prisoners' right to vote in the Contracting States."[88] The court has also placed great emphasis on the laws of states who are not party to the Convention in other cases.[89]

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81. *See* cases cited *supra* note 77.

82. Grant v. United Kingdom, 2006-IV Eur. Ct. H.R. 1, 9 (concerning a similar factual scenario to *Goodwin*).

83. *E.g.*, Muñoz-Díaz v. Spain, App. No. 49151/07, 50 Eur. H.R. Rep. 1244, 1262 (2009); D.H. v. Czech Republic, App. No. 57325/00, 47 Eur. H.R. Rep. 59, 118 (2007). The court seems to have been reiterating statements in pre-*Goodwin* decisions concerning nomadic minorities. *See, e.g.*, Smith v. United Kingdom, App. No. 25154/94, 33 Eur. H.R. Rep. 712, 740 (2001); Lee v. United Kingdom, App. No. 25289/94, 33 Eur. H.R. Rep. 677, 702 (2001); Coster v. United Kingdom, 33 Eur. Ct. H.R. 479, 506 (2001); Beard v. United Kingdom, App. No. 24882/94, 33 Eur. H.R. Rep. 442, 470 (2001).

84. *See, e.g.*, Weller v. Hungary, App. No. 44399/05 (Eur. Ct. H.R. Mar. 31, 2009) (unpublished); Ünal Tekeli v. Turkey, 2004-X Eur. Ct. H.R. 213, 254; Chapman v. United Kingdom, 2001-I Eur. Ct. H.R. 43, 29–30 (2001).

85. Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187.

86. *See* Convention Protocol 1, *supra* note 9, art. 3.

87. *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. at 206.

88. *Id.* at 230 (Wildhaber, J., Costa, J., Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

89. *See, e.g.*, Appleby v. United Kingdom, 2003-VI Eur. Ct. H.R. 189, 194–200 (2003) (noting, on the basis of an extensive analysis of American and Canadian law, an "interesting trend" towards accommodating freedom of expression on private property open to the public).

2. The Court's Use of Objective Indicia

The *Goodwin*[90] and *Hirst*[91] judgments are prominent examples of the Strasbourg Court's loose approach to the identification of indicia pointing towards consensus. To date, the court has not delimited the range of sources to which it may refer when determining whether a consensus, or emerging consensus, exists.

In its case law the Strasbourg Court refers to a wide range of sources: national constitutions of the contracting states; domestic legislation; international agreements to which not all contracting states are parties; the law of non-contracting parties; and, increasingly, documents produced by bodies that have no discernible democratic mandate, such as the Committee of Experts on the Application of Conventions and Recommendations[92] and the Council of Europe's Commission on Democracy through Law.[93]

Goodwin once again provides a useful example. In that case, as noted above, the court referred to a "continuing international trend" in favor of legal recognition of transsexuals' postoperative gender, citing Australian and New Zealand authorities, the EU Charter of Fundamental Rights, to which only twenty-seven out of the forty-seven contracting states to the Convention are parties, as well as citing provisions of the U.K. tax code.[94]

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90. Goodwin v. United Kingdom, 2002-VI Eur.Ct. H.R. 1.

91. *Hirst (No. 2)*, 2005-IX Eur. Ct. H.R. 187.

92. The Committee of Experts on the Application of Conventions and Recommendations ("CEACR") is a body composed of twenty members, tasked with examining government reports on the application of ILO conventions and assessing the conformity of national law and practice with ILO conventions. The Strasbourg Court has referred to documents of the CEACR in numerous cases. *See, e.g.*, Rainys v. Lithuania, App. Nos. 70665 & 74345/01, ¶ 30 (Eur. Ct. H.R. Apr. 7, 2005) (unpublished).

93. The Council of Europe's Commission on Democracy through Law (the "Venice Commission") is the Council of Europe's advisory body on constitutional matters, which operates as a pan-European legal "think tank." The court in *Menchinskaya v. Russia* held that "it has often used for the purpose of interpreting the scope of the rights and freedoms guaranteed by the Convention intrinsically non-binding instruments of Council of Europe organs to support its reasoning by reference to norms emanating from these organs." App. No. 42454/02, ¶ 34 (Eur. Ct. H.R. Jan. 15, 2009) (unpublished). In *Menchinskaya*, the court relied heavily on an opinion of the Venice Commission as to whether the Prosecutor's Office in Russia is compatible with the Council of Europe's Parliamentary Assembly Resolution 1604 (2003) concerning the role of the public prosecutor's office in a democratic society. *See id.* ¶ 34.

94. *Goodwin*, 2002-VI Eur. Ct. H.R. at 18.

Of even greater concern is where the court has broken new ground without expressly stating the basis for its finding of a new consensus. For example, in *Taxquet v. Belgium*,[95] decided in January 2009, the court ruled that the lack of a requirement for juries to adequately explain the basis for their verdicts was a violation of article 6 of the Convention.[96] This was an apparent departure from previous decisions in which it had found that the lack of reasoned verdicts did not constitute a violation of the Convention where adequate procedural safeguards existed.[97] The court stated:

> Not having been given so much as a summary of the main reasons why the Assize Court was satisfied that he was guilty, [the applicant] was unable to understand—and therefore to accept—the court's decision. . . . It is therefore important, for the purpose of explaining the verdict both to the accused and to the public at large—the "people" in whose name the decision is given—to highlight the considerations that have persuaded the jury of the accused's guilt or innocence and to indicate the precise reasons why each of the questions has been answered in the affirmative or the negative.[98]

The Belgian government has now appealed the *Taxquet* decision to the Grand Chamber of the European Court of Human Rights for final judgment, which is due in 2010.[99]

In the meantime, the meaning of the *Taxquet* judgment is not entirely clear, but it appears to indicate that juries in all contracting parties to the Convention will have to provide a reasoned basis for their verdicts.[100] This would, of course, have profound implications for juries across Europe, not least the Irish

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95. Taxquet v. Belgium, App. No. 926/05 (Eur. Ct. H.R. Jan. 13, 2009) (unpublished).

96. *Id.* ¶ 50.

97. In the cases of R v. Belgium, App. No. 15957/90, 72 Eur. Comm'n H.R. Dec. & Rep. 195 (1992), Zarouali v. Belgium, App. No. 20664/92, 78-A Eur. Comm'n H.R. Dec. & Rep. 97 (1994), and Papon v. France (No. 2), 2001-XII Eur. H.R. Rep. 235, the European Court of Human Rights had found that the procedure in France and Belgium, whereby the trial judge issues questions to the jury regarding the defendant's guilt, provided a sufficiently reasoned framework for the jury's decision where the questions were specific and precisely formulated.

98. *Taxquet*, ¶ 48.

99. A hearing of the Grand Chamber took place on October 21, 2009, and the Registry of the European Court of Human Rights has indicated that the Grand Chamber's final judgment should be issued at some point in 2010.

100. *Taxquet*, ¶ 40.

jury system, in which the secrecy of jury deliberations is sacrosanct under constitutional law and would appear to preclude the provision of formally reasoned verdicts.[101]

Ironically, given the subject matter of its decision, the court's finding of consensus is left unexplained in the judgment, with the court justifying its new position in one brief paragraph:

> [S]ince the *Zarouali* case there has been a *perceptible change* in both the Court's case-law and the Contracting States' legislation. In its case-law the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness. *Thus, certain States, such as France, have made provision for the right of appeal in assize court proceedings and for the publication of a statement of reasons in assize court decisions.*[102]

The general opacity of the court's reasoning and its failure to provide any explanation as to what this "perceptible" change in the case law is or any detail as to a substantial consensus in law or practice between the member states is, in itself, disturbing. This dubious rationale is highlighted by the French government's observation in its third party submission to the Grand Chamber that the Strasbourg Court's reference to legal developments in France is not based on any law in force, but on a 1996 Bill that was never enacted.[103] The fact that this is the sole explicit and concrete reference to legal developments in any of the contracting parties to the Convention, implicitly alluding to an evolving consensus, leaves the justification for the *Taxquet* decision precarious indeed. It also calls into question the so-called "consensus" approach and, in particular, recourse to the notion of "emerging trends."

In any event, had the court engaged in a more extensive comparative analysis, this would simply have revealed that no consensus exists in Europe as to the provision of reasoned verdicts by juries; rather, the opposite is true. While reasoned

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101. It has been said that a jury's deliberations "should always be regarded as completely confidential" and "should not be published after a trial." O'Callaghan v. Attorney General, [1993] 2 I.R 17, 26.

102. *Taxquet*, ¶ 43 (emphasis added).

103. *See* Third Party Observations of the Government of France, *Taxquet*, at 4.

verdicts are provided by some mixed courts in Europe where jurors sit with professional judges (*e.g.*, Denmark and Germany), in other mixed courts (*e.g.*, France) no reasons are provided. Among the various contracting parties with juries composed entirely of lay persons who deliberate without any judicial assistance (*e.g.*, Belgium, Ireland, Spain, United Kingdom), the provision of reasons is non-existent or extremely rare, Spain being the only exception.[104] Some countries, such as Belgium, do permit detailed questions to be put to the jury, the answers to which may disclose the underlying rationale for its verdict. All this is a far cry from a European consensus.

It is little surprise, then, that the respondent government, Belgium, and the governments of France, Ireland, and the United Kingdom, in third party submissions, have strongly criticized the *Taxquet* judgment.[105] Stressing the long pedigree of their respective jury systems and the profound implications of a requirement for reasoned verdicts, the governments take the Strasbourg Court to task for failing to respect the diversity in modes of jury trial across Europe, and stress that the court's role is to maintain minimum standards of rights protection across Europe, not, as the Belgian government puts it, "to favour a particular concept of (criminal) justice and thereby to favour, or even impose, a particular conception of the legitimacy of criminal proceedings."[106] "It is not for [the Court in Strasbourg]," the government states, "to pronounce in the abstract on [jury systems in Europe] or to harmonise the various systems . . . ."[107]

104. *See, e.g.*, Ethan J. Leib, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 635 (2008); *see also* Norsk Retstidende [Rt] [Supreme Court] 2009 p. 750 (Nor.) (criminal appeal of Arfan Qadeer Bhatti concerning a challenge to a jury verdict based on the decision in *Taxquet v. Belgium*). An official English translation of the Bhatti appeal is available on the Norwegian Supreme Court's website at http://www.domstol.no/upload/hret/bhatti-anonymisert-engelsk.pdf.

105. *See e.g.*, Third Party Observations of the Government of France, *Taxquet*; Observations of the Government of Belgium, *Taxquet*.

106. *See* Observations of the Government of Belgium, *Taxquet*, at 12.

107. *See id.* at 15.

V. *CONSENSUS AND LEGITIMACY*

A. *The Legitimacy of Consensus in the Convention System*

The case law briefly analyzed above is indicative of the elasticity and indeterminacy of the consensus doctrine as employed by the Strasbourg Court, and tends to lend weight to the view expressed by various commentators that the doctrine is a "moving target," used to "rationalize policy judgments rather than to reach decisions under a clear legal framework,"[108] or is a "convenient subterfuge for implementing the court's hidden principled decisions."[109]

On one level, disputes as to the use of the consensus doctrine by the Strasbourg Court in the international setting simply mirror those on the national stage. The U.S. Supreme Court, for example, has witnessed considerable controversy in cases such as *Atkins v. Virginia*[110] and *Roper v. Simmons*[111] as to both the role of consensus in determining whether the death penalty in different circumstances constitutes a cruel and unusual punishment in the light of evolving standards of decency, and the means of determining consensus. The U.S. case law evinces polar views as to how long-established a consensus must be, the indicia to which the Court may refer, and the legitimacy of applying the Court's independent judgment alongside the determination of consensus. For Justice Scalia, who has written key dissents to recent Eighth Amendment decisions, consensus must be overwhelming and long-established to justify departure from precedent;[112] applying the Court's own judgment to such consensus is to "replace judges with a committee of philosopher-kings."[113] He believes that referring to sociological studies and the law of other nations which support the majority's principled decision is merely "to look over the heads of the crowd and pick out its friends."[114]

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108. Brauch, *supra* note 76, at 287, 291.

109. Eyal Benvenisti, *Margin of Appreciation, Consensus and International Standards*, N.Y.U. J. INT'L L. & POL. 843, 851 (1999).

110. Atkins v. Virginia, 536 U.S. 304 (2002).

111. Roper v. Simmons, 543 U.S. 551 (2005).

112. *See, e.g.*, Atkins, 536 U.S. 304.

113. Stanford v. Kentucky, 492 U.S. 361, 379 (1989).

114. Roper v. Simmons, 543 U.S. 551, 617 (2005).

Whatever may be said concerning certain methods of interpretation of the U.S. Constitution, Justice Scalia's concerns take on added meaning when applied to the Convention system. After all, the U.S. Supreme Court ultimately operates in a national setting containing one *demos* (however heterogeneous its population may be) and is tasked with interpreting a federal constitution which has inherent primacy throughout the United States.[115]

By contrast, the Strasbourg Court operates in the international context, interpreting an international instrument to which forty-seven sovereign states are parties, each containing its own *demos* and its own historical, social, and political particularities.[116] Interpretation of the Convention is subject to the presumption that the states do not intend to surrender their sovereignty except to the extent made clear in the instrument itself. Yet the Convention, like all bills of rights, only offers so much guidance, and is replete with open-ended concepts such as "the right to respect for private and family life."[117]

Within the bounds of the nation state, a court faced with the interpretation of fundamental rights at least has the advantage of operating within a single societal context to which it is directly linked, and clear reference points such as a written Constitution, a legislating parliament and government. Lacking such clear reference points, the Strasbourg Court's reliance on extra-textual doctrines such as the margin of appreciation and consensus is understandable, but this nevertheless poses difficult questions of legitimacy in its interpretation of an international instrument applicable to sovereign states.

Defining the scope and content of fundamental rights cannot proceed on the basis of a mere head count. Law, after all, is to some extent a search for moral truth, and resort to a consensus doctrine as a method of interpreting the Convention cannot replace the search for the objective moral content of human rights referred to in the text of the Convention;

115. *See* John L. Murray, Consensus: Concordance, or Hegemony of the Majority? (Jan. 25, 2008), *in* Eur. Court of Human Rights, *Dialogue Between Judges 2008*, at 25, 34 (Nov. 2008), *available at* http://www.echr.coe.int/nr/rdonlyres/d6da05da-8b1d-41c6-bc38-36ca6f864e6a/0/dialogue_between_judges_2008.pdf.

116. *See id.*

117. European Convention on Human Rights, *supra* note 2, art. 8.

otherwise, the Strasbourg Court would abdicate its judicial role as interpreter. The Strasbourg Court's ambivalent attitude toward consensus, since the very inception of the doctrine,[118] and the fact that its decisions are often ultimately based on substantive consideration of the Convention right in question, rather than simply on the existence of some kind of consensus, appears in some way to reflect this concern.

The court clearly does not take a consistent or mechanistic approach to the application of the consensus doctrine: in some cases consensus, or absence of consensus, is presented as determinative of the issue; in others it is used to merely bolster a normative analysis of the Convention right at issue; in yet others absence of consensus has been dismissed as not being determinative of the issue.

Of course, the court has made general observations to the effect that where no consensus exists between the contracting parties, "particularly where the case raises sensitive moral or ethical issues," the margin of appreciation accorded to a respondent state will be wider.[119] Yet it is difficult to reconcile decisions such as *Evans v. United Kingdom*[120] and *Vo v. France*,[121] in which the court held that, due to the absence of consensus, the question of the beginning of life and the use of embryos came within the margin of appreciation of the state concerned, with the decision in *Goodwin,* in which the absence of consensus did not produce the same result as regards the right of transsexuals to marry,[122] another matter of ethical and social sensitivity.

It must be recognized that the European Court of Human Rights operates in a difficult institutional setting: it is, as many have observed, at once both an international court operating within the bounds of international law, yet it is endowed with at

118. In *Tyrer v. United Kingdom* the court, in finding that the corporal punishment of "birching" used in the Isle of Man constituted a "degrading punishment" contrary to article 3 of the Convention, noted that it could not "be influenced by the developments and commonly accepted standards in the penal policy of the member states of the Council of Europe in this field." 26 Eur. Ct. H.R. (ser. A) at 15 (1978). Yet, the decision fundamentally rests on the court's assessment of the intrinsic nature of the punishment at issue, and its objective view of the protection afforded by article 3 of the Convention.

119. Evans v. United Kingdom, App. No. 6339/05, 46 Eur. H.R. Rep. 728, 752 (2006).

120. *Id.*

121. Vo v. France, 2004-VIII Eur. Ct. H.R. 84.

122. Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R. 18.

least some of the characteristics of a constitutional court.[123] It must maintain minimum human rights standards across Europe yet allow the Convention to reflect developments in understanding and knowledge of issues that pertain to fundamental rights, while accommodating the great diversity in the legal traditions, societies, and cultures of the contracting parties. As Professor Janneke Gerards has recently put it, the court must navigate "between the Scylla of providing too little protection to individual rights and the Charybdis of pronouncing judgments that are not compatible with fundamental views and legal or institutional constructs existing in a certain state."[124] However, Professor Gerards notes that while this promotes a pragmatic and flexible approach to adjudication by the court, its use of interpretive principles is rather too lax, providing neither consistency nor predictability:

> Seemingly without good reason, the Court sometimes adopts an attitude of reserve, waiting for a natural convergence of national case law to occur, while in other cases it is far more activist and may force new and progressive definitions and methods upon the states. Thus, there is a considerable risk of the Court becoming entangled in its own ambiguous and inconsistent case law, without there being any directing principles that may help it to untie the knots.[125]

Even if the court was to apply the consensus doctrine in a consistent fashion, the very use of consensus as a tool for rights adjudication is contested: it may be characterized as an undesirable *renvoi* to national systems, whose human rights protection may be lacking, or praised as a means of respecting the diversity among the contracting parties to the Convention. Such praise, of course, could only be valid if the court confined itself to finding a true consensus and then respected any existing diversity among the contracting states.

Applied too loosely, as it has been in recent years, in cases such as *Goodwin* and *Taxquet*, discussed above,[126] the consensus

123. *See* Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and "Constitutional Justice*," 19 EUR. J. INT'L L. 769, 777–78 (2008).

124. Janneke Gerards, *Judicial Deliberations in the European Court of Human Rights, in* THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND 407, 418 (Nick Huls et al. eds., 2009).

125. *Id.* at 435.

126. *See* discussion *supra* notes 78–80, 95–112.

doctrine degenerates into an interpretive tool of such indeterminacy as to permit the court to exercise a freewheeling discretion in the interpretation of Convention rights, raising the specter of the convention system operating as a *Richterstaat* or "Judge's Empire," as Dworkin puts it,[127] or a "committee of philosopher-kings," to use Justice Scalia's colorful phrase.

Yet, when applied strictly, employment of the consensus doctrine can divest the Convention of its central purpose by eschewing objective scrutiny of state practices that risk violating individual rights, simply due to their prevalence. An example would be *Klass v. Germany*,[128] in which German antiterrorism laws permitting extensive phone tapping and interception of communications were upheld due to a perceived trend toward the use of such surveillance methods among the contracting parties. More importantly, it avoids objective interpretation of the text of the Convention by simply concocting an answer to a matter before the court by reference to the existence of consensus. This has proved, for some, all the more worrying when the "consensus" relied on by the court cannot legitimately be considered a meaningful consensus as such.

That is to say, even where the "consensus" relied upon by the Strasbourg Court as a basis for its decisions is clearly derived from a majority of legislation in a majority of the contracting states, this amounts to little more than the imposition of the majority view. The very word "consensus" implies more than this, a unanimity of sorts, meaning that majority consensus (however discerned) is ultimately oxymoronic. This hegemony of the majority is of particular concern where a state has, through the democratic process and national discourse, come to a carefully calibrated compromise on a difficult social, ethical, or moral issue.

Is it for an international court to negate the difficult choices made at the national level simply on the basis that a "majority consensus" exists? As Richard Posner has observed: "To equate truth to consensus would imply that the earth was once flat . . . ."[129] Indeed, as another American author has observed: "Historically, the claim of consensus has been the first refuge of

127. RONALD DWORKIN, LAW'S EMPIRE 399 (1986).
128. Klass v. Germany, 26 Eur. Ct. H.R. (ser. A) at 12–13 (1978).
129. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 113 (1990).

the scoundrel: it is a way to avoid debate by claiming that the matter is already settled."[130] On the other hand, Posner recognizes that consensus, particularly intergenerational consensus, is a commonly used reference point in the search for moral truth, stating "[m]uch of our stock of common and elementary moral beliefs is validated [by consensus] and no other way [and that] the longer a widespread belief persists, surviving changes in outlook and culture and advances in knowledge, the likelier it is to be correct."[131]

This raises the question as to whether the invocation of international trends or "emerging" consensus as a basis for construing Convention rights is entirely legitimate. In its selection of sources upon which consensus may be based, is the Strasbourg Court simply looking over the heads of the crowd and picking out its friends? Is it enough to make decisions on the basis of legislation or other indicia such as the reports of international bodies which are, by their very nature, reflective of merely local compromises or of current attitudes and perceptions?

The importance of such questions as to the legitimacy of the consensus doctrine has intensified in the current era due to the increasing influence of the convention system on domestic legal orders. The contracting parties, by establishing the full-time court as the sole judicial organ of the convention system in 1998, have significantly enhanced the court's power, leaving it in a position to adjudicate on "virtually every major constitutional controversy involving rights that arises in the Contracting Parties."[132] States have given effect to a greater or lesser degree to the Convention in their domestic legal orders: for those with monist systems, the Convention has been given full effect in domestic law and takes precedence over national legislation or even the national constitution; in states with dualist systems, such

130. Michael Crichton, Caltech Michelin Lecture: Aliens Cause Global Warming (Jan. 17, 2003) (transcript available at http://www.cfa.harvard.edu/~scranmer/SPD/crichton.html).

131. POSNER, *supra* note 129, at 112.

132. Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court*, 80 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 923 (2009).

as Ireland and the United Kingdom, the Convention has been given more limited, interpretive effect.[133]

The court has also enhanced its own role vis-à-vis the contracting states and accreted considerable influence, through "constitutionalization" of the Convention as an "instrument of European public order (*ordre public*)"[134] and, in particular, by beginning to deliver so-called "pilot" judgments which require specific measures to remedy systemic deficiencies in states causing multiple violations of the Convention, rather than merely providing redress to individual applicants.[135] Judge Christos Rozakis, vice president of the court, has referred to the court's role as one of "'integration,' in the sense that, through its decisions and judgments, it is attempting to create a coherent body of human rights rules that apply equally and indiscriminately in the sphere of the legal relations of all of the States party to the Convention."[136]

Talk of "'integration" suggests that the Strasbourg Court's role is similar to that of the European Union's Court of Justice: to harmonize the legal systems of the member states. However, the Court of Justice's harmonizing function is expressly provided for in the text of Community treaties and necessary due to the stated objectives of the European Union, which is to lay the foundations of an ever closer political union among the peoples of Europe within a constitutional framework based on an autonomous and holistic legal order.

By contrast, there is no substantive textual basis in the Convention ascribing such a role to the Strasbourg Court. Indeed, as Stone Sweet has observed, the founding states never came to full agreement as to whether the Convention simply set a minimum level of protection of basic rights or established "a legal foundation for a more expansive evolution of rights."[137] In

133. For example, in Ireland, the convention has been given greater effect at a sub-constitutional level: by statute, domestic legislation must be interpreted, "in so far as is possible," in accordance with the Convention, subject to the constitution and constitutional principles. European Convention on Human Rights Act, 2003 (Act No. 20/2003), § 2(1), *available at* http://www.irishstatutebook.ie/2003/en/act/pub/0020/index.html.

134. *See* Loizidou v. Turkey, 1998-IV Eur. Ct. H. R. 1807, 1820–21.

135. *See* Broniowski v. Poland, 2004-V Eur. Ct. H. R. 1.

136. Judge Christos Rozakis, *The European Judge as Comparatist*, 80 TULANE L. REV. 257, 272 (2005).

137. Sweet, *supra* note 132, at 2.

Stone Sweet's view, the contracting parties, in strengthening the judicial machinery of the Convention system over time, "have transferred authority to 'complete' or 'construct' Convention rights, rendering them more determinate over time for all members, despite national diversity."[138]

However, while states have certainly accepted the court's view that the Convention is a "living instrument" which must be subject to an evolutive interpretation,[139] the context in which the Strasbourg Court operates means that self-restraint is appropriate, particularly with respect to matters of a sensitive moral or ethical nature at a national level. Consensus, if it is to be invoked, should at least have the attributes identified by Posner of being intergenerational, long-established, and overwhelming,[140] and the Strasbourg Court should be loath to adopt a harmonizing approach where such consensus does not exist.

Yet, such self-restraint appears to be lacking in many recent judgments of the court, discussed above.[141] The legitimacy of imposing a uniform standard is particularly questionable where a case before the court involves the balancing of rights rather than a straightforward violation of one right; for example, the court's case law developing a stronger right to privacy on the basis of article 8 of the Convention has been criticized as imposing an undesirable uniform standard given that a great variety of solutions have been found in the contracting states to the conflict between freedom of the press and the privacy of individuals.[142]

Ultimately, the court's evolutive role is to mirror change, not to act as a catalyst for change or impose a uniform standard of rights across Europe. There are undoubtedly core and fundamental rights, such as the right to life and to liberty for example, which derive from a common European heritage and require a universal level of protection.[143] Beyond this, is it the

138. *Id.* at 3.

139. *See supra* note 69 and accompanying text.

140. *See supra* note 131 and accompanying text.

141. *See supra* notes 75, 78–80, 85, 88–91 and accompanying text.

142. *See* Dieter Grimm, *Freedom of Speech in a Globalized World, in* EXTREME SPEECH AND DEMOCRACY 20 (Ivan Hare & James Weinstein eds., 2009).

143. *Cf.* Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 COLUM. J. EUR. L. 349, 384 (2009) ("[C]ourts at the national and the European level share a responsibility to ensure the proper functioning of the Union, equal and effective

court's role under the Convention to impose standards based on questionable consensus or emerging trends reflected in, for example, national legislation, which often reflect compromises of political policy on a national level, accompanied by caveats, exceptions, or limitations, which over time may be amended or qualified, or even abandoned?

Why should contracting states have imposed on them law or principles not deriving from the text of the Convention, but stemming from decisions at legislative levels in, at best, a majority of contracting states? For the court to develop its jurisprudence on such foundations is a denial of the presumption in favor of the sovereignty of the contracting parties and of the diversity that an instrument such as the European Convention on Human Rights is meant to respect. As the French government has stated in its third party observations to the Grand Chamber in the case of *Taxquet v. Belgium*, even if some states have changed their legislation to require reasoned verdicts from juries, it is for each state to decide "whether or not to join this trend."[144] One cannot but agree with the statement that the court should exercise "extreme caution" in departing from its own precedent,[145] and that "the authority of the Court's decisions is indisputably weakened" where it develops its jurisprudence on the basis of an inadequate analysis such as that in *Taxquet*.[146]

B. *Importing Strasbourg's Consensus into Community Law*

These difficulties are amplified when Strasbourg case law is applied in the context of Community law. The Strasbourg Court's approach is in marked contrast to that of the European Court of Justice, which traditionally confined itself to the constitutions of its member states, and the international conventions to which they have subscribed, when it seeks inspiration from general principles of law as to the existence and content of fundamental rights in Community law. Those sources, particularly national constitutions, as opposed to national

application of the law throughout the Union, and the full respect of the basic principles common to the Union and its Member States—including the fundamental rights and liberties of the individual.").

144. Observations of the Government of France, Taxquet v. Belgium, at 7.

145. *Id.* at 6.

146. *Id.* at 6.

legislation, are more reliable indicators of consensus, and well-established consensus at that. However, under the new fundamental rights regime introduced by the Lisbon Treaty, the much more lax approach of the Strasbourg Court will influence Community law to a far greater extent than was previously the case.

One of the main difficulties, even if one were to accept the use of the consensus doctrine in principle, is that a finding of consensus by the Strasbourg Court may easily not reflect a consensus among EU member states. A so-called substantial consensus, let alone "emerging trends," among the forty-seven contracting parties to the Convention does not necessarily mean that any consensus exists between the EU twenty-seven. Consensus in its most flexible form, a "continuing international trend" that could be based on the laws and practices of any selection of states, including non-contracting parties to the Convention, is meaningless when transplanted to the context of Community law.

Yet, the Court of Justice under Lisbon will be bound to follow questionable consensus-based judgments emanating from the Strasbourg Court in its own case law, with the result that the scope and nature of fundamental rights in Community law will be determined according to the practices of states which are not, and most of which will never be, member states of the EU. Given the binding *erga omnes* nature of the judgments of the Court of Justice on EU member states, the door is therefore open to a far greater penetration of domestic legal orders by the case law of the Strasbourg Court, and far less discretion is left to national courts and legislatures as to the nature and scope of fundamental rights. The values inscribed in national constitutions will become less and less relevant.

Thus henceforth, as some perceive it, the great issues of human rights will be decided for the European Union, ultimately, not by reference to the constitutions of the member states, nor by a court in a union of twenty-seven member states, but by an international court, the European Court of Human Rights, whose reference point is a Convention applicable in forty-seven member states, that is to say, by an institution which refers to the perspectives of many states outside the European Union and has recourse to sources of law which are detached, and even

remote, to the constitutions of EU member states or treaties to which they are signatories.

CONCLUSION

This Article has presented perhaps a harsh view of the interpretive methods of the Strasbourg Court, and a pessimistic view of the impact of the Lisbon Treaty on Community law. However, the implications of the Lisbon Treaty for the future development of fundamental rights in Community law raises many difficult questions. The erosion or elimination of a state's capacity to act, particularly regarding issues on which difficult compromises must be made, on the basis of a consensus doctrine that is inherently flawed, threatens to shake the integrity and authority of the Strasbourg Court should it seek to strengthen its harmonizing role. Worse, through the Court of Justice's loss of interpretive autonomy under the Lisbon Treaty, the question mark that hovers over the legitimacy of the Strasbourg Court's interpretative methods may yet appear over the fundamental rights jurisprudence of the Court of Justice. This would be a highly undesirable development for fundamental rights in Community law, and by extension, for the law of EU member states that are all subject to the decisions of the Court of Justice.