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Consensus, Coherence and the European Convention on Human Rights

Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms¹ is widely regarded as the most effective international instrument for the protection of individual rights.² The Convention's reputation as a bulwark against arbitrary government interference stems at least in part from the fact that the decisions of its judicial enforcement organs, the European Court of Human Rights ("Court") and the European Commission of Human Rights ("Commis-

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Convention].

2. WARWICK A. MCKEAN, EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW 204 (1983) (Convention is the "most generally effective" international treaty for protecting human rights); JOHN G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 17 (1988) (Convention is regarded as the most highly developed scheme of international human rights protection in the world).

The Convention guarantees the following rights: life (Article 2); freedom from torture, inhuman treatment (Article 3), or enslavement (Article 4); liberty (Article 5); fair public hearings by an impartial tribunal (Article 6); freedom from retroactive criminal convictions (Article 7); respect for private and family life, home, and correspondence (Article 8); freedom of thought, conscience, and religion (Article 9); freedom of expression (Article 10); freedom of association (Article 11); freedom to marry and found a family (Article 12); and freedom to enjoy these rights without discrimination (Article 14). Convention, *supra* note 1.

Several optional Protocols to the Convention provide additional human rights guarantees. See, e.g., Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 (guaranteeing the right to education, free elections, and peaceful enjoyment of property).

sion”), are almost universally respected and implemented by the twenty-four European nations (“Contracting States”)³ that have ratified the Convention.⁴

The Contracting States’ compliance is especially significant given the teleological approach that the Court and Commission (the “tribunals”) use to interpret the Convention. Far from being bound by the intention of the drafters, the tribunals interpret the Convention as a modern document that responds to and progressively incorporates changing European social and legal developments. Toward this end, they search for the existence of rights-enhancing practices and policies among the Contracting States that affect human rights.⁵ When these practices achieve a certain measure of uniformity, a “European consensus” so to speak, the Court and Commission raise the standard of rights-protection to which all states must adhere. In this way the tribunals have expanded the Convention’s reach to groups of individuals whom the drafters did not view as falling within the Convention’s protective ambit.⁶

3. The Contracting States are those European nations that have ratified the Convention. They include Austria, Belgium, Cyprus, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, No. 5 (July 1992). Bulgaria, Hungary, and Poland have signed the Convention but had not ratified it as of July 1, 1992. *Id.*

4. The Contracting States comply with their Convention obligations by introducing legislative amendments, reopening judicial proceedings, granting administrative pardons, and paying monetary damages to individuals whose rights have been violated. See Fredrik G.E. Sundberg, *The European Experience of Human Rights Proceedings: The Precedential Value of the European Court’s Decisions*, 20 AKRON L. REV. 629, 635-42 (1987).

5. See *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1979) (Convention must be interpreted “in light of present-day conditions”); *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15 (1978) (Convention must be interpreted as a “living instrument”).

In nearly all cases decided to date, the Court and Commission have used this evolutionary methodology to incorporate rights-enhancing law reforms into the Convention. There is still much scholarly debate over whether rights-limiting modifications should be given similar effect. For a discussion of this question, see Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11 HUM. RTS. L.J. 57, 66-68 (1990); Colin Warbrick, *The Prevention of Terrorism (Temporary Provisions) Act 1976 and the European Convention on Human Rights: The McVeigh Case*, 32 INT’L & COMP. L.Q. 757, 758-60 (1983).

6. See, e.g., *Ozturk v. Federal Republic of Germany*, 73 Eur. Ct. H.R. (ser. A) at 36 (1984) (Bernhardt, J., dissenting) (“In the Dudgeon case [extending the right of privacy to homosexuals], the Court held that certain sexual behavior, formerly punishable under the criminal law in all States, should no longer be treated as criminal and punishable in a given social environment.”); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1979) (“[A]t the time when the Convention . . . was drafted, it was regarded as permissible and normal . . . to draw a distinction in this area between the ‘illegitimate’ and ‘legitimate’ family.”).

It should be emphasized that the tribunals only apply the consensus inquiry to human rights that are explicitly or implicitly protected by the Convention. The consensus inquiry is not an appropriate device to incorporate entirely new rights and

Nearly all those offering commentary on the Court and Commission have viewed this evolutionary interpretation as beneficial to the development of Convention case law, disagreeing only on how far a particular practice must evolve before it should be applied against less progressive states that have failed to modify their laws.⁷ Yet little scholarly attention has been devoted to normative aspects of the European consensus inquiry. In particular, few commentators have explored the implications of the tribunals' inability to define the consensus inquiry with precision when articulating the expanding obligations of European governments to protect individual rights.⁸

This Article focuses in depth on the ambiguity in the tribunals' current consensus methodology and its effect on the development of a coherent European human rights jurisprudence.⁹ It argues that the failure to articulate with precision the scope and function of the consensus inquiry poses a potentially grave threat to the tribunals' authority as the arbiters of European human rights. Without a consistent definition of the conditions under which emerging human rights principles should be incorporated into the Convention, the tribunals risk judicial illegitimacy whenever they depart from an interpretation based on the intent of the Convention's drafters. The time has come, therefore, to develop a more comprehensive and rigorous methodology for applying the European consensus inquiry.

freedoms into the Convention. For a more extended discussion of this issue, see *infra* notes 102-18 and accompanying text.

7. See MERRILLS, *supra* note 2, at 157:

Deciding whether European thought and practice has reached the stage at which conduct which might once have been regarded as unexceptional should now be condemned is never easy. If the Court is too conservative it will be accused of failing to uphold the objectives of the Convention. If it is too radical it will be accused of improper judicial legislation.

Id.; P. VAN DIJK & G. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 603 (2d ed. 1990) ("[T]he Commission and the Court, in their case-law, should make efforts at searching for . . . and elaborating common standards for the interpretation of the Convention."); Henry J. Bourguignon, *The Belilos Case: New Light on Reservations to Multilateral Treaties*, 29 VA. J. INT'L L. 347, 385 (1989) (The "slow, evolutionary process toward a uniform European protection of basic human rights is faithful to the vision which inspired those who created the European Convention system nearly forty years ago."); Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 483 (1982) (The Court has been unwilling "to require specific measures to be followed uniformly by the member states if the basic standards of the Convention can be met in a variety of ways."); Colin Warbrick, "Federal" *Aspects of the European Convention on Human Rights*, 10 MICH. J. INT'L L. 698, 715 (1989) ("The Court has not required that the States travel forward at the speed of the fastest. Where there remains diversity among the States' practices, a State may well be justified in maintaining its position.").

8. For one notable exception, see Mahoney, *supra* note 5, at 62-88 (discussing whether consensus methodology results in inappropriate judicial activism).

9. For an argument that stresses the importance of finding a coherent jurisprudential vision for the tribunals, see Colin Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background to the Soering Case*, 11 MICH. J. INT'L L. 1073 (1990).

Part I of this Article discusses the attempt by the Court and Commission to balance deference to national decision-makers against a teleological interpretation of the Convention. It then points out that this judicial balancing has led to a slow and somewhat haphazard development of the consensus inquiry. Although the tribunals view certain factors such as domestic law reforms, international treaties, and European public opinion as authoritative evidence of emerging human rights norms, they have not specified the relative weights to be given these factors, nor have they explained why certain elements are emphasized in some cases but not in others.

Part II then examines the jurisprudential concerns that are a consequence of the tribunals' failure to define the consensus inquiry with precision. For example, in the absence of a principled application of the inquiry, the Contracting States may be less willing to accept judicial expansion of their Convention obligations. In addition, the tribunals' practice of treating their prior decisions as authoritative may be weakened, particularly where those decisions articulate a new rule of rights-protection based on an unclear assessment of the consensus factors. Part II concludes that these doctrinal difficulties have arisen because the Court and Commission are uncertain of their role in developing uniform European human rights standards.

To place these ideas in a concrete factual context, Part III examines the tribunals' jurisprudence on family law, gender equality, and transsexualism. It explores the tensions produced by an uncertain application of the consensus inquiry in these areas, concluding that the Court and Commission have rendered decisions whose reasoning and outcomes are difficult to reconcile.

As a first step toward remedying these problems, the Article concludes in Part IV by recommending a general strategy for the tribunals to apply the European consensus inquiry. The proposal emphasizes the crucial role of the Convention's text in determining when rights-enhancing law reforms should be incorporated into the Convention. It then suggests ways in which the Court and Commission can analyze the consensus factors themselves, focusing on domestic and international legal developments that will assist them in balancing deference to national decision-makers against the need to develop a common acceptance and observance of human rights in Europe.

I. The European Convention and the Consensus Inquiry

A. Consensus and the Margin of Appreciation Doctrine¹⁰

In determining the scope of the obligations that the Convention imposes on the Contracting States, the Court and Commission weigh deference to national decision-makers against their conviction that the

10. This section, which succinctly describes the rationales underlying the margin of appreciation doctrine for readers unfamiliar with the Convention's system of adjudication, is based on a more extended discussion of the same subject in Laurence

treaty must be interpreted in light of progressive European conditions and attitudes. Striking the balance between these two competing goals is difficult, for although the tribunals have indicated that the Convention must be interpreted as a "living instrument"¹¹ and "in light of present-day conditions,"¹² they have also acknowledged that the Contracting States are entitled to a substantial degree of deference, or, to use their words, a "margin of appreciation" for their actions.¹³

The justifications for respect and deference are considerable. The tribunals are keenly aware that the Convention continues to exist solely by consent of the Contracting States.¹⁴ In an extreme case, a state faced with an unfavorable judgment can choose not to renew the right of individual petition or can withdraw from the Convention altogether.¹⁵ A state can also express its displeasure through less drastic means, for example, by failing to comply with a judgment or by delaying its execution.¹⁶ By contrast, the only genuine enforcement action that other Contracting States may take is to banish the offending state from the Council of Europe, the multi-national organization to which all of the Convention's signatories are members.¹⁷

The Court and Commission are also aware that they are not national legislatures or courts with plenary authority to strike the balance between competing interests in complex areas of law and public policy.¹⁸ Thus, they will not require a Contracting State to provide what they consider to be the most comprehensive human rights protection possible. Rather, if the laws of a Contracting State are on the "margin" of compatibility with the Convention, the tribunals will defer to the state's judgment in striking the balance between individual rights and

R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 VA. J. INT'L L. 157, 162-66 (1991).

11. *Tyler v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 31 (1978).

12. *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1979).

13. *See, e.g., James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 44 (1986) ("Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations permit a different treatment in law."); *Abdulaziz, Cabales & Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 36 (1985) (same).

14. *See* Convention, *supra* note 1, art. 66.

15. *See* Warbrick, *supra* note 7, at 709 (discussing the "contingent nature of a state's participation in the Convention system").

16. For a discussion of the remarkably few instances in which such dilatory tactics were attempted, see Sundberg, *supra* note 4, at 641.

17. *See* Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103. The Council is composed of two principal bodies. The Parliamentary Assembly, a legislative body composed of representatives appointed by each member state's national Parliament, debates and makes recommendations concerning any matter that affects the Council. *Id.* arts. 23, 25. The Committee of Ministers, composed of the member states' ministers of foreign affairs or their designees, is the Council's executive arm. It enforces the judgments of the Court and has the power to make recommendations to the member states on areas of common concern. *Id.* art. 15; Convention, *supra* note 1, art. 54.

18. *See* *The Belgian Linguistics Case*, 6 Eur. Ct. H.R. (ser. A) at 34-35 (1968) (Court cannot ignore subsidiary nature of Convention).

the public interest.¹⁹

The Court and Commission have not, however, allowed these prudential concerns for deference to frustrate their vision of the Convention as a treaty that responds to changing legal thought and practice across Europe. Instead, the tribunals have progressively narrowed the margin of appreciation doctrine by analyzing the degree to which common human rights practices can be discerned among the Contracting States. Where a majority of states have expanded the scope of a right guaranteed by the Convention or broadened the class of individuals to whom it applies, the Court and Commission have been far more likely to find that a state has violated the Convention by enacting or retaining a law which restricts that particular right.²⁰

B. Elements of the Consensus Inquiry

Although the tribunals have asserted in numerous cases that this European consensus approach is a "fact" of Convention jurisprudence, they have been less than clear in defining the elements that are relevant to discerning an emerging legal norm. As one commentator recently lamented:

Especially vexing in any attempt to uncover the meaning of the consensus factor is the consistently unsubstantiated nature of the Court's pronouncements. Each of these opinions relies upon the precedential value of other opinions in which a European consensus, or lack thereof, figured importantly, but a student of the Court is not informed as to how the Court measures the existence or non-existence of any one particular consensus.²¹

19. Perhaps the best definition of the deference inherent in the margin of appreciation doctrine can be found in an argument of the president of the Commission before the Court:

The concept of the margin of appreciation is that a Government's discharge of [its] responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of [its] powers . . . , then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation.

Lawless Case, 1 Eur. Ct. H.R. (ser. B) at 408 (1960-61).

20. See, e.g., *Rasmussen v. Denmark*, 87 Eur. Ct. H.R. (ser. A) at 15 (1984) (degree of scrutiny the Court applies to domestic laws varies according to the existence of "common ground between the laws of the Contracting States"); see also Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 860 (1990) ("the Court [has] declared that Convention standards . . . evolve with general European law reform trends regardless of whether a particular country ha[s] altered its own national laws") (citing *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1978)); Warbrick, *supra* note 7, at 716 ("The Court can find objective support for its judgments which drag along the reluctant State, where for reasons of local prejudice, inertia, even for conscious cost allocation reasons, the State has not kept up with the European understanding of the fundamental right.").

21. Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 CONN. J. INT'L L. 111, 158 (1987).

A comprehensive survey of the tribunals' judgments, however, reveals that, broadly speaking, the Court and Commission rely on three distinct factors as evidence of consensus: legal consensus, as demonstrated by European domestic statutes,²² international treaties,²³ and regional legislation;²⁴ expert consensus;²⁵ and European public consensus.²⁶

22. *See, e.g.*, Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) at 20 (1988) (recognizing statutory developments regarding sodomy laws as evidence of consensus); F. v. Switzerland, 128 Eur. Ct. H.R. (ser. A) at 16 (1987) (same, for laws temporarily prohibiting remarriage after divorce); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981) (same, for sodomy laws); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 19-20 (1979) (same, for laws disadvantaging non-marital families); Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978) (same, for use of corporal punishment against school children).

23. *See, e.g.*, Autronic AG v. Switzerland, 178 Eur. Ct. H.R. (ser. A) at 27 (1990) (citing European Convention on Transfrontier Television, May 5, 1989, Europ. T.S. No. 132); Inze v. Austria, 126 Eur. Ct. H.R. (ser. A) at 18 (1987) (citing European Convention on the Legal Status of Children Born Out of Wedlock, Oct. 15, 1975, Europ. T.S. No. 85); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 19 (1979) (citing Convention Concerning the Establishment of Maternal Filiation of Children Born Out of Wedlock, Sept. 12, 1962, 932 U.N.T.S. 73).

24. In this Article, the term "regional legislation" refers to the work product of the legislative and executive branches of the Council of Europe. Although the resolutions and recommendations of these institutions do not bind the Contracting States, they are a cogent expression of developing regional views concerning human rights.

For examples of cases citing to regional legislation as evidence of consensus, see, e.g., Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) at 16 (1990) (citing Recommendation of Parliamentary Assembly of the Council of Europe urging additional human rights protection for transsexuals); McVeigh v. United Kingdom, App. No. 8022/77, 5 Eur. Hum. Rts. Rep. 71, 97 (1983) (Commission report) (citing Recommendation of Parliamentary Assembly of the Council of Europe on the importance of controlling the international movement of terrorists in Europe).

25. *See* Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser. A) (1979). In *Winterwerp*, the Court construed the words "persons of unsound mind" for purposes of Article 5(1)(e), which outlines the right to liberty. The Court noted that the phrase's meaning "was continually evolving as research in psychiatry progresses." *Id.* at 16; *see also* F. v. Switzerland, 128 Eur. Ct. H.R. (ser. A) at 17 (1987) (citing Swiss Committee of Experts on Family Law Reform as evidence that a law temporarily prohibiting remarriage after divorce is incompatible with the Convention); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 20 (1979) (referring to the opinion of lawyers opposed to discrimination against non-marital families); X. v. Federal Republic of Germany, App. No. 5935/72, 3 Eur. Comm'n H.R. Dec. & Rep. 46, 56 (1976) (referring to German psychological and sociological studies relating to homosexual behavior).

26. *See, e.g.*, Ozturk v. Federal Republic of Germany, 73 Eur. Ct. H.R. (ser. A) at 36 (1984) (Bernhardt, J., dissenting) ("[T]he Court has in many cases accepted and practised an evolutive interpretation of the Convention, taking into account developments in society and in public opinion."); Winterwerp v. The Netherlands, 33 Eur. Ct. H.R. (ser. A) at 16 (1979) ("[A]n increasing flexibility . . . is developing [regarding] society's attitude to mental illness . . . so that a greater understanding of the problems of mental patients is becoming more widespread."); Marckx v. Belgium, 31 Eur. Ct. H.R. (ser. A) at 20 (1979) (noting the Belgian government's assertion that public sentiment increasingly favors ending discrimination against children born out of wedlock).

Although these elements appear with some regularity in Convention case law, the tribunals have yet to clarify the relative weight that they should be given in determining the presence or absence of an evolving European viewpoint. For example, the Court and the Commission have not specified what percentage of the Contracting States must alter their laws before a right-enhancing norm will achieve consensus status. Nor have they defined the degree to which international treaties and regional legislation are relevant to their analysis.

Rather, the tribunals speak in vague generalities, noting that a state's margin of appreciation varies according to "the existence or non-existence of common ground between the laws of the Contracting States."²⁷ The Court and Commission are equally ambiguous when examining the consensus factors themselves, referring to "developments and commonly accepted standards"²⁸ and "modern trends;"²⁹ or noting that the relevant reforms amount to an "evolution"³⁰ or a "marked change"³¹ in the Contracting States' conception of human rights; or that a "great majority"³² or a "great number"³³ of states have altered their laws.

II. Jurisprudential Problems with the Consensus Inquiry

One might view this lack of precision as an unremarkable result of the Court's young age (thirty years) and its limited number of judgments (approximately 250 by the end of 1992). Indeed, it seems plausible that as the Court's case load increases, it will have many opportunities to refine the consensus inquiry. But more is at stake here than underdeveloped doctrine. For the consensus methodology is one of the primary tools available for both the Court and Commission to implement the Convention's object and purpose: the protection of individual rights in light of the common European heritage of political traditions, ideals, freedoms, and the rule of law.³⁴ By allowing the level of rights-protection to evolve with progressive regional standards, the tribunals ensure that their interpretation of protected rights and freedoms is "consistent with 'the general spirit of the Convention, an instrument designed to

27. *Rasmussen v. Denmark*, 87 Eur. Ct. H.R. (ser. A) at 15 (1984).

28. *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978).

29. *Ozturk v. Federal Republic of Germany*, 73 Eur. Ct. H.R. (ser. A) at 36 (1984) (Bernhardt, J., dissenting).

30. *F. v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) at 16 (1987); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1979).

31. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 20 (1988); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 24 (1981).

32. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 23-24 (1981).

33. *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 30 (1986) (quoting preamble to European Convention on the Legal Status of Children Born Out of Wedlock, Oct. 15, 1975, Europ. T.S. No. 85).

34. *See Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 16 (1975).

maintain and promote the ideals and values of a democratic society.’ ”³⁵

This commitment to protecting individual rights is, however, in constant tension with deference to national decision-makers. Therefore, the tribunals must develop persuasive justifications for intruding into the Contracting States’ sovereignty. Indeed, if the Court and Commission expect the states to comply with their increasingly rights-protective judgments, they must provide a more precise explanation of the point at which an evolving European viewpoint acquires consensus status.

A. The Tension Between Precedent and Change

With greater consistency and a more principled approach, the tribunals’ practice of treating their prior judgments as authoritative is given enhanced legitimacy. Although the tribunals are not constrained by *stare decisis*, they “usually follow and appl[y their] own precedents, such a course being in the interests of legal certainty and the orderly development of Convention case-law.”³⁶ Since precedent is applied on an interstate basis, a judgment against one Contracting State will be extremely persuasive in a similar factual context against another state.³⁷

When the tribunals articulate a rights-protective interpretation of the Convention based on the consensus inquiry, they put other less progressive states on notice that their laws may no longer be compatible with the Convention if their nationals were to challenge them. Although such states may assert that special circumstances in their countries require a different result, in the face of principled and methodical decision-making they will be hard-pressed to articulate a compelling argument, particularly as a greater degree of unity builds across Europe.³⁸ Thus, when the Court and Commission overrule their previous case law “in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions,”³⁹ in effect they constrain the sovereignty of all Convention signatories.⁴⁰

35. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34 (1989) (quoting *Kjeldsen, Busk Madsen & Pedersen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at 27 (1976)).

36. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 14 (1990).

37. *See, e.g.*, *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 17 (1988) (finding challenge to sodomy laws of Republic of Ireland “indistinguishable” from prior challenge in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), to similar laws in Northern Ireland); *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 30 (1986) (relying on reasoning of *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979), that all states must take affirmative measures to respect family life).

38. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 28 (1990) (Martens, J., dissenting).

39. *Id.* at 14.

40. An example of this sovereignty-limiting effect can be seen in the recent debate over repealing the sodomy laws of the Isle of Man. Since at present the Isle of Man does not recognize the right of individual petition for its residents, the laws cannot be declared in violation of the Convention by the Court or Commission absent a complaint by another Contracting State (a relatively rare event in the Convention’s history). Nevertheless, the British government has attempted to persuade a very resistant Manx Parliament to amend its criminal code to bring it in line with the

This broad sovereignty-limiting aspect of the tribunals' decisions argues strongly in favor of a carefully reasoned approach to consensus definition.⁴¹ For if the Contracting States' reliance on a previously valid interpretation of the Convention is to be outweighed by the need to update the provisions enshrined in the treaty, those states that have not participated in the formation of a particular regional norm must have at least some confidence in the tribunals' reasoning. Indeed, such states will have a forceful argument against implementing a judgment where they perceive uncertainty or arbitrariness in the manner in which the Court and Commission have applied the consensus inquiry.⁴²

B. Finding a Proper "European" Interpretation

Underlying the tension between adhering to precedent and recognizing change is the tribunals' apprehension over whether they should strive to create an autonomous European interpretation of the Convention rather than a body of unrelated precedents that simply reflect European state practice in discrete subject areas.⁴³ The tension between these approaches is at the heart of the consensus methodology, which serves very different functions depending on which jurisprudential view is adopted.

At one extreme, the Court and Commission can be seen as a lens through which the existing practices of the Contracting States are reflected. Under this approach, there is little or no room for the tribunals to modernize the Convention on behalf of the states. Rather, they raise the level of human rights protection in accordance with evolving European norms only where almost all states have adopted the rights-enhancing measures and where it seems apparent that other states have considered reforms and are likely to follow. In the most extreme scenario, the tribunals simply recognize the *de facto* legal changes that have occurred in all states and then incorporate them into the Convention.

Court's rulings that such laws violate a homosexual's right to privacy. See *Keep Ban on Homosexuality, Say Manx MPs*, ASSOC. PRESS NEWSFILE, Feb. 27, 1991 (available in LEXIS, Nexis Library, Currnt file). In the Spring of 1992, the Parliament finally relented. See *Manx MPs Vote to Legalise Homosexuality*, THE INDEPENDENT, Apr. 1, 1992, at 2.

41. Of course, the Convention guarantees every Contracting State the right to litigate a potential Convention violation, even one that appears to be compelled by precedent. See Convention, *supra* note 1, art. 48 (Contracting State against which petition has been filed may appeal Commission decision to Court).

42. See Mahoney, *supra* note 5, at 76-77 ("Stability in the interpretation and application of the Convention is highly desirable if not even essential. Without such stability, the credibility of the Court and the Convention system as a whole would suffer."); Warbrick, *supra* note 9, at 1096 (When the Court "keep[s] its interpretation abreast of developments, . . . it is incumbent upon it to give a coherent justification for the steps it has taken: States need to know where they stand, and so do potential applicants.").

43. See Yourow, *supra* note 21, at 158 (noting that it is unclear "whether the Court creates a truly autonomous law of the Convention in its own case law, or whether the laws and practices of the Member States . . . actually define the international or European jurisprudence").

Such a position requires little theoretical reasoning and poses only a minimal threat to the Court's legitimacy.⁴⁴

At the other extreme, the Court and Commission play a far more aggressive role, highlighting and refining emerging norms and striving to develop a truly pan-European approach. Such activist tribunals might begin to incorporate a newly emerging principle of rights-protection at any time after a significant number of states had modified their domestic laws, with the justifications for judicial intervention growing as more states joined the reform movement. As the degree of European homogeneity increased, the Court and Commission would not allow any state to rely on special circumstances to prevent the formation of a uniform standard.

The tribunals have avoided both of these poles, choosing instead to weigh the need for common standards against the Contracting States' desire to chart a nonconformist course of human rights compliance. In *Cossey v. United Kingdom*,⁴⁵ Judge Martens concisely articulated the importance of balancing these two concerns. Arguing in favor of a uniform European approach, he noted that

the preamble to the Convention, which recalls the aim of achieving greater unity between member States and stresses that Fundamental Freedoms are "best maintained" by a "common understanding and observance of . . . Human Rights," seems to invite the Court to develop common standards. To the extent that the number of member States increases, this side of the Court's mandate gains in weight, for in such a larger, diversified community the development of *common standards* may well prove the best, if not the only way of . . . ensuring that the Convention remains a living instrument . . ."⁴⁶

Yet the judge also underscored the need for a wider degree of deference in certain contexts:

Judicial self-restraint may, on the other hand, be called for by the special features of the case or the fact that it cannot be decided without taking into consideration special situations obtaining in the defendant State. If, after careful consideration, the Court is convinced that the latter is really the case, then it may be that the State should be left a certain margin of appreciation.⁴⁷

44. It should be noted, however, that even this conservative approach to the consensus inquiry is a departure from traditional principles of treaty construction, which require an express intention by states to limit their sovereignty. See Warbrick, *supra* note 7, at 709.

45. 184 Eur. Ct. H.R. (ser. A) (1990).

46. *Id.* at 28 (Martens, J., dissenting); see also *Barfod v. Denmark*, 149 Eur. Ct. H.R. (ser. A) at 17 (1989) (Gölcüklü, J., dissenting) ("I wish to stress that it is difficult to reconcile the Convention, whose ultimate purpose is to establish European standards, with specific national features such as those put forward by the Government."); VAN DIJK & VAN HOOFF, *supra* note 7, at 602-03 (arguing that tribunals should search for and elaborate common standards for interpreting the Convention). But see MERRILLS, *supra* note 2, at 74 (noting danger of judicial illegitimacy where tribunals "encourage or promote a tendency which has yet to become firmly established").

47. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 28 (1990) (Martens, J., dissenting).

To determine an appropriate degree of deference and judicial self-restraint in specific cases, the Court and Commission have supplemented the consensus inquiry with an understanding of the shifting and context-based nature of a Contracting State's margin of appreciation. As the tribunals have astutely observed, a state's interest in policies or practices that conflict with developing legal norms is likely to vary with the specific human right at issue and with the objectives that are served by restricting the enjoyment of that right.⁴⁸ Thus, where states demonstrate the existence of diverse approaches to protecting a Convention right or where they have challenged the tribunals' proficiency to adjudicate a particular class of disputes, the Court and Commission have granted states discretion to restrict individual rights within widely set parameters.⁴⁹ By contrast, where a common interpretive perspective exists, where a Convention article contains especially stringent rights-protective language, or where a right serves a special function in democratic societies, the tribunals have scrutinized such restrictions with a "more extensive European supervision."⁵⁰

48. See *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A) at 25 (1987) (margin of appreciation varies with the nature of the restriction asserted and the nature of the goal pursued by the Contracting State); *Gillow v. United Kingdom*, 109 Eur. Ct. H.R. (ser. A) at 22 (1986) (margin of appreciation "will depend not only on the nature of the aim of the restriction but also on the nature of the right involved"); see also *Stroszen*, *supra* note 20, at 857 ("The Convention tribunals have stated that national government decision-makers are entitled to more deference . . . regarding certain kinds of decisions that are traditionally consigned to a particular community's power of self-determination.").

49. In *Muller v. Switzerland*, 133 Eur. Ct. H.R. (ser. A) (1988), the Court, after noting that "conceptions of sexual morality have changed in recent years," stated:

[I]t is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a "restriction" or "penalty" intended to meet them.

Id. at 22; see also *Mathieu-Mohin & Clerfayt v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 23 (1987) (manner in which Contracting States hold free elections given broad discretion); *James v. United Kingdom*, 98 Eur. Ct. H.R. (ser. A) at 32 (1986) (Contracting States have wide margin of appreciation to regulate private property in the public interest).

50. *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 36 (1979); see also *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34 (1989) ("Th[e] absolute prohibition of torture and of inhuman or degrading treatment and punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe."); *Abdulaziz, Cabales & Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 38 (1985) (requiring "very weighty reasons" to support differential treatment based on gender since "advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe"); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 21 (1981) (requiring Contracting States to advance "particularly serious reasons" for an interference with "a most intimate aspect of private life"); *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976) (noting that

III. Consensus Incongruity in Recent Cases Relating to Family Law and Gender Issues

It is against the backdrop of this contextual approach that the tribunals have struggled to build a coherent jurisprudential vision. As they have filled in the interstices of the Convention's text with an increasingly rich and complex case law, areas in which states might once have claimed authority for a nonconformist position have been eroded by the development of common standards. But the Court and Commission have been less than clear in explaining why certain settings require earlier recognition of emerging consensus principles whereas others demand a more circumspect approach. Nowhere has this ambiguity been more apparent than in human rights claims relating to the structure of the family, gender equality, and transsexualism.⁵¹

A. Family Life and Gender Equality Cases

In *F. v. Switzerland*,⁵² for example, the Court reviewed a Swiss statute that imposed a temporary waiting period for remarriage after a divorce. In deciding whether the law violated the right to marry enshrined in Article 12, the Court referred to the rules governing remarriage in other Contracting States. Although by the mid-1980s every other state had repealed the temporary waiting period, the Court stated that this should not be viewed as *prima facie* proof that the Convention had been breached. Rather, it stressed that

the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field—matrimony—which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit.⁵³

This passage notwithstanding, the Court held in a nine to eight decision that the Swiss law violated Article 12, rendering ambiguous the persuasive value of its assertion.⁵⁴

“[f]reedom of expression constitutes one of the essential foundations” of a democratic society and “one of the basic conditions for [society's] progress and for the development of every man”); *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 17 (1975) (“The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognized’ fundamental principles of law.”).

51. Although these areas of European human rights law provide the clearest examples of consensus ambiguity, a similar analysis can be made of the tribunals' freedom of expression and social insurance benefit cases. For a discussion of the doctrinal difficulties that these cases present, see Warbrick, *supra* note 7, at 711-14; Warbrick, *supra* note 9, at 1084-85.

52. 128 Eur. Ct. H.R. (ser. A) (1987).

53. *Id.* at 16-17.

54. *Id.* at 20. The dissenters appear not to have addressed the consensus inquiry, advocating instead a textual approach to marriage rights:

With regard to marriage, the State has more extensive powers than in some other fields. This is particularly apparent when one compares the very brief and non-exhaustive reference to ‘national laws’ in Article 12 of the Conven-

The deferential approach to family law articulated in *F. v. Switzerland* seems to imply that the tribunals grant a wide margin of appreciation to states whenever these issues arise. This is not an accurate picture of Convention jurisprudence, however. In several recent cases, the Court has required states to treat non-marital families with the same degree of respect as traditional families. In reaching the conclusion that the Convention fully protects non-marital relationships, the Court has relied on regional treaties and domestic law reforms as evidence of a consensus evolution.⁵⁵ Indeed, in *Inze v. Austria*,⁵⁶ the Court went so far as to state that “[v]ery weighty reasons would . . . have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention.”⁵⁷

In the area of gender equality the tribunals have applied an equally exacting standard of review. In *Abdulaziz, Cabales & Balkandali v. United Kingdom*,⁵⁸ the Court’s claim that the “advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe” allowed it to demand “very weighty reasons” from the respondent state for maintaining an immigration policy that discriminated on the basis of sex.⁵⁹ The unanimous judgment is significant for its forward-looking interpretation of the consensus inquiry. Although the Contracting States had ratified several multilateral treaties to protect women, their domestic legislation fell short of ensuring equality between the sexes.⁶⁰ This deficiency did not dissuade the tribunals from developing a rights-protective approach to gender issues based on states’ international aspirations rather than their domestic actions.

B. Transsexualism Cases

Perhaps the most troublesome issue in which the consensus inquiry has played a key role has been the claim by transsexuals to full legal recognition of their desired gender. Such cases have required the tribunals to analyze scientific evidence on biological, psychological, and surgically acquired gender identity, and have challenged them to develop an adequate response to a human rights problem that the Convention’s drafters did not envision. The tribunals have relied heavily on legal and expert consensus to determine whether a state’s refusal to permit a post-operative transsexual to alter his or her official documents and to marry

tion with the more circumscribed and restrictive wording of the second paragraph of each of Articles 8, 9, 10 and 11.

Id. at 22 (joint dissenting opinion).

55. See *Johnston v. Ireland*, 116 Eur. Ct. H.R. (ser. A) at 29-31 (1986); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 18-19 (1979).

56. 126 Eur. Ct. H.R. (ser. A) (1987).

57. *Id.* at 18.

58. 94 Eur. Ct. H.R. (ser. A) (1985).

59. *Id.* at 38.

60. See THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 55 & n.9 (1986) (citing Recommendations of the Committee of Ministers as evidence of existing gender inequality in European domestic laws).

according to his or her desired identity violates the Convention.⁶¹

The remarkable aspect of the tribunals' case law concerning transsexualism is the degree of disharmony existing among the members of the Commission and the judges of the Court. In three separate instances, the Commission held that a state had violated the Convention by failing to grant legal recognition to a transsexual's new identity,⁶² only to have the Court reverse those decisions on appeal. When the Court finally found a violation of the right to respect for private life, it did so in a convoluted judgment⁶³ that created substantial rifts among the jurists over how to approach future cases concerning transsexualism. More importantly, the decision compounded the confusion regarding the tribunals' proper role in balancing respect for precedent against the application of a consensus-based methodology.

1. *Rees v. United Kingdom*

The first detailed analysis of these problematic questions appeared in *Rees v. United Kingdom*,⁶⁴ where the Court, by a twelve to three vote, concluded that the government's failure to modify its birth registration system to accommodate transsexuals did not violate their right to respect for private life. The Court considered several factors in reaching this result. First, it noted that the United Kingdom had taken no official steps to recognize Rees' surgically acquired male gender. As a consequence, when he was asked to produce his birth certificate for employment or other purposes, it indicated that he was biologically female. The United Kingdom also considered Rees to be a woman for purposes of marriage, pension benefits, and certain employment rights.⁶⁵ By contrast, because the United Kingdom, unlike many civil-law Contracting States, did not maintain an integrated civil status register, Rees was able to change his name and was issued a passport that reflected his chosen name and gender. Although such modifications were not designed specifically to accommodate transsexuals, the Court indicated that they mitigated the interference with Rees' private life.⁶⁶

The Court also rejected Rees' request to amend the birth register and to require the United Kingdom to issue an updated birth certificate. The Court concluded that to protect Rees' privacy effectively, the amendment would have to be kept confidential from most third parties. Such secrecy would fundamentally alter the public nature of the registra-

61. See *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) (1990); *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) (1986).

62. See *Cossey v. United Kingdom*, App. No. 10843/84, (to be printed in 174 Eur. Ct. H.R. (ser. B) (199—) (Commission Report)); *Rees v. United Kingdom*, 89 Eur. Ct. H.R. (ser. B) (1991) (Commission Report); *Van Oosterwijck v. Belgium*, 36 Eur. Ct. H.R. (ser. B) (1979-80) (Commission Report).

63. *B. v. France*, App. No. 13,343/87, slip op. (Eur. Ct. H.R., Mar. 25, 1992) (to be printed in 232 Eur. Ct. H.R. (ser. A) (1992)).

64. 106 Eur. Ct. H.R. (ser. A) (1986).

65. *Id.* at 16.

66. *Id.*

tion system and would also cause complications in the administration of family and inheritance laws.⁶⁷

The Court bolstered its conclusion by analyzing the legal status of transsexuals in other European nations. Although noting that “[s]everal States” had given transsexuals the option of altering their official documents to fit their new gender, the Court concluded “that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage.”⁶⁸ Accordingly, it granted the United Kingdom a “wide margin of appreciation.”⁶⁹ In a key passage, however, the Court suggested that *Rees* would not be its last word on the subject:

[T]he Court is conscious of the seriousness of the problems affecting [transsexuals] and the distress they suffer. The Convention has always to be interpreted and applied in the light of current circumstances. The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.⁷⁰

The Court’s generalized formulation of the consensus inquiry created a substantial measure of ambiguity over when new developments would compel a reconsideration of its deferential approach to these issues. It also placed the United Kingdom in a position of uncertainty regarding the compatibility of its laws with the Convention, highlighting the fact that its future human rights obligations would be redefined based on changing practices in other European states.

From the perspective of enhancing the jurisprudential goals discussed above—the desire for legal stability, the interstate precedential value of prior judgments, and the need to modernize the rights enshrined in the Convention—the Court could have remained vague about the consensus inquiry had it not been required to reexamine its analysis in *Rees* until significant legal developments had occurred in European society. In that event, the Court could have found a violation of the Convention after noting the “marked changes” or “evolution” in state practice concerning transsexualism. If, however, the Court were required to reconsider its analysis and possibly overrule *Rees* after only minor changes had occurred in legal and expert consensus, these goals would risk being undermined unless the Court specified the developments that had occurred and explained why they required a different conclusion. But it is precisely at this point in the process of consensus evolution that reexamination of the issue would pose the most serious challenge to the authority of the Court and to its competing jurisprudential mandates.

67. *Id.* at 17-18.

68. *Id.* at 15.

69. *Id.*

70. *Id.* at 19 (citation omitted).

2. *Cossey v. United Kingdom*

Unfortunately, such an unhappy state of affairs presented itself just four years later. In *Cossey v. United Kingdom*,⁷¹ the Court reexamined the legal rights of transsexuals, noting rather cryptically that “[t]here have been certain developments since 1986” in the laws of some of the Contracting States.⁷² It also referred to a Resolution on Discrimination Against Transsexuals⁷³ authored by the European Parliament and to Recommendation 1117 on the Condition of Transsexuals adopted by the Parliamentary Assembly of the Council of Europe.⁷⁴ Although these documents called for additional legal protection for transsexuals, they also acknowledged the existing “diversity of practice” across Europe.⁷⁵ Therefore, the Court construed the regional legislation as an invitation to European states to harmonize their laws, rather than evidence of a consensus evolution. Accordingly, it held by a ten to eight vote that the United Kingdom had not violated *Cossey’s* private life, although, as in *Rees*, it reaffirmed the need to review the issue in future cases.⁷⁶

While on the surface the Court’s analysis appears persuasive, four dissenting opinions effectively undercut the majority’s reasoning by challenging its approach to the consensus inquiry.⁷⁷ These dissents examined recent legal and societal developments with a precision not found in prior cases. In addition to citing the specific statutes that had been enacted since *Rees*, the dissents also noted that several states had provided official acknowledgement of surgically acquired gender through judicial or administrative proceedings.⁷⁸ Thus, while the manner in which a post-operative transsexual’s identity was recognized varied from state to state, some form of legal recognition of gender reassignment surgery was possible in fourteen Contracting States. This

71. 184 Eur. Ct. H.R. (ser. A) (1990).

72. *Id.* at 16.

73. 1989 O.J. (C 256) 33, *cited in* *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 16 (1990).

74. Recommendation 1117, Eur. Parl. Ass., 41st Sess. (1989), *cited in* *Cossey v. United Kingdom* 184 Eur. Ct. H.R. (ser. A) at 16 (1990).

75. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 16 (1990). Both documents urged European states to ban discrimination against transsexuals and to facilitate legal recognition of their acquired gender by permitting name and sex modifications on birth certificates and other identity documents. *See id.* at 43 (Palm, Foighel, and Pekkanen, JJ., dissenting).

76. *Id.* at 17-18 (“Since the Convention always has to be interpreted and applied in light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review.”). The Court also held by a vote of fourteen to four that the United Kingdom has not breached Article 12 by refusing to permit *Cossey* to marry a man. It reasoned that “attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person’s sex for purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.” *Id.* at 18.

77. *Id.* at 20 (Bindschedler-Robert and Russo, JJ., dissenting in part); *id.* at 21 (Macdonald and Spielmann, JJ., dissenting in part); *id.* at 22-41 (Martens, J., dissenting); *id.* at 42-44 (Palm, Foighel, and Pekkanen, JJ., dissenting).

78. *E.g., id.* at 35 (Martens, J., dissenting).

number far exceeded the number of states—five—that had modified their domestic laws four years earlier.⁷⁹

The dissenting judges also took exception to the majority's interpretation of the regional legislation. Whereas the Court viewed these documents as evidence of a lack of common ground among the Contracting States, the dissent argued that "[t]he decisions of these representative organs clearly indicate that, according to prevailing public opinion, transsexuals should have the right to have their new sexual identity fully recognised by the law."⁸⁰ In the dissenting judges' belief, this increase in public sympathy, combined with the developing legal consensus, was sufficient to require states such as the United Kingdom to reform their laws.

3. B. v. France

After the divisive debate in *Cossey*, at least one judge believed that the tribunals would avoid re-examining the rights of transsexuals for several years.⁸¹ The need for an orderly development of Convention case law argued strongly against re-examination, as did the Contracting States' desire for repose and legal stability. Yet only eighteen months later, the Court for the first time in its history held, by a fifteen to six vote, that the Convention's right to respect for private life compels a state with an integrated civil status registration system to recognize a transsexual's surgically-acquired gender. The case, *B. v. France*,⁸² did little to resolve the methodological debate among the judges concerning the proper role of the consensus inquiry and the precedential worth of prior judgments. In fact, the Court appears to have muddied the theoretical waters even further: although purporting to distinguish *Cossey* and *Rees*, a majority of the judges (including all the dissenters in both cases)⁸³ cast substantial doubt on the validity of those judgments and the interpretive approach they embody.

Although B., a male to female transsexual, had urged the Court to reconsider and overrule its prior case law, the Court rejected this invitation, concluding that, with respect to scientific and legal developments, "there is as yet no sufficiently broad consensus between the member States of the Council of Europe to persuade the Court to reach opposite

79. *Id.* at 35-36; see also *id.* at 21 (Macdonald and Spielmann, JJ., dissenting in part) ("[S]ince 1986 there have been, in the law of many of the member States of the Council of Europe, not 'certain developments' but *clear developments*.").

80. *Id.* at 43 (Palm, Foighel, and Pekkanen, JJ., dissenting); see also *id.* at 36 (Martens, J., dissenting) (arguing that regional legislation evidences "a marked increase in public acceptance of transsexualism").

81. *Id.* at 34 (Martens, J., dissenting) (noting that "confirming that judgment [*Rees*] would bar overruling for a long time to come").

82. App. No. 13,343/87, slip op. (Eur. Ct. H.R., Mar. 25, 1992) (to be printed in 232 Eur. Ct. H.R. (ser. A) (1992)).

83. Judge Gersing died prior to the judgment in *Cossey v. United Kingdom*. Judge Foighel did not participate in the judgment in *B. v. France*.

conclusions to those in its *Rees* and *Cossey* judgments.”⁸⁴ Rather, the Court made a narrow fact-based evaluation of French law without expressly reconsidering the broader principles expressed in its earlier judgments. The Court relied on several factors to distinguish the legal status of French transsexuals from that of their British counterparts.

First, France, unlike the United Kingdom, maintained an integrated system for registering the civil status of its nationals. This system allowed a birth certificate to be updated throughout a person’s life to record such events as adoption, marriage, and divorce.⁸⁵ The information in the certificate was used to compile various identity and travel documents, some of which contained a reference to gender.⁸⁶ In addition, France did not permit individuals to change their forenames at will. Rather, the name given on a child’s birth certificate was conclusive and could only be altered by a court order upon the showing of a “legitimate interest.”⁸⁷ The Court noted that these constraints imposed a substantial burden upon transsexuals, who “could consequently not cross a frontier, undergo an identity check or carry out one of the many transactions of daily life where proof of identity is necessary, without disclosing the discrepancy between their legal sex and their apparent sex.”⁸⁸

The fact that this situation could be remedied without detailed legislation also swayed the Court. The French civil status system was already equipped to record amendments to a birth certificate; therefore a court order altering a transsexual’s gender could be easily entered “to bring the document up to date so as to reflect the applicant’s present position.”⁸⁹ Moreover, the limited access to civil status documents already required by French law ensured that the modification would remain confidential for most purposes.⁹⁰

These factors, viewed in isolation, provide a compelling justification for distinguishing the British birth registration system and holding France in breach of the Convention. Indeed, the Court was careful to reaffirm its view that the British system was still compatible with the Convention.⁹¹ A more careful assessment of the judgment, however, reveals the theoretical implausibility of separating the two strands of reasoning. Specifically, the Court’s efforts to move the Convention forward while reaffirming *Rees* and *Cossey* are undermined by the fact that France, unlike the United Kingdom, had begun to fashion an official response to the legal problems associated with transsexualism.

During the past ten years French courts had, in numerous judgments, ordered the birth certificates and identity documents of transsex-

84. *B. v. France*, App. No. 13,343/87, slip op. (Eur. Ct. H.R., Mar. 25, 1992) at 20.

85. *Id.* at 9.

86. *Id.* at 13.

87. *Id.* at 10.

88. *Id.* at 23.

89. *Id.* at 22.

90. *Id.* at 21.

91. *Id.* at 20.

uals to be altered to conform to the persons' outward appearance. In cases such as B.'s, where the courts denied these orders, they reasoned that the individuals concerned had not received their surgery in French public hospitals after undergoing properly documented medical and psychological treatment. The courts utilized these criteria to limit civil status modifications to persons who could demonstrate the "irreversible necessity" of gender reassignment surgery.⁹²

While acknowledging the availability of this judicial remedy, the Court found that French law failed to give sufficient weight to B.'s personal decision to abandon the sex of her birth through hormone therapy and surgery.⁹³ What is remarkable about this conclusion is the Court's willingness to second-guess the French courts on the issue of which transsexuals have the right to have their gender change acknowledged in the law, while simultaneously asserting that psychological and medical research on the nature of transsexualism remains largely unsettled.⁹⁴ Although this reference to a lack of consensus pays lip service to the *Cossey* and *Rees* precedents, the Court sharply undercut the analytical underpinnings that gave those judgments their jurisprudential force. For despite the absence of common ground, the Court effectively preempted the ability of the French courts to decide not the more fundamental question of whether a transsexual's civil status should be altered, but the more narrow issue of the conditions under which such a modification should be made. Such an intrusive action repudiates the rationale of deference articulated in *Cossey* and *Rees* and allows the Court to substitute its own judgment for that of national decision-makers.

The six dissenting judges in *B. v. France* highlighted the Court's inability to distinguish its precedents. Four of the dissenting judges stated that the Court had flatly overruled its prior case law,⁹⁵ whereas the remaining two judges believed that the judgment was susceptible to such an interpretation.⁹⁶ But far more troubling to the dissenting judges than the instability created by this sudden change in the law was the grave threat to the Court's legitimacy posed by a substantial expansion of the right to respect for private life without a carefully reasoned

92. *Id.* at 6.

93. Stated the Court:

It is true that the applicant underwent the surgical operation abroad, without the benefit of all the medical and psychological safeguards which are now required in France. The operation nevertheless involved the irreversible abandonment of the external marks of Miss B.'s original sex. The Court considers that in the circumstances of the case the applicant's manifest determination is a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8.

Id. at 22.

94. *See id.* at 20 ("[T]here still remains some uncertainty as to the essential nature of transsexualism and that the legitimacy of surgical intervention in such cases is sometimes questioned.").

95. *Id.* at 30 (Pinheiro Farinha, J., dissenting); *id.* at 36 (Valticos, J., dissenting); *id.* at 41-42 (Morenilla, J., dissenting). Judge Loizou approved Judge Valticos's dissenting opinion.

96. *Id.* at 29 (Matscher, J., dissenting); *id.* at 32 (Pettiti, J., dissenting).

approach to the consensus inquiry. Judge Valticos expressed these fears openly:

By overturning a line of case-law whose most recent decision was scarcely a year old—even though the facts, albeit different to a certain extent, were not in my opinion different enough to justify this change of direction—I fear that the majority of the Court could be opening the way to serious and as yet unforeseeable consequences. . . .

No doubt there is an evolution taking place, in people's minds and in science; . . . but it seems to me that as matters stand it is clearly inappropriate to consider that there has been a violation of the Convention where for legal, moral and scientific reasons, reasons which all deserve respect, a State does not follow, or at least is not yet ready to follow such an evolution. The countries of Europe as a whole do not appear to be ready to have such case-law imposed on them.⁹⁷

In a similar vein, Judge Pettiti chastised the majority for failing to respect France's judicial method of modifying civil status documents in accordance with well-defined medical conditions. The judge noted that France occupied a middle ground between those Contracting States that had afforded complete legal recognition to transsexuals and those nations that had made no response whatsoever to the problem. In his view, this diversity permitted states to choose "between the legislative path and the case-law path" and to base "the criteria for recognition of . . . transsexualism . . . upon undisputed scientific knowledge."⁹⁸ By failing to respect France's decision, he stated, the Court had ignored the margin of appreciation granted to states in unsettled areas of human rights law that involve "moral attitudes and traditions."⁹⁹

C. The Transsexualism Cases' Legacy of Confusion for Future Applications of the Consensus Inquiry

Cossey v. United Kingdom and *B. v. France* are watershed cases for the European consensus inquiry. The deep divisions among the judges over the human rights of transsexuals had three significant consequences for the developing doctrine. First, they forced the judges to articulate more precisely their competing visions of how to balance the protection of individual rights against deference to national decision-makers; second, they engendered an extremely candid debate over the relative weight accorded to the elements supporting the consensus inquiry; and finally, they compelled the tribunals to evaluate the precedential force that their prior case law should exert in the face of a rapidly evolving regional perspective on human rights.

The Court's sharply divided voting patterns enhance the significance of these judgments. Cases in which the majority and dissent split over difficult questions of consensus methodology compel the judges to clarify their conflicting views on the manner in which emerging norms

97. *Id.* at 36-37 (Valticos, J., dissenting).

98. *Id.* at 33 (Pettiti, J., dissenting).

99. *Id.* at 35.

should be incorporated into the Convention. These cases provide clearer insights into the jurists' reasoning than cases in which the Court is able to muster a very large majority and can therefore remain equivocal about the state of consensus evolution, either by failing to explain its analysis fully or by using evidence selectively.

The *ad seriatim* snapshots of consensus progression which cases like *Rees*, *Cossey*, and *B. v. France* take at particular historical moments allow scholars to calculate exactly how far European human rights law has evolved. Litigants before the Court and Commission will now debate whether these cases should serve as benchmarks for determining when other emerging human rights principles should crystalize into binding legal norms.¹⁰⁰ They will also discuss the content and scope of such norms by using increasingly precise evidence, including legislative, administrative, and judicial actions, to demonstrate that a threshold percentage of states have modified their laws. In the face of such precision, the Court may find it difficult to maintain an authoritative *ad hoc* approach.

In fact, it is the specificity of the dissent's consensus analysis in *Cossey* that erodes the Court's ability to rely on ambiguous reasoning in other areas of Convention jurisprudence. For once having defined the evolutive line with clarity, the failure to define it in other cases becomes increasingly unconvincing. Much of the reasoning in *B. v. France* is unpersuasive precisely because the Court did not adhere to its own prior assessments of consensus evolution. By failing to account for the striking similarities to the earlier cases, as well as the apparent differences, the Court leaves itself vulnerable to the charge that it manipulates the consensus inquiry to achieve an interpretation of the Convention that it finds ideologically pleasing.

Given these problems of interpretation, the Court and Commission will likely be confronted with an increasing number of disputes in which the proper role of the consensus inquiry will be hotly contested. If the tribunals hope to maintain their institutional authority and balance their opposing jurisprudential mandates, they must strive for greater coherence in applying the consensus methodology. While this may not always result in cases being decided by large majorities, it will enable states and individuals to predict with greater accuracy judicial responses to newly emerging human rights principles.

IV. A Revised Consensus Inquiry for the 1990s

As a first step toward jurisprudential harmony, I offer the following interpretive approach to apply the European consensus inquiry. The

100. As to the elements that comprise the consensus inquiry, the majority's refusal in *Cossey* to rely on regional legislation as evidence of a consensus evolution seems to diminish the importance of international developments. But it stands in sharp contrast to cases like *Abdulaziz and Marckx*, where the Court gave significant weight to the aspirations expressed on the international plane, even in the face of a somewhat underdeveloped domestic response.

proposal responds to the invitation by other scholars to develop a more rigorous methodology for resolving consensus-based disputes.¹⁰¹ It attempts to synthesize the principles expressed in numerous cases into a flexible framework that weighs the need for common standards to protect individual rights against deference to national decision-makers.

A. Textual and Structural Approaches

Although the consensus inquiry is a vital aspect of Convention jurisprudence, the controversies created by its application argue in favor of using it as an interpretive tool only after structural or textual approaches have been exhausted. Construing the plain meaning of individual articles, their relationship to one another in the Convention as a whole, and where appropriate, writings and statements from the *travaux préparatoires*, may reveal a rights-inclusive or rights-limiting interpretation that, because it is grounded on widely accepted principles of treaty construction,¹⁰² will command large majorities on the Court and Commission.

Yet even where the jurists disagree over whether the existence of a right can be implied from the Convention's object and purpose,¹⁰³ proper application of a structural or textual methodology provides greater stability than application of the consensus inquiry. For once the Court has ruled that an unenumerated right is not protected by the Convention, that interpretation will not be subject to reevaluation with the emergence of rights-enhancing law reforms.¹⁰⁴ Rather, the tribunals will respect the conclusion reached by a majority of the Court and allow the Council of Europe to overrule the decision by promulgating an optional Protocol to incorporate the right into the Convention's adjudicatory framework.¹⁰⁵ In addition, a textual or structural method validates the use of the consensus inquiry by limiting it to those human rights concepts that are explicit or implicit in the language of the Convention. A few examples from recent cases will help to illuminate these points.

101. See, e.g., Mahoney, *supra* note 5, at 73, 83.

102. See Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf. 39/27, reprinted in 8 I.L.M. 679, arts. 31-32.

103. The clearest example of such disagreement is found in Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991). There, the Court split ten votes to nine over whether the power to order interim measures could be implied from Article 25 § 1 of the Convention, which prevents the Contracting States from hindering the effective exercise of the right of petition. *Id.* at 38.

104. *Id.* at 36 ("Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision . . . but not to create new rights and obligations which were not included in the Convention at the outset . . .") (citations omitted); Feldbrugge v. The Netherlands, 99 Eur. Ct. H.R. (ser. A) at 28 (1986) (joint dissenting opinion) ("An evolutive interpretation allows variable and changing concepts already contained in the Convention to be construed in the light of modern-day conditions, but it does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the member States of the Council of Europe.") (citations omitted).

105. See, e.g., Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) at 36 (1991).

In *Johnston v. Ireland*,¹⁰⁶ the Court concluded that Article 12,¹⁰⁷ which guarantees the right to marry, could not be interpreted to include the right to divorce.¹⁰⁸ The Court grounded its decision on the plain meaning of the text and confirmed its reasoning by referring to the Convention's preparatory work, which indicated that the right to divorce had been deleted from the original version of Article 12.¹⁰⁹ This clear textual omission prevented a consensus-based interpretation of the Article, as "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset."¹¹⁰

Similarly, in *Soering v. United Kingdom*,¹¹¹ the Court used an integrated interpretation of the Convention and its Protocols to reach the conclusion that the Convention permits Contracting States to impose the death penalty for certain crimes.¹¹² Amnesty International argued before the Court that, because the majority of European states had formally abolished the death penalty, capital punishment was no longer consistent with regional standards of justice and should properly be viewed as inhuman or degrading punishment within the meaning of Article 3.¹¹³ The Court rejected this consensus-based approach. It relied instead on the existence of an optional Protocol¹¹⁴ that abolished the death penalty as evidence that the Convention permitted capital punishment by those states that had chosen not to ratify the Protocol.¹¹⁵

By contrast, in *Golder v. United Kingdom*,¹¹⁶ the Court interpreted Article 6, which guarantees fair public hearings by an impartial tribunal, to include a right of access to the courts. Although this right was not explicitly set forth in the text, the Court reasoned that "[i]t would be

106. 112 Eur. Ct. H.R. (ser. A) (1986).

107. Convention, *supra* note 1, art. 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.")

108. *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 25 (1986). For a critical appraisal of this case, see Kathleen M. Dillon, *Divorce and Remarriage as Human Rights: The Irish Constitution and the European Convention on Human Rights at Odds in Johnston v. Ireland*, 22 CORNELL INT'L L.J. 63 (1989).

109. *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 24 (1986).

110. *Id.* at 25.

111. 161 Eur. Ct. H.R. (ser. A) (1989).

112. Convention, *supra* note 1, art. 2, ¶ 1 ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.")

113. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 40 (1989).

114. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Europ. T.S. No. 114, *reprinted in* 22 I.L.M. 539 (1983), arts. 1, 2.

115. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 40-41 (1989). For an argument that the division of rights between a Protocol and the Convention's primary text poses especially complex and politically sensitive questions of interpretation, see Helfer, *supra* note 10, at 191-202 (discussing interaction between proposed sexual orientation Protocol and Articles 8 and 14 of Convention).

116. 18 Eur. Ct. H.R. (ser. A) (1975).

inconceivable . . . that Article 6 [paragraph 1] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.”¹¹⁷ The Court did not develop this interpretive construction from the consensus inquiry. Rather, it relied on “the very terms of the first sentence of Article 6 [paragraph 1] read in its context and having regard to the object and purpose of the Convention . . . and to general principles of law.”¹¹⁸

B. The Consensus Continuum

In many if not most cases, however, textual or structural approaches will not resolve the matter before the tribunals. For once they have determined that a particular right is protected by the Convention, they must then define the contours of that right in light of evolving regional trends in human rights. Rather than approach this analysis on an *ad hoc* basis, the Court and Commission should search for such trends along a structured continuum that recognizes the importance of the Convention’s text, the extent of domestic law reforms, and the existence of international treaties and regional legislation in assisting the formation of a common European perspective. At each stage along this continuum, the Court and Commission can claim greater authority for accelerating the process of consensus formation and creating a uniform rule of rights-protection.

1. *The Text of the Convention*

The Convention’s text provides the most important starting point for determining the role of the consensus inquiry in the Court’s evolutionary jurisprudence. The language of specific articles and the relationship between them should be understood as modifying the tribunals’ power to expand the protection of individual rights in Europe using a consensus-based methodology. The ability of the text either to authorize or to circumscribe an evolutionary interpretation can best be grasped by examining a spectrum of positions that illustrate the tribunals’ varying authority to impose a construction of the Convention based on shared European values.

At one end of the spectrum are instances in which the Convention expressly authorizes the Contracting States to limit the exercise of individual rights. For example, the language of Article 2 that permits the use of the death penalty provides a seemingly absolute textual limit on the Court’s ability to interpret the more open-ended language of Article 3’s prohibition against inhuman or degrading punishment. Yet in *Soering v. United Kingdom*,¹¹⁹ the Court stated that even such a clear textual restriction on an evolutionary interpretation could be overcome by sub-

117. *Id.* at 18.

118. *Id.*

119. 161 Eur. Ct. H.R. (ser. A) (1989).

sequent developments in the penal policies of the Contracting States.¹²⁰ In order for the death penalty to fall within the ambit of Article 3, however, the Court concluded that states had to be uniform both in their rejection of capital punishment as an appropriate sanction for criminal conduct and in their understanding of such actions as creating a binding legal obligation to augment the Convention's text. Moreover, the Contracting States' ability to rewrite the Convention through subsequent practices would cease to exist where the states had adopted what the Court referred to as "the normal method of amendment of the text;" that is, where they had drafted an optional Protocol to incorporate the new right or freedom into the Convention system.¹²¹

A somewhat more centrist position along the spectrum is occupied by such Convention provisions as Article 12, which states that "[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."¹²² As this language makes plain, the Contracting States have broad authority to control the exercise of the right to marry.¹²³ The Court has modified the consensus inquiry to accommodate this text-based deference to domestic law. Recent cases have demonstrated that evolutionary trends in European law reform will erode a state's power to regulate marriages only when the trends have been widely adopted.¹²⁴ Moreover, an expansion of Article 12 to include same sex partnerships will be recognized only where European legal reforms amount to a "general abandonment of the traditional concept of marriage."¹²⁵

At the far end of the spectrum is found a cluster of fundamental rights and freedoms, including respect for private and family life, home, and correspondence; freedom of thought, conscience, and religion; freedom of expression; and freedom of association.¹²⁶ These rights are linked not by the content of the substantive norms they enshrine but rather by the similarity of their texts. These Convention articles share two significant features. First, they contain an exclusive list of rationales upon which states may rely to restrict the exercise of the rights the articles protect.¹²⁷ Second, each of these articles further circumscribes

120. *Id.* at 39-40.

121. *Id.* at 40. In effect, the creation of an optional Protocol preempts the use of rights-enhancing law reforms to modify the interpretation of the Convention's primary text. See Helfer, *supra* note 10, at 191-99.

122. Convention, *supra* note 1, art. 12.

123. See *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 19 (1986) (Article 12 protects only "traditional marriage[s] between persons of opposite biological sex. This appears from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family.").

124. See *F. v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) at 16-17 (1987).

125. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 18 (1990).

126. Convention, *supra* note 1, arts. 8-11.

127. Each of these articles consists of two paragraphs. The first enumerates the content of the right while the second lists permissible limitations on its exercise. For example, Article 10 states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information

restrictions upon the rights therein by requiring that the restrictions be “necessary in a democratic society.”¹²⁸ The Convention drafters left this phrase undefined. The Court has construed it as requiring a “pressing social need”¹²⁹ for limiting any of these rights. As one commentator of the Court has noted:

In the concept of “necessary in a democratic society”. . . there is written into the very text of the European Convention a mechanism requiring the national law to respond to developing needs of society. . . . Democratic society does not stand still, and neither does the way in which democratic society upholds its cherished fundamental values. The drafters must be deemed to have realised this when they made democratic society one of the governing elements of the Convention.¹³⁰

The variable nature of this reference to democratic values authorizes the Court and Commission to apply the consensus inquiry in an aggressive manner by searching for emerging regional trends and developing common rules for respecting those human rights that the drafters believed should be vigilantly protected by all European nations.

2. *Domestic Law Reforms*

Having grounded the consensus inquiry in a textual framework, the tribunals must then explore in detail the degree to which common practices appear in the domestic laws of the Contracting States, as well as the views of relevant expert bodies and the European public. The existence of a common perspective provides the tribunals with a motive to modernize the rights enshrined in the Convention by developing a uniform European approach. While it is impossible to specify for every situation a precise formula for the number of states that must have amended their laws, at a minimum, at least half of the Contracting States should have adopted some form of the rights-enhancing measure in question. This majority rule serves as a minimum baseline against which the tribunals can judge the emergence of genuinely regional norms. Beyond this threshold, the justifications for creating a uniform perspective increase.

and ideas without interference by public authority regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Convention, *supra* note 1, art. 10.

128. *Id.* arts. 8-11.

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

130. *Mahoney*, *supra* note 5, at 64.

a. Factors Favoring Deference to National Decision-Makers

As part of their analysis, the Court and Commission must pay careful attention to the specific steps the Contracting States have taken to give effect to emerging European human rights norms. In some cases, a simple head count of legislative developments may satisfy the consensus inquiry, while in other cases states may have used different approaches to address the same issue. In the latter instance, the tribunals' task is far more complicated, for they must consider the various judicial, administrative, and legislative responses states have made and the extent to which such measures represent merely an accommodation of individual claims or a genuine recognition of the binding legal character of a new human rights principle.

Where states have adopted a variety of responses, the Court and Commission should respect their experimentation and encourage diversity by not imposing a single solution, at least until concordant state practice proves such a measure to be clearly preferable to others. During this transitional phase, the tribunals can rightly conclude that states that have made no effort at all to address the concerns raised by emerging regional norms have breached their Convention obligations. But the tribunals must give those states engaged in the process of working through a response an opportunity to strike the appropriate balance between individual freedoms and other important concerns.

For example, the tribunals must be sensitive to the unique circumstances in each state that may have prevented it from reforming its laws, even where a majority of states have recognized the existence of an emerging regional norm. In extreme cases, these conditions will have resulted in ratification of the Convention subject to an express reservation. But even where no reservation has been entered, the tribunals should give somewhat greater deference to the policy rationales put forward by non-conforming states in two situations: first, where the tribunals can demonstrate that they lack the institutional competence to adjudicate a particular category of disputes;¹³¹ and second, where the less progressive nations can be separated from their more progressive counterparts by a distinction that divides the Contracting States along common law/civil law lines¹³² or according to geo-political sub-regions.¹³³ During periods of consensus evolution, this additional mea-

131. See *supra* note 49.

132. Compare Warbrick, *supra* note 9, at 1083 n.69 ("the British government complained that the Commission had been unduly influenced by inquisitorial concepts of the criminal process") (citing *Brogan v. United Kingdom*, Eur. Ct. H.R. Cour/Misc. (88) 162, at 35-36 (argument of the United Kingdom)) with *id.* ("Belgian government argued that the Commission had relied on an accusatorial understanding of criminal procedure") (citing *Lamy v. Belgium*, Cour/Misc. (88) 64, at 11-13 (Memorial of Belgium)).

133. Such geo-political distinctions might exist between Western and Eastern European nations, or between EC and non-EC states. For example, the Court has held that a Contracting State which adopts a preferential immigration policy for individuals from EC states does not violate the Convention's nondiscrimination pledge. See *Moustaquim v. Belgium*, 193 Eur. Ct. H.R. (ser. A) at 20 (1991).

sure of deference allows states to consider alternative ways of adapting to an emerging legal trend.

b. Factors Favoring an Assertive Role for the Tribunals

The deference to national authorities need not be absolute. As the tribunals have noted, certain rights and freedoms enjoy enhanced judicial protection, either because of their textual composition in the Convention itself or their functional importance in European democratic societies.¹³⁴ The Court and Commission should not lightly dismiss any infringement of these Convention guarantees. Moreover, the tribunals can incorporate legal advancements expanding the scope of these highly protected rights into the Convention at an earlier stage than they can for comparable developments in areas where the Contracting States enjoy greater discretion.¹³⁵

The tribunals should also be more reluctant to grant a state a wide margin of appreciation where national decision-makers such as independent law commissions or parliamentary committees have endorsed a rights-enhancing law reform.¹³⁶ Similarly, deference may not be necessary where the tribunals can discern a less rights-restrictive means of achieving a Contracting State's objectives that the state itself has acknowledged or applied.¹³⁷ They may also claim greater authority where the challenged law or administrative practice is selectively enforced or has fallen into desuetude.¹³⁸

3. *International Treaties and Regional Legislation*

Admittedly, many close cases will arise in which reasonable jurists will differ over precisely how far a norm has evolved, even after carefully analyzing the Convention's text and national law reform trends. In such cases, the tribunals can look to developments in international law to confirm the existence of a movement toward a common regional perspective in the Contracting States' domestic legislation and to limit an individual state's discretion to adhere to a non-conformist position. International indicia of consensus provide strong evidence that the

134. See *supra* notes 50, 126-30 and accompanying text.

135. See, e.g., Mahoney, *supra* note 5, at 64 ("Freedom of expression is a necessarily organic and evolving concept, tied to the growth of democratic society in which it is designed to flourish. In so far as a Convention provision covers variable social notions of democracy, then the content of the guarantee provided by the Article must necessarily also be subject to variation with each generation.").

136. See *F. v. Switzerland*, 128 Eur. Ct. H.R. (ser. A) at 17 (1987) (bill to repeal legislation temporarily prohibiting remarriage after divorce approved by Committee of Experts on Family Law Reform); *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) at 19 (1987) (reform of laws disadvantaging non-marital children under review by Austrian government); *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 30 (1986) (Irish Parliament considering the equalization of legal rights for marital and non-marital families); *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978) (legislation concerning corporal punishment under review by Manx Parliament).

137. See *Rasmussen v. Denmark*, 71 Eur. Ct. H.R. (ser. B) at 43 (1988) (Commission Report).

138. See *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 15-16 (1988).

achievement of European unity with respect to a particular human right is a "major goal in the member states of the Council of Europe,"¹³⁹ even if the current domestic practice of states does not yet conform to that lofty aspiration.

In resorting to international law beyond the Convention's ambit, not all developments need be given the same weight. Global multilateral treaties relating to human rights which have been widely adopted by European states should be given the greatest force.¹⁴⁰ A heavy burden should be placed on Contracting States attempting to argue against the enforcement of a provision contained in these instruments which the international community recognizes to have developed into customary law or *jus cogens*.¹⁴¹

Treaties that have been opened for signature only to the member states of the Council of Europe should also be viewed as convincing evidence of a developing regional perspective on individual rights, particularly where they have been signed or ratified by a large number of states.¹⁴² However, not all such treaties are equally probative of consensus. Instruments that overlap to some degree with the Convention's substantive norms should have the strongest influence on the tribunals' case law, whereas regional treaties that create additional rights beyond the ambit of the Convention should be viewed with caution. For example, the Court has stated that the European Social Charter¹⁴³ contains

139. *Abdulaziz, Cabales & Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 37-38 (1985); see also *Open Door Counselling Ltd. v. Ireland*, App. No. 14,234/88, 14 Eur. Hum. Rts. Rep. 131, 143 (1991) (Commission Report) (Mr. H.G. Schermers, concurring) ("Increasingly States have transferred sovereign power to common institutions. Next to (or above) the national societies a European society is developing. For deciding whether a specific restriction . . . is necessary in Europe the European society as a whole should also be taken into account.").

140. Such instruments include the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948); the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (1967); the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966); the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 194, U.N. Doc. A/34/46 (1979), 19 I.L.M. 33 (1980); and the Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. E/CN.4/1984/72 (1984), 23 I.L.M. 1027 (1984).

141. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34 (1989) (citing multilateral conventions as evidence that prohibition of torture and degrading treatment or punishment "is generally recognized as an internationally accepted standard").

142. Examples include the European Convention on Transfrontier Television, May 5, 1989, Europ. T.S. No. 132; the Convention Concerning the Establishment of Maternal Filiation of Children Born Out of Wedlock, Sept. 12, 1962, 932 U.N.T.S. 73; the European Convention on the Legal Status of Children Born Out of Wedlock, Oct. 15, 1975, Europ. T.S. No. 85. The tribunals have already looked to these agreements as evidence of a consensus "evolution." *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1979); see also *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) at 27 (1990); *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) at 18 (1987).

143. Oct. 18, 1961, 529 U.N.T.S. 89.

certain substantive provisions that are beyond the scope of the Convention.¹⁴⁴

Other important regional developments include the recommendations and resolutions of the Committee of Ministers, which are designed to encourage the member states of the Council of Europe to develop harmonious policies on matters of common interest, including human rights.¹⁴⁵ Where such pronouncements purport to interpret or augment the Convention, they can be seen as substantiating a trend toward an evolving European viewpoint. Slightly reduced weight can be accorded similar recommendations and resolutions of the Parliamentary Assembly.¹⁴⁶ These documents are less authoritative because they must first be screened by the Ministers before being sent on to the member states.¹⁴⁷ The persuasive force of both the Ministers' and the Assembly's recommendations becomes more compelling as the Contracting States incorporate their suggestions into domestic law.

C. The Benefits of a More Rigorous Approach

Applying the above framework will permit the tribunals to inject greater rigor into the European consensus inquiry. A clearer exposition of the tribunals' reasoning and balancing of competing factors is necessary, even where the conclusions reached by individual jurists differ. Indeed, the absence of an objective "bright line" rule for deciding when an emerging norm has crystallized into a new rule of rights-protection makes such divergences unavoidable. But if the Court and Commission are committed to using a consensus-based methodology, they must both acknowledge the ambiguity that is a necessary consequence of such an approach and strive to develop general principles for weighing the competing elements of the consensus inquiry and the margin of appreciation doctrine.

For example, the majority's argument in *Cossey* would have been far more persuasive had it clarified why the "certain developments" since *Rees* did not warrant a reconsideration of the consensus analysis. In fact,

144. See *National Union of Swedish Engine Drivers v. Sweden*, 20 Eur. Ct. H.R. (ser. A) at 15 (1976); *National Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R. (ser. A) at 18 (1976). For a comprehensive analysis of the Court's use of international treaties as an interpretive device, see MERRILLS, *supra* note 2, at 198-204.

145. See Statute of the Council of Europe, *supra* note 17, arts. 15, 20. Relevant examples of the Ministers' work include: Recommendation No. R (85) 2 on Legal Protection Against Sex Discrimination, *reprinted in* 28 Y.B. EUR. CONV. ON H.R. at 220 (1985) and Recommendation No. R (83) 2 Concerning the Legal Protection of Persons Suffering from Mental Disorder Placed as Involuntary Patients, *reprinted in* 26 Y.B. EUR. CONV. ON H.R. at 52 (1983).

146. Important Assembly legislation relating to human rights include: Resolution 855 on Equality Between Men and Women, Eur. Parl. Ass., 38th Sess. (1986); Recommendation 971 on the Protection of Detainees from Torture and from Cruel, Inhuman or Degrading Treatment or Punishment, Eur. Parl. Ass., 35th Sess. (1983); Recommendation 924 on Discrimination Against Homosexuals, Eur. Parl. Ass., 33d Sess. (1981); and Recommendation 816 on the Right of Conscientious Objection to Military Service, Eur. Parl. Ass., 29th Sess. (1977).

147. Statute of the Council of Europe, *supra* note 17, art. 22.

the majority might well have defended its position on the dissent's own terms: that many of the states which had permitted transsexuals to amend their identity documents had done so through individualized judicial and administrative procedures (as opposed to national legislative reforms) and that this diversity of practice counseled against compelling the United Kingdom to develop a legislative response to recognize a transsexual's surgically-acquired gender. The majority could have further strengthened its argument by quoting the text of Recommendation 1117, which emphasized that "the legislation of many member states is seriously deficient in this area."¹⁴⁸ Exposing these underlying concerns not only renders the Court's adherence to a "wait and see" approach far more reasonable, but also helps to rebut Judge Marten's charge that the majority's analysis was "based on a distortion of the real state of affairs."¹⁴⁹

Similarly, in *B. v. France*, a more searching discussion of why the French courts' fact-based recognition of a transsexual's acquired identity violated the Convention would have enhanced the Court's reasoning. The Court might have explained that the difficult legal situation facing transsexuals required France to modify the civil status register of any person who, because of hormone therapy and gender reassignment surgery, could demonstrate a discrepancy between external appearance and official gender. In this way, the French courts' adherence to rigorous medical standards could be seen as giving insufficient consideration to a transsexual's privacy concerns, notwithstanding the fact that medical research on the nature of transsexualism was still unsettled.¹⁵⁰ Alternatively, the Court might have concluded that the scientific understanding of transsexualism had evolved since *Cossey*, thereby eroding France's ability to rely on exacting medical criteria as the touchstone for legal recognition.¹⁵¹

D. The Benefits of Ambiguity: A Rejoinder

Although there are clear advantages to a more rigorous consensus methodology, the counter-argument to this Article's thesis must be presented and refuted. The struggle for coherence and precision is arguably an unnecessary and improper task for international tribunals that must master the intricacies of twenty-four distinct legal systems. Because the Court and Commission must consider so many applications from this wide array of nations, the argument goes, they would be more

148. Recommendation 1117, Eur. Parl. Ass., 41st Sess. ¶ 8 (1989).

149. *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 37 (1990) (Martens, J., dissenting).

150. While these general principles can be inferred from the judgment, a more explicit exposition of the jurists' analysis would have assisted France in fashioning a remedy for its violation and would have given other Contracting States and human rights advocates a clearer understanding of the contours of this emerging legal issue.

151. B. had made just such an argument before the Court. See *B. v. France*, App. No. 13,343/87, slip op. at 19 (Eur. Ct. H.R., Mar. 25, 1992) (to be printed in 232 Eur. Ct. H.R. (ser. A) (1992)).

effective institutions by remaining elusive about both the elements of the consensus inquiry and the degree of harmonization needed to modernize the Convention.

In this way, the tribunals could exercise an internal, unarticulated control over the scope of the Contracting States' obligations in two opposing situations. First, they might refuse to declare a violation of the Convention as a matter of prudence where such an action would offend a respondent state, even if the indicia of consensus pointed toward that violation; and second, they might use a less precise analysis to enhance the protection of individual rights where the formation of a progressive regional norm had not yet fully emerged. Although this methodology gives the Court and Commission flexibility to reach a desired result, it risks judicial illegitimacy: in the first case by failing to uphold the Convention's objective of providing effective human rights guarantees and in the second by unduly encroaching on the Contracting States' sovereignty.

If such an approach were possible and even desirable when the Convention was still in its infancy and when consensus questions could be resolved by unanimous or nearly unanimous judgments, recent cases on family law, gender equality, and transsexualism reveal that it is no longer tenable. There are substantial disagreements about the scope and function of the consensus inquiry among the judges and the Commission members. States, applicants, and scholars also have cause to question the tribunals' reasoning and results. Given the contingent nature of the Contracting States' participation in the treaty framework, allowing this ambiguity to continue as the Convention becomes progressively more rights-protective may weaken the stature of the tribunals and result in an increasing number of unheeded judgments.

Conclusion

As consensus-based disputes expand over an increasingly sensitive field of human rights claims, the tribunals will face a choice: they can continue their current *ad hoc* approach, creating an inconsistent case law that may undermine their authority; or they can attempt to develop a principled basis for approaching the consensus inquiry that will enable them to deal with the inevitable controversies of application in a persuasive and logical manner. The purpose of this Article is to suggest one such principled foundation for consensus-driven human rights adjudication. Although the challenge of building a coherent vision for the consensus inquiry is formidable, the tribunals must undertake it.

