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The European Convention on Human Rights, the EU and the UK: Confronting a Heresy

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Abstract

The orthodox view of the ECHR and its Court as regime in the context of both the EU and UK has been that it has considerable value albeit with systemic flaws. The purpose of this article is to challenge this orthodoxy. Four inter-related submissions are made: that the ECHR has failed human rights conceptually (1); 'good' or lauded decisions of the ECtHR cannot remedy or sufficiently counter-balance this conceptual failure (2); 'bad' decisions further expose and exacerbate the failure (3); the procedural problems of the ECHR regime may contribute to the underlying failure of concept but their resolution cannot solve it (4). These submissions are to provoke a more intense assessment of value and how such value could be enhanced. It may be too late to see any influence on the accession process but this does not reduce the relevance of the critique for the future of human rights in both the EU and the UK. Ultimately an approach to the ECHR system needs to determine whether it continues to be lauded or its influence resisted (thus seeking reform or replacement – the alternative candidates being the EU Charter and/or a national Bill of Rights) and retained only as an iconic scheme of moral importance.

1 Introduction

The EU's likely accession to the European Convention on Human Rights (ECHR) and the persistent political demand for reform to the Human Rights Act in the UK may seem only distantly related matters. But there is a closer link worthy of analysis.

From the EU perspective, the Treaty of Lisbon and the ratification of Protocol 14 in the Council of Europe (CoE) made a closer relationship with the Convention

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possible.[1] Despite more pressing issues engulfing the EU, negotiations (mostly behind closed doors) between the European Commission and the Council of Europe on the modalities of accession have continued. In June 2011 the CoE's Steering Committee published its final draft accession agreement. It is likely that an institutional route map will be announced and then delivered at some point in the next year. The ECHR and the European Court of Human Rights (the 'ECHR regime' as it might be termed) are viewed as capable of playing a 'pivotal role' in the protection of human rights in Europe, a vital element in the evolution of 'a coherent system of fundamental rights protection throughout the continent'.[2]

In the case of the UK there has also been significant interest in the Convention and its Court, albeit within a very different political environment. The debate about replacing the Human Rights Act with a British Bill of Rights has included mounting critique of the ECHR regime. Reports by Civitas, Policy Exchange, and various campaigns in the press have all sought to make a case for change and to locate greater control over human rights judgments in Parliament and/or the British courts.[3] The flavour of the UK government's review of the topic, through an appointed Commission, is that there is something wrong with the current system which needs to be fixed.

Despite these apparent diverse impressions of the ECHR regime, the starting assumption in both contexts remains remarkably uniform; it is that the ECHR is an achievement for human rights, 'the crown jewel of the world's most advanced international system for protecting civil and political liberties'.[4] The jurisprudence that has developed over the decades is also presented as strong evidence for the success of law's ability to protect and promote human rights across Europe.[5] Even though certain judgments provoke criticism (particularly about the extent of deference paid to national courts and parliaments), the general stance is to laud the importance of the Convention and the bulk of the ECtHR's past decisions as of significant human rights value. It is not implausible to conclude that this is the orthodox or prevalent thinking applied to the Convention system. As Francis Jacobs rather tartly terms it: 'Informed opinion regards the Convention system as an unprecedentedly effective system for the collective enforcement of human rights in Europe, and indeed as a model for the world.'[6]

1 Art. 6 TEU provided the treaty based authority for the EU to accede to the ECHR and Prot. 14 to the ECHR enabling the EU to accede to the Convention and entered into force on 1 June 2010.

2 See Reding, 'The EU's Accession to the European Convention on Human Rights: Towards a Stronger and More Coherent Protection of Human Rights in Europe', at http://ec.europa.eu/commission_2010-2014/reding/pdf/speeches/speech_20100318_1_en.pdf.

3 See Pinto-Duschinsky for Policy Exchange, 'Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK', available at: www.policyexchange.org.uk/images/publications/pdfs/PX_Keeping_Human_Rights_at_Home_WEB_07_02_11.pdf. See also D. Raab, *Strasbourg in the Dock: Prisoner Voting, Human Rights and the Case for Democracy* (2011). The *Daily Telegraph* has also been pursuing a campaign entitled *End the Human Rights Farce* for some time.

4 Helfer, 'Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime', 19 *EJIL* (2008) 125.

5 See, for instance, H. Keller and A. Stone Sweet (eds), *A Europe of Rights: the Impact of the ECHR on National Legal Systems* (2008).

6 F.G. Jacobs, *The Sovereignty of Law: The European Way* (2007), at 34.

Accompanying these stories of value and achievement, though, is a firmly held belief that the system is also a 'victim of its own success'.[7] It suffers from structural problems that hinder good adjudication. Problems of case selection, delays in review, the enforcement of decisions, and (from some quarters) the selection of judges all cause concern.[8] Such criticisms are so prevalent that they too have become part of the orthodoxy; the basic system is presented as sound, as generally successful, but certain structural constraints prevent it from being what it might be. Hence, when looking to improve the condition of human rights *through* the regime, attention is focused upon structural and practical reform rather than re-evaluating its principled foundations. Even those advocates for a 'constitutional' rather than 'individual' justice model of adjudication look to procedural changes as a priority.[9]

For the EU, accession is viewed in this light; there is an assumption of fundamental value in the external regime but recognition that the current system should not apply without some revision to normal procedure. In this respect, the position of the Court of Justice of the European Union (CJEU), a view endorsed now by the ECtHR, is to advocate for the principle of subsidiarity (by which they appear to mean that any decisions regarding EU law should be made first by EU courts) to be reflected following accession in any judicial review of the acts of the EU institutions or Member States implementing EU law.[10] The preferred approach is that the CJEU will conduct an 'internal review' of any question of breach of the ECHR provisions *before* referral to the ECtHR in cases of both direct (against EU institutions) and indirect (against Member States in matters involving an EU law dimension) challenges to EU law application. Part of the stated rationale for this is the purported significance of the EU Charter of Fundamental Rights. Described as of 'primary importance in the recent case-law of the CJEU' and the 'reference text' for the assessment of fundamental rights in the EU,[11] the Charter is deemed too important for its interpretation to be left in the hands of a potentially insufficiently informed ECtHR. Thus to protect the coherent resolution of fundamental rights issues in the EU (which have always required consideration in the context of the EU's aims as expressed in the Treaties), the primary responsibility for adjudicating on complaints should rest with the EU courts.

For the UK a not dissimilar approach has evolved. Despite a more uncertain and critical political debate, there is a general consensus about both the value *and* problems associated with the ECHR regime. The Coalition Government's establishment

7 See Helfer, *supra* note 4.

8 See the UK Attorney General's speech on the ECHR, 24 Oct. 2011, available at: www.attorneygeneral.gov.uk/NewsCentre/Speeches/Pages/AttorneyGeneralEuropeanConventiononHumanRights%E2%80%93currentchallenges.aspx, and Lord Hoffmann's speech on the Universality of Human Rights, 19 Mar. 2009, available at: www.judiciary.gov.uk/media/speeches/2009/speech-lord-Hoffmann-19032009.

9 See, for instance, S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (2006). The current UK government has also appeared to adopt this stance.

10 See Joint Communication from Presidents Costa and Skouris, 27 Jan. 2011, available at: www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf.

11 *Ibid.*

of the Commission on a UK Bill of Rights (which reported in December 2012) was based on the acceptance that any such Bill 'incorporates and *builds on* all our obligations under the [ECHR], ensures these rights continue to be enshrined in UK law and protects and extends our liberties'.[12] Its interim advice, published in September 2011, focuses on the need for reform in case selection and procedure as well as appointment of judges to give effect to the Convention.[13] There seems to be little party political appetite, therefore, for the complete withdrawal of the UK from the Convention, although some statements by political figures suggest the contrary. However, the value of the ECHR is now largely accepted as the precondition for discussion about the future of human rights in the UK whatever elements of the press may say.

Nonetheless, analogous to the concerns expressed by the CJEU in relation to the EU Charter, the Attorney General Dominic Grieve QC recently acknowledged that it was the Strasbourg Court and its relationship with UK law which justified critique.[14] He called both for ECtHR reform to enforce a principle of subsidiarity, meaning in this instance that greater deference should be paid to the domestic legislature and courts, *and* reform of Strasbourg procedures, in particular the appointment of ECtHR judges and the selection of cases for review. Lord Hoffmann no doubt inspired some of this thinking with his speech in 2009 which accepted the ECHR as a 'perfectly serviceable abstract statement of the rights which individuals in a civilised society should enjoy', but condemned the mechanism adopted for 'the application of these abstractions to concrete problems'.[15]

There is good cause, therefore, to see that although the EU and UK cases present different political and legal issues, both are affected by a parallel assessment of value *and* critique. The purpose of this article is to question this underlying orthodoxy. My dominant focus, however, is on the EU's liaison with the ECHR regime in the light of imminent accession. In this respect I make the assumption that to revisit the aptness of the ECHR regime for the EU is by no means a redundant exercise. The future of human rights in Europe has yet to be fixed. It is still pertinent to ask: does the Convention system offer added value for the EU? By way of subsidiary concern I suggest that this question and the EU's interaction with the ECHR regime are not irrelevant for the UK. Much of what I have to say offers a contribution to the national debate about a Bill of Rights as well.

To begin, I make what for some will appear as a heretical statement: we should seek to bury the ECHR and the ECtHR; contemplating mild reform through the system itself is futile if the objective is to improve human rights in the EU and the UK; the system of text and court should be replaced and their control over human rights should be undone. This goes further than Lord Hoffmann's damning (and quite populist)

[12] Emphasis added. The Commission was launched on 18 Mar. 2011: see Ministry of Justice press release, available at: www.justice.gov.uk/news/press-releases/moj/press-release-180311.htm.

[13] See Commission on a Bill of Rights, letter of advice to Rt Hon Nick Clegg, 28 July 2011, available at: www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf.

[14] See AG's speech, *supra* note 8.

[15] See Lord Hoffmann's speech, *supra* note 8.

assessment of the regime.[16] For despite ridiculing the ECtHR judges and their decisions, he still argued for the Convention's retention as a political document, useful for assessing human rights violations in states. My statement challenges even this notion of retaining the Convention's abstract value.

It should be clear, however, that my purpose here is *not* to recommend the acceptance of this opening proposition. Its function is rather to incite a Shakespearean Mark Antony inspired reflection. Just as Antony unleashed his 'mischief' and convinced his countrymen to think about what they would lose after burying their Emperor, my provocation should make us think more about what will be lost *as well as* what might be gained if the current regime is buried. This is no bad thing. If those values attributed to the ECHR and the ECtHR's judgments (which together may be plausibly identified as: a moral counterpoint to the vagaries of national justice; an objective and authoritative judicial review of an individual's treatment at the hands of the state or European institution; a body of jurisprudence that has reinforced some essential human rights in the governance of nations; an iconic statement of commitment to a scheme of values which act as a protection for more than just a select list of civil and political rights) are vital for the future of human rights then we should be sure of these claims. I thus wish to avoid the assumption that the Convention regime is sacrosanct and test its resilience (and that of its related jurisprudence) as a vital foundation for human rights nationally and regionally.

To develop the heresy, I present four subsidiary submissions.

First, the ECHR regime has failed human rights conceptually. It has not done justice to key human rights conceptions that have gained common purchase, particularly within the EU, despite the 'living instrument' quality ascribed to the ECHR. The regime fails when assessed in terms of the EU's avowed normative position (one which is not disputed in UK terms either) that human rights are 'universal, indivisible and interdependent'.

Secondly, 'good' or lauded decisions of the ECtHR cannot remedy or sufficiently counter-balance the conceptual failure described in my first submission.

Thirdly, 'bad' decisions further expose and exacerbate the failure.

Fourthly, the procedural problems of the ECHR regime may contribute to the underlying failure of concept, but their resolution cannot solve it. Lord Hoffmann, the UK Ministry of Justice's commission, and many others are wrong to believe otherwise. Attacking the 'mechanism' in the belief that the grounding philosophy is stable is counter-productive, deflecting attention to matters which will remedy little in either the EU or UK context.

I will discuss each of these submissions in turn before considering their, perhaps unpalatable, consequences in my conclusion.

2 First Submission

It is some years now since Stephen Sedley challenged the basic integrity of the ECHR. In 1994 he suggested that the Convention was 'a full generation out of date'.[17] It

[16] *Ibid.*

[17] Sir Stephen Sedley, quoted in Gibb, 'Judges and peers back human rights Bill to aid speedy justice', *The Times*, 10 Oct. 1994.

represented a 'limited view of human rights' which was 'based on the nineteenth century paradigm of the individual whose enemy is the State'. Nearly two decades later Sedley's charge is even more apt.

On the face of it, this might seem an uncomfortable point of attack for two reasons. First, given the contested nature of human rights theory it would be invidious to suppose that any historical text could avoid the charge of failing to reflect changes in understandings about human rights. Such documents are a product of their time and frequently require amendment or addition, something accepted in the ECHR regime through the process of protocol ratification and parallel instruments.[18] Secondly, my submission goes against the grain of the eulogies supporting the institutions of European civilization after World War II. These have rested on the understanding that both the normative text of the Convention and the institutional development of the ECtHR have been necessary and desirable inventions for Europe and its constituents. Assertions along these lines have become institutionalized over the past 50 years. They have been supported by evidence of changes in national law following landmark decisions by the Court as well as pressure to adopt the ECHR and change legal systems in newly democratized states following the end of the Cold War. The assumption has been that the achievements have been many and good, underpinning a self-sustaining narrative of success.[19]

However, my first submission is not limited to the ECHR's anachronistic character (although this is a factor in my critique), nor does it need to challenge the claim that the Convention regime can be ascribed historical value. Rather my primary proposition is that the ECHR has failed human rights at a deeper conceptual level. Its achievements must be considered in accordance with principles regarded (by dominant human rights theory in general and the EU in particular) as fundamental to the conception of human rights. The primary principles are twofold: first that human rights should be considered as universal; secondly, that they are indivisible.[20]

I take it as read that these principles are uncontested in mainstream international human rights discourse, at least as rhetorical devices. Politically there is little dissent evident in international fora. Both of the grounding principles are also now explicitly central to the EU's policy on human rights externally and internally, and this has been the case, rhetorically if nothing else, since at least the early 1990s.[21] The preamble to the EU Charter on Fundamental Rights confirmed the EU's foundation on 'the indivisible, universal values of human dignity, freedom, equality and solidarity'. The Charter

[18] The number of human rights related instruments produced by the CoE number 33, ranging from the ECHR of 1950 to the Convention on preventing and combating violence against women and domestic violence.

[19] See, for instance, Keller and Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems', in Keller and Stone Sweet (eds), *supra* note 5, at 677–710.

[20] There is an arguable third principle, that of interdependence. However, this is for all practical purposes subsumed within the notion of indivisibility. In any event, relevant texts of the EU now focus on universality and indivisibility and make little reference to interdependence.

[21] See, for instance, Communication from the Commission to the Council and the European Parliament, 'The European Union and the External Dimension of Human Rights Policy: from Rome to Maastricht and Beyond', COM(95)567 final.

(and thus its principles) has also been adopted as the point of reference for all EU institutions, providing a uniform text of human rights norms which are supposed to govern all practice.[22] Article 21 TEU also set the Union's guiding principles in its external action as including the advance of 'the universality and indivisibility of human rights and fundamental freedoms'. The UK's position is similar. It is happy to confirm officially that '[h]uman rights are universal and apply equally to all'.[23]

Of course, these principles are not an invention of the EU or the UK. They are the product of a discourse that has developed since the construction of what Jack Donnelly calls the 'Universal Declaration model' of human rights theory which grew from the 1948 Universal Declaration of Human Rights (UDHR) and its evolved adoption during the latter half of the 20th century.[24] The principles were made explicit in paragraph 5 of the UN's Vienna Declaration that emerged from the World Conference on Human Rights in 1993. This stated that 'all human rights are universal, indivisible and interdependent and interrelated'.[25]

It is reasonable to suggest, therefore, that if any assessment of the conceptual success or failure of the ECHR is to be undertaken, we need to look at its adherence to these principles. I will focus on 'universality' and 'indivisibility', which I take to be the most salient.

A *Universality*

It would be wrong to claim, however, that the qualities attributable to the concept of 'universality' are self-evident or even generally accepted. The concept is indeed one which has attracted considerable theoretical dispute. Nonetheless, despite various critiques either aimed at the contemporary international human rights discourse (on grounds of it being an expression of western ideological hegemony and disrespectful of cultural difference) or sceptical of the claim that any so-called right can be universal, the enduring account is, as Donnelly amongst many others has suggested, that all human beings have human rights simply by virtue of their existence as human beings.[26] The very attachment of the term 'human' to 'rights' is said to require that foundational position. Although there may be debate about the rights included in this category, those for which agreement can be attained should be understood as applicable to all people.[27]

[22] See Communication from the Commission, 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', COM(2010)573 final.

[23] A recent expression can be found in the UK's Statement on Rights of Indigenous People to the UN GA, Third Committee, 28 Nov. 2011, available at: http://ukun.fco.gov.uk/en/news/?view=PressS&id=698933882.

[24] J. Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, 2003).

[25] Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23.

[26] Donnelly, *supra* note 24. James Griffin, for instance, puts it differently, saying that human rights 'must be universal because they are possessed by human agents simply in virtue of their normative agency': J. Griffin, *On Human Rights* (2008), at 48.

[27] Griffin makes the case for 'highest-level human rights' centred around three themes of autonomy, welfare and liberty: see *ibid.*, at 150 ff.

On that ground has grown a consensus which, as a minimum, requires in theory that whatever content is ascribed to 'rights' they have to apply to *all* 'human' subjects. Donnelly, in further developing his Universal Declaration model, argues that the UDHR provides that list of rights in the contemporary world.[28] This is a plausible position, given the uniform commitment to the UDHR expressed by the vast majority of states and international organizations, the EU and UK included. It follows that there should be no discrimination in the protection and promotion of those human rights 'on any grounds', as the British Government has reaffirmed recently.[29] Their application should be equal in principle and practice.

It is similarly a product of considerable international consensus that *individuals* should possess the listed rights again without discrimination (with states the primary but not only agents responsible for promoting and respecting them). Some argue that collectivities should also possess 'human' rights under the terms of the UDHR. The right to self-determination may be seen by Donnelly as an exception, but others contend that many minorities and 'peoples' provide equally valid subjects of universal human rights. However, I do not need to go this far in my first submission concerning the ECHR.

In terms of this arguably reasonable, albeit limited, interpretation of the principle of universality (that it rests on the UDHR list of rights, applicable to all individuals equally) my first submission contends that a fundamental contradiction was built into the Convention at its inception. The text emerged from an opposition constructed between the expressed 'universal' nature of human rights adopted *and* their particular purpose and interpretation within a specific locality: Europe. On the one hand the Convention was drafted in the light of the Universal Declaration. The ECHR stated explicitly that it was aimed 'at securing the universal and effective recognition' of those rights in that declaration.[30] Since then it has become part of the system's self-affirming rhetoric that the 'Convention represented the first step towards the collective enforcement of certain of the rights set out in the Universal Declaration'.[31] On the other, it was also conceived in a period of intense dreaming of political realignment and reconstruction. The Convention represented part of a powerful parochial (or relativist) political statement of intent: to provide greater unity between European states through a new order for Europe. The 'maintenance and further realisation' of rights was 'one of the methods by which … greater unity between' Members of the Council of Europe was written into the Convention.[32] In this respect, the rights enshrined were to give the people *of* Europe a set of core standards that would forever cast a light on their national governments' practices and that would provide some degree of assurance of protection against extreme visions of social management.

[28] Griffin rightly points out that a blind acceptance of these rights would be a mistake given that some fail his test for a meaningful and universally applicable human right. Nonetheless, the UDHR incorporates the range of rights which fall into his three themes of autonomy, welfare, and liberty to a greater extent than the ECHR.

[29] See the statement in *ibid.*

[30] See the Preamble to the ECHR.

[31] See, for instance, ECtHR Annual Report (2008), at 9.

[32] See again the Preamble to the ECHR.

But in conceptualizing these standards an extremely narrow beam was constructed, one that did not embrace the universal quality otherwise attributed to human rights. A.W. Brian Simpson's tome *Human Rights and the End of Empire* provides the greatest insight into the history of this endeavour.[33] Highlighting the vacillating and ultimate antipathy of the British Government towards creating a meaningful institution of European union, Simpson unveils the parochial interests that helped determine the conceptual and practical architecture of the Convention, the Court of Human Rights, and the Council of Europe within which this was all set. The political intervention by the British and other authors of the Convention in the interests of then current concerns (mostly with the loss of colonial power and world influence; with the desperate need for economic regeneration; and with the fear of the communist threat externally from the USSR and internally from home grown European far-left movements) had an enormous impact on the conceptual skeleton of the Convention. In essence it ensured that the rights were limited; only partially reflected the scope of the UDHR; paid little or no heed to the past; made no attempt to mention, let alone address, the potential of systemic violence re-emerging; restrained their application on the basis of legal technicality; and gave no succour to rights which might suggest support for a centralized economic system.

All of this was and remains quite understandable historically. Appreciating the context of the times, and indeed the forces of *realpolitik*, is vital to understanding why the Convention was designed in its original form. But even so, there is redolent within the text and what we know of the negotiations which gave it form a sense of a conceptual approach that was highly constrained towards human rights. The political environment was, if anything, antithetical to the creation of a legal instrument that would advance 'human' as opposed to some other form of legal rights.

Four aspects of the Convention support this interpretation. First, the absence of a cohering motif that could act as a universalizing ideal, in particular the concept of human dignity. Secondly, the introduction of a jurisdictional limitation which favoured a parochial and thus self-contradictory form of universalism. Thirdly, the systemic application of limitations on those selected rights included in the Convention. And, fourthly, the absence of adequate responses to the need for equality. These I examine further below.[34]

First, the Convention lacked any statements of an underlying principle of human dignity (or anything remotely akin to a universalizing ideal). It failed to replicate the philosophical language of the UDHR. The latter explicitly recognized that 'the inherent dignity … of all members of the human family is the foundation of freedom, justice and peace in the world'.[35] It thus provided the base out of which all the rights listed could then be interpreted, allowing for a sense of universal application to be adopted.

[33] A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001).

[34] In doing so I point out that the EU, through its Charter and developed practice, and the UK, through the prospect of a new Bill of Rights, provide significantly greater potential for commitment to the principle of universalism by comparison.

[35] See Preamble to the UDHR.

In particular, it encouraged recognition of 'others' as related to any individual whose rights have been violated. Sandra Fredman notes the importance of this sense of 'recognition' when she refers to Hegel's understanding of individual identity (promoted, as we have seen, within the Universal Declaration model) 'according to which an individual only becomes an individual by virtue of recognising others and being recognized by them'.[36] This is the underpinning notion of humanity or 'human family' fostered by the UDHR and the concept of universalism as predominantly accepted.

As a cohering concept for human rights, dignity has, according to Christopher McCrudden, 'supplied a theoretical basis for the human rights movement in the absence of any other basis for consensus'.[37] There may be a lack of an overlapping consensus in jurisprudence across regimes and jurisdictions, but that does not undermine the initiating value of dignity. Whatever the misgivings, McCrudden still concluded that dignity provided:

> a language in which judges can appear to justify how they deal with issues such as the weight of rights, the domestication and contextualization of rights, and the generation of new or more extensive rights.[38]

In contrast, the ECHR denied the possibility of seeing bonds of humanity extend through or in human rights. Instead, it prescribed a collection of selected independent rights which required little, if any, inter-related theme. The Convention's textual architecture denied a sense of coherence through the concept of human dignity (or any other explicit idea) to underpin and thus realize universalism as promoted by the UDHR. None of the rights in themselves or as a disparate collection offer that cohering concept. Rather, they are arbitrarily disaggregated in conception, something which might be ameliorated through judicial interpretation but can never be resolved.[39] Indeed, the reference to dignity in certain ECtHR cases indicates recognition of the need for such a theme in assisting in decisions but fails to provide guidance on how it can inform all Convention rights.[40]

This is not a mistake that the EU Charter has made. By providing a section on 'Human Dignity' and leading with a central statement in Article 1 that '[h]uman dignity is inviolable. It must be respected and protected', a foundation is provided for all other rights and interests to be considered, at least in theory. This is a theme embraced by the CJEU as well. In *Omega* there were indications that the notion of dignity was fundamental in interpreting human rights recognized in the Union.[41] Whether accurate or not, the concept was put to use and provides a core for interpretation. The UK is not so happily placed, bound as it is to the ECHR. The common law may provide equity as a possible alternative, but in truth this has become too disassociated from rights

[36] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008), at 177.

[37] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', 19 *EJIL* (2008) 655, at 677.

[38] *Ibid.*, at 724.

[39] The 'good' decisions I will refer to in my second submission indicate this tendency by the Court with regard to its interpretation of Art. 3 and the prohibition of torture and inhuman and degrading treatment.

[40] See, for instance, App. No. 5856/72, *Tyrer v. UK*, 2 EHRR (1979–1980) 1, at para. 33, which referred to corporal punishment as an affront to 'a person's dignity and physical integrity'.

[41] Case C–36/02 *Omega v. Bonn* [2004] ECR I–9609.

as such. Nonetheless the prospect of release from the ECHR through a Bill of Rights could provide a remedy. It is arguably an urgent need, given that the UK is not bound by the EU Charter to the extent intended by the Treaty of Lisbon as a result of the UK's opt-out. A statement on dignity similar to that in the EU Charter could nonetheless be adopted, providing a universalizing motif to inspire an integrated rather than disparate approach to recognized human rights.

Secondly, on jurisdiction the ECHR established little that replicated the ideal of universality evident in the UDHR. In particular, the legalistic restriction on jurisdiction of Convention Article 1 was pursued with the direct intention of excluding colonial territories. The original Article 63 (now 56) required a state to accept formally the jurisdiction of the Convention for any of its 'territories for whose international relations it is responsible', making the application of Convention rights there purely voluntary.

Some of this could be put down to the intention to construct an instrument that would have legal force, something the UDHR was not designed to do. But in making this commitment through a very restricted vision of human rights that were *capable of being binding* a political statement was made through law. It intimated that only a limited number of 'rights' could be contemplated as falling within that restricted category. In choosing a set of limited rights deemed enforceable, ostensibly in part fulfilment of the UDHR (which in turn attempted to identify a list of universal human rights by definition) a political decision that challenged the Convention's own stated purpose was made. It called into question at a fundamental level the ability or even desire to *realize* the corpus of human rights now to be promoted and defended internationally. For if it was not possible to protect the whole range of agreed rights in a democratic and still relatively affluent Europe, how could it be promoted with conviction elsewhere?[42]

This potential structural failing of human rights as a concept is mirrored and extended through Article 15 and the powers of states to derogate from most rights under the Convention.[43] Simpson tells the story of how this provision was produced in an 'amateurish fashion' and immediately became a concern for certain states with regard to colonies.[44] The uncertainty attached to how the Convention rights should apply to territories outside the immediate jurisdiction of states parties may have been of acute concern in the late 1950s when direct colonialism was nearing its end, but it remains a significant problem today. The history of Turkish involvement beyond its borders and recent practices of the UK in Iraq and Afghanistan as well as Russia in Chechnya, demonstrate an inherent failure in the Convention to come to grips with its application. The irony is that this failure was most obvious when it was drafted. The colonial question was very much alive at the time. It has only been fairly recently that similar problems have been revived in disparate and perhaps unpredictable ways. Nonetheless, the implications of a failure to address the scope of application and the scope of derogation in an effective way have left a legacy that continues to have

[42] Affluent, that is, in comparison to the colonial world lying beyond Europe.

[43] The notable exceptions are Art. 2 (right to life) other than as a result of 'lawful acts of war', Art. 3 (right not to be tortured etc), Art. 4 (the prohibition of slavery), and Art. 7 (no crime without law).

[44] Simpson, *supra* note 33, at 875 ff.

considerable impact on the realization of *human* rights. It further undermines the universality of the concept (howsoever that is interpreted) and gives impetus to the idea that we are not dealing with human rights at all, but rather some other form of rights. In the case of the Convention we might term these 'European rights' perhaps. These would be related to, but not synonymous with, human rights.

Andrew Moravcsik's assessment of the documents which gave rise to the Convention supports this interpretation. He discovered no evidence of 'altruistic motivations or transnational socialization' in its construction.[45] Self-interest in those parties to the ECHR at its inception, he suggests, was focused on defending 'democratic order at home and "democratic peace" abroad'. He claims that any 'moral interdependence among governments' was a consequence, not cause, of the Convention. The implication, and reasonable assumption, is that universalism was never in mind during the drafting of the document at all.

Again, in contrast, the EU Charter places only limited geographical boundaries on its application. It does institute a technical restriction, in as much as the rights ascribed apply as regards Member States only when they are in effect doing the EU's bidding; in other words, when violations occur whilst implementing measures decided at the European legislative level. However, universal applicability is not denied by this legal clarification. Rather the language is akin to that of the UDHR, referring generally to 'everyone' being the beneficiary of most of the rights identified. There are some exceptions, particularly those rights in chapter V under Citizens' Rights. But these are explicitly related to association with the political construction of the EU (i.e., with regard to the right to vote and participate in elections, move freely within the EU, and access documents and the services of the ombudsman – even then non-citizens are entitled to take advantage of the right to good administration in Article 41). The presence of rights of asylum (Article 18) and protection from expulsion (Article 19), for instance, are addressed to non-EU citizens, evidencing the Charter's wider scope than the ECHR's. So too those Articles which apply 'regardless of frontiers' (e.g., Article 11 on freedom of expression). The legislative practice of the EU has reinforced this. From the rights of victims of trafficking to access to social security, a whole range of rights has been implemented for the benefit of non-EU nationals. Nor has the EU seemingly felt unquestioningly restricted by jurisdiction. In combating human trafficking and the sexual exploitation of children the EU has imposed obligations on Member States to pursue those who have offended in other jurisdictions.[46] Similarly, as I have noted, the adoption of the Charter as a guide for institutional activity beyond the EU's borders demonstrates consistency in the face of a principle of universality. In theory and in practice, therefore, there are indications that universality of human rights has purchase in EU law where it does not in the Convention.

[45] See Moravcsik, 'Explaining the Emergence of Human Rights Regimes: Liberal Democracy and Political Uncertainty in Postwar Europe', originally published in the Working Paper Series of the Weatherhead Centre for International Affairs, Harvard University, Dec. 1998, available at: www.princeton.edu/~amoravcs/library/emergence.pdf.

[46] See Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ (2002) L 20/1 and Council Framework Decision 2004/68/JHA of 22 Dec. 2003 on combating the sexual exploitation of children and child pornography, OJ (2004) L 13/44.

Thirdly, the limitations or qualifications that were negotiated for the majority of rights in the Convention sit uneasily in comparison with their supposed counterparts in the UDHR. Admittedly, the international Bill of Rights that followed the UDHR in 1966 incorporated some limited qualifications to certain rights, but at the time of its creation the Convention deliberately set about *restricting* the possible impact of those rights. One example will suffice. Let us compare Article 8 ECHR, which related to respect for family life, and Article 12 UDHR. The latter provides that:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the rights to the protection of the law against such interference or attacks.

The Convention Article on the other hand states that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The extensive qualifications introduced here have given life not to human rights as universal constructs but to the 'margin of appreciation' principle that recognizes and favours an acknowledgment, in essence, of the importance of the parochial 'public interest'.[47] In terms of human rights this is again a direct contradiction. For the notion of the 'public interest' that can be attached to the 'human' element of 'human rights' must be unlimited in its conception of 'the public'. That is an inherent quality of the language of universality applied to human rights. It is what distinguishes them from those 'rights' otherwise constructed without any sense of humanity necessarily informing their content let alone their application. The humanity that is implied in human rights requires a way to be found for their realization, *not* to surrender to the practical barriers put in their way by legal jurisdiction and political partiality. That, it could be said, is part of the promise of 'human rights', their transcendence of the political at least at the level of their conceptual recognition. As David Luban argues, 'human rights are the demands of all of humanity on all of humanity'.[48]

In the context of the immediate aftermath of World War II and the suffering inflicted by governments unconcerned with appeals of humanity, it seems reasonable to suppose, contrary to Moravcsik's findings, that the notion of human rights *was* intended to evoke a greater awareness of a human bond beyond mutual citizenship. Borders were to be transcended, which, of course, suggests that any understanding of public

[47] White and Ovey note that the 'greatest application' of the margin of appreciation by the ECtHR has arisen 'when balancing the rights contained in the first paragraphs of Articles 8 to 11 … against the permissible interferences which may be justified by resort to the limitations permitted by the second paragraphs of those provisions': see R. White and C. Ovey, *The European Convention on Human Rights* (5th edn, 2010), at 79.

[48] Luban, 'Just War and Human Rights', 9 *Philosophy and Public Affairs* (1980) 160, at 174.

interest should have been conceived in this light. That the Convention text contravened this position is indicative of the conceptual failure as translated, not necessarily as conceived.

This is not to say that the approach of the Convention is or was unreasonable *per se.* There is undoubtedly much to be said for the need for each state to be able to manage its laws and its social and political choices in its own way. Protecting a plurality of ethical responses to dilemmas of conflicts between individual and collective interests may well be considered a notable virtue. So long as the essence of the right concerned is not undermined, governments should have the ability to make decisions that interfere with individual rights for the benefit of the wider community. Similarly, there are theorists who argue that any universal idea of human rights existing independently of a system that constructs their parameters and content is an empty one. The Benthamite attribution of 'nonsense' to the idea remains a strong critique. It is reflected in the argument that the 'rights' aspect of the notion requires a system that identifies not only those who hold those rights but also those against whom those rights are addressed (the 'obliged' as they might be called) *and* the extent to which the holders can expect the obliged to respond to their claims. The nonsense of human rights is then said to occur when the logic of 'all humanity owing an obligation to all humanity', as Luban would have it, is applied to political systems. How can they in reality respond to such an overarching idea without diluting its impact to the point of impossibility? Far better, it is argued, to rely on existing state law to provide the definition and certainty in realizing designated human rights at the very point where they are needed: at particular state institutions exercising power over people's lives. Such 'rights realism' remains a strong argument for allowing the 'text' to rest not too heavily on human rights concepts, but rather on its own agreed terms. But can this approach really accord with a notion of 'human' as opposed to other types of rights? If we attribute *any* universalist characteristics to human rights then clearly such potential restrictions can excuse considerable infringements on individual liberty.

The EU Charter does not follow the ECHR model in this respect. It has broadly embraced the UDHR approach of adopting unlimited statements of rights. Some are absolute, engaging prohibitions of certain actions (torture, slavery, trafficking, collective expulsions, etc.); others ascribe freedoms without caveat (right to liberty, respect for private life, freedom of thought). Some may be expressions of principle which fail to establish a clear right as such (Article 22 for instance requires the Union only to 'respect cultural, religious and linguistic diversity'). The general tenor of the Charter, however, is to avoid explicit limitations. It may appreciate in a number that a right is recognized 'in accordance with the national laws governing the exercise of this right' (e.g., Article 10(1) regarding conscientious objection), but this provides a restricted form of appreciation for domestic laws which does not directly challenge the assumption of universality. Article 52 provides that any 'limitation of the exercise' of the Charter rights must 'respect the essence of those rights and freedoms'. Limitations are permissible 'only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

Admittedly, reference to the 'general interest' could open the way to erosion of rights, but the starting presumption is in favour of respect, *not* avoidance of responsibility.

Fourthly, the Convention's failure to encompass rights associated with equality was long recognized as a defect. The fact that protocol 12, which finally incorporated a general prohibition of discrimination only in 2000, was deemed necessary illustrated the failure in original drafting; the ECHR made no reference to prohibiting discrimination other than in the 'enjoyment' of those rights listed in the Convention.[49] Even then, the protocol remains unsigned or unratified by the majority of Council of Europe states, including the UK and most EU Member States. Part of the reason for this tepid response was undoubtedly that equality provisions have been developed within the EU over a protracted period of time. The EU Charter's equality provisions in chapter III are largely a reflection of long established jurisprudence and specific Treaty and secondary legislation. The Convention thus remains deficient with regard to a fundamental principle associated with human rights in the contemporary era. At its core it was never conceived with an appreciation of application to *all* human beings even within a restricted geographical jurisdiction.

For these reasons the Convention presents a highly constrained and relatively flawed application of the principle of universality, one which has not been rectified despite additional protocols.

B *Indivisibility*

We move on to indivisibility, the second significant principle ascribed to human rights by the international human rights movement. It may not detain us long. The principle is simple in essence; it is that there should be no distinction between any of the enumerated rights of the UDHR in terms of their recognition, promotion, or protection. They are all of equal value.

Undoubtedly this is not a principle wholeheartedly adopted in state practice. Some states and critics take the view that there is an appreciable difference between two sets of norms; on the one hand civil and political rights and on the other economic and social rights. Ever since the international bill of rights divided into the Covenant on Civil and Political Rights and a Covenant on Economic Social and Cultural Rights, there has been doubt about the latter's equivalence with the former. Invariably commentators point to the lack of enforcement mechanisms under the ICESCR as compared with the individual petition processes available under the ICCPR. Nonetheless, at the international level there has been increasing acceptance that there should be and there are no differences of moral significance between the two sets.[50] The Vienna Declaration in 1993 emphasized the acceptance of ascribing rights to economic and social claims. The adoption of the optional Protocol to the ICESCR in 2008 allowing for individual petition demonstrated the growing international commitment to make such rights justiciable. Of course, it is still open to argue that states fail to implement

[49] Art. 13 ECHR.

[50] Jack Donnelly rehearses the arguments for a distinction and dismisses them in Donnelly, *supra* note 24, at 27–33.

this principle in practice. Paul O'Connell makes the case that even in those states where there is constitutional recognition of economic and social rights, the prevailing judicial approach is resistant to enforcing them.[51] But this is not a truism for all judicial or political responses and does not negate judging the Convention in terms of the principle.

From this perspective there is a clear failing in the ECHR regime. The Convention is overwhelmingly focused on civil and political rights. Although the Council of Europe has presided over the development of a European Social Charter, extremely detailed in its identification of economic and social rights deemed essential 'to improve the standard of living and to promote the social well-being' of the Contracting Parties' populations, there is a clear acceptance that the ECHR is partial in its human rights scope. Indeed, the revised version of the Social Charter produced in 1996 accepted the need 'to preserve the indivisible nature of all human rights, be they civil, political, economic, social or cultural and, on the other hand' through refreshing its content. There was therefore explicit recognition that the ECHR provided a restricted approach to human rights which had to be remedied through another instrument. The fact that the Social Charter does not allow access to a court to pronounce with the gravitas of the ECtHR, has also meant that there persists a direct challenge to the accepted indivisibility principle overseen by the ECHR.

Once measured in comparison to the EU's preferred standards, therefore, the ECHR again fails to provide a convincing conceptual basis for human rights *tout court.* The EU institutions have, for instance, embraced the indivisible principle, have endorsed it and applied it. The rhetoric of fundamental rights has precluded a hierarchy whereby civil and political rights should be or are preferred. This is reflected within the Charter and EU case law. One might point to the ambivalence attached to some social and economic rights in the former, but this is by no means a pervasive flaw. Of course, prior to the Charter's adoption there was little to guide EU institutions in responding to human rights demands other than a confusing mixture of sources of law which differed greatly depending on the context of their actions. The ECHR provided an essential precedent internally (as recognized first in case law and then in the Treaties), but it was by no means the only source. The Social Charter and international human rights instruments also provided inspiration. Externally, the EU institutions eventually developed a broader conception of applicable human rights norms.

The development of social policy internally and identification of economic and social rights for promotion externally point to an institutional appreciation of indivisibility within the EU that simply transcends the limitations of the Convention. The CJEU's jurisprudence also indicates a willingness to see matters of equality and solidarity as human rights matters worthy of protection as well as being justiciable. It is plausible to suggest therefore that indivisibility is a working normative principle applicable in the EU context, one which is not shared by the ECHR in its constitution.

From a UK perspective we might add that the debate about a Bill of Rights has reflected some of these fault lines regarding the ECHR and the indivisibility question.

[51] O'Connell, 'The Death of Socio-Economic Rights', 74 *MLR* (2011) 532.

In 2008 the parliamentary Joint Committee on Human Rights reported a mixed response.[52] On the one hand there was recognition that 'including fully justiciable and legally enforceable economic and social rights' in any Bill of Rights 'carries too great a risk that the courts will interfere with legislative judgments about priority setting'.[53] Nonetheless, it concluded that certain rights (to health, education, and housing) should be included, but with carefully drafted limitations on judicial interpretation drawing on the South African model as inspiration.[54] The point here, though, is not whether such proposals are workable. It is that the ECHR is acknowledged as not providing a sufficiently credible instrument to protect the range of rights now assumed as vital to a tolerable definition of 'human rights'.

For these two reasons associated with universality and indivisibility, therefore, the Convention fails human rights.

3 Second Submission

My second submission follows. It is that 'good' or lauded decisions of the ECtHR cannot remedy or counter-balance the conceptual flaws noted in my first submission. The political and structural constraints placed on the meaning of human rights through the Convention text, which were the result of perceived national interests and the preservation of national sovereignty (themselves both antithetical, I would suggest, to the underlying appeal of contemporary international human rights discourse), have meant that we cannot look to the practice of the ECtHR in order to provide an effective antidote. In other words, it would be expecting too much to rely on the jurisprudence of any court to cure what was a theoretically defective constituting text. Indeed, any court which attempted to do so could be admonished for its lack of respect for the internationally negotiated text *and* have its judgments questioned on the basis of an unjustified activism that arguably contradicts the authorizing instrument. That would put in jeopardy the whole mantle of legitimacy placed on the Convention.

This is not to say that judgments handed down over the years possess limited value. Undoubtedly we can point to a whole welter of decisions which have helped further particular Convention human rights, giving them greater definition, wider application, and directive clarity. We may not be able to claim that individuals who brought the cases to Court have benefited (mainly due to the delays in reaching judgment that have undermined the usefulness of decisions for people alleging abuse). Nor may we be able to suggest uniformly that states parties have honoured their obligations to make necessary changes to their practices or laws to reflect the 'good' judgments.[55] But even so, there are many instances where there has been a positive development of Convention rights benefiting societies and individuals alike in the medium and

[52] See House of Lords and House of Commons Joint Committee on Human Rights, 29th Report, 21 July 2008, available at: www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/16502.htm.

[53] *Ibid.*, at para. 167.

[54] *Ibid.*, at para. 192.

[55] It remains an outstanding criticism that judgments are not sufficiently respected by states parties.

longer term. At least that is the argument.[56] The difficulty, however, is in demonstrating whether this impact is of any great consequence. Have the 'good' decisions merely reinforced the conceptual failings by emphasizing the restricted application of human rights in the European sphere? Have they given greater weight to civil and political rights at the expense of other rights, particularly collective ones, which remain outside the Convention's remit? Have they entrenched the sense that indivisibility as a reliable or even useful notion of human rights is practically impossible except through the lens of a tight reading of civil and political rights or at best as a result of discriminatory practices?[57]

Ultimately we lack a clear cost-benefit analysis that would help to answer these questions. Maybe that is because it is difficult to talk about human rights in such technical terms. Given their pedigree, the dreams that are often referred to as providing their appeal, constructing a balance sheet along these lines can be difficult to accept. Richard Rorty has pointed to this 'sentimental' quality to human rights in their modern mythology.[58] Even if we would like to address rights in a more technical fashion, thus providing them with some sense of substantive achievement, the allure of human rights does not rely on calculation. They generate emotional responses that have more to do with people's sense of justice howsoever they may be formed, than they do with respecting their legal articulation. But some method of evaluation still needs to be conducted. And it remains largely haphazard in the analysis of the Convention system and its jurisprudence. Even with the limited information available is there any indication that the conceptual failings *vis-à-vis* universality and indivisibility have been remedied by decisions of the Court?

Let us take the example of extra-territoriality. If the notion of human rights as universally held by reason of one's humanity (not citizenship) *and* the obligation to protect those rights rested initially with the signatory states, then it would be logical to suppose that any breach of a Convention right by such a state would be condemnable by and within the regime. The ECHR labours under a restriction though. Article 1 provides that its signatory states shall secure the Convention rights 'to everyone within their jurisdiction'. It is to the interpretation of 'jurisdiction' that we must therefore turn. In that respect a rich history of judgment has developed. In *Loizidou* v. *Turkey* the Court found that the Convention applies to actions by a state agent (members of the Turkish armed forces in this instance) outside state borders provided the state concerned could be said to have exercised 'effective control of an area'.[59] The *Bankovic* case (addressing injuries inflicted as a result of NATO bombing Serbia in

[56] See Keller and Stone Sweet, *supra* note 5.

[57] Ken Roth gave a clue as to the meaningfulness of economic and social rights for instance when he advocated for legal action only in limited circumstances. He eschewed the justiciability of many rights other than where there was evidence of discrimination: see Roth, 'Defending Economic, Social and Cultural Rights', 26 *Hmn Rts Q* (2004) 63.

[58] Rorty, 'Human Rights, Rationality, and Sentimentality', in S. Shute and S. Hurley (eds), *On Human Rights: The Oxford Amnesty Lectures 1993* (1993), at 111.

[59] App. No. 15318/89, *Loizidou v. Turkey*, Judgment (preliminary objections) of 23 Mar. 1995, Series A No. 310, at para. 62.

1999) found no jurisdictional link when applying that test.[60] In doing so the ECtHR, unintentionally perhaps, pointed to the thinking underlying the ECHR's construction. It established that the Convention 'was never designed to be applied throughout the world' whether in relation to the behaviour of contracting states or not.[61]

The later case of *Issa* seemed to reflect more on this conclusion, reiterating that it was possible for states to be responsible for the actions of their forces in other territories provided that sufficient control was exercised over the region at the time, a fact that the Court would not find in that case.[62] It would be true to say, therefore, that the preponderance of case law by 2005 supported the contention that there had been a failure to redress the universality lacuna.

The recent decision of *Al Skeini*, however, may provide a better representation of the Court's qualities.[63] Examining the occupation of Iraq by British forces in 2003, the ECtHR held that by assuming the 'authority and responsibility for the maintenance of security operations in Basrah' the UK exercised control over individuals killed during those operations *as well as* those taken into custody. It thus overruled the House of Lords which had accepted the latter scope of responsibility but not the former.[64]

Here, then, is evidence that the Court has been able to overcome the perceived conceptual failure. But I suggest one must be cautious. The Court accepted that this was an exceptional case. It also accepted that jurisdiction applied only to the rights 'relevant to the situation of the individual'.[65] The rights *could* be 'divided and tailored', concluding that if the occupying power's role was restricted to security operations and 'supporting the civil administration' then it would be only in those areas that rights could attach, and only relevant rights at that.[66] These conditions may have been met in the case of the UK's operations from 1 May 2003, when it assumed occupying powers, but these ceased on 28 June 2004 when power was formally passed to the Interim Iraqi Government. Despite the fact that British troops continued to operate within the country they were not subject to the same Convention requirements prior to that date. Thus on the 27 June 2004 the UK could be answerable under the Convention for the unlawful killing of an Iraqi civilian, and the next day it could not unless the offence occurred within one of its army installations.

If there was the prospect of strong universalism, the reality of application dispels that notion with this conclusion. Even though it has been applauded as a victory for human rights, and certainly represents a clarification of human rights law extending its scope post *Bankovic*, the fact remains that there is a structural restriction on the application of rights embedded in the Convention. The Court has found itself bound in the face of such a constraint. It has also produced a fudge, in the sense that it has accepted the

[60] App. No. 52207/99, *Bankovic and Others v. Belgium and Others*, decision (inadmissibility) of 12 Dec. 2001, ECHR (2001) XII.

[61] *Ibid.*, at para. 80.

[62] App. No. 31821/96, *Issa and Others v. Turkey*, Judgment of 16 Nov. 2004 (final on 30 Mar. 2005).

[63] App. No. 55721/07, *Al-Skeini and Others v. UK*, Judgment, 7 July 2011.

[64] *Ibid.*, at para. 149.

[65] *Ibid.*, at para. 137.

[66] *Ibid.*, at para. 147.

notion that rights can be divided up depending on those responsibilities assumed by a state party in a territory outside its own. How this can be achieved in practice is difficult to know. Was the support provided to the civil administration in the context of *Al Skeini* limited to security operations when it was clearly involved in social reconstruction and the introduction of a new system of governance? Even if there was a limit, what rights would be excluded from consideration in these circumstances? The 'good' judgment of the Court may not be quite as good as it first appears with regard to future application.

On the question of indivisibility of rights there are again signs of lauded decisions which suggest that the Court is willing to interpret the Convention so as to encompass economic and social type rights. In *Airey v. Ireland* the ECtHR accepted the premise that there was an overlap between civilian and political rights and economic and social rights.[67] This meant that in applying the ECHR rights regard sometimes had to be paid to rights in the latter category. The principle of overlap has caused litigants to look for the enforcement of economic and social type rights through the portal of those rights listed in the Convention. Often these have revolved around a fluid interpretation of Article 3 and the prohibition of torture and inhuman and degrading treatment. The Court has responded accordingly. Indeed, since the adoption of the 'living instrument' principle in *Tyrer v. UK* the Court has been presented as liberal in its interpretation of 'present-day conditions' with regard to the application of Convention rights.[68] It has used this to underpin decisions designed to draw in rights which had absolutely no mention in the Convention or its Protocols. The joint dissenting judgment in *Hatton v. UK*, which incidentally has drawn Lord Hoffmann's particular ire, declared that the

> 'evolutive' interpretation by the Commission and the Court of various Convention requirements has generally been 'progressive', in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the 'European public order'. In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on.[69]

Again the intent to remedy the indivisibility failure is redolent in this opinion. It promises a Court ready to develop human rights in the European sphere *regardless* of the initial text. Similarly, the economic and social dimension of rights might be seen to require positive obligations assumed by governments to act to protect rights. Much has been made of the ECtHR's desire to do just that, often through the prism of Article 8 and the right to family life. In *X and Y v. Netherlands* the Court declared that:

> although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such

[67] App. No. 6289/73, *Airey v. Ireland*, Judgment, 9 Oct. 1979, 2 EHRR 305.

[68] *Tyrer v. UK*, *supra* note 40.

[69] App. No. 36022/97, *Hatton and Others v. UK*, 2003-VIII 189; (2003) 37 EHRR 28, Joint dissenting opinion of Judges Costa, Ress, Turmen, Zupancic, and Steiner, at para. 2.

> interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life[70]

The possibility of developing through case law greater obligations upon states which might conceivably advance some economic and social rights as traditionally viewed suggests a Court happy to challenge the civil and political rights straitjacket. But again caution is required. The Grand Chamber in *Hatton* still found that:

> Environmental protection should be taken into consideration by Governments in acting within their margin of appreciation and by the Court in its review of that margin, but it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights.[71]

Although the Court has undoubtedly 'embraced the radically different natures of contemporary European societies … from those existing when the founding States drafted the Convention in the early days of the Cold War', there is precious little evidence that it has contributed to the betterment of peoples in economic and social terms.[72] *Chapman v. UK* illustrated this failure well. The judgment included the observation that 'Article 8 does not give a right to be provided with a home … [w]hether the State provides funds to enable everyone to have a home is a matter for political not judicial decision'.[73]

Of course, it is more than arguable that this is not its job. Alastair Mowbray ends his appreciation of the Court by stating that it has 'generally struck a fair balance between judicial innovation and respect for the ultimate policy-making role of member States in determining the spectrum of rights guaranteed by the Convention'.[74] In other words, the indivisibility failure has *not* been challenged in any fundamental way. Rather the Court has only played around the margins of developing rights understandings by using Article 3 (torture) or Article 8 (family life) when deemed appropriate. This may have led to some desirable decisions about sexuality[75] or discrimination in education,[76] but the conceptual failure haunts every judgment. It has also the added disadvantage of providing those who see any interference from Europe as unwelcome with the reason to show how 'out of control' the Court can be. When compared with the original text, this can be convincing for those who dislike the idea of courts attempting to impose policy change on purportedly democratic governments beyond their constituting authority.

Thus, for all the good decisions the conceptual failure remains a debilitating condition. It is a problem which is accentuated, or so Lord Hoffmann and other critics of the

[70] *X and Y v. Netherlands, Series* A No. 91, 8 EHRR (1986) 235, at para. 23.

[71] *Ibid.*, at para. 122.

[72] Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Hmn Rts L Rev* (2005) 57, at 59. For a condemnatory view of the ECtHR's pretentions regarding economic and social rights see Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', 2 *Erasmus L Rev* (2009) 397.

[73] App. No. 27238/95, *Chapman v. UK*, ECHR 2001-I, 33 EHRR (2001) 101, at para. 99.

[74] Mowbray, *supra* note 72, at 425.

[75] For instance, App. Nos. 33985/96 & 33986/96, *Smith and Grady v. UK*, 27 Sept. 1999, 29 EHRR (2000) 493.

[76] App. No. 57325/00, *D v. Czech Republic*, 13 Nov. 2007, 47 EHRR (2008) 3.

Court would claim, by reputed serious failings in the quality of the judges. The argument, in essence, is that good decisions are dependent on a bench the composition of which is decided by nomination rather than qualification. Hoffmann may have jeopardized any *entente cordiale vis-à-vis* the relationship between the British and European judiciaries, but his point has been reinforced.[77] Certainly, the ECtHR's counterparts in the CJEU fare better by comparison. However, it is a petty point when compared with the underlying critique I have presented. Even a highly qualified judiciary would remain constrained. A less qualified bench merely makes the exceptional nature of good decisions remedying the conceptual failure more likely.

Such a submission can and will be countered by those who believe in the general impact attributed to the Convention on the improvement in human rights in Europe over the last 50 years. The evidence of change can be presented in a positive fashion. It would indeed be churlish to suggest that the Convention and the decisions produced by the ECtHR have had no influence on the development of human rights cultures in Europe in general. But the central conceptual failure remains unaddressed despite the 'good' decisions that may occur.

4 Third Submission

It may seem a little ironic, given the above, that my next submission should make more of 'bad' decisions than I say is possible for 'good' decisions. But the arguments are different. 'Bad' decisions can expose the conceptual failure which underscores the Convention. They can provide an insight into not only the quality of the judges who have the task of interpreting the 'text' but also the parameters of judgment which the text demands. Indeed, it is when judges of reputed great virtue act in *spite* of the text that we can discern an underlying flaw in its composition. Similarly, when they fail to look beyond the constraints of that text we can also discover failings inhabiting it. Of course, this requires a theoretical approach to the Convention that does not accept the 'law as text' and 'law as practice' dichotomy. The two reflect the value of each other.

Having said this, there is clearly something rather nebulous about using such terms as 'good' and 'bad' judgments. These designations are themselves the product of judgement. And that is in turn likely to be a subjective matter unless we can identify a plausible basis for making pronouncements one way or another. This returns us to the conceptual underpinning of human rights integral to my first submission. Without becoming embroiled in discussion about the meaning or foundations of human rights, I will refer to only one quality which I believe can be plausibly assumed: that for a human rights text to be considered just that, a human rights text, it has to be applied humanely to all humans caught up in the actions of states.

I want to use one case, *N v. United Kingdom*, to illustrate my claim, one that I appreciate will require considerably more support through the examination of other cases

[77] It may be acquiring mythic proportions in the UK context with stories about lack of quality infusing the Civitas and Policy Exchange reports and surfacing in press reports. See *supra* note 3.

than I can reasonably undertake here.[78] Nonetheless, the case of *N* seems to me of great significance in my scheme of submissions.

The facts of the case are quickly drawn. N was a Ugandan citizen who had sought asylum in the UK. She was an HIV sufferer and began to receive anti-retroviral drugs whilst her claim for asylum was still being considered. The Secretary of State then refused her application. N appealed on the grounds that it was clear that if she were returned to Uganda her access to treatment would be severely affected and her life expectancy would be dramatically reduced. This would be a violation of Article 3 ECHR. Her appeals through the UK system failed. When the case was referred to the ECtHR, a similar conclusion was reached. The Court determined that only in 'exceptional circumstances' would the expulsion of a failed asylum seeker fall foul of Article 3. The Convention was expressed as aimed at protecting civil and political rights. Its purpose was to manage a balance between communal interests on the one hand and the individual's on the other. It did not offer any significant possibility for equalizing 'care' (be it health or any other type of care one imagines) among state parties and was not designed to address economic and social rights exclusively. Consequently, it could not be used to protect those from non-state parties and in effect be used as a means of addressing global inequalities in health care. This was the central premise of the judgment. It recognized the unpalatable possibility of a contrary finding opening the 'floodgates' to people from outside any state party to receive free health care. That would be placing 'too great a burden on the contracting states' it was held.

The dissenting judgment of Judges Tulkens, Bonello, and Spielmann highlighted the way in which this decision has reflected the underlying failure of human rights apparent in the Convention and its system. Two particular arguments are relevant for my purposes.

First, they alluded to the unsatisfactory statement by the majority of the Court that the ECHR was essentially an instrument of civil and political rights that could not, and indeed should not, be deployed to provide relief or even guidance on wider notions of human rights. Although the dissenters were able to point to previous decisions that there is in theory 'no water-tight division' between the two sets of rights, the fact remains that the Convention was conceived in narrow terms.[79] The indivisibility of human rights was from the outset denied by the Convention, as we have seen.

Secondly, the dissenters also objected to the application of derogation in this case. They recognized that, although some balancing exercise had been prevalent early in the life of the Convention system, whereby the 'communal interest' was weighed against the position of the individual, such an approach could not be applied to Article 3. This provision has often been lauded as the 'absolute' right within the Convention, suggesting that it possesses a position that denies the legitimacy, from a human rights perspective, of any balance of interests in its application. If someone is found to suffer inhumane treatment at the hands of a state party then there can be no social interest that would forgive it. This interpretation, the dissenters suggested, was sacrosanct.

[78] App. No. 26565/05, *N v. UK*, Grand Chamber, 27 May 2008, 47 EHRR (2008) 39.

[79] The dissenters relied on *Airey v. Ireland, supra* note 67, at para. 26.

It had been forged through the case law concerned with returning migrants to their country of origin where they faced a real prospect of torture or ill-treatment.[80] But, of course, the Convention does not really offer this protection. It was not designed to do so. The majority of the Court was technically correct in its interpretation because of the instrument's very failure that I outlined in my first submission. The Convention in its partial adoption of the human rights idea denied those same human rights. Providing a politically parochial determination of a balance of interests within its language and structure ensured that human rights were always to be contingent and *subject to* the rights of states.

It is in this sense that the decision in *N* was 'bad'. Not from a Convention point of view but rather from a human rights perspective. The same could be said for two other modern cases, *Behrami/Saramati* and *Leyla Şahin v. Turkey*.[81] Although I do not have space to examine these judgments they are both plausible in their findings in terms of the Convention and both indicative of the central failures I suggest exist.

Of course Lord Hoffmann would look upon these 'bad' decisions as both 'good' (in the sense that they achieved the preferred result of leaving policy decisions to national governments) and 'bad' (in that they allowed certain judges to show their dissent from the decision and thus suggest the whole system was flawed). Hoffmann even doubted the legitimacy of those judges in *Hatton* who pronounced that the UK government had 'struck the right balance' when it had reviewed the planned expansion of Heathrow airport. His outrage was focused on the fact that the ECtHR had had the temerity to pass judgment on whether a balance had been struck at all.

In adopting this disdainful approach Lord Hoffmann did little more than reflect the views of many populist commentators who doubt the ability of a distant court adjudicating on delicate matters in a specific national jurisdiction. This may be persuasive at UK or other national level, but how might that then figure at the EU level? Will the EU institutions be any more accepting of ECtHR interference in deciding matters of relevance to the EU's interests?

We can glean some sense of the trouble ahead by looking at some of the EU's recent pronouncements. The Joint Communication from Presidents Costa and Skouris about the principles of accession to the ECHR by the EU emphasized the growing reliance placed on the EU Charter rather than the ECHR. This is a position amplified by Vivian Reding, Commissioner responsible for human rights policy, who recently pronounced:

> Protecting fundamental rights is about upholding human dignity and the full enjoyment of rights. In view of the strength of the EU Charter – which is in many instances more ambitious than the Convention – the European Union will not find it difficult to meet the standards required by the Convention. The accession of the European Union to the Convention is an incentive to develop the policies that strengthen the effectiveness of the fundamental rights that people enjoy in Europe.[82]

[80] App. No. 22414/93, *Chahal v. UK*, 15 Nov. 1996, 23 EHRR (1997) 413.

[81] App. Nos 71412/01 and 78166/01 *Behrami v. France* and *Saramati v. France, Germany and Norway,* 45 EHRR (2007) SE10 and App. No. 44774/98, *Leyla Şahin v. Turkey*, 10 Nov. 2005.

[82] Reding, *supra* note 2.

The message appears to be that the Charter is the superior document. Placed in the context of the functioning of the EU the danger of interference by a court relatively ignorant of the complexities of EU law and policy, the preference for EU problems to be dealt with first and primarily by EU courts is very strong. Costa and Skouris' joint statement reinforces this by emphasizing the importance of the principle of 'subsidiarity' as governing the accession arrangements. In this context they argued that 'a procedure should be put in place in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review'.[83] In other words, the integrity of the CJEU's jurisdiction should be preserved. It is the CJEU which understands the complexities of EU law, *not* the ECtHR. 'Bad' decisions can be avoided only by the appropriate court, which is presented as predominantly the CJEU, taking the lead. This is the message.

Is this any different from the position of those in the UK who value the ECHR but not necessarily the ECtHR's judgment and interference? The prospect of 'bad' decisions resulting from an inability of the Court to appreciate the EU context in essence mirrors Lord Hoffmann's and others' view. The lack of trust evident in the ECtHR institution and personnel, whether justified or not, reinforces the submission that 'bad' decisions should not be tolerated.

5 Fourth Submission

All of which brings me to my final submission. Systemic problems attributed to the ECHR regime merely compound the conceptual failure. Thus their remedy may obscure some of the flaws, but it will not address them.

Steven Greer has identified the most significant of the structural problems.[84] 'Case overload', made unbearable by the expansion of states parties following the end of the Cold War, the inability to enforce judgments of the Court, ineffective means adopted to improve the application of the Convention, and the jurisprudential confusion between adopting an 'individual justice' model rather than a 'constitutional justice' model.[85] In essence, the last issue again takes us back to the conceptual failing and is something of a blanket covering all the individual problems. It speaks of a confusion of purpose that applies to international human rights as global phenomena. Should international rights instruments act as a means for interfering in the affairs of states *and* providing a direct channel for individuals to seek redress? Or should those courts, tribunals, or commissions constructed by these instruments provide general guidance on errors, flaws, and abusive practices that can inform future procedures adopted by states parties both specifically and collectively?

The Convention as developed through jurisprudence of the Court has failed to make this choice. And as a result the sense of human rights promoted by the regime has

[83] Joint Communication, *supra* note 10.
[84] Greer, *supra* note 9.
[85] *Ibid.*

become confused. When weighed with the 'crises' (as Greer calls them) of case overload and ignored decisions, the impact of this conceptual uncertainty serves to undermine human rights as transcendental in character or as having particular application to the lives of individuals. There may well be some evidence that the ECtHR's practice has been to move closer to a constitutional justice model. Wojciech Sadurski suggests that the use of 'pilot-judgments' by the Court *vis-à-vis* Central and Eastern European countries is pushing the regime in this direction.[86] He argues that the fiction that the Court previously only adjudicated on 'bad decisions', not 'bad laws', has been exposed and that both are now being assumed as within its jurisdiction. The development remains tentative, 'fragile', and resting on 'unstable foundations', but there is a sense that in new states parties there is a willingness to accept a partnership between the ECtHR and national legislatures, the latter learning from the Court's decisions so as to change laws which offend the Convention.

However much of a positive spin is placed on this trend (and Sadurski recognizes the tentativeness of his analysis), there is no suggestion of resolution of the fundamental conceptual failing which lies at the heart of the regime. Indeed, it reinforces the argument that the Convention system may have relevance for those states in transition from autocracy to modern capitalist, democratic systems, but that relevance falls away once legal systems address underlying violations. That, at least, is one possible implication, one which might be relied upon by advocates for a new relationship with the ECHR.

In sum, therefore, we have a system that has failed to address significant questions about human rights and their composition and character. Greer's critique that there has been an inadequate determination of the appropriate model of justice adopted (the individual or the constitutional) is part of this problem. It is indicative of a system that demonstrates its inability to overcome underlying conceptual failings. But remedying these structural problems through an increasing number of additional protocols or procedural alterations is a fruitless exercise. If they are the product (even in part) of a central conceptual failure then however much we may tinker with the details of process, however much the rules of the Court and the structures of its operation may be developed, we will never escape that condition. All such amendments can hope to achieve is to diminish some of the injustices made more apparent through the operation of the system itself. So, for instance, speeding up the resolution of cases may well address the problem of the victims of human rights abuses receiving redress only years after their suffering, but it will not assist in cases such as *N.* All we may get is less drawn out processes. This will not mean that the decisions the Court delivers will be or can be any better or that they may somehow remedy the underlying problems of the Convention.

From the EU perspective, the current approach suggested for accession to the Convention is to limit the times when matters are referred to the ECtHR. The insistence

[86] Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe and the Idea of Pilot Judgments', 9 *Hmn Rts L Rev* (2009) 397.

that the CJEU deal with complaints first as a means of exhausting domestic remedies has now been embraced by the Steering Committee, which recently presented its draft accession agreement.[87] The Committee explained that 'it was considered desirable that an internal EU procedure be put in place to ensure that the CJEU has the opportunity to review the compatibility with the Convention rights at issue of the provision of EU law which has triggered the participation of the EU as a co-respondent'.[88] In other words, if an action is taken against a Member State of the EU with regard to a matter related to an EU law, then the CJEU should have first determination of the issue. The prospects for prolonged litigation thus resurface.

But it is difficult not to feel that with the recognition of the Charter within the EU's legal system following the Treaty of Lisbon, accession will confuse the general development of human rights protection in the EU. Given that the Charter covers a greater range of rights than the Convention, accession will lead to an international body able to adjudicate on some recognized rights but not many others. Within the EU legal system, there will be a possibility of developing jurisprudence which will allow the CJEU to approach many problems from a holistic perspective, comparing and assessing a variety of rights issues which may permeate a single case. However, specific elements relating to rights associated with the Convention may end up being adjudicated on with a much narrower focus. Can the ECtHR really cope with this? The margin of appreciation principle would not allow for such creative rights thinking when dealing with social and economic dimensions to civil and political rights claims. Expanding the meaning of Article 3 on torture and inhuman treatment so as to encompass aspects of destitution or Article 8 on family life so as to encompass environmental concerns will inevitably be criticized as overstepping the Court's authority. This can only continue to undermine the development of human rights in Europe and nationally. The CJEU may attract various other critiques, but the Charter allows significantly more flexibility in this wider human rights perspective.

Would this be the same for the UK? At present the reliance upon the Convention for human rights claims falls foul of the same criticism applied to the ECHR regime. UK law is tainted by association even if the common law may remedy some of the effects by relying on other sources of rights, including legislation.[89] A British Bill of Rights which incorporated a wider range of rights than those in the ECHR but retained a role for Strasbourg's Court would then suffer from the same partial intervention by the ECtHR as will afflict the EU – the ECtHR could be called to review *some* rights but not others, leaving external scrutiny strangely limited and any Bill subject to potentially ambiguous influences. If it did not expand recognized human rights then the conceptual and systemic problems would be perpetuated.

[87] Steering Committee, Draft Explanatory report to the Agreement on the Accession of the EU to the ECHR, CDDH(2011)009.

[88] *Ibid.*, at para. 58.

[89] The anti-discrimination body of legislation is a case in point, where a specific rights matter inadequately addressed by the Convention has been protected through a sequence of legislative acts some of which have been inspired by EU law.

6 Consequences

Where does this leave us? The sequence of four submissions suggests that for the EU and the UK the Convention regime offers limited benefit for future human rights development. For the UK a British Bill of Rights may thus promise the opportunity to resolve the conceptual and systemic problems. For the EU there is already arguably a Charter fit for the purpose of reviewing EU institutions and an evolving system of scrutiny and review. As the CJEU and the Commission reiterate, the Charter is the preferred text to assess policies and decisions. What more does or could the ECtHR provide? Perhaps it may remain of symbolic or iconic value, but that may not be seen as adequate when weighed against the disadvantages. Now that the Convention has been effectively subsumed within the Charter, we are left with an ECtHR limited in its ability to address the complexities of human rights based on principles of universality and indivisibility. Much the same can and has been said for the UK.

But perhaps we must pause here. All the arguments I have advanced are not an invitation for those wishing to do away with the Convention *without seeking a suitable replacement*. Nor is it a supporting framework for those attempting to see reform of the Convention's procedures, as I have explained, as sufficient response to perceived ills. In the absence of a policy and plan to replace the Convention with a text and system of investigation which are fit for the purpose of a modern, western society in times of both plentiful resources *and* austerity, then nothing will be gained by its burial.

Until that time we must still ask what *will* be lost if the Convention system is discarded or reduced to the periphery? First and foremost will be an external review by an international body, a check on the outrages of government which are not or cannot be challenged by the domestic courts. Some argue that it is this attribute which offends. Lord Hoffmann noted that a reduction in the cases brought before the ECtHR may be desirable to remove the issue of case overload. He suggested this was 'so that the Court can husband its resources … to deal with cases which are not the subject of well-established case law of the court'. He then added: 'But these cases where the point is reasonably arguable either both ways, are likely to be the very cases in which the Court should not be intervening at all.'[90] In other words, the Court has no place to decide contentious matters of human rights. These should be left to the domestic system of legislature and judiciary.

That might be appealing to some, applying the principle of subsidiarity as advocated by the EU in particular. But the obvious danger arises through tyrannies obscured by democratic processes. J.A.G. Griffith's *Politics of the Judiciary* remains essential reading in this respect.[91] A review of the experience of anti-terrorism legislation over the past 15 years in the UK demonstrates when matters of security can override human rights in insidious ways. Similarly, fears about the ability of the EU to override human rights matters when purportedly operating in the interests of the single market (or salvation of the single currency) will hardly be assuaged by avoiding or removing the ECtHR's influence.

[90] Hoffmann, *supra* note 8.

[91] J.A.G. Griffith, *Politics of the Judiciary* (5th edn, 2010).

Of course, the value of external review is not lost on the Convention regime critics. Lord Hoffmann accepted that the ECHR could remain as a text to be used 'as a standard against which a country's compliance with human rights can be measured for the purposes of' political criticism, but eschewed external *legal* review. The argument is that if a national regime operates beyond acceptable levels then the more general political community will intervene. But the experience at the EU level is crisply clear here. Article 7 TEU provides a political means for condemning Member States for *inter alia* human rights abuse. However, the prospects of its deployment are minimal. It would only be in the most egregious circumstances of human rights violations that any intervention was likely, which would leave the vast rump of abuses subject only to the domestic judiciary's willingness to challenge government policy and legislation.[92] And in any event the future of the EU is hardly assured as a body capable of or willing to assess its Members in this area.

There are other benefits that would be lost. Some were identified by Keller and Stone Sweet in their study of the Convention's reception in national orders.[93] They pointed to how the number of applications relating to a particular state helped to reveal 'problems in domestic orders'; to the Convention system's value in filling 'gaps in national legal orders', particularly those without a 'comprehensive entrenched Bill of Rights'; to the Court's role as a partner to national judiciaries in the development of human rights jurisprudence.

Of course all of these are deemed insignificant by those who mistrust the interference of the ECtHR in national affairs *per se*. But Hoffmann's rhetorical question, 'What should be done?' has not been followed by any practical suggestions for how the loss of benefits might be compensated. The 2011 Policy Exchange report, whose author sits on the government-appointed commission to examine the possibility of a British Bill of Rights, only looks to limited problems of the ECtHR as well.[94] There are no proposals to introduce initiatives to deal with the conceptual failure or the dangers inherent in an insular system of review through law or other effective means.

For all the reasons why we should bury the Convention system, therefore – and I have argued that its interment can be justified, if the benefits it provides are not replaced by better structures and processes of monitoring, promotion and enforcement *as well as* an acceptance of a preferred text (the EU Charter is already a suitable candidate as I have argued elsewhere) – then we may be left with more than just mischievous praise.[95] One citizen's response to Mark Antony's lament for the loss of Julius Caesar is apposite here: 'I fear that there will a worse come in his place.'

[92] See Williams, 'The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iraq', 31 *EL Rev* (2006) 3.

[93] Keller and Stone Sweet, *supra* note 19, at 691.

[94] See Policy Exchange, *supra* note 3.

[95] The reform of the EU's human rights regime is the subject of a forthcoming work by the author.