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The human-rights verdict is in: Europe wins

The U.S. Supreme Court has been overtaken as the world's premier arbiter of justice

By Andrew Reding

The U.S. Supreme Court is being upstaged in its traditional role as the world's most powerful and innovative legal body. As highlighted by the European Court of Human Rights' decision that Britain must admit gays into its military, and the European Court of Justice's decision that Germany must allow women to serve in combat roles in its armed forces, Europe is also overtaking the United States on the frontiers of human-rights law.

Just think about it. The *Bundeswehr*, whose symbol remains the iron cross, is being compelled to let women bear arms. The Royal Navy, that bastion of stodgy tradition, will have to admit open homosexuals. There will be no "don't ask, don't tell" on the other side of the Atlantic alliance. All because a couple of transnational courts said so. Bismarck and Churchill would be scandalized.

Yet both Germany and Britain are complying without a murmur.

The European Court of Human Rights now has jurisdiction over 40 countries with a combined population of 800 million, almost three times the 275 million people who are within the jurisdiction of the U.S. Supreme Court. Only two years ago, Eurocitizens gained the same direct access to the court as American citizens have had for two centuries. The European Court of Justice, meanwhile, has jurisdiction over the European Union's 376 million citizens.

Like the Supreme Court, its European counterparts are courts of last resort, to which citizens may turn once they have exhausted all other legal means of redress. That is how Tanja Kreil, a 23-year-old German woman, forced change on the *Bundeswehr*. And how four British gays and lesbians who were discharged from the Royal Air Force and Royal Navy forced change on the British military.

Unlike the Supreme Court, however, the two European courts are transnational. That means they place international human-rights law above domestic constitutional law. Germany, for instance, will now have to amend its constitution to conform to the court ruling. Even the Turks are being stopped cold in their plan to execute Kurdish rebel leader Abdullah Ocalan. Mr. Ocalan's lawyers have appealed to the European Court of Human Rights, and Turkey dares not imperil its chances of joining the European Union.

As transnational courts alter jurisprudence within Europe, they are also changing it worldwide. If the nation-state is no longer sacrosanct in Europe, why should it be anywhere else? That is the mindset that is sweeping across Europe as borders all but disappear.

It was a crusading Spanish judge, Baltasar Garzon, who brought charges against former Chilean dictator Augusto Pinochet for violating the Torture Convention, and it was Britain's supreme court—the Law Lords—who agreed that Gen. Pinochet could be extradited to Spain to stand trial. (The British Home Secretary's tentative decision to return Mr. Pinochet to Chile for health reasons makes no difference from a legal standpoint.) Last month, Judge Garzon issued arrest warrants for 48 members of Argentina's military dictatorship. And, for the first time, a sitting head of state—Yugoslav President Slobodan Milosevic—has been indicted by an international war-crimes tribunal.

Heads of state can no longer rely on sovereign immunity and the sanctity of the nation-state to provide cover for human-rights violations. Nor can hide-bound military establishments shelter themselves from change by relying on time-honoured traditions. And if the European Court of Human Rights rules that Turkey must spare Abdullah Ocalan's life, as it virtually has to do on a continent that has abolished the death penalty, Turkey will have little choice but to comply.

These are much bigger achievements than anything the U.S. Supreme Court is up to these days. Where the world's attention was once riveted on *Brown v. Board of Education* and *Roe v. Wade*, it is now on the likes of *Kingdom of Spain v. Augusto Pinochet*, and *Smith and Grady v. United Kingdom*.

Europe has taken the lead in jurisprudence because it has gone global in its approach to law as the United States continues to cling to an outdated concept of national sovereignty that no longer accords with economic and political reality. That is all the more ironic given the fact that U.S. business and technology—notably including the Internet—is at the leading edge of globalization. The United States leads in economic and technological innovation, but is among the last in recognizing its legal implications.

Pacific News Service associate editor Andrew Reding is a senior fellow of the World Policy Institute in New York.