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# The European Convention on Human Rights, the EU and the UK: Confronting a Heresy: A Reply to Andrew Williams

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## Abstract

*This reaction piece responds to the article by Andrew Williams entitled ‘The European Convention on Human Rights, the EU and the UK: Confronting a Heresy’. In his article, Williams contends that we should not further support the ‘orthodox’ view that the Convention (ECHR) has been very successful in protecting and promoting human rights across Europe, offering four submissions to that end. It will be argued that Dr Williams’ submissions regarding the ECHR’s success and the European Court of Human Rights (ECtHR)’s role are not well supported and justified. The relationship between the ECHR and a future UK Bill of Rights will also be explored in the piece, as there is no sufficient link between the author’s arguments about the ECHR regime and the UK legal system, making it rather artificial to refer to the UK as a possible model for human rights.*

## 1 Introduction

In his article, entitled ‘The European Convention on Human Rights, the EU and the UK: Confronting a Heresy’,<sup>1</sup> Andrew Williams attempts to highlight the conceptual failures of the ECHR in the area of human rights and argues that even ‘the ‘good’ decisions of the ECtHR cannot remedy or sufficiently counter-balance’ such conceptual failures.<sup>2</sup> According to his fourth submission, the resolution of the procedural problems of the ECHR regime will not improve the effectiveness of the regime, as its grounding philosophy is not stable.<sup>3</sup> Based on these assumptions, he is in favour of

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<sup>1</sup> Williams, ‘The European Convention on Human Rights, the EU and the UK: Confronting a Heresy’, in this issue, at 1157.

<sup>2</sup> *Ibid.*, at 1173.

<sup>3</sup> *Ibid.*, at 1161.

the idea of ‘bury[ing]<sup>4</sup> the ECHR and the ECtHR’, because ‘mild reform through the system itself is futile’ if there is no alternative in place suitable to improve human rights in the EU and the UK. For Dr Williams, the current negotiations for the accession of the EU to the ECHR are closely related with the debate about the need for a new UK Bill of Rights. On this issue, he recommends that the new Bill should expand recognized human rights and thus avoid the conceptual and systemic problems of the ECHR regime.

At first glance, Dr William’s main thesis is not so heretical, because it is widely accepted that the ECHR regime has inherent flaws, the most significant of which being that it is a legal document created in the 1950s. However, he supports the view that ‘the Convention regime offers limited benefit for future human rights development’<sup>5</sup> and that its ‘structural problems hinder good adjudication’<sup>6</sup>. From a theoretical perspective, this article is an attempt to move the literature away from a focus on the accession negotiations and adopt a more pragmatic approach towards the future of human rights protection in the UK and the EU as a whole. However, the identification of gaps in the system and shortcomings in the condition of human rights through the ECHR regime is not a sufficient basis upon which to contend that its principled foundations are defective and that it should be retained only as ‘an iconic scheme of moral importance’.<sup>7</sup>

In this article it will be maintained that the above assertions are based on wrong perceptions about the role of the ECHR and its relationship with the EU Charter of Fundamental Rights. This position will be explored in three separate, but mutually supported, sections. The first discussion will focus on the real contribution of the ECHR in the context of human rights protection in the European continent, the second on the role of the EU Charter in the EU legal order, while the third one will make reference to the plans for a UK Bill of Rights. Finally, having rejected the central assumptions made by Dr Williams, the last section of this article will explore how his thesis could be re-employed to tackle a related problem concerning the future of human rights protection in the UK.

## 2 ECHR Revisited

The ECHR is an international treaty by which signatory states oblige themselves to secure certain rights to persons within their jurisdiction.<sup>8</sup> It entered into force in 1953 at a time when Europe was still recovering from the atrocities of World War II, as part of a wider initiative to create a common ideological framework, stressing

<sup>4</sup> It is worth acknowledging that the use of the term ‘bury’ creates ambiguity, as the term is rather blunt, but at the same time it is linked with the references to Shakespeare’s work. Therefore, it is assumed that the function of such a heretical proposition is to incite a Shakespearean Mark Antony inspired reflection rather than suggest the actual burial of the ECHR and ECtHR system.

<sup>5</sup> Williams, *supra* note 1, at 1184.

<sup>6</sup> *Ibid.*, at 1159.

<sup>7</sup> *Ibid.*, at 1157.

<sup>8</sup> Art.1 ECHR.

individual civil and political freedoms and rights. Five decades later, it is undisputed that the ECHR has been successful in carrying out its mission, judging from its influence on the laws and social realities of the contracting parties, the extensive jurisprudence in the field of the protection of human rights, as well as the remarkable compliance with the ECtHR's judgments. Europe has become an area of freedom, equality, and fairness, while the ECHR regime has paved the way for governments to bring human rights protection into the 21st century. The Convention and the ECtHR have played a key role in encouraging countries to adopt laws or amend legislation to ensure an effective protection of the rights enshrined in the Convention,<sup>9</sup> make all the essential institutional changes and organize their operation in a fashion that ensures that rights guaranteed by the Convention become effective,<sup>10</sup> and, when necessary, take action which guarantees the effective enjoyment of rights entrenched in the Convention.<sup>11</sup>

The ECHR has indeed inherent flaws and limitations, but it cannot be ignored or simply downgraded as suggested by Williams. It serves as a platform for external scrutiny of the EU initiatives and an excellent basis for achieving harmonization through the establishment of minimum standards across the 27 EU Member States as well as the 47 Contracting Parties of the Council of Europe. Harmonization, even at the level of minimum standards, in the area of fundamental rights is one of the priorities of the EU, and it is far from being considered an easy task. The cases of *Omega*<sup>12</sup> and *Schmidberger*<sup>13</sup> have already identified some of the problems, and we are still far from reaching consensus on what is the optimal level of protection that should be afforded regarding certain rights.

The guarantees enshrined in the ECHR are a minimum standard. While the Contracting Parties must not afford a level of human rights protection lower than that required by the Convention, they are free to exceed it. If the level of protection within a particular country is higher than the protection provided by the ECHR, the Convention must not be construed as limiting any of the rights entrenched in the domestic legal framework of that state.<sup>14</sup>

There are conceptual flaws contained in the Convention, but its operation as minimum standards<sup>15</sup> of human rights protection in a gradually enlarging European Union and a constantly changing globalized world cannot be overlooked. It cannot be given just a symbolic value, due to the fact that it is a living instrument, designed to be interpreted in the light of present day conditions so as to be practical and effective. The

<sup>9</sup> App. No. 8978/80, *X and Y v. The Netherlands* 8 EHRR (1985) 235. See also App. No. 30210/96, *Kudla v. Poland*, 35 EHRR (2002) 11.

<sup>10</sup> App. No. 34884/97, *Emilio Bottazzi v. Italy*, ECHR 1999-V; App. No. 13023/87, *Salesi v. Italy*, 26 EHRR (1998) 1871.

<sup>11</sup> App. No. 74552/01, *Oya Ataman v. Turkey*, ECHR 2006-XIII, at para. 35.

<sup>12</sup> Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

<sup>13</sup> Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-05659.

<sup>14</sup> Art. 53 ECHR.

<sup>15</sup> Art. 52(3) of the Charter suggests the use of the ECHR as a minimum standard of protection.

Convention was drafted 50 years ago, but its application has been kept in line with all the recent scientific, sociological, and technological developments as well as the evolving perceptions of ethics and human rights.<sup>16</sup>

Therefore, 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’, as Williams acknowledges and claiming that there is no effective antidote for this ‘theoretically defective constituting text’ does undermine the overall significance of the ECHR not only for the EU but for all countries in Europe.

### 3 The EU Charter as an Alternative

Williams supports the adoption of the Charter instead of the Convention, as it is much more modern and updated than the ECHR and covers a greater range of rights than the Convention, while it also shows greater potential for commitment to the principle of universalism.<sup>17</sup> For him, it is more appropriate to serve as a uniform text of human rights in Europe and a tool for the advancement of ‘the universality and indivisibility of human rights and fundamental freedoms’.<sup>18</sup>

Two points need to be made at this instant regarding the Charter. The first point has to do with the role of the Charter in the EU legal order. Post-Lisbon, the Charter has been given legally binding force and has the same status as the Treaties being part of the primary law of the EU. It has initiated a new era of human rights protection, due to the fact that it covers not only the traditional civil and political rights, but also social and economic rights, confirming that such rights are recognized as having the same status as civil and political rights.

Once the EU accession is completed, the ECHR will represent the minimum standards of protection afforded within the EU and it will be used as the means to create a level playing field for human rights protection across Europe. This is particularly important following the enlargement of the Union and the inclusion of countries with different legal traditions and political systems from the older Member States. In this context, the Charter operates as the ‘alter ego’ of the ECHR; it embodies the maximum standard on human rights.<sup>19</sup> Williams seems to ignore this important aspect of the Charter, and this is why he considers the Charter as one of the candidates to replace the ECHR, provided that the attempts for an extensive reform fail. The Charter’s importance will become even clearer after the EU’s accession to the ECHR and the minimum-maximum level of protection will be much more visible.

<sup>16</sup> Whelan, ‘Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights’, in D. Whelan, *Indivisible Human Rights: A History* (2010).

<sup>17</sup> Williams, *supra* note 1, at 1165.

<sup>18</sup> *Ibid.*, at 1163.

<sup>19</sup> For further reflections on the architecture of the EU in the post-Lisbon era and the role of the Charter in the new EU legal order see Morano-Foadi and Andreadakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: the European Judicial Approach to Fundamental Rights’, 17 *Eur LJ* (2011) 595, in S. Morano-Foadi and F. Duina (eds), Special Issue ‘The Institutionalisation of Regional Trade Agreements Worldwide: New Dynamics and Future Perspectives’.

Until then, the overlapping functions of the two legal institutions are complicated by the fact that both involve different mechanisms and methods. There is no formal linkage between them, aside from a certain degree of overlap whereby EU Member States are also members of the Council of Europe. Moreover, since the EU is not a party to the ECHR, it is not subject to scrutiny by the ECtHR nor bound by its decisions.<sup>20</sup> Similarly, the ECHR and its Strasbourg judicial mechanisms technically do not apply to the EU's actions, although EU Member States, as parties to the ECHR, have an obligation to respect the Strasbourg system in any circumstances even when applying or implementing EU law. In other words, EU Member States would be subject to the EU Charter of Fundamental Rights whenever implementing EU law, and to the ECHR where they are acting on their own.<sup>21</sup>

The second point has to do with the broader coverage of the Charter. The provisions of the Charter apply primarily to all citizens of the EU Member States. There is reference to third-country nationals, but the protection mechanism within the EU is based on the distinction between citizens and non-citizens. Although many entitlements contained in the Charter may be considered applicable regardless of citizenship status (for example, the rights found in the chapters entitled 'Freedoms' and 'Equality', including the right to free movement and access to work), the mere presence of the 'Citizen's Rights' chapter has triggered academic debate and critique of this European Bill of Rights. Whilst distinctions between nationals and non-nationals are not unusual in international human rights documents, the Charter is so unusual because it is arguably founded upon this distinction.<sup>22</sup> Also, there were concerns that the universal applicability of the rights enshrined in the Charter would be jeopardized by the fact that Poland, the UK, and the Czech Republic have opted out of specific chapters of the Charter, but, as became obvious from the recent jurisprudence of the Court of Justice, the judges can make use of the general principles of law instead of individual provisions, as in the case of *Kücükdeveci*.<sup>23</sup>

Therefore, although Williams advertises the universal character of the Charter and its general tenor to avoid explicit limitations, its scope of protection is not 100 per cent universal. The ECHR, despite being narrower and more anachronistic, offers the same level of protection to all human beings in Europe, as the notion of citizen is absent from the operation of the Council of Europe. All individuals who deem that their rights and freedoms have been violated in one country can bring a case to the ECtHR in Strasbourg after the exhaustion of domestic remedies. This individual complaint mechanism has been the key to the success of the ECHR and is responsible for its astonishingly broad and rich jurisprudence on rights and freedoms. An independent court rules on all complaints, offering

<sup>20</sup> Scheek, 'The Relationship between the European Courts and the Integration through Human Rights', [2005] *Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht* 837, at 856 and 860.

<sup>21</sup> Jacobs, 'The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights', in I. Pernice, J. Kokott, and C. Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (2006), at 291, 294.

<sup>22</sup> Davis, 'Citizenship of the Union ... Rights for All?', 27 *Eur L Rev* (2002) 121, at 125.

<sup>23</sup> Case 555/07, *Kücükdeveci v. Swedex GmbH & Co. KG*, Judgment of 19 Jan. 2010, [2010] *IRLR* 346. See also Morano-Foadi and Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence', 22 *EJIL* (2011) 1071, at 1084.

a fair ruling while all states parties are bound to implement the judgments of the Court, even if the judgments may also require that laws and practices be changed.<sup>24</sup>

#### 4 A British Bill of Rights and the Way Forward

The four submissions made by Williams focus on the problems of the ECHR regime, and one of the recommendations is to create a comprehensive national Bill of Rights. The Human Rights Act is an instrument which is not likely to stand the test of time, as it has major flaws and there is an ongoing debate about reforming or even replacing it. However, it is not clear how this new Bill will be more extensive than the Convention, how it will manage to avoid the conceptual and systemic problems of the ECHR regime, and finally how effective the new system will be without any form of external scrutiny.

The UK should build on the relevant case law of the Court of Justice of the EU and the ECtHR as well as make effective use of the lessons that the development of human rights policy and legislation by the EU and the Council of Europe has offered, instead of trying to operate in isolation. The UK cannot afford to ignore the existing legislative framework, as the national legislation of the EU Member States does not operate in a vacuum and it is influenced, if not shaped, to a large extent by the EU institutions. A UK Bill should be drafted on the basis that it will form one of the three different layers of human rights protection, the other two being the Charter and the Convention. These three layers must complement and reinforce each other with a view to providing a broader human rights protection in Europe.

The EU Charter cannot be seen as a candidate to replace the ECHR mechanism, because its role is far different from offering better structures and processes of monitoring, promotion and enforcement than the Convention.<sup>25</sup> Both instruments will operate together on different levels, providing a complete legal framework for human rights protection and facilitating the harmonization of standards across Europe.

Therefore, the challenge for the UK government is to create a wide-ranging and clearly orientated document which would find its position somewhere between the existing minimum and maximum standards of protection. This plurality of human rights standards can have some positive impact, offering multiple safeguards against human rights violations at EU, regional, and national level. Once the accession agreement is finalized, there will hopefully be no problems of legal connection and hierarchy between the EU and the Council of Europe. The accession is not aimed at harming the multiplicity of standards in Europe, as both institutions will maintain their respective boundaries and separate functions. At the same time, they will monitor each other's activities in order to balance the various human rights standards existing in different countries, and avoid any possible conflict of interpretation.<sup>26</sup>

<sup>24</sup> Boyle, 'The European Experience: The European Convention on Human Rights', 40 *Victoria U of Wellington L Rev* (2009) 167.

<sup>25</sup> Williams, *supra* note 1, at 1185.

<sup>26</sup> Waagstein, 'Human Rights Protection in Europe' (2010), SPICE Digests, Freeman Spogli Institute for International Studies, available at: [http://iisd.stanford.edu/docs/441/humanrights\\_in\\_europe\\_Layou\\_1.pdf](http://iisd.stanford.edu/docs/441/humanrights_in_europe_Layou_1.pdf). See also Besselink, 'The European Union and the European Convention on Human Rights after the Lisbon Treaty: From Bosphorus' Sovereign Immunity to Full Scrutiny?', in A. Sabitha (ed.), *State Immunity: A Politico-Legal Study* (2009).

It is not an exaggeration to say that the EU accession to the ECHR is a decisive step towards the creation of a 'Europe of Rights'. It would not only reconfirm the present level of integration between the two institutions, but also address the diversity of standards and questions of external control. The ECtHR will have jurisdiction over human rights protections at the EU level, and this, ultimately, is the best way to establish and preserve a harmonious dynamic of interpretation between the two organizations.<sup>27</sup>

## 5 Conclusion

Dr Williams' article provides an interesting take on a contemporary and highly complex area of EU law. He clearly makes an attempt to contribute to the academic debate on the accession of the EU to the ECHR and to link this debate with the plans for reforming or replacing the Human Rights Act.

However, the submissions made within his article together with the recommendations for the future do not work towards the improvement of the existing regime and do not offer practical solutions to the highlighted problems. By burying the ECHR we would not improve the protection of human rights in Europe. At the same time, there is no evidence that a national Bill of Rights, isolated from the initiatives of the EU and the Council of Europe, would offer adequate protection on such a sensitive and fast-changing area of law.

Demolishing the whole ECHR system before the EU's accession, without waiting to see whether this idea of different layers of human rights standards and external scrutiny would work, does not appear to be the right recommendation for the future. Such an assumption does not simply challenge the orthodox view about the ECHR regime, but is rather extremist.

<sup>27</sup> Balfour, 'Application For the European Convention on Human Rights by the European Court of Justice', (2005) *Harvard Law School Student Scholarship Series*, paper 4, at 17.