Articles

Religion in the EU: Using Modified Public Reason to Define European Human Rights

By Brian M. Awe[*]

A. Introduction

At the current stage of its evolution, the European Union ("Union" or "EU") has reached a juncture where many leaders and scholars believe that greater integration is both desirable and necessary.[1] Presumably, a primary method by which greater solidarity and integration can be achieved within the EU is through the public inclusion of common value-laden concepts – as defined through a dialectical process – present within comprehensive doctrines such as religion. To date, however, an effective and inclusive means for utilizing religion in this manner has yet to be formulated. In response, this article takes two prominent paradigms – Jurgen Habermas' intersubjective discourse theory and John Rawls' liberalism – to approach the problem and draws from them a new solution that, while tied to their theoretical underpinnings, is nonetheless a novel approach to achieving greater integration within the Union. Under this new framework, the process of legislatively defining human rights allows the morality common to European comprehensive doctrines – including official and unofficial religions – to bolster the Union's solidarity, legitimacy, and democracy both procedurally and substantively.

In developing a unique framework for this process, it is initially helpful to contrast the relationships between government and religion in Europe with the historical situation in the United States. Though it is commonplace in American democracy to seek the formation and maintenance of constitutional barriers against the "loathsome combination of church and state,"[2] pursuing a similar separationist viewpoint within the European context is by no means assumed. In fact, one of the primary impetuses for colonial emigration from Europe to North America, and

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[1] See, *e.g.*, JOSEPH CARDINAL RATZINGER & JURGEN HABERMAS, DIALECTICS OF SECULARIZATION: ON REASON AND RELIGION 67-72 (Florian Schuller ed., Brian McNeil trans., 2005); J.H.H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 10-13 (1999).

[2] EDWIN S. GAUSTAD, FAITH OF OUR FATHERS: RELIGION AND THE NEW NATION 47 (1987) (quoting Thomas Jefferson, *Letter from Jefferson to Charles Clay*, 29 January 1815).

ultimately for the American secession from Great Britain, was to avoid the persecution of minority faiths at the hands of official government religious institutions. This collective American history led to the creation and ratification of a constitution and bill of rights that largely – although by no means completely – isolated religious institutions from involvement with the state.[3] Despite the success of the American formulation, many European nations have not adopted a similar separationist constitutional approach to the relationship between church and state. In fact, of the twenty-seven Member States comprising the European Union, seven still recognize specific national religions.[4] Several have multiple government-sanctioned faiths.[5] Additionally, of the remaining Member States, a number have systems that permit government preferences for specific religious denominations.[6] On the other hand, however, each nation does in fact reflect the American secularist approach to some extent by providing varying degrees of legal protection for the individual religious liberty of its citizens.[7]

Under the initial treaty structures, the European Economic Community[8] merely constituted a free trade area that only required economic cessions from the largely still-sovereign members to the European bureaucracy.[9] As its economic influence grew, the European Union also subsumed substantial governmental powers in many areas that extend beyond purely economic matters. Involvement with

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[3] Perhaps the most important rationale for this largely unprecedented approach to government was that such a separation would ensure personal liberty for individuals and, additionally, strengthen legitimacy and viability for both minority and majority religious faiths, as well as the state. PHYLLIS MOEN ET AL, A NATION DIVIDED: DIVERSITY, INEQUALITY, AND COMMUNITY IN AMERICAN SOCIETY 235 (1999).

[4] EUROPEAN CONSORTIUM FOR STATE AND CHURCH RESEARCH, STATE AND CHURCH IN THE EUROPEAN UNION *passim* (Gerhard Robbers ed., 1996).

[5] For example, Belgium officially recognizes six denominations: Catholicism, Protestantism, Judaism, Anglicanism, Islam, and the Greek and Russian Orthodox Church. *Id.*, 18-19.

[6] *Id.*, 18-21.

[7] For example, French constitutional sources generally establish neutrality of the state with regard to religion, and impose a positive obligation on the government to support freedom of public worship. *Id.*, 123, *passim*.

[8] Although "Europe" and the various embodiments of the supranational European government – ranging from the European Economic Community to the contemporary European Union – are distinct from one another, this article is concerned with the embodiments and use of religion within the European Union. Accordingly, despite the fact that analysis of the status of religion within non-EU European countries (such as Turkey) is instructive in a number of related areas, references to "Europe" within this article refer only to those nations subject to European supranational control at the time in question.

[9] Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. I (Cmd. 5179-II) [hereinafter EEC Treaty]; Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty] (expired on 23 July 2002).

religion, however, has largely remained under national sovereign control.[10] For instance, the EU has generally avoided regulating comprehensive doctrines such as religion even in the narrow instances where a particular practice directly interferes with rights considered essential to the functioning of the economic union.[11] Thus, while the variety of approaches to religion-state involvement are not necessarily problematic from a strictly external international relations standpoint, the decision to enter into a union presents a situation in which the formerly autonomous nations must address the issue of religion in a constructive and solidarity-increasing manner in order to fully realize the EU's goal of open and equal economic relations between Member States. The variant theoretical approaches developed by Habermas and Rawls to address religion's role in government each have merit when applied to the EU, but require a constructive synthesis of their individual strengths in order to effectively combat the apparent divisiveness within the various embodiments of religion in the Union.[12]

To aid in such theoretical synthesis, Part II of this article examines the problems inherent in legislating religion, both generally and on the European level, and then, by way of illustration, considers and discounts Joseph Weiler's argument for a Christian Europe. Part III briefly traces the theory and modern development of European human rights, and argues that the inclusion of treaty-based legislative protections for these rights is the best possible approach to ensuring religious

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[10] See, *e.g.*, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 Dec. 2007, 2007 O.J. (C 306) *passim* [hereinafter "Lisbon Treaty"]; Treaty on European Union, 29 July 2002, 2002 O.J. (C 191) *passim* [hereinafter "TEU"]; JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM 94-95 (2007).

[11] In Case 41/74, *Van Duyn v. Home Office*, 1974 ECR 1337, the European Court of Justice held that although the European Community is able to regulate when there is a conflict between European public order and the public order of Member States, the establishment of policy for matters of freedom of religion will nonetheless be left to the Member States. Case 41/74, *Van Duyn v. Home Office*, 1974 ECR 1337; José M. González del Valle, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Spain*, 19 EMORY INTERNATIONAL LAW REVIEW 1033, 1041 (2005). Thus, a British law denying immigration for a Church of Scientology worker was left intact despite its obvious conflict with the Community right to freedom of movement for workers. *Van Duyn*, 1974 ECR at 1337; González del Valle, *supra*, 1041. Even though the responsibility for religious policy falls on the member countries, the EU adopted a general position on expressing religious beliefs in Case 130/75, *Vivien Prais v. Council*, 1976 ECR 1589; González del Valle, *supra*, 1041; Alenka Kuhelj, *Religious Freedom in European Democracies*, 20 TULANE EUROPEAN & CIVIL LAW FORUM 13 (2005). That case held that religious freedom includes the protection of private religious beliefs from public interference. *Prais*, 1974 ECR 1589; Kuhelj, *supra*, 13. The Court has similarly declined to intervene in the recent controversy regarding France's banning of religious symbols, including Muslim headscarves, preferring instead to defer to the national conception of religion.

[12] It has been theorized that the best approach to continued assimilation is through the establishment of a European constitution. Upon the defeat of the constitution in 2005 by failure to secure Member State ratification, however, most scholars agree that the European constitutional project is dead. See MÜLLER, *supra*, note 10, 94-95, 96-97.

liberty, solidarity, and legitimization within the EU. Part IV presents a theoretical framework – drawing initially from Habermas' and Rawls' models – through which the Member States, and the various religious and irreligious factions within them, can agree upon a European canon of human rights that is politically acceptable to all. Finally, Part V attempts to address several potential objections regarding this human rights approach to religion as creating greater integration within the European Union.

B. Legislating a "European" Religion

I. The European "Sacredness-of-Life" Morality

Although specific embodiments of religious practices vary widely from culture to culture and religion to religion, there is little dispute that a large percentage of people across the globe affiliate themselves in one way or another with some form of comprehensive belief system. Within the twenty-seven Member States, for example, 79% of citizens profess a belief in at least some higher life force.[13] In recognition of this complexity, especially given the deeply ingrained national and cultural aspects inherent in many European interreligious conflicts, the supranational European Union largely avoided explicit references to religion within its primary law documents.[14] Although there are many virtues to avoiding inclusion of religion within government – as illustrated, for example, by the strict separationism within the American context[15] – the isolation of core religious ideas from government influence does not need to be absolute. Including basic protection for certain fundamental rights that are common to comprehensive doctrines through a process inclusive of the wide swath of European belief systems

[13] EUROBAROMETER, SOCIAL VALUES, SCIENCE, AND TECHNOLOGY 9 (2005).

[14] *E.g.*, EEC Treaty, 11; ECSC Treaty, 140; see, *supra*, note 9.

[15] Following the American Revolution, and given the collective memory of British religious persecution, there was extensive debate on the extent to which the nascent government should be able to regulate, support, or otherwise involve itself in the affairs of the religious institutions. Ultimately, a largely strict separationist viewpoint, advocated initially by James Madison and, later, by Thomas Jefferson and others, was adopted. These thinkers had the foresight to determine that stopping direct government action in the area of religion protects religion by preventing a domination of theological thought by the majority faith. This separationist approach ensures the liberty of individuals and religious institutions alike by protecting them from the coercive force of government interference. The overall legitimacy of the government itself is also reinforced because such separation ensures that it remains neutral as between faith groups. Indeed, French philosopher Alexis de Tocqueville observed that this constitutionally mandated division between church and state strengthened religion and smoothed the relationship between politics and religion. See, Moen et al, *supra,* note 3, 235; JOHN RAWLS, THE LAW OF PEOPLES 167-68 (1999).

provides an avenue to increase social solidarity and integration within the Union.[16] In this sense, the general concept of religion and belief in a higher being presents the proverbial golden opportunity for integration within the EU because of the unifying commonality of these basic moral concepts. Although insufficient to unite nations[17] that are not already integrated to a certain extent, such a process will be effective within the EU both because of the high level of economic integration already achieved and the ongoing desire among Member States to continue close economic relations with one another.

Even though the European landscape contains a wide variety of comprehensive doctrines – including religious faiths – Europeans as a whole no longer associate themselves with these institutions in a uniform manner.[18] In fact, most Europeans now believe and practice the comprehensive doctrines of their choice – whether it be religion, secularism, or nationalism – in an individualistic fashion, thus eliminating the presence of state or national religions.[19] One can be French, German, or Italian, and at the same time be either Catholic, Jewish, Muslim, or practice no religion at all.[20] As a result, religion in the EU – in a departure unique from the situation in most contemporary societies – has become an individual matter that concerns the conscience of each European, and is thus independent of his national or ethnic affiliation.[21] By extension, therefore, it can be said that one's feelings of nationalism (or any other comprehensive doctrine) are likewise individual and independent of religious affiliation.[22]

How, then, can there be a common core of morality between comprehensive doctrines such as religion and nationalism if these belief systems, as now constituted within Europe, are primarily individualistic in nature? More importantly, what is that common moral core? The important point of analysis in answering these questions does not require looking to contemporary or historical

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[16] See Jurgen Habermas, *Three Normative Models of Democracy*, *in* THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY, 240, 249 (Ciaran Cronin & Pablo De Greiff eds., Ciaran Cronin trans., 1998) [hereinafter Habermas, *Democracy*].

[17] For the purposes of this article, I take the state to be the relevant unit of analysis due to the largely Member State centric structure of the European Union.

[18] Ernest Renan, *What is a Nation?*, *in* NATION AND NARRATION, 8, 18 (Homi K. Bhabha ed., Martin Thom trans., 1990).

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] See *id*.

embodiments of religion or other comprehensive doctrines, but rather focuses on the constituent aspects that make up those forms.[23] Based on this substance-over-form emphasis, the essential element underlying European comprehensive doctrines is the determination that life itself is untouchable and sacred.[24] Although the particular comprehensive doctrines arising from this baseline moral can and do differ greatly[25], it is nonetheless apparent that, when reduced to their most basic attributes, the beliefs contained within such doctrines do in fact espouse these sacredness-of-life values.[26] Thus, so long as this basic moral consciousness is utilized by a large aggregate of EU citizens, the benefits of the unifying moral commonality arising from the largely individualistic contemporary comprehensive doctrines can be utilized to further social and economic solidarity and integration within the Union.[27]

Even with the significant utility of the common morality underlying European comprehensive doctrines, a theoretical framework must be identified or developed that will allow the substantive and procedural benefits of this morality to be utilized in a solidarity and democracy increasing manner. Importantly, such a framework must also provide an avenue through which European citizens whose comprehensive doctrines are based on the highly individualistic sacredness-of-life morality are able to draw from those beliefs within the public political sphere. Perhaps because of an unwillingness or inability to use this common morality successfully, European politicians have historically been wary of taking a stand in one direction or another on the treaty status of religion. The formulations of religious ideas within the treaties, therefore, are generally interpreted to embody a compromise solution aimed at satisfying supporters of a strict separationism between the Union and religion as well as those favoring the invocation of specific religious values.[28] Such an approach does little either to employ the possible

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[23] Timothy Brennan, *The National Longing for Form*, *in* NATION AND NARRATION, 44, 51 (Homi K. Bhabha ed., Martin Thom trans., 1990) (quoting Regis Debray, *Marxism and the National Question*, 105 NEW LEFT REVIEW 1, 26 (1977)).

[24] *Id*.

[25] For example, Catholicism and Orthodox Judaism, among others, hold the fundamental belief that abortion cannot be allowed because it is the unjustifiable taking of life. On the other hand, a secularist might believe that the acceptability of abortion cannot be prescribed by another; rather it is a decision that is based on the fundamental right of personal liberty. Although each viewpoint is largely variant from the other, when reduced to their respective essential elements both perspectives place a fundamental value of the sacredness of human life. It is the explication of such a moral that varies between European comprehensive doctrines, not the concept of the basic moral itself.

[26] See Brennan, *supra,* note 23.

[27] See Brennan, *supra,* note 23; Renan, *supra*, note 18; see also Habermas, *Democracy*, *supra*, note 16.

[28] The Preambles to the Treaties of Amsterdam and Nice, as amended by the agreements reached in Lisbon, specify that the EU draws "…inspiration from the cultural, religious, and humanist inheritance

integrative benefits associated with the sacredness-of-life morality or to draw that morality from the private to public sphere. On the other hand, however, the treaties' use of extremely general language does nothing to establish a separation that prevents religion from being utilized – either in specific or general form – within Union law.[29]

Due to their vagueness, the treaties' historical least common denominator approach[30] to the use of religion, irreligion, and culture as the agreed-upon foundations for the basic fundamental rights afforded to all Europeans provides little utility in guiding the Union's evolution.[31] By providing that the European definition of basic rights is, at the same time, based upon widely divergent concepts of religion, secularism, and nationalism, the Preambles provide wide latitude for the European Court of Justice ("ECJ" or "Court") to interpret human rights protection.[32] In other words, by explicitly providing that the Union is based simultaneously on concepts that are diametrically opposed to one another – religion, nonreligion, and concepts of cultural inheritance – the treaty is effectively ceding to the ECJ extensive power to strike down or uphold laws based on judicial interpretations of the rights that constitute the religious, irreligious, and cultural inheritance of Europe.[33] The lack of legislative clarity, therefore, means that the nondemocratic Court seems likely to make unilateral determinations of the rights that constitute the common inheritances of Europe.[34] Accordingly, complete

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of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law. Lisbon Treaty at 10; Srdjan Cvijic & Lorenzo Zucca, *Does the European Constitution Need Christian Values?*, 24 OXFORD JOURNAL OF LEGAL STUDIES (2004).

[29] See Cvijic & Zucca, *id.*, 739-40.

[30] The least common denominator conception is broadly analogous to Rawls' definition of *modus vivendi*. Under this conception, a formative document such as a treaty is merely an agreement to maintain civil peace. Based on this implicit accord, issues of religion are not discussed within the political realm to avoid arousing sectarian hostility. Such an approach serves to quiet divisiveness and encourage a superficial social stability among adherents to different religious beliefs. It does not, however, resolve the underlying conflicts between different religious, cultural, social, national, or ethnic groups. See, Rawls, *supra*, note 15, 149-50.

[31] See, *e.g.*, WEILER, *supra*, note 1, 105-06, 108-12; Treaty Establishing a Constitution for Europe, 16 December 2004, 2004 O.J. (C 310) *passim* [hereinafter European Constitution] (received approval from the European institutions in 2004, but has not entered into effect due to failed ratifications in France and the Netherlands and abandonment of the ratification effort in the Czech Republic, Denmark, Ireland, Poland, Portugal, Sweden, and the United Kingdom).

[32] See Lisbon Treaty, *supra*, note 10, *passim*; TEU *passim*.

[33] See MÜLLER, *supra* note 10, 94.

[34] See *id*.

deference to the Court's discretion in this area must be avoided and legislatively formulated definitions of fundamental rights should instead be utilized.

II. Joseph Weiler's Christian Europe

Among the proposed approaches to this legislative inclusion of religion and the associated unifying commonality of its basic morals, few have drawn more attention than the model advocated by Joseph Weiler. Instead of attempting to utilize a method whereby the multiplicity of European comprehensive doctrines are able collectively to define the nature and use of religion within fundamental human rights, Weiler argues that explicit references to Christianity and Christian values should be included within the Preamble to any European treaty or constitution.[35] Because the treaty language builds a wall between the European government and religion – including Christianity – generally, he argues that there is a need for contextualization of any universal values to be associated with such a document.[36] According to Weiler, Christianity simply cannot be eliminated from the historical foundations and the present identity of Europeans.[37] Moreover, he assumes the validity of the communitarian perspective, which "…requires utilization of historical memory and a common culture for the construction of an ethical community."[38] Thus, the dearth of commonality among Europeans with regard to shared national history, cultural norms, or even common language means that the only remaining source of the necessary European community required for greater integration is the institution of Christianity.[39]

Although Weiler's analysis is based on an interpretation of Christianity that focuses more on the cultural and historical aspects of the Christian church than on its particular theological beliefs, any mention of Christianity within the Treaty of Lisbon, or any other European Treaty, cannot be approved. To include such a reference, even if ostensibly based on a "theology-lite" definition of Christianity, will cause rapid erosion of the legitimacy constructed by the EU over the past fifty years. By explicitly endorsing one religious viewpoint over the multiplicity of other comprehensive doctrines within the Union, the historical divisiveness associated

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[35] See, Cvijic & Zucca, *supra,* note 28, 740-42.

[36] *Id*., 741.

[37] *Id*., 741-42 (paraphrasing Weiler's statement in *Un'Europa Cristiana*).

[38] The communitarian position is premised on the idea that the document being created is a constitution. This is not the case here, but the distinction is de minimis for reasons discussed in Part IV below. *Id*., 739, 742.

[39] *Id*., 740-43.

with these fundamental beliefs will be emphasized. Even though Weiler advocates a legislative process through which Christianity would be included, the fact that the outcome of such a process is already predetermined eliminates the possibility of utilizing the unifying commonality present within religion.[40] Since citizens will not actually have a voice in determining the inclusion of religion within the EU, its insertion will broaden rather than narrow the democratic deficit.

Additionally, Weiler argues that merely including Christian concepts in a formative document such as a constitution or, by extension, a treaty will not give Christian religious values an advantageous position over opposing nonreligious viewpoints.[41] This contention, however, cannot stand. By placing a Christian gloss over all rights granted to European citizens, the ECJ will be permitted to evaluate the substance of these claims against a Christian backdrop in order to determine their meaning. In deciding whether citizens have a fundamental right to abortion[42], for instance, the Court would likely feel obligated to analyze the "rights of the human person" – as granted in the Treaty of Lisbon – against a Christian conception that all life is sanctified and cannot be taken.[43] Even in the face of a compelling argument in favor of abortion that construes that same right in terms of individual liberty and personal autonomy, the Court could still effectively be required to view the Christian ethical argument as controlling in its interpretation.[44] Although certain measures could be enacted to avoid such religion-based jurisprudence – for instance, a provision in the Preamble that prevents the ECJ from referring to religion when interpreting the treaty – such steps would ultimately only restrict the Court's use of explicitly religious language and would therefore be ineffectual as a real restraint on the role of religion within EU legal decisions.

While Weiler's approach is non-workable within the European context, his overall determination that the meaningless and deferent language used in the proposed Preamble should be rejected is completely on target. This begs the question,

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[40] But see *id.*, 740-42, 743 (paraphrasing Weiler's statement in *Un'Europa Cristiana*).

[41] *Id.*, 739, 744.

[42] Although a case addressing abortion – or other similar issues – initially seems likely to be heard within the European Court of Human Rights in Strasbourg, the ECJ has in fact already applied European Community law to the issue of a woman's right to abortion services. *Society for the Protection of Unborn Children (SPUC) v. Grogan*, 3 C.M.L.R. 849 (1991); Anne M. Hilbert, *The Irish Abortion Debate: Substantive Rights and Affecting Commerce Jurisprudential Models*, 26 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1117, 1143-47 (1994). In *Grogan*, the ECJ held abortion to be a protected economic right by defining it as a service under Article 60 of the EEC Treaty, thus bringing such cases within the Court's jurisdiction. *SPUC v. Grogan*, 3 C.M.L.R. at 849; see Hilbert, *supra*, at 1143-47.

[43] Cvijic & Zucca, *supra,* note 28, 739, 744.

[44] See, generally, *id.*

however, of what, if anything, should take its place? Since the unifying moral commonality associated with religion still presents an opportunity for increased solidarity, democracy, and legitimacy within the EU, developing an approach through which these positive forces can be implemented in Union law is extremely important.[45] Given the fundamental nature of human rights to both religious and secular frameworks, the best manner in which to utilize these unifying morals is through the process of legislatively defining a new canon of European human rights in a procedurally and substantively beneficial manner.

C. European Human Rights

Although religion's core moral ideals have strong unifying power, it is essential that they become embodied in an EU Treaty through the utilization of a popular and democratically agreed-upon explication of these morals. Only through such a framework can their true unifying power be realized so as to ensure greater social solidarity and further integration for the Union.[46] On the other hand, the inherent divisiveness present among various religious sects – arising from cultural, historical, and national variation on the core sacredness-of-life morality – prescribes caution in attempting to define and implement any common morality as the basis for including religious ideas in the EU. Additionally, the process of defining such ideals needs to be couched in sufficiently non-religious terms so that secular, atheist, and agnostic Europeans are also included within the process.

How, then, should these potentially socially unifying and integrative (as well as potentially divisive) religious moral ideas be brought into the laws of the Union without excluding the irreligious from the process or causing offense to religious groups, many of whom have long been at odds with one another for historical, political, or cultural reasons? Any approach that will satisfy these requirements appears initially to be prohibitively complex. When analyzed against a backdrop of EU history as a whole, however, it becomes apparent that the overarching emphasis on human rights – which focuses on the preservation of rights for the European individual – as a centerpiece of EU integration in recent years provides a suitable means for the implementation of this process. In order to elucidate the reasoning for this determination, a brief recounting of the history of human rights within the EU and its predecessors is necessary.

The first substantial codification of human rights within Europe occurred in 1948, with the approval of the Universal Declaration of Human Rights ("UDHR") by the

[45] See, generally, RAWLS, *supra,* note 15; WEILER, *supra,* note 1.

[46] See Habermas, *Democracy*, *supra,* note 16, 249.

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United Nations.[47] At that time, the predecessor to the current EU – the European Coal and Steel Community – was an almost exclusively economic alliance that declined to sign the UDHR.[48] Partially reflecting the attenuated relationship between the economic aims of the Coal and Steel Community and a desire to nonetheless ensure uniform protection of fundamental rights, the Council of Europe adopted the European Charter of Human Rights ("ECHR").[49] Importantly, however, this charter was developed outside of the Community framework and therefore did not have legally binding ties or, indeed, any relevance to the workings of the Community institutions.[50] The European Community's Treaty of Rome, signed in 1957, declined to adopt any provisions from either the UDHR or ECHR and contained no provisions addressing human rights.[51]

This largely deferent approach to fundamental rights within the EU continued for more than twenty years, until the pivotal ECJ decision in *Stauder v. City of Ulm, Sozialamt*.[52] Although the Community had previously been unwilling to engage in active definition or explication of human rights due to its economic nature, *Stauder* presented a situation in which the German fundamental right to dignity directly conflicted with a Community economic program.[53] The ECJ, in the interests of protecting Community economic prerogatives amid varying Member State constitutional human rights guarantees, was finally forced to act. In its opinion, the Court for the first time recognized that general principles of Community law – rather than the treaty – contained protections for fundamental human rights.[54] This was the first time that the ECJ acknowledged a role for fundamental rights within

[47] Universal Declaration of Human Rights, G.A. Res. 217A, *passim*, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (12 December 1948) [hereinafter Declaration of Rights].

[48] *Id*.

[49] The ECHR set out, for the first time, a solely European supranational system for the protection of human rights and, to that end, simultaneously created the European Court of Human Rights in Strasbourg. Eur. Consult. Ass., *Convention for the Protection of Human Rights and Fundamental Freedoms* 213 U.N.T.S. 221, E.T.S. 5 (1950).

[50] The ECHR was created by the Council of Europe, which, as a non-Community institution, could not bind the ECSC. *Id*.

[51] EEC Treaty at 11, see, *supra,* note 9.

[52] Case 29/69, 1969 ECR 419.

[53] *Id*.

[54] *Id*.

Community law, a fact previously denied by the Court because of the Community's economic nature.[55]

After *Stauder*, a number of subsequent ECJ and national court decisions addressed the rapidly expanding notion of human rights with the European Community.[56] These cases largely attempted to balance the economic purpose of the Community against the traditional and varying levels of fundamental rights protection within the Member States. Although the nonjudicial branches sporadically responded with legislative pronouncements, such moves were largely reactive to the prior judicial human rights activism.[57] Even the relatively novel inclusion of specific fundamental rights within 1999's Treaty of Amsterdam merely codified prior Court decisions.[58] Finally, after more than thirty years of deference to the ECJ with regard to fundamental human rights, the nonjudicial branches adopted the European Charter of Fundamental Rights in 2001.[59] Despite the apparent democratic progress contained in adopting the Charter, many of the included rights are so broad that the ECJ effectively will still be granted substantial interpretive power to construe the definitions in almost any manner it chooses without significant oversight by the democratic branches.[60]

As is readily apparent from this recitation, almost all inclusions of human rights within European law have been initiated by the ECJ and only later, if at all, been addressed by the democratic institutions of the EU. By rubberstamping the prior decisions of the Court and adopting the largely vague Charter of Fundamental Rights, the nonjudicial branches appear to be seeking the appearance of proactivity with regard to human rights in order to shrink the democratic deficit that still grips

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[55] Stauder, 1969 ECR 419; see, *e.g.,* Case 26/62, *van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 ECR 1; Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica (ENEL)*, 1964 ECR I-585; MÜLLER, *supra*, note 10, 94-95.

[56] See, *e.g.*, Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [Solange I]*, 1970 ECR 1125; Case 4/73, *Nold v. Commission*, 1974 ECR 491l; *Bundesverfassungsgericht [BVerfG]* [Federal Constitutional Court] 22 October 22 1986, 73 *Entscheidungen des Bundesverfassungsgericht [BVerfGE]*, 339 (F.R.G.); Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979 ECR 3727.

[57] See, *e.g.,* TEU *passim*; Joint Declaration on Fundamental Rights, 27 April 1997, 1997 O.J. (C 103/1) *passim* [hereinafter "Joint Declaration"].

[58] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, 1997 O.J. (C 340) 1, 58-69, 69-73.

[59] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1 (approved in the Treaty of Lisbon but still requires ratification by the Member States to be effective) [hereinafter EU Charter]; Lisbon Treaty *passim*.

[60] See EU Charter at 1; Lisbon Treaty *passim*.

the Union. Failure to effectively utilize the social solidarity-increasing power available through the democratic process, however, has limited the EU's ability to further integration through defining European human rights.[61]

The long-overdue development of a comprehensive definition of fundamental rights by the nonjudicial EU institutions – especially Parliament and the Council – would have multiple positive repercussions. Perhaps most importantly, constructing the definition of human rights with reference to the morality common to European religions and other comprehensive doctrines will ensure utilization of the substantial unifying power inherently present within those doctrines. This is especially true because the substantive core of human rights is concerned with addressing and protecting the sacredness of Europeans simply based on their humanity, which is complementary to the common sacredness-of-life morality underlying European religious and secular comprehensive doctrines. Additionally, structuring the process itself in a democratic manner will also generate new levels of social solidarity among the nationally-divided Europeans, thus providing the Union with an independent source of secular legitimation.[62] Therefore, given the fundamental nature of human rights to both religious and secular frameworks, the best manner in which to utilize these unifying morals is through the process of legislatively defining a new canon of European human rights in a procedurally and substantively beneficial manner.

D. The Modified Public Reason Model

Having laid the historical foundation for human rights within the Union, it is now necessary to return to the problem of how inclusion of the unifying sacredness-of-life morality within the human rights law of the EU can most effectively be achieved. For the reasons detailed above, continuing to allow the ECJ its nearly unfettered prerogative to define and implement an explicit canon of European fundamental rights will be costly and serve to further stoke the deficits of democracy, solidarity, and legitimacy occurring within the Union. In order to combat this problem, a new paradigm is needed in the area of basic human rights: one that utilizes the sacredness-of-life morality common to comprehensive doctrines, allows that largely individualistic morality to be drawn forth from the

[61] See Jurgen Habermas, *Does Europe Need a Constitution? Response to Dieter Grimm, in* THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY, 157, 159 (Ciaran Cronin & Pablo De Greiff eds., Ciaran Cronin trans., 1998) (hereinafter Habermas, *Constitution)*; Jurgen Habermas, *The European Nation-State: On the Past and Future of Sovereignty and Citizenship, in* THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 112 (Ciaran Cronin & Pablo De Greiff eds., Ciaran Cronin trans., 1998)] (hereinafter Habermas, *Sovereignty and Citizenship)*.

[62] See Habermas, *Constitution*, *id.*, 159; Habermas, *Sovereignty and Citizenship*, *id.*, 112.

private to public sphere, and avoids the explicit invocations of religious concepts and language that doomed Weiler's Christian-centric model.

The process for defining fundamental rights within a constitutional context has been explored in a variety of manners by a number of scholars, including German Jurgen Habermas and American John Rawls.[63] Habermas and Rawls both loosely base their approaches on a form of dialectic.[64] Under such an umbrella, defining these basic rights takes place through a process in which individuals or groups of various, and often conflicting, private ideologies gather publicly to debate the merits of their particular viewpoints.[65] In classical philosophy, a dialectic is a theoretical device that attempts to resolve disagreements between individuals by means of rational discussion.[66] Through an exchange of arguments and counterarguments, the goal of the dialectic is to develop a synthesis between the previously opposing assertions.[67] It is the inclusive, logical, and ordered process of these interactions, during which a higher agreed-upon approach to human rights is reached that will help to ensure legitimacy, solidarity, and increased democracy within the Union.[68] Beyond this generalized dialectic commonality, however, Habermas and Rawls' respective approaches largely vary from one another.

Habermas perceives Europe as a continent of individual nation-states, each with a specific and disparate interpretation of every possible political, religious, and social concept.[69] In Belgium, for instance, religion has a political status that is much different from the rights accorded to it in France, which is still different from the

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[63] Although the European constitutional project died with 2005's failed ratification effort, the respective dialectical approaches proposed by Habermas and Rawls nonetheless retain significant utility as guidance for the current endeavor. More specifically, many of the same aims sought by a European constitution – including increased solidarity, legitimacy, and democracy, as well as supremacy for the European hierarchy within a number of areas such as human rights – are similarly being pursued through treaty-based increases in integration. See MÜLLER, *supra,* note 10, at 96-97.

[64] See, Rawls, *supra,* note 15, 135-36, 143, 144-46; Habermas, *Constitution*, *supra,* note 61, 159-61, *passim*.

[65] RAWLS, *supra,* note 15, 132-33, 136-37, 149-52, 153-54.

[66] F.H. VAN EEMEREN ET AL., ANYONE WHO HAS A VIEW: THEORETICAL CONTRIBUTIONS TO THE STUDY OF ARGUMENTATION 92 (2003); R.C. PINTO, ARGUMENT, INFERENCE AND DIALECTIC: COLLECTED PAPERS ON INFORMAL LOGIC 138-39 (2001).

[67] A.J. AYER & JANE O'GRADY, A DICTIONARY OF PHILOSOPHICAL QUOTATIONS 484 (1992); JOHN M.E. MCTAGGART, A COMMENTARY ON HEGEL'S LOGIC 11 (1964).

[68] See, Rawls, *supra,* note 15, 132-33, 136-37, 149-52, 153-54.

[69] Jurgen Habermas, *On the Relation Between Nation, the Rule of Law, and Democracy, in* THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY, 137-39 (Ciaran Cronin & Pablo De Greiff eds., Ciaran Cronin trans., 1998) [hereinafter Habermas, *Nation*].

Italian relations between church and state.[70] In Habermas' estimation, nationalism, as a driving political force within the Member States, similarly varies from nation to nation.[71] Within each particular country, these forces interact in a manner that creates unique political and social cultures different from any other state. The key questions for Habermas, then, are (1) is it possible to accommodate these widely divergent ideas within a supranational body such as the Union and, if so, (2) how can this process of integration be accomplished in a legitimate, public, and solidarity-creating manner?[72]

With regard to the first question, Habermas implicitly argues that it is possible to effect such integration between the historically and culturally different nations, but that mere accommodation is not the approach best suited to such an endeavor.[73] Trying to construct an effective international union while allowing each State to keep inviolate their individual political and social practices would be an exercise in futility.[74] Proceeding in this manner will result in an EU that is ineffectual, as it will be forced to adopt legislation inherently subordinated to individual national interests. Due to the large degree of variance between the laws of any Member State and those of any other, the Union would be forced to adopt legislation limited to a least common denominator approach.[75] In other words, the only provisions or secondary laws that the Union could implement would be forced to be expansively drafted so that each individual Member State's sovereign prerogatives are not violated.[76]

Although this approach initially seems wholly ineffectual at achieving any type of integration beyond very basic levels, it is in fact largely descriptive of the legislation adopted by the EU throughout most of its history. Especially in the early years, Member States were wary of ceding sovereignty to the European government and, as a result, only granted the EU powers in the limited areas necessary for the utilization of benefits related to the economic union.[77] For example, the EU is competent to regulate within most areas directly and incidentally related to the

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[70] STATE AND CHURCH IN THE EUROPEAN UNION, *supra*, note 4, *passim*.

[71] See Habermas, *Nation*, *supra,* note 69, 137-39.

[72] See Habermas, *Constitution*, *supra,* note 61, 159-61; see *generally* Habermas, *Democracy*, *supra,* note 16.

[73] See Habermas, *Constitution*, *supra,* note 61, 159-61.

[74] See Habermas, *Nation*, *supra,* note 69, 132-33, 137-39; Habermas, *Constitution*, *supra,* note 61, 159-61.

[75] See Habermas, *Nation*, *supra,* note 69, 153; WEILER, *supra,* note 1, 106-13.

[76] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39, 153.

[77] See, *e.g.,* EEC Treaty at 11; ECSC Treaty at 140, *supra*, note 9.

European economy – such as its ability to ensure the free movement of workers, goods, and services – but lacks authority in a variety of social and cultural areas, including religion and capital punishment.[78] Although the limited powers were broadened over the years, the impetus for such expansion often did not come from the States. Rather, the general and relatively loose language employed by the EU legislators in the adoption of bills and treaty provisions was seized upon by the Court, which used its politically isolated perch to initiate sweeping changes to increase integration within the Union.[79] In many cases, the Court even exceeded its arguably treaty-limited power of review to construe various vague provisions – both within the applicable treaty and with regard to secondary legislation – in a manner that stripped national sovereignty and forced cessions to the EU hierarchy.[80]

There are a number of reasons that the Court was able to effect change in this extremely activist manner, including the fact that many of the expansive moves were made through cases that were relatively mundane and technical in nature.[81] Foremost among the reasons, however, was the Court's political insulation. Because the judges were only indirectly accountable to Member States and their citizens, they were able to bring about these changes in a manner impossible for the politicians in the democratic branches.[82] Among the extensive changes the Court was able to produce was the definition and inclusion of human rights within the Union.[83] As discussed above, the Court on more than one occasion read these fundamental rights into the applicable treaty despite the fact that the EU was not a signatory to any international human rights conventions, nor were there any explicitly defined human rights within the treaties themselves.[84] When the legislative institutions finally reacted by crafting an inclusion of human rights within primary law, the language used was always so broad and esoteric that the

[78] In *Van Duyn*, the European Court of Justice held that although the European Community is able to regulate when there is a conflict between European public order and the public order of Member States, the establishment of policy for matters of freedom of religion will nonetheless be left to the Member States. *Van Duyn*, 1974 ECR at 1337; del Valle, *supra* ,note 11, at 1041. The Court has similarly declined to intervene in the recent controversy regarding France's banning of religious symbols, including Muslim headscarves, preferring instead to defer to the national conception of religion.

[79] See, *e.g.*, *Solange I*, 1125; *Nold*, 1974 ECR 491; BVerfG at 339; MÜLLER, *supra,* note 10, 94.

[80] See, *e.g.*, *Solange I*, 1125; *Nold*, 1974 ECR 491; BVerfG at 339. MÜLLER, *supra,* note 10, 95.

[81] See, *e.g., Solange I* , 1125; *Nold*, 1974 ECR 491; BVerfG at 339.

[82] See MÜLLER, *supra,* note 10, 96-97; see, *e.g., Solange I*, 1125; *Nold*, 1974 ECR 491; BVerfG at 339.

[83] See, *e.g., Solange I*, 1125; *Nold*, 1974 ECR 491; BVerfG at 339.

[84] See *Solange I*, 1125; *Nold*, 1974 ECR 491; BVerfG at 339.

Court was again put in the position of being the primary agent for human rights progress within the EU.[85]

It is clear, therefore, that widely divergent comprehensive doctrines can be accommodated within the supranational Union. Habermas, as a next step, would then inquire whether this integration can be accomplished in a legitimate, public, and solidarity-creating manner.[86] The historical utilization of the nondemocratic ECJ as the primary impetus for change within the Union was at the same time both an effective and divisive force.[87] Although certainly successful in shifting the EU to a more integrated status, the lack of democracy present in the Court's moves prevents an increase in the level of European solidarity.[88] This decreasing solidarity causes the overall level of citizen involvement and support for the EU also to drop since individuals likely feel fewer obligations to their fellow Europeans and, accordingly, have little incentive to participate in the European system.

Habermas, in response to this democratic deficit and lack of both solidarity and legitimacy, advocates utilizing a different model for implementing change on the European level.[89] Reduced to its essential elements, his paradigmatic approach uses an intersubjective discourse model to democratically determine European definitions of basic constitutional norms such as human rights.[90] Through this process, citizens come together to publicly debate, argue, and ultimately agree on a definitive European conception of whatever topic is being discussed.[91] The primary precondition underlying such discursive interactions is that each participant must come to the table as a European citizen who has divorced herself from preexisting nationalism, religious beliefs, historical ideas, or any other form of cultural homogeneity.[92] Although scholars such as Ernst-Wolfgang Bockenforde argue that religion and shared history provide the source for the collective identity

[85] See Lisbon Treaty *passim*; Joint Declaration *passim*.

[86] Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, at 137-39, 153; see generally Habermas, *Democracy*, *supra,* note 16.

[87] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, Nation, *supra,* note 69, 137-39.

[88] Habermas, *Democracy*, *supra,* note 16, 240, 249.

[89] Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39.

[90] Although here constitutional formation is not being analyzed, formulating a treaty-based concept of human rights will have the same positive solidarity-building and integrative effects. Habermas, *Constitution*, *supra* note 61, at 159-61; Habermas, *Nation*, *supra,* note 69, at 137-39, 153.

[91] Habermas, *Constitution*, *supra* note 61, 159-61; Habermas, Nation, *supra* note 69, 137-39, 153.

[92] See Habermas, *Nation*, *supra* note 69, 137-39, 153.

prerequisite to the establishment of a constitutional state,[93] in fact the independence of the individual from collective histories is essential to the functioning of this approach primarily because the separation ensures that the divisiveness inherent in the varying historical backgrounds is either mitigated or completely eliminated.[94] By neutralizing such impact and instead promoting the sovereignty and commonalities of the individual, consensus whereby basic constitutional human rights are defined in an inclusive and distinctly European manner can be achieved.[95]

As a prerequisite to this discourse process, however, every European must be granted a European citizenship that ensures a basic level of human rights protection.[96] In addition to furthering the concept that all forms of cultural homogeneity must be isolated from this process, the grant of such protection guarantees that each participant in the democratic discourse will be on a level playing field with each other participant.[97] Providing basic and preexisting guarantees of equality and the freedoms of expression, speech, and self-determination, among others, ensures that all citizens will be able fully to represent their interests throughout the democratic process.[98] It also prevents the commandeering of the minority by a majority faction based on external power differentials rather than the strength of ideas.[99]

The ultimate strengths of Habermas' model are procedural in nature. By requiring that human rights be defined in a democratic manner, many of the legitimacy problems arising from the ECJ-centered history of human rights activism within the EU are eliminated.[100] In particular, because judicial decision-making is bound to democratically determined law, the rationality of human rights adjudication is both sustained and limited by the legitimacy of that law.[101] Since the democratic

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[93] *Id*., 132-33 (paraphrasing ERNST-WOLFGANG BOCKENFORDE, DIE NATION (1995)).

[94] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39, 153.

[95] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39.

[96] See Habermas, *Nation*, *supra,* note 69, 147-48.

[97] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 153.

[98] See Habermas, *Nation*, *supra,* note 69, 147-48; Habermas, *Constitution*, *supra,* note 61, 159.

[99] See Habermas, *Nation*, *supra,* note 69, 137-39, 147-48.

[100] See Habermas, *Constitution*, *supra,* note 61, 159-61; see generally Habermas, *Democracy*, *supra,* note 16; MÜLLER, *supra,* note 10.

[101] JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 222-23, 238 (William Rehg trans., 1996).

discourse process itself creates inherently legitimate law, judicial interpretation of such law is permitted only to the extent that it fits within the procedural framework created by the discourse process.[102] In other words, although the Court will still have interpretive authority, an explicit definition of human rights within a governing treaty will limit this expansive power and subject it to the boundaries imposed legislatively by the European citizens.[103] As an additional procedural benefit, allowing citizens to define for themselves the nature of European rights permits residents of the formerly wholly sovereign member states to feel greater integration and solidarity with one another than would have previously been possible.[104] In total, therefore, the model's progressive extension of a distinct European citizenship independent of national citizenships to the whole population coupled with the increased democracy present through public discursive exchange provides both secular legitimation and a new level of abstract legally mediated social solidarity essential to the future integration of the EU.[105]

Habermas, however, largely ignores the substantive benefits of including religion within a treaty-based definition of human rights in favor of the procedural benefits granted by a purely intersubjective discourse.[106] Moreover, the forced separation between the public individual and his private religious, national, and other preexisting ideas may dissuade many citizens from becoming involved in the political process.[107] Even if Europeans are adequately represented within the necessary discourse process, excluding the largely divisionary national, religious, and cultural norms does nothing to resolve their underlying conflicts. By placing these problems aside, it is true that an agreeable definition of human rights may be formed in a democratic manner; however, when the need arises to modify or legislatively interpret the scope of those rights (which will always be necessary despite the high level of explicitness desired), it is likely that the same animosities and conflicts will rear their heads and cause difficulties within the amendment process. Exclusion of these normative ideals also prevents utilization of the unifying commonality of basic religious norms. As a result, and while keeping an eye towards preserving the procedural benefits associated with Habermas' intersubjective discourse model, the necessity of an approach that also utilizes the

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[102] See *id.*

[103] See *id.*

[104] See Habermas, *Constitution*, *supra,* note 61, 159-61.

[105] Habermas, *Nation*, *supra,* note 69, 147-48; see Habermas, *Democracy*, *supra* note 16, at 240, 249; MÜLLER, *supra,* note 10, 98.

[106] See Habermas, *Constitution*, *supra,* note 61, 159-61.

[107] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 132-33 (paraphrasing BOCKENFORDE, DIE NATION).

substantive benefits associated with religion, nationalism, and other comprehensive doctrines must be included in the formation of a treaty-based definition of human rights.[108]

The best approach for ensuring the substantive benefits associated with these underlying cultural norms while at the same time maintaining Habermas' procedural benefits is through the implementation of a modified public reason dialectic to define a European canon of human rights. Utilization of this dialectic will ensure a balancing between the desire for inclusion of some religious embodiment within the public realm, the necessity for the basic human rights guarantees essential to the grant of European citizenship, and the dual liberty protections inherent in the separation of government from explicit religious ideas.[109] The substantive foundation for the novel modified public reason model is found within John Rawls' public reason dialectic. Although the process used within his approach is broadly similar to that endorsed by Habermas, Rawls' explication of public reason differs in several important substantive aspects.[110] When taken together, these differences show that employment of the public reason process to define European human rights is both complementary and essential to the procedure-centered model.[111]

Rawls' approach to the public reason dialectic has several important components, each of which seeks to utilize the basic religious and political morality common to all Europeans in order to come to an acceptable definition of human rights.[112] Perhaps the most obvious requirement of this model is suggested by its very name: *public* reason.[113] Rawls suggests that there are three manners in which this reason is public.[114] First, as the reason of European citizens, it is the reason of the public.[115]

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[108] Brennan, *supra*, note 23, 44, 51; Renan, *supra*, note 18, 18.

[109] See Rawls, *supra*, note 15, 132-33, 136-37, 149-52, 167-68; Habermas, *Constitution*, *supra,* note 61, 159-61.

[110] See Rawls, *supra*, note 15, 134-37, 149-52, 154.

[111] Habermas and Rawls have long argued that there are substantial differences between their theoretical approaches. Nonetheless, the novel modified public reason framework combines the models in a complementary manner that preserves the respective procedural and substantive benefits contained within each approach while avoiding the other sources of perceived incompatibility. See generally Jurgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 JOURNAL OF PHILOSOPHY 109 (1995); John Rawls, *Political Liberalism: Reply To Habermas*, 92 JOURNAL OF PHILOSOPHY 132 (1995).

[112] See Rawls, *supra*, note 15, 149-52, 153-54.

[113] See *id*., 133.

[114] *Id*.

[115] *Id*., 133-34.

The definition of a European citizen, by the same token, is as a "free and equal citizen," a status guaranteed by the treaty-based inclusion of human rights resulting from this process.[116] Despite the inherent circularity of such a definition[117], requiring a baseline protection of equality and certain freedoms, as discussed above, ensures that each citizen is able to come into the public reason discussion on a level field with all other citizens.[118] Public reason is also public because it addresses the subject of the public good concerning questions of fundamental justice.[119] These questions, in turn, are of two kinds: constitutional essentials and matters of basic justice.[120] Although matters of constitutional essentials are not relevant to the present inquiry, the definition of human rights as a method to increase solidarity, democracy, and legitimacy certainly constitutes a matter of basic justice.[121] Third, and most importantly, the contents and nature of this dialectic are expressed through public reasoning by reasonable conceptions of political justice that satisfy the principle of reciprocity.[122] It is this aspect of public reason that is most essential to the proper functioning of the model, as it provides an opening for religion, nationalism, and other preexisting comprehensive doctrines to enter the process and ultimately influence, albeit indirectly, the resulting definition of human rights.[123]

When taken together, these three basic criteria illustrate that public reason arises from a conception of citizenship in a democracy structured by higher law.[124] Although in most situations this embodiment is based on a constitution, a treaty-based governmental structure also fits within Rawls' two-pronged definition of the fundamental political relationship of citizenship.[125] The first prong explains that the citizenship relationship occurs within the basic structure of society, which, in the case of the EU, is a treaty system that is largely equivalent to a constitution.[126]

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[116] See, Rawls, *supra,* note 15, 133; JOHN RAWLS, POLITICAL LIBERALISM 216-17 (1993).

[117] This circularity problem is discussed below in Part V.

[118] See, Rawls, *supra,* note 15, 133-35.

[119] See, Rawls, *supra,* note 15, 133; Rawls, *supra* note 116, 225-26, 227-29.

[120] See, Rawls, *supra,* note 15, 133; Rawls, *supra,* note 116, 224-26, 227-29.

[121] See, Rawls, *supra,* note 15, 133; Rawls, *supra,* note 116, 227-29.

[122] See, Rawls, *supra,* note 116, 227-29.

[123] See, Rawls, *supra,* note 15, 133-34, 149-52.

[124] See *id.*, 133-34, 149-52.

[125] See *id.*, 133, 149-52; see generally MÜLLER, *supra,* note 10.

[126] RAWLS, *supra*, note 15, 133-34; MÜLLER, *supra*, note 10, 96. For a general application of Rawls' theoretical model to the EU, see Pavlos Eleftheriadis, *The Idea of a European Constitution*, 27 OXFORD

Second, the conception is formed from the relationships of free and equal citizens who collectively exercise ultimate political power.[127] Since the treaty-based system provides this basic political citizenship relationship, the question arises as to how, when matters of basic justice such as human rights are at stake, European citizens can be bound to its definitions despite the likelihood of irreconcilable conflicts between the democratic definitions and those arising from preexisting comprehensive doctrines such as religion and nationalism.[128] For example, a devout Catholic, who is diametrically opposed to abortion based on a religiously defined fundamental right to life, could espouse her viewpoint within the public sphere and, nonetheless, find that the majority instead wishes to allow abortion based on a secularist fundamental right to personal liberty. Since religious beliefs are often unavoidably essential to an individual's self-conception, it appears that a conflict of this sort could result in a public reason stalemate.[129] Does this mean that all is lost as a result of Rawls' willingness to include religion within the public reason process?

Habermas' intersubjective discourse theory would answer affirmatively.[130] According to Harbermas, the fact that pre-existing normative ideas were allowed to enter into the fundamental rights dialectic dooms the model because the ideas espoused by these doctrines – whether religious or irreligious – are simply unable to be compromised.[131] Rawls, however, draws a nuanced distinction that effectively allows the initial involvement of religion, nationalism, or any other comprehensive doctrine in the public reason process, but then strictly limits its direct utility within the actual definition of particular rights.[132] That distinction essentially takes the form of a requirement that all who seek to participate in the formation of human rights must meet the definition of a reasonable citizen.[133] Citizens are considered to be reasonable when they are ready to propose principals and standards as fair terms of cooperation and to abide by them willingly, given a

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JOURNAL OF LEGAL STUDIES 1 (2007); Thomas Nagel, *The Problem of Global Justice*, 33 PHILOSOPHY & PUBLIC AFFAIRS 113 (2005); Pavlos Eleftheriadis, *The European Constitution and Cosmopolitan Ideals*, 7 COLUMBIA JOURNAL OF EUROPEAN LAW 21 (2001); Ian Ward, *International Order, Political Community, and the Search for a European Public Philosophy*, 22 FORDHAM INTERNATIONAL LAW JOURNAL 930 (1999).

[127] RAWLS, *supra*, note 15, 136-37; RAWLS, *supra*, note 116, 224-26.

[128] RAWLS, *supra*, note 15, 136-37.

[129] *Id.*

[130] See Habermas, *Constitution*, *supra* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39.

[131] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39, 53.

[132] RAWLS, *supra,* note 15, 136-37.

[133] *Id.*; RAWLS, *supra,* note 116, 48-54, 224-26.

concomitant assurance of reciprocity from others involved in the public reason process.[134] Those norms they view as reasonable for everyone to accept, and therefore as justifiable to them, are those that comport with the requirement of reciprocity.[135] Reasonableness – along with its associated requirement of reciprocity – is neither solely altruistic nor is it only a concern for self.[136] Reasonable persons are not moved by the general good as such but desire – purely for its own sake – a social world in which they, as free and equal citizens, can cooperate with others on terms all can accept.[137] The definition of reciprocity also closely comports with the requirement of human rights to guarantee the equal status of all free and equal citizens because ideas must be reasonably acceptable to other free and equal citizens, not to dominated or manipulated participants who are under the pressure of an inferior political or social position.[138] The power that underlies the capacity to propose and then to act from fair terms of cooperation for its own sake is the essential solidarity and legitimacy-increasing virtue that arises from the public reason model.[139]

If these requirements of public reason are met by European legislators as well as citizen stakeholders through full participation in the democratic process, the legal enactments that result from the opinion of the majority are legitimate law.[140] It may not be thought to be the *most* reasonable possible approach by each particular citizen-participant, but utilization of the model means that the result is politically binding on them.[141] In other words, political legitimacy and solidarity are achieved as a result of this democratic process only when each free and equal citizen believes that the reasons stated for a particular position are sufficient and might reasonably be accepted by other free and equal citizens.[142] Going back to the example of the anti-abortion Catholic, the basis of her position is unclear. If she were to advocate within the human rights debate solely from a theological position and not on any

[134] RAWLS, *supra,* note 15, 136-37; RAWLS, *supra,* note 116, 48-49, 224-26.

[135] RAWLS, *supra,* note 116, 48-49.

[136] *Id.*, 54.

[137] *Id.*, 50.

[138] See, Rawls, *supra,* note 15, at 133-34, 136-37.

[139] *Id.*, 54.

[140] *Id.*, 137. For Rawls, public reason is an ideal and not a strict precondition to the exercise of democratic rights. Within modified public reason, however, such a requirement is necessary in order to realize the full democraticizing elements. See, *infra.*

[141] *Id.*, 137-38.

[142] See *id.*, 138.

objectively reasonable basis, then her objections would be excluded.[143] If, on the other hand, she advocated the same position based upon the logically supportable idea that each human has a right to life, then she would be able to participate in the process of defining a potential fundamental right to life.[144]

It is through this example that the substantive strength inherent in the public reason model can best be observed. Although at first glance this framework appears to prohibit religion, nationalism, or any other preexisting comprehensive doctrine from forming the basis for a particular human rights definition, it in fact allows any of these comprehensive doctrines to at least to partially justify a particular definition so long as the viewpoint is nonetheless independently and objectively reasonable.[145] As a result, the definition of free and equal citizen varies substantially between Habermas and Rawls. Under Habermas' approach, individuals meet this standard only if they come into the dialectic after abandoning all preexisting notions, beliefs, traditions, history, or culture.[146] Although theoretically laudable as a means to prevent the divisiveness often associated with such ideals, in fact such a rigid requirement does nothing more than turn people away from participation in the discourse. People are generally loathe to abandon their traditional beliefs and ways of life to form something new if that novel formation process requires them unquestionably to disregard their previous comprehensive doctrines. Within the European context, then, greater legitimacy and solidarity are prevented by the very definition of the democratic means proposed to achieve those goals.[147] Under the nuanced public reason definition of a "free and equal citizen," however, individuals are not forced to abandon their comprehensive doctrines.[148] Indeed, they can even use them as starting points in their exploration of defining rights within the new European context.[149] The only

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[143] See *id.,* 133-34, 137-38.

[144] See *id.,* 133-34, 137-38; see generally RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994).

[145] RAWLS, *supra,* note 15, 132-33, 136-37, 149-52, 169. Rawls' initial conception of public reason provided that a citizen could only base his decision on a comprehensive doctrine when he believes that such reliance would strengthen the ideal of public reason. RAWLS, *supra,* note 116, 247, 251; Charles Larmore, *Public Reason*, *in* THE CAMBRIDGE COMPANION TO RAWLS, 385-86 (Samuel Freeman ed., 2003). Subsequently, however, Rawls revised this viewpoint to conclude that citizens may call upon their comprehensive doctrines at any time, so long as the principles of reciprocity and reasonableness are met. Larmore, *supra*, 385-86.

[146] Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39.

[147] See Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39.

[148] RAWLS, *supra*, note 15, 137-38.

[149] *Id.,* 135-38.

requirements associated with being involved in the process are that the ultimate rationale for a particular stance must be objectively reasonable and comport with the principle of reciprocity.[150]

Thus, while maintaining the procedural strengths associated with Habermas' discourse theory, the proposed modified public reason model permits a utilization of the legitimizing and solidarity-increasing substantive benefits of religion and other comprehensive doctrines in the definition of European human rights.[151] The integral aspects of most European religions – and, indeed, many secularist viewpoints – espouse the same sacredness-of-life moral values, almost all of which are independently justifiable. As a result, the universality of these ideas means that their implementation within the process of defining human rights will assist integration and solidarity because of the unifying commonality of this basic morality.[152] At the same time, such inclusion will ensure protection of personal religious liberty in a manner that comports with the benefits of strict separationism since the use of specific religious language within the applicable treaty is avoided.[153]

Importantly, the nature of modified public reason also means that the defining process must occur through the legislative branches of the EU.[154] Although Rawls is willing to allow public reason to be exercised by a number of public officials – including judges – maintenance of Habermas' procedural requirements requires that the original explication of human rights occur solely through the legislature.[155] More specifically, although the Court will still have interpretive authority, an explicit definition of human rights within a governing treaty will limit this expansive power and subject it to legislatively imposed boundaries.[156] The creation and evolution of fundamental human rights through the democratic branches will thus result in those institutions being proactive with regard to human rights, causing shrinkage of the Union's democratic deficit. In turn, this increased democratization will augment solidarity among Europeans. If EU citizens believe that their opinions are being addressed and represented on the European level, then they will be more likely to feel solidarity with other Union citizens and

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[150] *Id.*

[151] See *id.,* 149-51, 152-54.

[152] See *id.,* 133-34, 138, 149-52; see generally Habermas, *Democracy*, *supra,* note 16.

[153] See, Rawls, *supra,* note 15, 167-68.

[154] See *id.,* 135; Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-41.

[155] See, Rawls, *supra,* note 101, 222-23, 238.

[156] See *id.*

approve of increased cessations to the EU. Relegating the ECJ to a judicial review-based role, rather than its traditional activist approach, will further increase the levels of democracy. When both Habermas' and Rawls' approaches are blended together in this manner, it becomes apparent that utilization of modified public reason ensures that both the necessary substantive and procedural benefits of a dialectical definition of human rights are achieved in a manner that increases democracy, solidarity, and integration within the EU.[157]

E. Objections to the Modified Public Reason Framework

Although utilization of the modified public reason model to include basic morality within a European canon of human rights will substantively and procedurally increase solidarity, integration, and democracy within the Union, there are a number of practical implementation problems that arise from the largely theoretical nature of this approach. In particular, circularity inherent in the protection of human rights for free and equal citizens, the impact of politics within this democratic process, and the seeming exclusion of radical or fundamentalist groups from political participation appear to erect substantial bars to the effective implementation of modified public reason within the European context. Upon closer analysis, however, it becomes clear that each of these problems can be addressed in a manner in which either the benefits of the modified public reason model are recognized as outweighing the practical implementation obstacle, or the obstacle itself is seen to be largely similar to issues that arise under any approach to EU governance and, in either case, should not be a dispositive factor preventing utilization of modified public reason.

The first of these problems arises from the theoretical circularity involved in defining human rights through modified public reason. The dialectic utilizes a framework that essentially discards any prior controlling conceptions of human rights in favor of the newly defined approach.[158] Underlying the modified public reason model, as well as both Rawls' and Habermas' approaches, however, is the prerequisite that each participant in the process be granted free and equal citizenship.[159] Requiring a baseline protection of equality and certain freedoms ensures that each citizen is able to come into the public reason discussion on a level

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[157] See, Rawls, *supra,* note 15, 132-33, 136-37, 149-52, 153-54, 155, 168-69, 169, 171-72; Habermas, *Democracy*, *supra* note 16, 240, 249; Habermas, *Nation*, *supra,* note 69, 137-42.

[158] RAWLS, *supra*, note 15, 144-45, 151; Habermas, *Constitution*, *supra*, note 61, 159-61; Habermas, *Nation*, *supra*, note 69, 137-39.

[159] RAWLS, *supra*, note 15, 144-45.

field with all other citizens.[160] The necessary conferment of rights to protect the status of each individual as free and equal citizen while at the same time discarding all preexisting human rights norms, however, presents a practical conflict within the model. In other words, modified public reason necessitates that fundamental human rights be determined not from preexisting norms, but rather solely through the dialectic process, which itself requires a human rights baseline that ensures the freedom and equality of citizens before it can claim the legitimate and solidarity-increasing qualities essential to the dialectic's success.[161]

Part of the reason that this problem arises in a manner not explicitly addressed within either Rawls' or Habermas' models is due to the fact that both were premised upon the drafting of a constitutional conception of human rights rather than the formulation of a treaty-based definition.[162] Within the original public reason and intersubjective discourse theories, all prior notions of human rights did not have to be abandoned; only preexisting *constitutional* definitions could not be utilized.[163] As a result, the largely vague treaty-based conceptions of human rights – when coupled with the baseline individual Member State notions – were seen to provide enough basis to protect the status of free and equal citizens. Although Part IV showed that each approach can be theoretically modified to function within this non-constitutional context, the practical application of the modified public reason model presents an instance in which transferability is unclear.

Despite this initial opaqueness, however, the only appropriate solution is to determine an appropriate source of basic human rights protection that will ensure the free and equal citizenship status of individuals participating in the process of legislatively defining European fundamental rights. Fortunately, the EU has a large corpus of human rights protections that, although neither legislatively formed nor explicitly included within the formative treaties, is nonetheless an essential part of EU law.[164] These ECJ-defined rights provide an independent source of citizenship protection for participants in the modified public reason process. Upon development of the new conceptions arising from the proposed dialectic, the old definitions will be supplanted in a manner that is broadly analogous to the replacement of treaty-based human rights that would have occurred within the

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[160] *Id.*, 135-36.

[161] RAWLS, *supra*, note 15, 135-36; Habermas, *Nation, supra*, note 69, 137-41.

[162] RAWLS, *supra*, note 15, 136, *passim*; Habermas, *Constitution*, *supra*, note 61, *passim*; Habermas, *Nation*, *supra*, note 69, *passim*.

[163] RAWLS, *supra*, note 15, 136; Habermas, *Constitution*, *supra*, note 61, 159-61.

[164] See, *e.g.*, EEC Treaty at 11; Case 26/62, *van Gend en Loos*, 1963 ECR at 1; *Costa*, 1964 ECR I-585; Joint Declaration *passim*; Case 44/79, *Hauer*, 1979 ECR 3727; see also BVerfG at 339.

drafting of a European constitution.[165] Perhaps even more importantly, the replacement of non-democratic judge-made law with the new definitions will further amplify the solidarity and democracy produced by the dialectic.[166] As a result, the apparent circularity issue does not pose a significant practical barrier to the implementation of the modified public reason model.

Another issue that appears, at least initially, to be problematic for modified public reason relates to the reasonableness and reciprocity requirements essential to the model's proper functioning. Since only those citizens who meet the requirements of reasonableness and reciprocity are able to participate in the crafting of European human rights, individuals and groups who are unable or refuse to adapt their positions to these criteria will be excluded from the modified public reason sphere.[167] The definition of basic human rights is so central to legitimacy and solidarity within the Union that automatically excluding certain groups from democratic participation appears to draw into question the viability of the entire process. This is especially so given that modified public reason, as a means for accommodating the substantive benefits of religious and secular morals, presents a mechanism that appears to be wholly untenable by virtue of its exclusion of fundamentalists or devoted nationalists – groups likely to be unwilling to "compromise" their beliefs through reasonableness and reciprocity but who may nevertheless be entitled to a basic democratic right to partake in the process. [168] In addition to the erosion of legitimacy, removing such groups also appears to be damaging to the dialectic process because of its dependence on the inclusion of a variety of viewpoints in order to ultimately come to the most suitable and inclusive definition of human rights.

Despite the apparent detrimental effects associated with exclusion of unreasonable or nonreciprocal individuals or groups, modifying the model to accommodate these parties simply cannot be permitted. Doing so would compromise the essential nature of the dialectic to allow individuals with vastly divergent backgrounds to come to a mutually agreeable – although perhaps not most agreeable – definition of human rights based on independent, logical, and democratic reasoning.[169] By allowing unreasonable religious, political, or social groups to enter into the process, the special utility of modified public reason will be lost and attempting to define human rights will occur through a process that is no different from everyday

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[165] RAWLS, *supra*, note 15, 136, 137-38, 146-47; Habermas, *Constitution*, *supra*, note 61, 159-61.

[166] See, Rawls, *supra,* note 15, 133-34, 137-38.

[167] See *id.,* 36-38.

[168] See *id.,* 136-38, 144-45, 152-53.

[169] See *id.,*133-34.

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legislative actions. Instead of utilizing the solidarity and legitimacy-increasing benefits associated with the model, the national and religious histories – and their associated conflicts, divisiveness, and nonaccomodationism – will again be a part of the political process and prevent employment of the procedural and substantive advantages associated with the modified public reason model.[170] So long as most Europeans are willing to participate within the dialectic, the overall associated legitimacy and solidarity benefits will still be realizable despite the exclusion of unreasonable fringe groups.[171]

The final primary problem inherent within the public reason process is an issue that is always lurking inside theoretical political models: the presence of "politics." In other words, the modified public reason model is predicated on the ability of individuals to come together as free and equal citizens who have abandoned unreasonable preconceived beliefs and ideologies in order to reach a new definition of fundamental rights.[172] In theory, the success of such an endeavor rests simply upon the willingness and ability of individuals to participate in the dialectic. In practical terms, however, it is not so simple. Within the political sphere, there are a variety of influences that substantially impede such individual participation. Perhaps most obvious is the utilization of a representative political system in which individuals are insulated from the ultimate decisions made on their behalf. Additionally, the presence of lobbyists, special interests, and other political action groups serves to decrease substantially the levels of reasonableness and reciprocity present within the Union. As a result, pure functioning of the modified public reason model is, practically speaking, impossible to achieve.

Even though the modified public reason approach to defining European human rights is, in practical terms, imperfect, it is still the best possible avenue to ensure legitimacy, solidarity, and increased democracy within the Union. All theoretical political models will be corrupted to some extent by these "real world" factors and, as a result, the fact that an approach cannot be crafted that is both theoretically and practically perfect is unavoidable. Therefore, the best practice is to define a model that is the most effective possible approach to defining human rights within the European Union and strive to apply it to the greatest extent within the real world political sphere. Based on those criteria, the modified human rights model is the best theoretical basis from which human rights can be defined in a manner that utilizes the procedural and substantive benefits associated with the dialectical

[170] See *id.,* 36-37.

[171] See *id.,* 137-37.

[172] See, Rawls, *supra,* note 15, 136-38, 149-52; Habermas, *Constitution*, *supra,* note 61, 159-61; Habermas, *Nation*, *supra,* note 69, 137-39.

process and the basic morality associated with European comprehensive doctrines such as religion, secularism, and nationalism.