

3-1-1997

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### Recommended Citation

Larry C. Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition within Federative and International Legal Systems*, 4 *Tulsa J. Comp. & Int'l L.* 185 (1996).

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# TULSA JOURNAL OF COMPARATIVE & INTERNATIONAL LAW

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Volume 4, No. 2

Spring 1997

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## HARMONIZATION, SUBSIDIARITY AND CULTURAL DIFFERENCE: AN ESSAY ON THE DYNAMICS OF OPPOSITION WITHIN FEDERATIVE AND INTERNATIONAL LEGAL SYSTEMS

*Larry Catá Backer\**

### I. A POLITICAL FUGUE

In this essay, I will consider the consequences of efforts by supranational organizations to bring *harmony* to laws within the territories of their respective competencies. For that purpose, I will attempt to un-

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ravel a portion of the complex fugue through which we play at the harmonization of law. This fugue plays in three themes.

The principal theme consists of the endlessly rhythmic thrusting of the essentializing of law within ever more broadly drawn geographic territories by compelling all law to "look alike." The other two melodies form two of the great political counter-themes of the late twentieth century: national and cultural solicitude. The first is the chant for the preservation of the autonomy and singular character of the domestic legal systems of traditional national states. These entities, formerly sovereign and sometimes imperial are now subject to the new supranational suzerains whose tunes threaten to drown out these former sovereigns. The second theme is a haunting ballad to a nostalgic past. This aria articulates the desire to preserve those aspects of subnational norms which are both charming and tourist worthy. It is also relentless in efforts to geld those aspects of subnational norms of its essential and dangerous vitality.

When played individually, each theme is quite self sufficient. Europe, especially, has had intimate connection with all three at one time or another and at one place or another. Modernity, however, has a penchant for complexity. Europe, and especially Europe as reconstituted as a European Union, has attempted to make a mellifluous counterpoint from out of the three themes. Such complexity is beyond us. Sadly, what has issued from this counterpoint is not harmoniousness, but rather dissonance. Thus is the perversity of complexity. I will try to help us hear more clearly the cacophony produced by the three voices which, induced to believing that together they are producing a fine counterpoint, are simultaneously singing from three distinct scores.

This Western concept of *harmonization*, then, is currently bound up in three distinct and opposing concepts. Heard accurately, one will be able to hear this European melodic schizophrenia in the statutory framework of the European Union<sup>1</sup> as well as in the decisions the European Court of Justice (ECJ). In the European Union's constitutional context, these three melodic pulses exist as three separable political concepts.

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1. The reference here, of course, is to the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EC TREATY]. For amendments prior to the ratification of the Treaty on European Union, see TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off., 1987). The full text of the last amendment to the EC Treaty, the TREATY ON EUROPEAN UNION, along with the text of the EC Treaty as amended, can be found at 1992 O.J. (C 224) 1, 1 C.M.L.R. 573 (1992) [hereinafter EU TREATY].

The first is *harmonization*: the power (as well as the will) to impose law directly<sup>2</sup> and indirectly through what Europeans term “approximation.”<sup>3</sup> This is a power substantially directed by the supranational entity. The second is *subsidiarity*: the institutionalization of rules for situating the power to legislate between federative political units.<sup>4</sup> This is a means of shifting power to control the object of law to the component political units. The third is *cultural solicitude*: consider here Article 128’s brazen and hyperbolic statement: “[t]he Community shall contribute to the flowering of the cultures of the Member States.”<sup>5</sup> This represents an effort, to date self-consciously limited and benign,<sup>6</sup> to erect a limitation on those objects of culture on which the law of the supranational entity or the nation-state may act.

Especially since the end of the Second World War, it has become quite fashionable in the Western World to simultaneously promote *harmonization*, *subsidiarity* and the *protection of minority cultures*. This trio of norm goals has assumed significance because of the dominance of the Western world, and its notions of right and wrong, within the international community. At the same time, it has become quite fashionable outside the Anglo-European world to preach the opposite.<sup>7</sup> For

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2. In the E.U., for example, the Community has power over the free movement of goods, see EC TREATY, *supra* note 1, arts. 12-37, including agricultural goods, see EC TREATY arts. 38-47; persons, services and capital, see EC TREATY arts. 48-73(h); the regulation of transport, see EC TREATY arts. 74-84; and competition, see EC TREATY arts. 85-95.

3. Article 100 of the EC Treaty as originally enacted contained the impetus for vesting in the Community institutions the power to approximate the laws of the Member States for the purpose of fulfilling the “mission” of the Common Market. That approximation function has been expanded considerably by the addition of Article 100(a) in the Single European Act, Feb. 28, 1986. For the text of the Single European Act, see TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES, *supra* note 1.

4. On subsidiarity generally, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1053 (1992).

5. EU TREATY, *supra* note 1, art. 128.

6. European governments have resisted even the addition of a protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], covering minority or cultural rights.

7. These are also described in Daniel A. Bell, *The East Asian Challenge to Human Rights: Reflections on an East West Dialogue*, 18 HUM. RTS. Q. 641, 644-45, 660-667 (1996). These sentiments were made crystal clear in recent statements from intellectuals and politicians in Japan and Singapore. See MAHATHIR MOHAMMAD & SHINTARO ISHIHARA, *THE VOICE OF ASIA: TWO LEADERS DISCUSS THE COMING CENTURY* (1996). Thus, for example, Mr. Ishihara notes: “Asians know we can have the baby of affluence without the bath water of Western values. In any case, Western arrogance no longer plays in Asia.” *Id.* at 107. Mr. Mahathir is the Prime minister of Malaysia and Mr. Ishihara was a long time member of the Japanese Parli-

non-Westerners is evoked the far simpler provisions of closed fundamentalist systems with a limited prejudiced tolerance for marginally different groups, and no tolerance for others.<sup>8</sup>

The European Union itself has illustrated this complex and perverse fugue in the recent case of *P. v. S & Cornwall County Council*.<sup>9</sup> There, the ECJ extended the European Union's protection against sex discrimination to transsexuals. "Human rights" was the *object* of the law of that case. But the case implicates two other struggles as well. The first subtextual struggle involved the power to impose a *grammar* on the object of law (human rights) by a supranational entity (the ECJ). The second involved the power of the nation-state and "culture" to resist both the grammar and object of law as drawn by the centralizing entity.

I will briefly describe the three foci of power distribution and their rationales. My purpose is to critically examine the tensions and oppositions within the drive to establish a singular multinational order. In particular, I interrogate the way in which the politics of choosing one form of order from among the many has important consequences of the choices made. In an effort to reconcile oppositions and reduce tensions, we have made political choices which have produced potentially perverse political systems. The perversities of our systems will persist as

ment. Arguably conservative and marginalizable on that score by some, they do represent significant currents of non-Western thought in a world order in which most cultures have been forced to accept the Euro-American fundamental rules of the game. Not that many in the West, liberal or conservative, view this as a bad thing. Quite the opposite as I show below. See *infra* text accompanying note 77. See also Reza Afshari, *An Essay on Scholarship, Human Rights and State Legitimacy: The Case of the Islamic Republic of Iran* 18 HUM. RTS. Q. 544 (1996) (arguing that academic interaction with states such as Iran marginalizes considerations of human rights: "human rights discourse can . . . offer basic principles that individuals should observe in their interactions with the institutions of a delinquent state . . . [and] academics . . . have a responsibility to ensure that their interactions and research do not . . . offer legitimacy to those who rule by violent means." *Id.* at 547.).

8. Consider the persecution of Christians in the Sudan and Pakistan, for among other things, blasphemy. See, e.g., Tom Carter, *Many Christians Face Eternal Struggle: Persecution Worsens as West Watches*, WASH. TIMES Sept. 30, 1996, at A16. The recent intellectual and political revolution in Afghanistan is a case in point. See, e.g., Barbara Crossette, *Afghans Draw U.N. Warning Over Sex Bias*, N.Y. TIMES Oct. 8, 1996, at A1. Crossette discusses the imposition of strict dress codes for women and the barring of women from work or school outside the home. For its trouble, the Afghans have been threatened by the U.N. with the loss of aid. The author notes, however, that the U.N. has turned a blind eye to discrimination against women in other muslim majority nations, and that some nations, such as China, do not recognize the regime of international human rights standards at all. For a thoughtful journalistic summary of the tensions generated by Islam's wrestling with its law, see Elaine Sciolino, *The World: The Many Faces of Islam*, N.Y. TIMES, Oct. 13, 1996, § 4 (Week in Review), at 4 (describing the extreme range of interpretive possibility within Islam).

9. Case C-13/94, *P. v. S. & Cornwall County Council*, 2 C.M.L.R. 247 (1996).

long as they remain animated by a simultaneous desire to harmonize the social, legal, cultural and economic structure of the supranational unit while preserving autonomous national and subnational systems. I examine these imperatives and perversities as they are manifested in *Cornwall County Council*. I end with a discussion of the obligatory consequences of systems built upon conflicting systems of power distribution. I do not mean to imply that the global human rights enterprise is wrongheaded or a mistake.<sup>10</sup> However, the Western world has had a habit of advancing multiple agendas simultaneously. I wish to highlight the contradictions of that thoughtless approach to constructing a global framework of moral/legal principles.

## II. POWER DISTRIBUTIONS AND RATIONALES

### A. Harmonization

All groups serve integrative purposes. The nation-state serves as the territory within which those under its power are expected to conform their behavior to the same standard. Supranational organizations also serve this purpose. This was made explicit in the U.S. Federal Constitution over two hundred years ago.<sup>11</sup> As in the United States, the fundamental purpose of the European Union is harmonization at a level above that of the traditional national state.<sup>12</sup> Indeed one can think of the sole overriding purpose of the European Union as harmonization within its areas of competence. It is meant to integrate, to consolidate . . . *e pluribus unum*.

Having so presumptuously stated the case for harmonization, I will retreat a bit and explain. The integrative powers I so lavishly described are not absolute. In both the United States and the European Union, the ceding of integrative power is limited. In the case of the European

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10. Thus, I do not believe we should give up on "human rights foundationalism." Contrast Richard Rorty, *Truth and Freedom: A Reply to Thomas McCarthy*, 16 *CRITICAL INQUIRY* 633, 638 (1990). On the other hand, we should be quite conscious about what we do when we engage in the hegemonic enterprise of universalizing moral principles.

11. Recall the explicit purpose of the American federative enterprise: "in Order to form a more perfect *Union*, establish Justice, insure Domestic Tranquility . . ." (emphasis added). U.S. CONST. preamble. These are meta-concerns, the authority for the establishment of the ground rules for which necessarily flow up to the supranational entity.

12. "The Community shall have as its task, . . . to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States." EU TREATY, *supra* note 1, art. 2.

Union such limitations are meticulously described. The scope of European integration has grown in spurts over the years. Although Community institutions may not assert powers other than those set forth in the EU Treaty and then only for the purposes there stated, E.U. legislative and judicial competence has been exercised broadly and with great flexibility.

Couched in the language of general principles of Community law which spring, like Athena, fully developed out of the black letter of the Community Treaties, the quest for harmonization has developed into its own cottage industry.<sup>13</sup> To identify general principles of community law as a great engine of supranational harmonization is not to say that it is bad. Yet the power and direction of this engine may take one where one might have wanted to go. The rationales of harmonization at any level, but especially at the level of the supranational entity are well known: efficiency, clarity, predictability.

The harmonizing effects of general principles of Community law, as discovered from time to time by the ECJ, increases in significance when wed to that other great imperial truth of the E.U., the principle of Community law supremacy. That principle has been declared, at least by the ECJ.<sup>14</sup> The principle has become well established to some extent, although not without formidable resistance from the interpretive institutions of the subsidiary political units.<sup>15</sup> I want to concentrate on

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13. See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle Fur Getreide und Futtermittel*, Case 11/70, 1970 E.C.R. 1125. In *Nold v. Commission*, Case 4/73, 1974 E.C.R. 491, the Court noted that:

Fundamental rights form an integral part of the general principles of law . . . . In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States . . . . Similarly, international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

14. See, e.g., Case 26/62, *N.V. Transport v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; Case 6/64, *Costa v. Ente Nazionale Per L'Energia Elettrica (ENEL)*, 1964 E.C.R. 585. See generally R. Bieber, *On the Mutual Completion of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders*, 13 EUR. L. REV. 147 (1988); J. Temple Lang, *Community Constitutional Law: Article 5 EEC Treaty*, 27 COMMON MKT. L. REV. 645 (1990); Joseph H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 276 (1981).

15. "Even though the Court of Justice found that the transfer of Member States powers to the Community is definite and irreversible, neither the Community legislative practice, nor the relevant rulings of the Member States' constitutional and supreme courts endorse this Court's pronouncement." Daniela Obradovic, *Repatriation of Powers in the European Community*, 34 COMMON MKT L. REV. 59, 88 (1997). On the reluctance of some Member State courts to accept the supremacy of all community action over Member State constitutional principles, see,

the expansiveness of harmonization through the assertion of the power of the European Court of Justice to derive and impose general principles of Community law.<sup>16</sup>

### B. *Subsidiarity: Protecting the Middleman*

The recently incorporated principle of subsidiarity, imposes on the European federative system a constitutional choice of the political level at which legislative action must be taken within the European Union.<sup>17</sup>

Critics of the principle have argued that subsidiarity will give the Member States, as independent political entities, significant leverage in negotiating the extent of E.U. actions within the E.U. Council. They note that an argument can always be made that while an action falls within the competence of the E.U., the matter has not been shown to be better achieved by the Community.<sup>18</sup>

for example, Berthold Wild & Bernd Joch, *The Application of Community Law in Germany*, 17 COMMON MKT. L. REV. 509 (1980) and 18 COMMON MKT. L. REV. 79 (1981); R. Pettriccione, *Supremacy of Community Law Over National Law: Italy*, 11 EUR. L. REV. 320 (1986); Laurence Gormley, *The Application of Community Law in the United Kingdom 1976-1985*, 23 COMMON MKT. L. REV. 287 (1986); Marta Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, 12 MICH. J. INT'L L. 173 (1990); M. Arpio, *Spanish Adaptation to Community Law: 1986-1988*, 16 EUR. L. REV. 149 (1991); Henry Schermers, *The Scales in Balance: National Constitutional Court v. Court of Justice*, 27 COMMON MKT. L. REV. 97 (1990).

16. On the authority of the judicial organs of the European Union to entertain human rights issues, see, for example, Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103 (1986) (describing the basis of E.U. control over the determination of human rights issues within the E.U. and the constitutional and statutory bases therefor). Hajalte Rasmussen has argued that the EJC's activism in matters of culture and politics is democratic to the extent it reflects the will of the people better than the representatives of the Member States within the institutions of the Community. See HAJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 101-102 (1986).

17. As set forth in the EC Treaty, the principle of subsidiarity provides a limitation of the competence of the institutions of the European Union:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

EU TREATY, *supra* note 1, art. 3(b).

18. See STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 170 (1995). Note, though, that subsidiarity, as a formal matter, is only relevant in the areas of shared competence between Member States and the Community. In areas of exclusive Community competence, it has no role to play. Of course, the Treaty is singularly unhelpful in defining areas of exclusive and joint competence. One can argue (broadly) that any area covered by the



The United States has no equivalent principle of deference to its constituent states. We rely on politics.<sup>19</sup> And yet politics can be very effective. Consider the subsidiarity issues within the Contract with America<sup>20</sup> on which the Republican party rode to political domination in the legislative branch of the federal government in the 1994 elections.

### C. *Protection of Group Culture: Sanctioned Rebelliousness*

Protection of group culture is today relatively meaningless as a political concept. Yet, it stands potentially, like the principle of subsidiarity, against the expansiveness of harmonization not only at the level of the Community itself,<sup>21</sup> but also at the level of the Member State.<sup>22</sup> "The Parliamentary Assembly of the Council of Europe believes that defining the rights of national minorities and providing an effective guarantee of such rights at an international level is one of the main ways of defusing ethnic conflicts and establishing peace in Europe."<sup>23</sup>

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EC Treaty would be exclusively within Community competence. The only exceptions would be in those areas where the EC Treaty expressly give the Member States a role to play (for example, Article 129 and vocational training; Article 128 and cultural solicitude). Conversely, areas of exclusive Community competence might be defined as limited to those areas in which the Member States are expressly forbidden to legislate. For a discussion of these issues, see, for example, Bermann, *supra* note 4, at 344-47.

19. For a discussion of the way in which the choice of the best site for legislation within the U.S. federal system is made, see Bermann, *supra* note 4.

20. REPUBLICAN NATIONAL COMMITTEE, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (1994).

21. EC Treaty Article 128, itself, requires the Community to "take cultural aspects into account in its action under other provisions of [the EC] Treaty." EU TREATY, *supra* note 1, art. 128(4).

22. EC Treaty Article 128 makes clear that the objective of cultural solicitude stands in opposition to harmonization, and is yet not the equivalent of subsidiarity. In compelling the Council to adopt incentive measures for the promotion of culture, Article 128 specifically forbids to the Council measures which would result in "harmonization of the laws and regulations of the Member States." EU TREATY, *supra* note 1, art. 128(5). Protection of national and subnational cultural norms has also become something of a cottage industry in European international law. Consider the flowing of international law which touches on these concerns: Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966); Convention on the Elimination of All Forms of Discrimination Against Women, 19 I.L.M. 33 (1979); Framework Convention on the Protection of National Minorities, in FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES AND EXPLANATORY REPORT (Council of Europe publication 1995); European Cultural Convention, 218 U.N.T.S. 139 (1955); and European Charter for Regional and Minority Languages (Strasbourg, Nov. 5, 1992, Eur. Treaty Ser. No. 148).

23. Statement of the Parliamentary Assembly of the Council of Europe, *The Protection of*

Yet here also is vested the possibilities of self-determination at a social, cultural or economic level. This possibility exists whether or not the outcome is formal political independence or autonomy.<sup>24</sup> In the E.U., the Member States have sought to bottle the genie of self-determination within strict confines.<sup>25</sup> No supranational unit and scarcely any nation-state would currently countenance the *de jure* creation of collective rights based on cultural "identity." Thus, for example, in drafting the framework convention for the protection of minority rights, the Committee of Ministers resisted any suggestion that protection of minority rights would create extranational collective rights. "Nevertheless, parties recognise that a national minority can be protected through protection of the rights of individuals belonging to the minority."<sup>26</sup>

Still, I suspect that the "culture clause" of the EC Treaty will quickly escape its borders and become as potent a force as subsidiarity and harmonization.<sup>27</sup> I also wonder about the harmlessness of a con-

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*National Minorities* (undated), available at <http://stars.coe.fr/gen/aintro7.htm>.

24. Indeed, self-determination has been hailed as the "new constitutive dynamic of the world community . . . . Of the many consequences of this historical, contemporary, and collective process is a new global skepticism about the adequacy of the national state, especially in matters of justice, rights, economic equity, and representative government, plus its ability to control its own markets and control sources of environmental degradation within its borders." Henry J. Richardson, III, "Failed States," *Self-Determination, and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectation*, 10 TEMP. INT'L & COMP. L.J. 1 (1996). This notion is taken up in MORTON H. HALPERIN ET AL., SELF-DETERMINATION IN THE NEW WORLD ORDER 46-52 (1992).

25. Thus, for example, Article 128 specifically excludes the power of harmonization at the Community Institution level. And even with respect to the measures permitted under Article 128, primarily incentive measures, Article 128 imposes a unanimity requirement for E.C. Council actions. See EU TREATY, *supra* note 1, art. 128.

26. Statement of the Parliamentary Assembly of the Council of Europe, *The Protection of National Minorities* (undated), available at <http://stars.coe.fr/gen/aintro7.htm>.

27. Accord STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 173-174 (1995). Professor Weatherill correctly, I think, notes that activity covered ostensibly by Article 128 might well leak into the harmonization regimes of Article 100 through the "necessary and proper" provisions of Article 235 as a means of circumventing the unavailability of law making power in Article 128. Article 235 provides that if "action by the Community should prove necessary to attain . . . one of the objectives of the Community and this Treaty has not provided the necessary powers" then the Council acting unanimously may take "the appropriate measures." It might even be plausible to argue that Article 100(a)'s harmonization authority (through which legislation may be enacted by qualified majority voting rather than the unanimity requirements of Articles 100 and 235) might be available as well. I would take Professor Weatherill one step farther and argue that Article 128 may provide a sort of veto power in cultural groups as against community institutions (by permitting challenges to Community action or inaction under Articles 173 and 175) and also against Member State action for failure to comply with Treaty obligations. Further treatment of this possibility is beyond the scope of this article.

vention which requires national and supranational entities to prohibit forced assimilation and to encourage transfrontier and international cooperation.<sup>28</sup> Certainly this is one of the substratum "morals" of the *Cornwall County Council* case.

### III. EURO-SCHIZOPHRENIA AND THE CORNWALL COUNTY CASE

#### A. *The Cornwall County Council Case in Context*

The case involved the employment effects of the gender transformation odyssey of P, a manager in an educational establishment operated by the defendant. About a year after P commenced work she informed her employer of her intention to undergo gender reassignment. This began a "life test" during which P dressed and behaved as a woman. This period was followed by surgery to give P the physical attributes of a woman.<sup>29</sup>

At the commencement of the series of surgical procedures, P was given three months notice and terminated. P brought an action against defendants in which she claimed she was the victim of sex discrimination. The defendants asserted that she was the victim of redundancy.<sup>30</sup>

The Industrial Tribunal, before which the action was brought, determined that the gender reassignment was the real cause of the dismissal. The Tribunal determined that such a situation was not covered under the English Sex Discrimination Act of 1975, but was unsure whether the situation was covered under the sex discrimination directive issued by the E.U.<sup>31</sup> Therefore, the Tribunal referred the question of the applicability of the directive to the ECJ.<sup>32</sup>

The ECJ was quite aggressive in highlighting the oppositions within harmonization in a pluralistic world of meta-states, nation-states and subnational cultural groups. The ECJ noted that the directive in question merely expressed that the principle of equality "is one of the fundamental principles of Community law."<sup>33</sup> The ECJ also noted that

28. Cf. Statement of the Parliamentary Assembly of the Council of Europe, *The Protection of National Minorities* (undated), available at <http://stars.coe.fr/gen/aintro7.htm>. For example, it is not clear to me that the day will not come when a culturally identifiable minority will argue that the imposition of European sex discrimination laws would require it to forcibly assimilate into an alien culture.

29. Case C-13/94, *P. v. S. & Cornwall County Council*, 2 C.M.L.R. 247 (1996), at ¶ 3.

30. *Id.* at ¶¶ 4-5.

31. Council Directive No. 76/207/EEC, 1976 O.J. (L 39) 40. For a discussion of that directive, see generally SACHA PRECHAL & NOREEN BURROWS, *GENDER DISCRIMINATION LAW OF THE EUROPEAN COMMUNITY* 104-164 (1990).

32. Case C-13/94, *P. v. S. & Cornwall County Council*, at ¶¶ 7-9.

33. *Id.* at ¶ 19.

“the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure.”<sup>34</sup>

On that basis, the Court read the directive broadly to cover the cause of P’s dismissal. “To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.”<sup>35</sup> The decision provides an important insight into the intersections and oppositions of harmonization, subsidiarity and cultural solicitude within a supranational system. We explore these next.

### B. *The Oppositions Revealed*

The *Cornwall County Council* decision was neither a run-of-the-mill or straightforward application of the E.U.’s equal treatment directive. The ECJ was well aware that “in Community law there is no precise provision specifically and literally intended to regulate the problem.”<sup>36</sup> It is quite likely that the ECJ was well aware that it was making a major pronouncement in a “big” case. Certainly, advocate general Tesauro expressed the desire that the ECJ use this case to *force* most of the Member States “forward” in accordance with advanced Western European notions of “progress” (and no other).<sup>37</sup>

The question thus quite consciously involved the manner in which the voices of harmony, subsidiarity and cultural solicitude would be allowed expressive freedom. The ECJ chose to base its decision on the widest possible basis of decision, the invocation and application of general principles of Community law. As such, the ECJ deliberately invoked the rules of the normative substructure of the Community to bind the Member States and subnational cultures by reading the result into the organic constitution of the group. *Cornwall County Council* stresses the essential point of the resolution of the oppositionality of harmony, subsidiarity and cultural solicitude—subgroup autonomy may be exercised only within the framework created by the supranational

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34. *Id.* at ¶ 20.

35. *Id.* at ¶ 23.

36. *P. v. S. and Cornwall County Council*, C-13/94 opinion of advocate general Tesauro delivered Dec. 14, 1995 (on file with author).

37. Whether the court chose to adopt the advocate general’s aggressive stance remains to be seen. Evidence of their intent will come shortly, when the ECJ decides whether the sex discrimination provisions also apply to discrimination on the basis of sexual orientation. See *Lisa Grant v. South-West Trains, Ltd.*, Southampton Indust. Tribunal Case No. C-249/96.

group. This framework limits as well as binds. That it may well substantially vitiate the core norms of those subgroups is of no moment.

**Harmonization.** Harmonization is the key to this case. It represents an exercise, now fairly common to the ECJ, of cobbling together a Europe-wide norm<sup>38</sup> from its interpretation of the constitutional traditions of the Member States,<sup>39</sup> the EC Treaty,<sup>40</sup> and the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>41</sup> Thus for

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38. The Treaty on European Union added Article F, which provides in part that:  
The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 December 1950 and as they would result from the constitutional traditions common to the Member States, as general principles of Community Law.

EU TREATY, *supra* note 1, art. F. However, Article L of the Treaty on European Union does not explicitly make the provisions of Article F subject to the powers of the ECJ. The ECJ accepts this notion of the harmonizing role of fundamental norms within the context of its *Cornwall County Council* decision. See Case C-13/94, *P. v. S. & Cornwall County Council*, at ¶¶ 18-22.

39. See, e.g., Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle Fur Getreide und Futtermittel*, Case 11/70, 1970 E.C.R. 1125 ("In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community." *Id.* at ¶ 4).

40. Thus, for instance, the ECJ has derived a general principle of community law respecting non-discrimination and equal treatment from out of its sense of the general direction taken by the EC Treaty with respect to those concepts. Consider Joined Cases 103 & 145/77, *Royal Scholten-Honig (Holdings) Ltd. v. Intervention Board for Agricultural Produce, Tunnel Refineries Ltd. v. Intervention Board for Agricultural Produce* (first isoglucose cases), 1978 E.C.R. 2037, 1 C.M.L.R. 675, where the Court, in interpreting EC Treaty Article 40(3) (prohibiting discrimination between producers and consumers within the Community), explained that the non-discrimination provision in that article of the EC Treaty "is merely a specific enumeration of the general principle of equality which is one of the fundamental principles of Community law." *Id.* at ¶ 26. See PRECHAL & BURROWS, *supra* note 31, at 2-6 (on the development of the principle of equal treatment within the ECJ and its application to sex and gender discrimination issues).

41. See Case 4/73, *Nold v. Commission*, 1974 E.C.R. 491, 2 C.M.L.R. 338 (noting that the Convention for the Protection of Human Rights and Fundamental Freedoms supplied guidelines to be followed within the framework of Community law). See also Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 6. Among other things, the Human Rights Convention protects the right to respect for private and family life (Article 8), and the freedom to enjoy protected rights without discrimination (Article 14). The enforcement proceedings can be complex. The Human Rights Convention permits a state to limit protected rights under a number of circumstances. Article 8 rights may be limited in the interest of public safety, public order, national security, the protection of health or morals, or the protection of the rights of others, but only if such limitations are "prescribed by law" and "necessary in a democratic society." *Id.*, art. 8. Article 14, by contrast, supplements the substantive rights accorded

example, note the ease with which the ECJ cited to the interpretations of the European Court of Human Rights in *Cornwall County Council*.<sup>42</sup>

This is a normalizing harmonization; the ECJ means to impose a standard of conduct on the citizens of the E.U. which will provide the basis on which the propriety of conduct will be judged. Yet, as even the ECJ conceded, the real basis for this social disciplining lies outside the "black letter" of the EC Treaty itself.<sup>43</sup> This is not an unproblematical enterprise for the Court of Justice, especially where it has asserted the power to impose conduct norms in the arena of "human rights." In this context, politics may intervene.<sup>44</sup> For example, the ECJ has recently opined that the European Union itself cannot accede to the Convention for the Protection of Human Rights and Fundamental Freedoms absent an amendment to the EU Treaty itself.<sup>45</sup>

Shorn of its sentimentality and rhetoric, *Cornwall County Council* is an expression of hegemony at the level of the supranational entity.

by the Human Rights Convention and has no independent existence. See, e.g., *N. v. Sweden*, App. No. 10410/83, 40 Eur. Comm'n H.R. Dec. & Rep. 203, 206 (1985). Complaints are first reviewed by the European Commission of Human Rights. Complaints not resolved by that body are usually (but not always) referred to the European Court of Human Rights. Sometimes complaints may be referred to the Committee of Ministers (although decisions of this body may also be appealed to the European Court of Human Rights). Decisions of these bodies are usually (but not always) given specific effect. See Laurence R. Helfer, Note, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention of Human Rights*, 65 N.Y.U. L. REV. 1044, 1047-1053 (1990). By March, 1994, all but one of the signatories of the Human Rights Convention had signed Protocol No. 11 pursuant to which the present system of enforcement will be replaced by a single permanent court modeled on the European Court of Justice. See Andrew Drzemczewski & Jens Meyer-Ludwig, *Principal Characteristics of the New ECHR Control Mechanism as Established by Protocol No. 11*, 15 HUM. RTS. L. REV. 81 (1994).

42. *Id.* at ¶ 16. For reservations about the harmonizing power of the ECJ in this context, see Weiler, *supra* note 14, at 1103.

43. See Weiler, *supra* note 14, at 1103 (describing the basis of E.U. control over the determination of human rights issues within the E.U. and the constitutional and statutory bases therefor).

44. On the disciplining of society, see MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan, trans. 1979) (1975) at 195-228 (on discipline in modern culture).

45. Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94 (Mar. 28, 1996). Giorgio Gaja has explained this reticence as a consequence of the politics of power: "what is here at stake is the conservation by the Court of Justice of its present functions, although understandably the Court has not stressed this point in order not to emphasize its concern with its own prerogatives." Giorgio Gaja, *Case Law: Court of Justice, Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Given on 28 March 1996, Not Yet Reported*, 33 COMMON MKT. L. REV. 973, 988 (1996).

For the advocate general, this decision was a deliberate, conscious, and aggressive act.<sup>46</sup> The actual merits of the determination by the ECJ are of secondary importance. What makes *Cornwall County Council* particularly interesting is its juridical underbelly—the real decision of the case was the determination that the ECJ retains the authority to determine the scope of those general principles of Community law which may be imposed on the Member states and all who reside within them. In effect, an organ of the supranational entity now reserves to itself the power to determine the extent of its power to define the conduct parameters of all subordinate entities. A very neat trick; one which significantly increases the power of the E.U. for the purposes of doing “good things” but also one which permits a substantial intrusion into the autonomy of the member states. It is now left to the ECJ, within its self-defined parameters,<sup>47</sup> to designate the base line and limits within which (non-dangerous) deviation will be permitted. These powers are exercised through the Court’s power to declare “fundamental principles of community law.”<sup>48</sup>

That this retention of norm-defining harmonizing power was affirmed in the service of an arguably noble cause does not change the characteristic of the taking. General principles of Community law may as easily be used by the ECJ in the service of the imposition of less noble norms in the eyes of national and subnational cultures. Whatever the nobility of the harmonizing, national and subnational groups are clearly required to incorporate them as new parts of their respective cultural landscapes.

Indeed, the *problem* of *Cornwall County Council* is that many people will believe that *politically* the Court reached the “right” result. But that is not my focus. Rather, *Cornwall County Council* teaches us most not from its doctrinal application of the equal treatment directive, but from its offhanded acceptance of a hierarchy of lawmaking. What

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46. Thus, advocate general Tesaro stated:

Finally, I am well aware that I am asking the Court to make a “courageous” decision. I am asking it to do so, however, in the profound conviction that what is at stake is a universal fundamental value, indelibly etched in modern legal traditions and in the constitutions of the more advanced countries: the irrelevance of a person’s sex with regard to the rules regulating relations in society.

P. v. S. and Cornwall County Council, Case C-13/94 opinion of advocate general Tesaro delivered Dec. 14, 1995 (on file with author), at 8.

47. See, e.g., Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle Fur Getreide und Futtermittel, Case 11/70, 1970 E.C.R. 1125.

48. Case C-13/94, P. v. S. & Cornwall County Council, 2 C.M.L.R. 247, at ¶ 18.

makes “good” cases like *Cornwall County Council* problematic is the way in which politically “good” cases highlight the tensions between all sorts of “good” policies. In this case, a “good” result for transsexuals highlights the cost—the sacrifice of the “good” policies of subnational cultural determinism and member state autonomy. These contradictions are less usefully illustrated in the obvious cases. In such cases, one is arguably prepared to recognize and act on the contradiction. Moreover, the motivation for criticism in those cases is usually suspect, since it is as likely a dissatisfaction with the result as it is with any discomfort with the structure from which it was produced. In contrast, in subtle cases one would not tend to look for the contradictions. In cases like *Cornwall County Council*, one is freed of the distractions of the merits to concentrate on the structural basis on which the decision was produced, and on the nature of the power relationships between national and supranational entities which permit the acceptance of this structure of power.

**Subsidiarity.** The *Cornwall County Council* case represents a stark example of the subsidiarity principle’s limits as a formalized basis for the prevention of the erosion of the power of the Member States. Decisions like *Cornwall County Council* leave no room for subsidiarity—and no room for the peculiarities of Member State legal norms. “In so far as the law seeks to regulate relations in society, it must, on the contrary keep up with social change, and must therefore be capable of regulating new situations brought to light by social change and advances in science.”<sup>49</sup>

Of what use is subsidiarity in the face of the power of the centrality? The centrality, through its courts, creates the norms which regulate the internal actions of the Member States themselves. Hence, the meta-state assumes the role of source of new centralizing power. It must,

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49. Case C-13/94, *P. v. S. and Cornwall County Council*, opinion of advocate general Tesauero, at 4. Of course, assuming one takes a very broad view of the meaning of exclusive Community competence, then the issue of subsidiarity would be irrelevant in *Cornwall County Council* for more technical reasons. If the principle of equality is covered under Article 119 of the EC Treaty and if the Equal Treatment Directive is grounded in Article 119, then the entire field of equal treatment is within the exclusive competence of the Community. It would then follow that the Court would not have to justify its decision in light of the subsidiarity principle. I owe this insight to Bruce Carolan. But even were this the case, the Court never reached that issue, or, rather, it leaped over that issue to ground the decision in a broader context, that of the imperatives of basic *European* norms under its construction of general principles of equality. The Court assumes that in the area of general principles of Community law, there is no place for the Member States (except indirectly as founts of such principles).



because “[s]ubsidiarity is concerned with the means of furthering [common] values [shared between central and local institutions] but cannot provide a way out of fundamental conflicts about the values themselves.”<sup>50</sup> Values conflicts can only be resolved by the central authority—and so we introduce the discipline of harmonization and hegemony. “This is inevitable. In society as it is today, in which customs and morals are changing rapidly, citizens are guaranteed ever wider and deeper protection of their freedoms.”<sup>51</sup> Thus, subsidiarity may well work against its own interest. Subsidiarity assumes the state is little more than a mere geo-political entity. This construction of the “state” might well permit the court to ignore the state in making any cultural (as opposed to “political”) analysis.

Indeed, the evidence is *Cornwall County Council* itself, where the court quite consciously assumed the role of centralizing cultural authority. In this way, the *Cornwall County Council* court provided a strong indication of the value of the principle of subsidiarity as a source of protection of Member State autonomy as against the power to declare general principles of community law. Quite simply, subsidiarity is irrelevant in connection with the consideration of the most basic questions affecting a supranational grouping. The doctrine of subsidiarity, then, is solicitous of Member State norm-making power only *after* the supranational entity has created the fundamental norms under which all rule making will be interpreted and judged. Once basic choices are made, subsidiarity is free to come into play. Subsidiarity is a tool of legislative implementation, not of core legislative formulation.

Contrast the relationship of subsidiarity to general principles of Community law with that of the *margin of appreciation* doctrine in interpreting the ECHR by that “step-sister” court of the European Union, the European Court of Human Rights.<sup>52</sup> The recent “transsexual cases” of the European Court of Human Rights suggest the difference.<sup>53</sup> The European Court of Human Rights has expressed the view

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50. Nicolas Bernard, *The Future of European Economic Law in the Light of the Principle of Subsidiarity*, 33 COMMON MKT. L. REV. 633, 651 (1996).

51. Case C-13/94, P. v. S. and Cornwall County Council, opinion of advocate general Tesauero, at 3.

52. On the margin of appreciation generally, see, for example, Pieter van Dijk, *The Treatment of Homosexuals Under the European Convention on Human Rights*, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE: ESSAYS ON LESBLIAN AND GAY RIGHTS IN EUROPEAN LAW AND POLICY 179 (1993).

53. See *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622 (1990); *Rees v. United Kingdom*, 9 Eur. H.R. Rep. 56 (1986). In *Cossey*, a person, born male, who underwent gender reassignment surgery and lived as a woman, challenged the denial by the United Kingdom of her

that where there exists "little common ground between the Contracting States," national entities enjoy "a wide margin of appreciation."<sup>54</sup> Thus, "[a]lthough some contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concepts of marriage."<sup>55</sup> Thus, the "margin of appreciation" works as a limiting principle on the European supranational human rights regime.

Yet, the very lack of nation-state consensus which gives the margin of appreciation its widest power to limit the interpretive power of the European Court of Human Rights can sometimes serve as the vehicle to overcome the domination of that principle. This is especially the case where consensus, while divided, is interpreted to be changing in a particular direction.

For example, in the transsexual cases, the consensus gap transformed itself into something problematic when the European Court of Human Rights became "conscious of the seriousness of the problems facing transsexuals and the distress they suffer. Since the Convention always has to be interpreted and applied in the light of current circumstances, it is important that the need for appropriate legal measures in this area should be kept under review."<sup>56</sup> "Current circumstances" analysis permits the European Court of Justice some discretion to balance the interests of the community and the individual "the search for which balance is inherent in the whole of the Convention."<sup>57</sup> However, when the balance tilts in favor of the individual, the margin of appreciation disappears. That was the essence of the European Court of Human Rights's holding in the "homosexual sodomy" cases.<sup>58</sup> A con-

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request to obtain a birth certificate indicating she was female and the legal restriction on her ability to marry a man. The European Court of Human Rights held over vigorous dissent that there had been no violation of either Articles 8 or 12. In *Rees*, a person, born female, who underwent medical treatment and lived as a man, challenged the denial by the United Kingdom of his request to obtain a birth certificate indicating he was male. The European Court of Human Rights held over vigorous dissent that there had been no violation of either Articles 8 or 12.

54. *Cossey*, at 641; *Rees*, at 64.

55. *Cossey*, at 642 (respecting the Article 12 challenge).

56. *Cossey*, at 641; *Rees* at 68.

57. *Rees*, at 64.

58. See *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 485 (ser. A) (1981); *Norris v. Ireland*, 13 Eur. Ct. H.R. (ser. A) (1988); *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993). For a discussion of the political nature of the determination of the limitations of "human rights" in this context, see Larry Catá Backer, *Inscribing Judicial Preferences into Our Basic Law: Constitutional Interpretation in the Service of the Status Quo* (1996) (manuscript, on file with au-

sensus gap pointing the way to a particular new consensus, of course, was also what the dissenting judges argued in *Cossey*.<sup>59</sup>

A pronouncement of general principles of community law by the European Court of Justice is similar to the notions inherent in a determination by the European Court of Human Rights that no margin of appreciation is possible in a particular case. Both implicate the need for inherent normative consistency in the emerging meta-system of human rights. This normative consistency is simultaneously superior, and in opposition, to the meta-systems of self-determination and respect for cultural (national) difference. It may be that "a cross fertilization process is well underway, one that ultimately may lead to more harmonization of the law in . . . human rights areas."<sup>60</sup> Certainly, *Cornwall County Council* vividly demonstrates this principle within the European system of human rights.

Thus, general principles of Community law serve as a limiting principle for Member State autonomy, even with respect to areas where the Member State has legislative authority. There is a U.S. equivalent. It is the enunciation of federal constitutional principles as against the power of both federal and state political units. General federal constitutional principles supply the interpretative norms with which we under-

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*Norris* defined the parameters of the newly recognized political reality. Thereafter, the cases were not hard. In Europe, popular cultural norms, the habits of ordinary *European* citizens makes it exceedingly difficult to find particularly serious reasons creating a pressing social need to criminalize sexual activity between men. Before the Court, the government argued that the "moral fibre of a democratic nation is a matter for its own institutions and the Government should be allowed a degree of tolerance, . . . a margin of appreciation that would allow the democratic legislature to deal with this problem in the manner which it sees best." *Id.* at ¶ 42. The Court rejected this argument citing that to make such a determination, "the reality of the pressing social need must be proportionate to the legitimate aim pursued." *Id.* at ¶ 44. The court rebuffed the Government's attempt to preclude it from review of Ireland's obligation not to interfere with an Article 8 right when such deals with the interests of the 'protection of morals.' The Court also noted that serious reasons must exist before government interference can be legitimate for purposes of Article 8. Once again, citing a portion from *Dudgeon* regarding the lack of evidence showing that the non-enforcement of Northern Ireland's relevant law had been detrimental to the moral standards of its people or that there was public demand for stricter enforcement of the law, the Court held that "it cannot be maintained that there is a "pressing social need" to make such [homosexual] acts criminal offenses. *Id.* at ¶ 46.

59. *Cossey*, at 648. See dissenting opinion of Judge Martens.

60. Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 ST. LOUIS U. L.J. 699, 702 (1996) (footnotes omitted) (arguing for the need for what the author calls the harmonization of international human rights law). Note, however, that recent voices have begun to sense that there is a "declining consensus on the role that the system established by the European Convention plays for the protection of human rights." Gaja, *supra* note 45, at 989.

stand our legislation.<sup>61</sup> Constitutional principles, like general principles of Community law, are examples of meta-harmonization—norms which are meant to limit the range of acceptable subsidiarity. Subgroups are not permitted to explode the boundaries of these general principles. This is law making which is impervious to the logic of subsidiarity as a general principle of comity; it is outside of what Americans conceive of as issues of federalism. In this sense *Cornwall County Council* functions much like U.S. federal constitutional cases wrestling with principles of interpretation.

**Cultural Solicitude.** It is at this residual level of power that *Cornwall County Council* is at its most interesting. After all, where in the decision is there exhibited the concern for the idiosyncracies of subnational cultural norms to which Community Institutions (including, presumably the ECJ) now ought to show sensitivity? There are none. Such solicitude would amount to the kind of obsolescence rejected by the advocate general in his opinion.<sup>62</sup> Indeed, the advocate general's opinion, if persuasive in future cases, would indicate that cultural resistance to the normalization of "homosexuality" would also have to be swept aside. As a result, discrimination on the basis of sexual orientation would also violate the principle of equality as described by the advocate general and in the opinion of the European Court of Justice itself.<sup>63</sup>

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61. For example, consider *Romer v. Evans*, 116 S. Ct. 1620 (1996), from the analytical perspective of the European Union. In *Romer*, the U.S. Supreme Court held that an amendment to the Colorado state constitution violated the Equal Protection Clause of the federal Constitution. The amendment, through a statewide voter referendum, precluded all legislative, executive or judicial action at any level of state or local government designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships". Colorado, a Member State of the United States, has the legislative authority to amend its constitution by popular referendum. However, general principles of Constitutional law foreclosed the use of that power in ways that violated the harmonizing norms of the principle of "equal protection." For a discussion of *Romer*, see Larry Catá Backer, *Reflections of the Law of "Moral and Social Disapprobation" in Romer v. Evans: Conformity and the Political Function of Courts in the U.S. and U.K.* (1996) (manuscript, on file with author).

62. Case C-13/94, P. v. S. and Cornwall County Council, opinion of advocate general Tesouro, Dec. 14, 1995, at 6 (on file with author) ("I regard as obsolete the idea that the law should take into consideration, and protect, a women who has suffered discrimination in comparison with a man, or vice versa, but denies that protection to those who are also discriminated against, again by reason of sex, merely because they fall outside the traditional man/woman classification.").

63. This necessarily follows from the advocate general's argument. Case C-13/94, P. v. S. and Cornwall County Council, opinion of advocate general Tesouro. The ECJ also implied the possibility of this extension when it explained that "the scope of the [equal treatment] directive cannot be confined simply to discrimination based on the fact that a person is of one or other

Indeed, the *Cornwall County Council* case demonstrates the effectiveness of cultural sensitivity only as a second order concern. Where the issue touches on matters deemed to involve a fundamental characteristic of the European "character" (the supranational character if you will), then subnational cultural idiosyncracies may not intrude. "To my mind, the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it risks imposing outdated views and taking on a static role."<sup>64</sup> Left in the wake of this dynamism are the cultural norms which one might otherwise think should have helped inform the Court's decision.

Cultural solicitude, then, is limited to the margin. Yet perversely, even the definition of that margin must be a matter of foundational concern. The definition of the margin cannot be left to the idiosyncracies of the subnational culture and its "conflict of laws" rules. Cultural solicitude, protection of sub-national minority ethos, is reduced to the ultimate residuum. This reduction follows from the inherent circularity of our understanding of what *necessary* solicitude of culture means.<sup>65</sup>

Advocate general Tesauro is quite clear on this point. What is at stake here is the concept of social justice and European integration. The fact that "in Community law there is no precise provision specifically and literally intended to regulate the problem"<sup>66</sup> should not prevent the Court from imposing on all subnational cultures a harmonizing conception of "the great value of equality"<sup>67</sup> an equality derived from "principles and objectives of Community social law, the statement of reasons for the directive underlining 'the harmonization of living and working conditions while maintaining their improvement' and also the case law of the Court itself, which is ever alert and to the fore in ensuring that disadvantaged persons are protected."<sup>68</sup>

sex. In any event, we may all find out soon enough. The Southampton Industrial Tribunal made a reference in July, 1996, seeking a preliminary ruling respecting the applicability of the Equal Treatment directive to sexual orientation discrimination. See *Lisa Grant v. South-West Trains, Ltd.*, Southampton Indust. Tribunal Case No. C-249/96.

64. Case C-13/94, *P. v. S. and Cornwall County Council*, opinion of advocate general Tesauro, at 4.

65. Consider the circularity of the requirement in Article 128 that the "Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." EU TREATY, *supra* note 1, art. 128(1). It is quite a task to surmount the oppositions lying just below the surface of this multi-tasking command.

66. Case C-13/94, *P. v. S. and Cornwall County Council*, opinion of advocate general Tesauro, at 8.

67. *Id.*

68. *Id.*

## IV. NECESSARY CONSEQUENCES CONSIDERED

*Cornwall County Council* provides a good illustration of my thesis: the tensions between the whole and its parts are (i) unavoidable (ii) unresolvable and (iii) eternal.

Our birthright as social animals is an unquenchable *will to order*.<sup>69</sup> We seek connection with others. From connection comes order and power. It is the way we replicate ourselves in multiple form. Groups, in this sense are very much like the Borg.<sup>70</sup> The curse of our individuality, disconnected at the most basic level from others, is that we resist connectivity at the level of the individual and that of the group. Connectivity implies subordination of the individualism which is the basis of human life. But individuals come to the text of group normativity individually.<sup>71</sup> That, in itself, ensures that normativity can never be uniform or immutable.<sup>72</sup>

69. I have explored this in the context of the development of Queer theory and in the crafting of images through which we understand our constitutional principles. See Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996); see also Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, in LEGAL QUEERIES — (Sara Beresford et al., eds. forthcoming 1997).

70. See *Star Trek: First Contact* (Paramount Pictures 1996). For those who are not fans of American science fiction television and motion pictures, the Borg were a race which had attained the highest level of communitarian development on a number of levels. Borg society was composed of humanoid beings who, shortly after birth, were joined with a number of mechanical components. The result was a being part human and part machine, and intimately connected to all other being in the "collective," the community in which all were expected to function. Each being thus created became an undifferentiated part of the Borg community. The primary mission of this collective was assimilative and expansionist. Having derived the perfect state of being, the Borg felt compelled to spread the message across the galaxy. Their primary function thus was to seek out other life forms to assimilate them or destroy them. With the Borg we are presented with an exaggerated version of our own rendering of the nightmare (to some) of an imperial conformity: near human and machine in perfect integration within each body, the individual subsumed within the collective, and a "passive-aggressive" defensive mechanism for community protection.

71. See Backer, *Queering Theory*, *supra* note 69.

72. Backer, *Constructing a "Homosexual" for Constitutional Theory*, *supra* note 69, at 529 ("we practice culture through an endless attempt at replication"). In the context of gender theory, consider Nancy J. Chodorow, *Gender as a Personal and Cultural Construction*, 20 SIGNS: J. OF WOMEN IN CULTURE & SOC. 516, 517 (1995):

When I claim that gender is inevitably personal as well as cultural, I do not mean only that people create individualized cultural or linguistic versions of meaning by drawing upon cultural or linguistic categories at hand. Rather, perception and meaning are psychologically created. As psychoanalysis documents, people use available cultural meanings and images, but they experience them emotionally and through fantasy, as well as in particular interpersonal contexts. Individuals thereby create new meanings in terms of their own

The manifestation of that *will to order* simultaneously permeates all human relationships. It is as effective at the level of the personal and familial as at the level of global interaction. The *resistance to every particular imposed order*, emanates as well from this will to order. Resistance of the individual is the shadow of order through community. This resistance is expressed through lived experience, the vagaries of interpretation, or conflict (a militant politics of difference). Thus, our political systems internalize these tensions without hope of resolution.

Harmonization, subsidiarity and protection of "group" culture represents a political shorthand for what Jurgen Habermas has identified as a *proceduralist understanding of law*.<sup>73</sup> Look at the necessary consequences of understanding in our late twentieth century political enterprise.

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unique biographies and histories of intrapsychic strategies and practices.

Leslye Obiora expressed it well in the context of the "culture" of legal education: "Thus no one is ever exposed to the totality of a culture; culture is collectively filtered through the particularities of individual experience. Furthermore, individuals differ in the extent to which they conform to norms, and situations differ in the extent to which they elicit conformity." Leslye Amede Obiora, *Neither Here Nor There: Of the Female in American Legal Education*, 21 L. & SOC. INQUIRY 355, 385 (1996). Cf. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

73. Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 776 (1996). A number of thoughtful analyses of Habermas' proceduralism can be found in Symposium, *Habermas on Law and Democracy: Critical Exchanges*, 17 CARDOZO L. REV. 767 (1996). As I suggest, proceduralism works, but only within the framework established by *someone*—that is, as *meta-process*. The contest for the acceptance and construction of meta-process itself reflects the tensions at lower levels. It is in this sense only that I tend to agree with Professor Rosenfeld's notion of "comprehensive pluralism." Like his comprehensive pluralism, the shorthand of harmonization, subsidiarity and cultural solicitude form:

a dynamic system that depends on the concurrent work of thrust and counterthrust which is propelled by the permanent tension generated by the friction between its negative and positive work . . . [it] has an important negative role to play—it can be vital in [the] struggle against the permanent entrenchment of any particular set of first order norms . . . [It] can also play a limited, but nonetheless crucial, role on the positive front. By exposing particular inequities through its leveling mechanisms and by revealing concealed inequities through the reversal of perspectives, [it] can channel [the] need for contested first order norms toward more encompassing, widely shared, and less oppressive alternatives.

Michel Rosenfeld, *Can Rights, Democracy, and Justice be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791, 824 (1996).

### A. *Trivialization*

Where subnational culture, Member State and Community interests conflict, only one may prevail. But which? In the area of fundamental human rights, the answer is the supranational unit.<sup>74</sup> Subsidiarity, and the solicitude for cultural difference, assume a decorative function in this area when the courts choose to speak. Subsidiarity and cultural solicitude fall to the individual states during periods of norm genesis when a "margin of appreciation" acts to restrain system-wide pronouncements of these norms.

In effect, cultural currency is allowed its freedom only at the margin—as something picturesque because of its difference. Yet, when cultural difference becomes serious and violates Anglo-European notions of fundamental human and sexual rights, solicitude for difference ends. Such conduct is not picturesque or tourist worthy. At this point, the requisites of harmonization will take precedence.<sup>75</sup> Even subsidiarity has been said to presuppose "a background of shared objectives or values [necessary] in order to determine what can be regarded as a 'failure' of the lower level entities."<sup>76</sup>

But why must assignment to the supranational unit necessarily follow in a regime now obeisant to the principle of subsidiarity? The

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74. Thus, for instance, Jacques Derrida speaks of the need of a duty to shoulder the "European, and *uniquely* European, heritage of an idea of democracy" which carries with it a number of choices and limits on the forms of acceptable cultural norms within political expression. JACQUES DERRIDA, *THE OTHER HEADING: REFLECTIONS ON TODAY'S EUROPE* 78-79 (1992). The practical effect of this decision is not limited to areas such as the rights of "marginalized" groups, but affects core economic regulation as well. Though outside the scope of this article, I note, for example, that the fundamental community law principle of privacy underlies the recent push to develop E.U.-wide regulation of data protection. See Ulrich U. Wuermeling, *Harmonization of European Union Privacy Law*, 14 J. MARSHALL J. COMPUTER & INFO. L. 411, 414-415, 419-420 (1996).

75. Consider the issue of female circumcision. See, e.g., Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Daliah Setaveh, *Women Escaping Genital Mutilation—Seeking Asylum in the United States*, 6 U.C.L.A. WOMEN'S L.J. 123 (1995). Consider also the issue of the role of females in society. See Crossette, *supra* note 8.

Where culture is allowed to flower is in the areas of language, national costume (as long as it is European), music and other essentially charming cultural eccentricities. Much more troublesome are issues of religious practice. Even that can be troublesome in Europe when non-European cultures attempt an "invasion." Consider the wearing of the hidjab by Muslim women in France. See Lakeisha S. Townes, *French Don't Veil Resentment of Muslim Tradition*, TAMPA TRIB., May 5, 1996, at 25. Indeed, Ernesto Laclau has argued that the universalism of Enlightenment ideas ought to be embraced as "pragmatic social constructions." ERNESTO LACLAU, *EMANCIPATION(S)* 103-104 (1996).

76. See Bernard, *supra* note 50, at 635.



answer, I think, is historical as well as political. Europe continues to suffer the trauma from the consequences of its collective conduct during the period 1933-45. Cultural solicitude on a national scale has a nasty habit of racializing national and religious minorities. Difference has a way of becoming hubris. Part of Europe's healing process necessarily has had to involve the construction of the belief that difference is basically cosmetic and that general principles of conduct and outlook unite all peoples of Europe.<sup>77</sup> Difference must necessarily be trivialized. I suspect that this is a healthy course.

### B. *The Paradox of Process*

Privileging harmonization of human rights in a system which requires comity for the advancement of the principles of subsidiarity and cultural solicitude can weaken the supranational system. Privileging assimilative supranational systems of human rights is particularly important where the object of the system, the strongest glue holding the system together, is the maintenance of a *process* which must (in order to succeed) always produce some sort of agreement.<sup>78</sup> If process is the key to our system of discordant voices, then a system incorporating multiple voices (but where one voice is the *primus inter pares*) weakens the system itself in a number of ways.

First, process can appear to be uncontrolled and devolving into an exercise of ad hoc politics. With devolution comes the threat of arbitrariness as the exercise of process. In the *Cornwall County Council*

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77. See Vivian Grosswald Curran, *Categories in Comparative Law* (manuscript 1996). Professor Curran's description of the basis for the émigré construction of essentialism and universalism in comparative law provides a compelling rationale for the same tendencies in the construction of base-line general principles of Community law:

The émigré comparatists intended the denial of difference to be the theoretical underpinning of societal and legal tolerance of difference. The émigrés' personal experiences led to their faith in the fundamental similarity of all humans, and to their belief in the perniciousness of according legal recognition to differences in religious or ethnic origin. Their commitment to a theory of inclusion did not, however, extend to an inclusion of others' differentiating attributes, but to a levelling absorption, a homogeneity to be born of erasure of difference rather than a homogeneity of common genetic background. The émigrés' approach is reminiscent of Montaigne's, whose legendary humanism of inclusion did not necessarily signify a tolerance of difference so much as an erasure of it through assimilation."

*Id.*, manuscript at 48.

78. The parallel here is to the proceduralist jurisprudence of Herbert Wechsler. Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 12 (1959); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

case that uncontrolled political process can be seen in the power of the ECJ to read into the Treaty broad powers of hegemony within traditional modes of cultural behavior.

But by whom is that arbitrary power controlled? Ultimately, it can be controlled only by the constituent parts of the unity asserting their own political power within the supranational system. However, the price of such control can well be instability and the breakup of the supranational entity itself. Arbitrariness can thus serve not only as the locus of hegemony, but also as a point of instability in system building.

Second, instability can also follow from the process of unmasking power. *Cornwall County Council* unequivocally delineates the real locus of power within the E.U. system. The blandishments of subsidiarity and cultural solicitude are window dressing when the supranational institutions confront issues of importance to them. The power of the decision in *Cornwall County Council* is the power to normalize and to colonize. Its pronouncements became the standard of behavior throughout the Union. As the expected basis of behavior, as the background norm, such conduct standards replace those which might have otherwise existed in the Member States. This is a power that means to exclude those who will not play by the "rules." For those who do not wish to "play" the only choice is exit.

### C. *Preserving Artificial Culture*

Having unmasked the instability of power at the center, it is also easy to see the way in which the solicitude of such a centralizing force for the cultural differences of its constituent parts will destroy the essence of those cultures. We see the solicitude of cultural difference for what it is—a *zookeeper's approach to culture*. This approach to culture contains within it the possibility of what Jurgen Habermas describes as "administrative preservation" of cultures like forms of endangered species.<sup>79</sup>

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79. See Jurgen Habermas, *Struggles for Recognition in Constitutional States*, 1 EUR. J. PHIL. 128, 142 (1993). That, certainly is the implication of a cynical reading of Derrida's definition of the European democratic hegemonic norm as including "respecting differences, idioms, minorities, singularities, but also the universality of formal law, the desire for translation, agreement and univocity, the law of the majority, opposition to racism, nationalism and xenophobia." DERRIDA, *supra* note 79, 78-79. In effect we see difference in a cage. It can be given effect only within the strong containing walls of a hegemonic foundationalism which prevents much freedom for cultures to be as they may have to be. Where stability and the expression of minority norms is important, this is a desirable outcome, though hardly the leftist or radical politics under which these notions are hawked. What we approach here are the notions of toleration espoused by John Locke read somewhat more generously than in the past. See also John Locke, *A Letter Concerning Toleration*, in GREAT BOOKS OF THE WESTERN WORLD 1 (Robert M.

This approach can be criticized on two grounds: *First*, the very act by any dominant group of using its norms to *preserve* the cultures of others is an effective means of subordinating the very group which the dominant group means to *preserve*. This is the exercise of raw power—the power to define and the power to regulate. *Second*, the resulting culture will inevitably be an artificial construct of a second order—the artificiality results from the maintenance of cultural norms from without rather than from the exercise of free cultural practice from within. Understood properly the temporal expression of culture at any one time, is what I call popular culture. Popular culture represents merely an implementation of the *possibilities* inherent within culture, not the impossibility of a totality of the possibilities of culture itself. Anglo-Europeans necessarily *practice* culture through an endless attempt at replication.<sup>80</sup> “All the constitutional state can do is make possible this hermeneutic accomplishment of the cultural reproduction of lifeworlds. A guarantee of survival would necessarily rob members of the very freedom *to say yes or no* that is required today to make cultural heritage one’s own and to preserve it.”<sup>81</sup>

#### D. Modulating Subordination

In a sense, the notion of contained conflict is built into a system with the irreconcilable goals of harmonization, subsidiarity and protection of insular cultures. This is a containment of conscious design—a metaphorical caging of the dragon that ought not be killed *or* freed. It reflects both the mistrust of harmonization, subsidiarity and insularity, as well as the mistrust of the absence of any of them.<sup>82</sup>

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Hutchins, ed. 1952) (1689).

80. See Backer, *Queering Theory*, *supra* note 69, at 32. In this sense, popular culture can be understood as the “prejudices” (what I would characterize as value choices) of the extant communal tradition. See also HANS-GEORG GADAMER, TRUTH AND METHOD 302, 306 (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989). This is the fundamental nature of our interpretive community. See also Stanley Fish, *Is There a Text in this Class?*, in IS THERE A TEXT IN THIS CLASS? 303-304 (1980); Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 188 (1996) (“[W]e constantly constitute and reconstitute our tradition, our culture, and our community as we engage in hermeneutic actions. Most important, this constant reconstitution is always simultaneously constructive *and* destructive.”) (footnotes omitted).

81. See Habermas, *supra* note 79, at 142.

82. This is reflected in the recent writing of no less than Jacques Derrida. See DERRIDA, *supra* note 74. Derrida argues that while it is important to prevent the severe reconstitution of centralizing hegemony, it is also important to avoid the multiplication of borders. “It is necessary not to cultivate for their own sake minority difference.” *Id.* at 44.

This dragon of contained conflict inherent in a system of overlapping power carries negative and positive potentialities. The negatives include subordination as an independent concept. Subordination is a negative value in itself. Yet subordination is a necessary component of human social organization. The necessity for disagreement always leaves the door open to subordination. Someone's norms will always have to be the basis for determining what is acceptable and what is not, and domination is born with the making of that choice. Thus containment is preferable either freedom or death for the dragon.

There seems to be a level of subordination which most Western thinkers are not only willing to accept, but insist on imposing on all cultures. These are what are called basic or human rights. Thus, Jurgen Habermas notes:

The universalistic content of basic rights is not restricted by the ethical permeation of the legal order; rather, it thoroughly penetrates nationally specific contexts. It is for this reason that the legal neutralization of value conflicts, which would otherwise fragment the political community, requires that the justice aspect *have a privileged position* . . . . In Germany, for example, the rights of young Turkish women must, if necessary, be enforced against the will of fathers who appeal to the prerogatives of their culture of origin.<sup>83</sup>

Indeed, no less than Renata Salecl has argued in favor of the imperialism and the necessity of a colonizing spirit built on human rights as "one of the essential elements of democracy precisely because [it is] grounded on the idea of the abstract individual."<sup>84</sup> The problem is that even basic or human rights pose severe problems of identification and interpretation.<sup>85</sup> This, of course, is closely tied to the previously considered consequence of trivialization of difference, or the creation of limited spheres of acceptable difference.

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83. Jurgen Habermas, *Reply to Symposium Participants*, Benjamin N. Cardozo School of Law, 17 CARDOZO L. REV. 1477, 1498 (1996). Professor Richardson, who would applaud the breakup of nation-states on principles of self-determination, grounds his notions on the foundations of currently expressed notions of international human rights law. See, e.g., Richardson, *supra* note 24, at 61.

84. RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 119 (1994). On the privileging of human rights concepts, see generally, M. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980); Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996) (arguing that there is transcultural moral truth in universal human rights).

85. Consider the views of Islamic thinkers on this point. For a thoughtful review of the relationship of Islam and the enterprise of the global (Western-origin) human rights enterprise, see David A. Westbrook, *Islamic International Law and Public International Law: Separate Expressions of World Order*, 33 VA. J. INT'L L. 819 (1993) (arguing, in part, that Islam views public international law as a foreign law to which it must react, and that Islam has set for itself the task of constructing an alternative (and competitive) vision).

Another negative turns on the potential which always exists for instability and violence. This is the dragon unleashed—power uncontrolled. This is the classical dilemma of the toleration of groups which advocate the end of toleration.<sup>86</sup> At some point, harmonization and cultural solicitude can reach a point of irreconcilability. At that point, either the dominated culture will change, or it will go underground. In the limiting case, sub-cultural groups will exit the union—if they can!

But there are also positives to a system of domesticated oppositions. Modulation implies ever-shifting patterns of dominance and subordination. In effect the system provides for the containment of subordination and dominance. The U.S. achieves the same result through the patterns of politics inherent in a fluid federal system.<sup>87</sup>

Moreover, there is the possibility of shifting centers of power from the top to the bottom, and then back. The instability of modulating power through multiple process systems can actually lead to stability if the modulations can be contained. This, of course is the point made in a more theoretical vein by Thomas McCarthy.<sup>88</sup> It underlies the postmodern radical politics of Ernesto Laclau.<sup>89</sup>

86. Many scholars find no easy answer to this. See, e.g., Nomi Maya Stolzenberg, "He Drew a Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 582 (1993). Others argue that the only groups which may be permitted entry into the circle of discourse are those which are willing to "play by the rules." That is the essence of Jurgen Habermas's process based constitutionalism. See, e.g., Habermas, *supra* note 79, at 128. It animates Renata Salecl's notion that only certain cultural types ought to be allowed to "play" at democratic politics (the rest might well be re-educated or excluded). See SALECL, *supra* note 84, at 37 (democracy must create a space in which democracy will become self-perpetuating, where the anti-democratic will have no real effect). Bill Bowring has documented the problems of the normalization of subnational cultures which might not be willing to play by the "rules" in his study of the Crimean Tatars. See Bill Bowring, *Minority Rights and the Problem of Nationalism: Is there a European Solution?* (Sept. 1996) (unpublished manuscript, on file with author). Bowring correctly observes, at the conclusion of his piece, that "Difference, the Other, is to be recognized and respected, but must not, says Derrida, be cultivated for its own sake. But that may well not be the perspective of the Other herself." *Id.*, at 14.

87. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 403-48 (1994).

88. See, e.g., Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, 17 CARDOZO L. REV. 1083 (1996). "Practical rationality in the face of diversity is as much a matter of recognizing, respecting, and accommodating differences as one of transcending them. Arrangements shaped by the former concern are no less practically rational than those shaped by the later, and just political arrangements will normally be shaped by both, as well as by negotiation and compromise." *Id.* at 1124.

89. Laclau has argued that solicitude for minority culture can occur only within the framework of a traditional territorially based nation-state of the Western European model. See LACLAU, *supra* note 75, at 28-29. Any other model, that is, any model built on closure, poses severe problems for democratic notions and perhaps even for fundamental rights. See *id.* At least in the context of African "nation-states," this notion has been vigorously contested. See,

The danger of contained conflict is its inherent instability. As a Biblical people, our theology is based on notions of equilibrium and stasis. To deliberately support a system based on controlled instability may well be beyond us. Most supranational federative institutions have not deliberately confronted both the dangers and the possibilities in the creation and *maintenance* of complex political systems. Yet, to order complex inter-individual and intergroup relationships under the rubric of multigroup representative democracy will require a strong-willed determination to embrace and control instability. Subsidiarity and cultural solicitude contribute to that necessary instability. To that extent, systems without these opposing forces sink into routinized mindless traditionalism and a barbarism with which Europe is all too well acquainted.

#### V. NECESSARY CONSEQUENCES ILLUSTRATED

The necessary oppositions of harmonization and subsidiarity and cultural solicitude are not just a function of judicial law making gone wild. Nor does this trio exit merely for the benefit of the European Union. The multiple dominances inherent in these oppositions also exist within the "federative" structures of international law.

Keith Aoki considered the perversity of harmonization from "the other side."<sup>90</sup> He described how in a world of unequal power, harmonization of concepts of ownership through international bodies provides a vehicle for the imposition of the norms of dominant states on those with less power. Indeed, in this sense, harmonization can be considered the ultimate act of subordination.

This creates its own perversities. Taken to its limit, the notion of harmonization itself can be understood only as an instrument of subordination: of a territoriality which accords with power relationship norms of a powerful Euro-American civilization. Implicit in Professor Aoki's argument is the idea expressed by Professor Richardson, who citing Professor Falk's work on the necessity to evolve notions of sovereignty,<sup>91</sup> argued that it is time for the "state to step back, in myth and practice, render itself amenable to, for example, multiple sovereignties, and grasp the integrative opportunities in the modern international community in order to remain viable."<sup>92</sup>

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*e.g.*, Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113 (1995); William Pfaff, *A New Colonialism? Europe Must Go Back Into Africa*, 74 FOREIGN AFF. J. 1 (1995) (arguing that as African states have failed with tragic human consequences, Europe must reassert suzerainty to aid development).

90. Keith Aoki, *Property and Sovereignty: Notes Toward a Cultural Geography of Authority*, 48 STAN. L. REV. 1293, 1299 n.8 (1996).

91. *See, e.g.*, RICHARD FALK, *EXPLORATION AT THE EDGE OF TIME: THE PROSPECT FOR WORLD ORDER* (1992).

92. Richardson, *supra* note 24, at 49. Professor Richardson here cites RICHARD FALK, *supra*

The implication, for those who find subordination of any type uncomfortable may be that the project of harmonization must be abandoned to avoid the trap of subordination. This requires, as Henry Richardson intimates, the abandonment of the notion of the political nation-state and of norm-imposing international bodies.<sup>93</sup> Yet, it is also true that Professor Richardson does not follow the implications of his argument to their logical end. There is a strong sense in the work for need to preserve and perhaps even expand a necessarily hegemonic and norm imposing system of human rights policed by some sort of world order.

However, it is hard to reconcile the notion of a necessary hegemony with the idea that "people ought to be free." What we are doing here is picking and choosing. Once we begin down that road we are back where we started. *Who* gets to pick and choose and *what* they pick and choose is matter of power—dominance and hegemony, and the resulting subordination will surely follow. I have suggested that the inevitability of dissent is regulated in two ways within the normative framework of the principles of harmonization, subsidiarity and cultural solicitude: when dissent is characterized as benign (not contradicting the core norm) it may be permitted; where dissent expresses fundamental disagreement with the normative structure, it will be suppressed. We suppress disequal treatment of women within Europe and the United States. Saudi Arabians might suggest that disequal treatment of women works to the benefit of women by providing them a space within which they can reach their full potential free of the harassing possibilities of contact with men.<sup>94</sup> There is no way to kill or free the dragon. Contained subordination in an unstable state is the most free we can hope to be. Yet this is likely an impossible state to maintain for long.

Professors Aoki and Richardson have each explored the way the tensions I have described have made their imprint on the relations between social/cultural/political *wholes* and the sum of its parts. In each case, the oppositions of the theoretical constructs—harmonization,

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note 91, at 204-205. See also Richard Falk, *The Pathways of Global Constitutionalism*, in THE CONSTITUTIONAL FOUNDATIONS OF WORLD PEACE 13, 25-27 (Richard Falk et al. eds. 1993).

93. See Richardson, *supra* note 24. Bronislaw Geremek has also suggested that the "growing pressures and demands of supranational integration have given rise to a degree of uncertainty as to the fate of the nation-state." BRONISLAW GEREMEK, THE COMMON ROOTS OF EUROPE 162 (Jan Aleksandrowicz et al. trans. 1996). Yet he goes on to make a case for the preservation of the cultural state (rather than the political state), arguing that rejecting nationhood as a cultural construct frees people to manipulate the idea of nationhood to develop the social and political state and may thus possibly inhibit integration. "But in the model of the nation-state which has become the common property of Europe, the state is tempered and restricted by the 'sovereignty of the people,' and in the interplay between aspirations and realities, one can discern not only conflicts of interest but also feelings of brotherhood and solidarity." *Id.* at 184.

94. See, e.g., Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 HUM. RTS. Q. 587, 596-97 (1995).

subsidiarity and cultural solicitude—produce theoretically perverse results. However, in practical terms, they reflect a reasonable practical resolution. The opposition of the three represent a balancing of competing needs in a world in which power is not shared equally—a world in which power must be expressed and to which actions must defer.

## VI. CONCLUSIONS

In the end there is only domination and subordination. We must accept the fact that as long as we insist on grouping ourselves in multiple joinings with others on the basis of any differentiating set of criteria, we will have created the environment in which domination and subordination, hegemony and colonization, will exist.

The law of the state and international law must remain ever aware of this reality. Its purpose must be to contain the possibilities of hegemony and subordination. To that end, every system of supranational organization, every system of international law must be grounded on the understanding that it will create a hegemony defined by the core rules its ordering will represent.<sup>95</sup> At the same time, the participants in these organizations must remain vigilant that the hegemony created remains rooted in minimalism and in *ever-evolving* common notions of justice. Such interlocking systems must remain ever committed to testing and retesting the normative legitimacy of contemporary law.<sup>96</sup>

We have chosen our hegemonic basis within the Euro-American world—fundamental process and human rights.<sup>97</sup> In this sense, Europe

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95. This is now becoming more clearly understood within the concept of subsidiarity, and especially the relationship between the downward pressure of subsidiarity and the necessarily supranational task of defining the general principles within which subsidiarity principles (including the principle of cultural solicitude) may operate.

Although subsidiarity is often represented and perceived as a way to protect local values against interference by higher level entities, it in fact presupposes that common values are shared between central and local institutions in spheres of concurrent competencies. Subsidiarity is concerned with the means of furthering those values but cannot provide a way out of fundamental conflicts about the values themselves. It is an inherent limit of the principle that it relies on the basic assumption that individuals will act in pursuance of the common good. If there is no common good, in the sense that there is profound disagreement as to what the common good requires, subsidiarity will provide no solution to the problem. The definition of common values and objectives has to logically precede any application of the principle of subsidiarity.

Bernard, *supra* note 50, at 651-52.

96. The process, of course, is conscious and unconscious; it is a process at once internalized in politics and outside of it; it remains a process rooted in individual action and group conformity. These notions are developed in Backer, *Queering Theory*, *supra* note 69.

97. See generally MCDUGAL ET. AL., *supra* note 84. As Richard Lillich has noted in another context:



especially, is the child of the left, "which has always felt an affinity for another kind of liberalism, a liberalism based in values that are to serve as regulative ideals so that actions are never only formal procedures or substantive decisions."<sup>98</sup> The imposition of a set of regulative ideals necessarily subordinates alternative models. They must. The suppression of competing models is good as and to the extent that the normative legitimacy of the ideals actually chosen cannot be challenged.<sup>99</sup>

Supranational entities will adopt and impose fundamental principles on its subordinate units. In the European Union, as the *Cornwall County Council* court so eloquently put it, the "principle of equality, which is one of the fundamental principles of Community law" is a "fundamental human right whose observance the Court has a duty to ensure."<sup>100</sup> This duty requires the making of a "courageous decision"—courageous because *harmony* here is an act of aggression, perhaps a necessary one, the object of which is to flatten the contours of state idiosyncrasy otherwise possible within the principle of

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The need for normative consistency is a very important one. If international human rights law is indeed universal (the "mantra" of the international community most recently reiterated in the 1993 Vienna Declaration and Programme of Action), then not only must the UN treaty bodies be expected to interpret and apply the identical or essentially similar human rights norms and standards found in their respective treaties uniformly, but they and the regional human rights treaty bodies must be aware of and sensitive to each other's jurisprudence as well.

Lillich, *supra* note 60, at 701. Professor Lillich recounts how, "in the Bloemfontein Statement, senior judicial figures from the Commonwealth and the United States joined judges and jurists from South Africa to affirm 'the importance of both international human rights instruments and international and comparative case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law.'" *Id.* at 700.

98. Gabriel Motzkin, *Habermas's Ideal Paradigm of Law*, 17 *CARDOZO L. REV.* 1431, 1439 (1996). That "other kind of liberalism" mentioned in the quote refers to the "economic component of liberalism," *id.* with which the classic right has tended to ally and the classic left has tended to war.

99. Of course, here is the rub, since the question inevitably arises—challenged by whom? Every normative framework will generate dissenters—no matter how good the framers convince themselves the normative framework may be. This applies between those who have agreed that such a system ought to apply, *see e.g.*, *Fundamental Rights and Common European Values*, 33 *COMMON MKT. L. REV.* 215 (1996). It also applies, perhaps with even more force, as between peoples who do not share even the basic framework from which to distill a common framework. That, certainly, is the point that is made in a fairly jingoistic way in MOHAMMAD & ISHIHARA, *supra* note 7. *See also* Heiner Bielefeldt, *Muslim Voices in the Human Rights Debate*, 17 *HUM. RTS. Q.* 587, 595-601 (1995) (discussing the ways in which Western notions of human rights and "Islamic normative requirements" conflict, and particularly with respect to the legal status of women, restrictions on religious liberty and corporal punishment).

100. Case C-13/94, *P. v. S. & Cornwall County Council*, 2 *C.M.L.R.* 247 (1996), at ¶¶ 18, 19.

subsidiarity, as well as muting the possibility of the "flowering of the cultures of the Member States."<sup>101</sup>

Thus, we leave our three voices. Although the European Union, like other supranational organizations, loudly announces its adherence to the principles of diversity and respect for difference, although it celebrates the locality in theory, the facts are necessarily otherwise. Difference is celebrated, but only as long as it sings to the tone dictated by the voice of harmony. Harmony within groups is the first meta-principle. All else is simply dressing. Culturally respected dressing comprised of national costume, language, cooking style, holidays, art, music is celebrated as significant difference. Further departures from the centralizing idea is suppressed for the preservation of the group. Uncontrolled difference has meant annihilation in Europe. Still, beyond the suppression of violation of core norms, there is the possibility of toleration, accommodation, mutual respect, and multiculturalism. Subsidiarity, deference and cultural solicitude can only exist within this box. Yet within the box, much is possible.

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101. EU TREATY, *supra* note 1, art. 128.

