Human Rights in the Council of Europe and the EU: Towards ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?

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Abstract: The European Convention on Human Rights, promulgated by the Council of Europe in 1950, is widely regarded as the world’s most successful experiment in the trans-national judicial protection of human rights. The EU’s much more recent judicial and political interest in human rights has also been widely welcomed. Yet, while the crisis currently afflicting the Convention system has not gone unnoticed, the same cannot equally be said of the difficulties presented by the increasing interpenetration of the two systems. Amongst the few who have shown some interest in these problems, the dominant view is that good will and common sense will provide adequate solutions. We disagree. Instead, we detect a gathering crisis which, unless properly analysed and effectively tackled, will only deepen as the EU’s interest in human rights develops further. In our view, the problem is essentially conceptual and that, ultimately, it boils down to a much-neglected question, simple to state but not so easy to answer: is the trans-national protection of human rights in Europe a matter of ‘individual’, ‘constitutional’ or ‘institutional’ justice?

1 Introduction

In the aftermath of the Second World War, and more recently the Cold War, European political, constitutional, legal and economic systems have increasingly converged around, or been integrated according to a common institutional model, formally defined by the values of democracy, human rights, the rule of law and the democratically regulated market. As far as human rights are concerned, the processes of convergence and integration have, however, produced distinctive problems in the two pre-eminent trans-national systems, the Council of Europe and the EU. Despite the perceived successes of each, both are, nevertheless, afflicted by conditions that undermine their individual legitimacy and/or effectiveness. The possibility of a closer relationship between them, first through practical cooperation and, second, through the potential accession of the EU to the European Convention on Human Rights (ECHR; the Convention), may be seen as offering solutions. But each system will have to change to accommodate the other, a process made even more problematic by the rejection of the Lisbon Treaty in the Irish referendum of June 2008. The purpose of this article is to consider what kind of accommodation might be required.

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The first part examines the key problems associated with the ECHR, particularly the tension between the ‘individual’ and ‘constitutional’ justice models. Although the former has dominated the judicial landscape, it simply cannot fulfil its promise. Pursuit of this objective, coupled with the ever-increasing case load, threatens to bring the whole structure grinding to a terminal standstill. The latter, however, remains to a great degree an aspiration but nonetheless an important ingredient in the Council of Europe fulfilling its underlying rationale.

The second part then considers the EU and some of the difficulties of its human rights regime. Here, the principle of respect for human rights has become a constitutional prerequisite informing both European law and policy. While drawing on the jurisprudence of the European Court of Human Rights (ECtHR), the EU has developed its own human rights regime, with constituting pretensions yet also considerable limitations. Issues of jurisdiction are continually in play, creating uncertainty and ambiguity about the constitutional role human rights can and do play in the Union, not only within its borders but also in its external relations. Although issues of individual and constitutional justice are apparent, a form of ‘institutional justice’ characterises this particular human rights field. In short, human rights have assumed a legitimating function instead of serving the interests of justice as more generally conceived.

The third and concluding part of this article then questions whether, and if so how, closer cooperation between the two systems would serve any notions of justice or the promotion of human rights more generally. Rather than examine procedural issues relating to accession, our concern here is with identifying and addressing the fault lines in both regimes vis-à-vis the promotion and better fulfilment of human rights. Our conclusion is that, if human rights are to be considered paramount in Europe, and if greater convergence of the Convention and EU systems is to be a positive step towards fulfilment of that aim, a common constitutional justice model needs to be adopted. Although this will require further work on its modalities, we argue that, in principle, the adoption of such a model is a necessary first step.

II The Council of Europe and the European Convention on Human Rights

A Origins

Various ideas about increased European collaboration, ranging from loose union to full-blooded federation, had been under discussion in the years between the two world wars. But it was only as 1948 drew to a close that the governments of the UK, France and Belgium agreed to establish a Council of Europe and invited Ireland, Italy, Denmark, Norway and Sweden to participate in the negotiations. Luxembourg and the Netherlands also later became founding members. The Council of Europe was intended to achieve four main objectives: to contribute to the prevention of another war between

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western European states, to provide a statement of common values contrasting sharply
with Soviet-style communism—hence the almost exclusive emphasis on civil and politi-
cal rights in the ECHR—to reinforce a sense of common identity and purpose should
the Cold War turn ‘hot’, and to establish an early warning device by which a drift
towards authoritarianism in any Member State could be detected and dealt with by
complaints to an independent trans-national judicial tribunal. And even this ‘early
warning’ function was also inextricably linked to the prevention of war since the
experience of the slide towards the Second World War suggested that the rise of
authoritarian regimes in Europe made the peace and security of the continent more
precarious.\(^3\) Six core principles underpinned the new organisation. Certain unspecified
‘spiritual and moral values’—‘the cumulative influence of Greek philosophy, Roman
law, the Western Christian Church, the humanism of the Renaissance and the French
Revolution\(^4\)—are said to constitute the ‘common heritage’ of the signatory states (the
‘common heritage’ principle) and to be the true source of ‘individual freedom, political
liberty and the rule of law’ (the ‘human rights’ and ‘rule of law’ principles) which form
the ‘basis of all genuine democracy’ (the ‘democracy’ principle). The promotion of
these principles, and the interests of ‘economic and social progress’ (the principle of
‘economic and social progress’), requires closer unity between like-minded European
countries (the ‘closer unity’ principle).

But the ECHR was, and remains, the Council of Europe’s core document. While
some would have preferred individual applications to the ECtHR to have been mandat-
dary from the start, this proved unacceptable to others. It was, therefore, agreed that
the Convention’s main modus operandi should be complaints made to an independent
judicial tribunal by states against each other (the ‘inter-state process’). At its inception,
therefore, the Convention was much more about protecting the democratic identity of
Member States through the medium of human rights, and about promoting interna-
tional cooperation between them, than it was about providing individuals with redress
for human rights violations by national public authorities. As an international treaty
the Convention is, nevertheless, unusual in that it does enable individuals to bring
complaints to the ECtHR. However, this facility only developed gradually over the
past half century and did not become available to everyone in each Member State as of
right until the 1990s.

**B Half a Century of Change**

For most of its first 30 years, the Convention was largely ignored by just about
everybody, including victims of human rights abuses, lawyers, jurists, politicians and
social scientists. Only 800 or so individual complaints were received by the Strasbourg
institutions per year. But from the mid-1980s onwards things began to change dramati-
cally. First, the rate of formal individual applications to the ECtHR began to rise
steeply, reaching, by the late-2000s, over 40,000 a year, ie over 50 times the annual
average for the first 30 years. This was due partly to the second significant change: the
huge expansion in the number of countries belonging to the Convention system, from
a mere 10 in 1950 to 46 by the end of the 1990s, including all the former communist

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\(^3\) Greer, *The European Convention on Human Rights*, op cit n 1 supra, ch 1.

\(^4\) H. Robertson, *The Council of Europe: Its Structure, Functions and Achievements* (Stevens & Sons, 2nd
states of central and eastern Europe except Belarus. The post-communist expansion has, however, deprived the Council of Europe of one of its founding functions as a vital weapon in the Cold War, and raised deep questions about its current role. Third, as the twentieth century drew to a close, it also became clear that inter-state complaints—just under two dozen in the Convention’s entire history—were largely a dead letter, not least because they undermine the Council of Europe’s rationale. Litigation is, after all, a hostile act in most circumstances and, therefore, not an ideal vehicle for cultivating international interdependence. The fourth change, and one of the key factors in the rising application rate, is the fact that the Convention is now much better known by lawyers and by the general public in Member States, including its founders.

In response to the rising application rate, the judicial process was reformed by Protocol 11 with effect from November 1998, the fifth change to note. The European Commission of Human Rights was abolished and the restructured ECtHR became a more professional full-time institution with responsibility for delivering legally binding judgments on whether or not the Convention had been violated, providing advisory opinions upon request to the Committee of Ministers (the Council of Europe’s executive body), registering applications, ascertaining the facts, deciding if the admissibility criteria were satisfied and seeking friendly resolution of complaints. Protocol 11 also stripped the Committee of Ministers of the power it had hitherto enjoyed to settle cases on the merits, a responsibility deemed incompatible with the now enhanced judicial complexion of the applications process. From that point on, the Committee’s role in the complaints machinery has been limited to supervising the execution of the Court’s judgments. Both the right of individual petition, and acceptance of the Court’s jurisdiction, also became compulsory, although, by the 1990s, each had already been voluntarily endorsed by all Member States.

The sixth change concerns the decrease in the risk of a conflict between liberalism and authoritarianism over the ‘ideological identity’ of the post-Cold War European nation state—the context out of which the Convention emerged—with a concomitant increase in the risk of conflict over its ‘existential identity’, particularly as ethnic and religious animosities stifled by communism can now be more easily re-asserted, as, for example, in the Balkans, Chechnya and parts of the Caucasus.

Seventh, the identity which the Convention originally provided for western Europe has now become an ‘abstract constitutional identity’ for the entire continent, linking the former communist zone with the west, and the EU with non-EU halves. As a result, the ECtHR has effectively become the constitutional court for greater Europe. This constitutional identity is, however, ‘abstract’ in three senses. First, it provides the ‘constitution’ for only a ‘partial polity’, that is to say one with executive and judicial, but no legislative, functions. Second, the jurisdiction of the ECtHR is limited to declaring whether or not the Convention has been breached. It does not have the power, as possessed by some national constitutional courts, to annul legislation, nor to prescribe to states precisely what needs to be done in order to correct a violation. Third, as a result of its highly abstract character, and the fact that the Court’s role is subsidiary to that of national authorities, the Convention leaves considerable

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5 There are now 47. Montenegro briefly left the Convention system when it gained independence from Serbia on 3 June 2006, but rejoined on 11 May 2007.

C From ‘Individual’ to ‘Constitutional’ Justice?

The Convention system suffers from five systemic problems, the most visible and pressing of which is its case overload crisis. The others concern how persistent violations can be effectively tackled, and how the Court’s method of adjudication and its impact in the jurisprudence can be improved. But the most pervasive problem underlying all of these is a lack of commitment to the delivery of ‘constitutional justice’.

There is great reluctance on the part of the Council of Europe as a whole, some judges of the Court, human rights non-governmental organisations, jurists and others to recognise that the dominant model for the Convention system—‘individual justice’—is discredited, and that the only other alternative—‘constitutional justice’—now provides the only viable way forward. The model of individual justice assumes that the ECtHR exists primarily to provide redress for Convention violations for the benefit of the particular individual making the complaint, with whatever constitutional or systemic improvements at the national level might thereby result. The model of constitutional justice maintains, on the other hand, that the Court’s primary responsibility is to select and to adjudicate the most serious alleged violations, brought to its attention by aggrieved applicants, with maximum authority and impact in the states concerned. The official mantra, that the Court has a dual mission to deliver both individual and constitutional justice, is inescapably true in the sense that the only justice the Court can deliver, given the effective demise of inter-state complaints, is through individual applications. But this misses the point. The real issue is whether the Court can systematically deliver individual justice—justice to all deserving applicants—or whether it must concentrate upon the delivery of constitutional justice instead.

There are at least three compelling reasons why the case for the systematic delivery of individual justice cannot be sustained. First, as already indicated, the delivery of individual justice was not what the Convention system was originally set up for. Second, as a result of the changes over the past half century, there is no realistic prospect of justice being systematically delivered to every worthy applicant. In any conceivable set of circumstances, the ECtHR, like national constitutional courts, is capable of judging less than 5% of the formal applications it receives, although some 94% of these result in a finding of violation. It is naïve to believe that over 95% of applications either fail the procedural formalities or contain no plausible complaint whatever. Third, for many applicants a judgment that their Convention rights have been violated is a hollow victory because levels of compensation are low and other rewards few. For example, those who persuade the Court that their conviction for a criminal offence occurred in circumstances where their right to a fair trial was breached, will not necessarily have their convictions quashed as a result, although this is less uncommon than it once was.

The ‘individual-constitutional justice’ debate is inextricably linked to the alarming rate of individual applications to the ECtHR, currently just under 50,000 a year and

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7 Greer, The European Convention on Human Rights, op cit n 1 supra, at 39.

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rising. It has been predicted that, if this process continues unchecked, by 2010 a colossal backlog of 250,000 files will have accumulated awaiting a decision about admissibility, the threshold which all applications must cross before being considered on the merits.\(^9\) Both the former President of the Court, Luzius Wildhaber, and the current President, Jean-Paul Costa, have warned that the system will ‘asphyxiate’ unless this problem is tackled effectively soon.\(^10\)

Regrettably, the Council of Europe’s track record provides little cause for optimism. The failure to commit to the delivery of constitutional justice has led to the quest for managerial and administrative solutions within the flawed paradigm of individual justice when much more imaginative and radical alternatives suggested by constitutional justice are required instead. As already indicated, after years of debate, the Convention system was modified by Protocol 11 in 1998. But, by 2000, this was already officially recognised as inadequate, not least because the consequences of the post-communist enlargement had not been adequately anticipated. In May 2004, after further debate characterised by a blizzard of papers and proposals by a multiplicity of contributors, another modest reform package, Protocol 14,\(^11\) was unanimously endorsed by all state parties and its implementation was scheduled for late 2006 or early 2007. However, by early 2005, it had already become clear that this too would not make much difference and that something much more radical was required. The Heads of State and Governments, meeting at a summit at Warsaw in May 2005, therefore, convened a Group of Wise Persons to make further proposals. In December 2005, the retired British judge, Lord Woolf, also delivered the report of a panel which had been invited, by the Secretary General of the Council of Europe and the President of the ECtHR, to review the Court’s working methods.\(^12\)

The Wise Persons Report, made public in November 2006 and based on the assumption that Protocol 14 will soon come into effect, has inaugurated a fresh round of deliberation also likely to take several years.\(^13\) However, neither the Wise Persons, nor anyone else, could have foreseen that, in December 2006, the Russian state Duma would refuse to ratify Protocol 14 in spite of the fact that Russian government representatives sitting on the Committee of Ministers had already approved it. The result is that the whole carefully constructed and laboriously approved reform process contained in Protocol 14 has stalled, the case overload crisis has deepened and the future of the entire Convention system is in more doubt than ever before. Frantic diplomatic efforts to reverse this set-back have yet to bear fruit. And even if they do, vital time will have been lost. If, and when, it is implemented, Protocol 14 will streamline the preliminary screening of applications, the most time-consuming aspect of which is selecting the 5% or so of formal applications which cross the admissibility threshold and proceed to judgment on the merits. It will also provide a new summary procedure which will enable committees of three judges to settle admissibility and merits simultaneously in applications which disclose clear Convention violations. Disappointingly, the Wise Persons Report contains no new proposals of substance and largely recycles ideas already rejected in the course of the Protocol 14 debate.

\(^12\) Woolf, op cit n 9 supra.
The third systemic problem with the Convention system, intimately linked to complaints about delays in the administration of justice, is that the Council of Europe has failed to tackle persistent Convention violations in Member States effectively. While it is undeniably true that many national laws have been changed as a result of successful applications to the Court, the paradox is that, in spite of this, violation patterns in western Europe, where the Convention has been in force longest, show an enormous resilience to change. There are two key indicators. First, some 60% of the Court’s judgments concern ‘repeat applications’ involving complaints about violation already condemned in the state concerned. The original judgment, often reinforced by a string of others, has, in other words, not led to the problem being solved. Second, the official violation league tables for western European states, which have been in the system long enough for stable patterns to develop, show remarkably little variation over the years.14 The same countries—Italy, France and Turkey—appear at the top, and the same ones—Ireland, Norway and Denmark—at the bottom, leaving aside the micro-states with less than a million inhabitants.

The Convention’s fourth systemic problem concerns the haphazard method of adjudication adopted by the ECtHR. A more consistent commitment to the delivery of constitutional justice would require a more formal distinction to be drawn between the Convention’s primary constitutional principles—the ‘rights’ principle, the ‘democracy’ principle, and the principle of ‘priority-to-rights’, each of which incorporates the ‘rule of law’ principle—and secondary principles such as proportionality, non-discrimination and the ‘margin of appreciation’. The ‘rights’ principle holds that, in a democratic society, Convention rights should be protected by national courts and by the ECtHR through the medium of law. The ‘democracy’ principle maintains that, in a democratic society, collective goods/public interests should be pursued by democratically accountable national non-judicial public bodies within a framework of law. The principle of ‘priority-to-rights’ mediates the relationship between the rights and democracy principles by emphasising that Convention rights take procedural and evidential, but not necessarily conclusive substantive, priority over the democratic pursuit of the public interest, according to the terms of given Convention provisions. Each of these three primary constitutional principles incorporates what might otherwise be regarded as a fourth, the principle of legality/rule of law. However, providing the role of the principle of legality is recognised as being integral to the other three, little of consequence results from counting them one way or the other. It needs to be emphasised that this approach does not amount to the readmission of the model of individual justice by the back door. Its objective is not merely to secure the Convention rights of the specific applicant, but through the medium of individual complaints and the priority-to-rights principle, to deliver constitutional justice to the many whose rights are likely also to have been violated by, or to be under threat from, the public authorities in question.

If the Court followed this model, two things in particular would become clearer. First, where the nature and scope of Convention rights have to be defined in the absence of any competing public interest (such as ‘national security’ or the ‘prevention of disorder or crime’), the matter should be settled authoritatively in Strasbourg with universal application in Member States. There is no genuine scope for national discretion on the part of domestic non-judicial bodies concerning how Convention rights should be understood. However, there is a legitimate national discretion on the

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question of whether the disputed conduct is compatible with those rights thus defined. Second, where a conflict between Convention rights and public interests has to be resolved, the Court’s main responsibility is not simply to ‘balance’ these two elements against each other, but to ensure that the principle of priority-to-rights has been properly observed. Unlike the balance metaphor, which is pervasive in the jurisprudence, the priority principle insists that when weighing rights and public interests, the scales should be loaded procedurally and evidentially, but not decisively, in favour of rights. Different resolutions of the tension between Convention rights and public interests may, therefore, be tolerable in different circumstances in different states.

The core constitutional problem with the case-law, the fifth systemic difficulty, is that the priority-to-rights principle implicit in the Convention’s inherent constitution has not been consistently applied. Its effects can be observed in many cases, although not expressly in these terms. Yet, in others, a much looser ‘balancing’ test has been used to settle the conflict between Convention rights and competing collective goals. Prima facie, the strongest versions of the priority principle are found in relation to the formally unqualified prohibitions on torture, inhuman and degrading treatment and punishment, on slavery and servitude, and on retrospective criminalisation found, respectively, in Articles 3, 4(1) and 7(1) of the Convention, and in the prohibition on killing except when it results from the use of force which was no more than absolutely necessary for a set of law enforcement purposes found in Article 2(2). Less strong versions of the ‘priority’ principle are found in Articles 2(1), 5, 6 and 8–11, and in Article 1 of Protocol 1. The case-law on the relationship between Convention rights and collective goods in Articles 8–11 (which concern the rights to privacy-related interests, freedom of thought, conscience and religion, freedom of expression, and freedom of association and assembly) is, for example, unprincipled and confused largely because the Strasbourg institutions have not fully appreciated the implications of the priority principle and have too often sought refuge in the margin of appreciation and balancing as a substitute. The main effect of the ‘priority’ principle in this context is to require respondent states to discharge a more formal and exacting burden of proof in seeking to justify interference with these rights on the specific public interest grounds provided by the second paragraphs than is currently recognised to be the case. The weakest form of the ‘priority’ principle applies to the right to the peaceful enjoyment of possessions under Article 1 of Protocol 1. In litigation under this provision, the Court has often used the balance metaphor and has granted states wide margins of appreciation. But the ‘priority’ principle nonetheless applies in this context since it has also been held that the principle of proportionality must be observed, that arbitrariness is avoided, that other alternatives for achieving the aim in question have been properly considered, that appropriate procedural safeguards are available, that due regard has been paid to the consequences of the interference for those affected by it, and, most importantly of all, that interferences are adequately compensated.15

The above diagnosis might suggest that the future of the Convention system is bleak. This may be so. But all is not yet lost. The prerequisites for brighter prospects are to be found in more formal official recognition of the Convention’s central achievements, and a more committed attempt to find appropriate ways of securing and developing them. Emerging from the shadows of the individual applications crisis is a much more subtle, but nonetheless vital, achievement than the doomed quest for the systematic

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15 ibid, at 274–276.
delivery of individual justice. The ECtHR has effectively become the Constitutional Court for greater Europe, sitting at the apex of a single, trans-national, constitutional system, which links former communist states with the West, and the EU with non-members. The exercise of public power at every level of governance is formally constrained within this framework by a set of internationally justiciable, constitutional rights. As the twenty-first century has unfolded, it has become increasingly clear that the Court’s main task is to administer this system by delivering ‘constitutional justice’ and, in the process, gently to nudge European public authorities towards the fuller acceptance of common Convention standards. This is a much more subtle and indirect function than either the systematic delivery of individual justice (which the Court is structurally incapable of realising) or the more substantial constitutional justice administered by those national constitutional courts which have the power to annul legislation. Nevertheless, it is an important function for the present and future well-being of Europe and all its peoples, not least in its potential to promote operational convergence in public decision-making processes around the ‘common European institutional model’ defined by the core Council of Europe principles of democracy, human rights and the rule of law. The greatest failure of the Convention system, on the other hand, is that the Court has not yet been fully able to realise its constitutional mandate because of the continued dominance of the individual justice model in the case management process, and an uneven commitment to constitutional justice in its own method of adjudication and case-law. Neither Protocol 14, nor the Wise Persons Report, expressly endorses the constitutional justice model. Yet, if implemented, both would move the system in this direction. Although this would fall far short of a definitive solution, it would at least buy time for more careful reflection on the future of the trans-national protection of human rights in Europe, particularly at a time when confusion between the roles of the Council of Europe and the EU is increasing. But is it feasible to talk about the Convention system being rescued given the rise of the EU and its deepening and widening interest in human rights? And what kind of constitutional futures beckon in the current environment? Before returning to these questions, the EU’s human rights regime needs to be considered.

III The EU’s Human Rights Regime

A From Silence to Constitutional Babel

As with the European Convention system, the EU has been seen as a site for the successful protection of human rights and a model for other parts of the world. Its ‘laboratory’ character has been noted by cosmopolitan theorists who see the EU as an institutional example of global justice in action. The inclusion of human rights norms and a constitutional commitment to their ‘respect’ has been of particular interest.17

16 Decisions, such as those of the Grand Chamber in Bosphorus Hava Yollari Turizm v Ireland (2006) 42 EHRR 1 may indicate that the ECtHR is willing to scrutinise some EU action and, under certain circumstances, the actions of Member States when giving effect to EU law. But, in the process, they raise further questions while others have yet to be considered at all. See C. Costello, ‘The Bosphorus Ruling of the ECtHR: Fundamental Rights and Blurred Boundaries in Europe’, (2006) 6 Human Rights Law Review 87.

Unlike the Council of Europe and the ECHR system, the EU represents the potential strength of a marriage between policy and law. However, when the then named European Economic Community was established by six states in the Treaty of Rome in 1957, human rights were not visible on the political or legal landscape. Their presence was at best subliminal. The subsequent gradual construction of a discourse that human rights were fundamental in the creation of the European Project by the European Court of Justice (ECJ), the Commission, the Council, and now all institutions of the EEC/European Community/European Union, is a myth. Nonetheless, the institutional practice that has developed over the past 30 or more years seems to have placed respect for human rights at the core of the EU’s stated values. Not only is respect for human rights a prominent and explicit feature of the core values identified in the proposed Article 2 TEU (as provided in the Lisbon Treaty of 13 December 2007), and the existing Article 6 TEU of 7 February 1992; it also helps frame an array of other implicit constitutional themes. From constructing an identity for the EU, legitimising its operations, providing a bulwark against extremism and the abuse of power, to acting as a spur to ‘closer union’ between the peoples of Europe, human rights provide an iconic concept, respect for which gives the EU at least threshold moral credibility.

Although many have questioned whether the EU should have a human rights mandate, it has assumed such a role regardless. As with the Council of Europe, the EU has developed a human rights regime with increasing vigour over the years. The European Court of Justice, in Opinion 2/94 on Accession by the Community to the ECHR, may have famously, if ambiguously, noted that ‘[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights’ but this has not prevented the EU from increasingly becoming engaged in human rights related activity. On the basis that ‘fundamental rights form an integral part of the general principles of law’, that ‘respect for human rights is...a condition of the lawfulness of Community acts’ and is a condition for membership of the Union, the EU institutions have, through law, policy, constitutional change and political action, become so enchanted by the discourse of human rights that there are now few areas in which their rhetoric does not appear. The reality, therefore, is that the EU operates in the human rights field, explicitly accepts this fact, and actively pursues initiatives designed to demonstrate its commitment to respect and promote human rights regionally and globally, as well as institutionally.

Despite this reality, a significant distinction between the EU’s approach to human rights internally and externally has developed. From a common origin where human rights had no obvious role to play, these two dimensions have evolved with markedly different trajectories. In particular, since the end of the Cold War, it is possible to chart

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18 Von Bogdandy reminds us that the creation of the EEC was ‘legitimated by goals that were to a large extent neutral with regard to constitutional issues’. These include respect for fundamental or human rights. See A. von Bogdandy, Doctrine of Principles, Jean Monnet Working Paper 9/03, at 9, available at http://www.jeannoquetprogram.org/papers/03/030901-01.html
19 Opinion 2/94 on Accession by the Community to the ECHR[1996] ECR I-1759, para 27. The statement was ambiguous because it did not articulate what the EU could do with regard to human rights. It certainly did not preclude the adoption of specific rather than general legislative measures.
20 ibid, para 33.
21 ibid, para 34.
the scope of structural divergence across the range of norms, scrutiny measures and possibilities for enforcement.\textsuperscript{22}

In brief, when we look to the external realm we find that the EU appears to have become committed to a wide range of standard-setting, monitoring systems and meaningful enforcement measures. All are seemingly inspired and reflected in legal provision, by concern for human rights. On a normative level, close attention is paid to ‘the principles of the United Nations Charter’ (Article 11 TEU), and, at least in development cooperation, to commitments made by the Member States and the EU ‘in the context of the United Nations and other competent international organisations’ (Article 177 EC). The Universal Declaration of Human Rights and the two UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights provide the immediate backdrop. However, these are not only supplemented by an appreciation of the relevance and application of a myriad number of more particular international human rights instruments but also wider sources of inspiration. Thus, the EU’s guidelines on human rights dialogues, for instance, announce ‘issues’ for discussion incorporating not only the ‘implementation of international human rights instruments’ but also, more generally, ‘the role of civil society’ and the ‘promotion of the processes of democratisation and good governance and the prevention of conflict’.\textsuperscript{23}

Similarly, the Council highlighted its intention to support work addressing ‘a wide range of human rights concerns, such as . . . international justice including the ICC, the fight against the death penalty and support to democracy, good governance and the rule of law’.\textsuperscript{24} These themes have informed the allocation of substantial resources for specific human rights projects.\textsuperscript{25}

When it comes to scrutiny and enforcement, the EU has been particularly adept at constructing a range of effective procedures. The approach to states seeking accession to the Union has demonstrated specifically the extent to which human rights could be the subject of serious intervention. Operating largely outside the authority provided by the treaties, the EU institutions were able to apply considerable pressure on applicant states on human rights issues.\textsuperscript{26} This remains possible for those states still seeking admission such as Turkey and certain Balkan and east European states. Similarly, in development policy, significant possibilities for addressing human rights concerns have arisen.\textsuperscript{27} Through political and economic pressure and through an active engagement in international human rights fora, the EU has demonstrated a broad appreciation of human rights and the circumstances in which they should be considered, promoted and/or enforced. Throughout all these initiatives, many criticisms of consistency and political interference can and have been directed at the EU’s role in external human


\textsuperscript{26} See Williams, EU Human Rights Policies, op cit n 2 supra, ch 3.

\textsuperscript{27} ibid, ch 2.
rights matters, but generally the willingness to adopt a working policy applicable by and through the institutions has been notable.

Internally, the commitment to human rights has been much more constrained. Legally, the position noted in Opinion 2/94 has retained much of its force. The Union has no authority to enact legislation of a general nature for the promotion of human rights. Nonetheless, the EU has not been entirely shackled. In the construction of norms, the developing of systems of monitoring and in enforcement the possibilities for human rights advancement have appeared. On a normative level, the EU Charter of Fundamental Rights is a relatively recent attempt to express what the Union sees as of concern in human rights matters. However, its non-binding status ensures its influence is limited. The sources of inspiration remain the constitutional traditions of the Member States and international treaties. In this respect, much attention has been given to the ECHR, ascribed with almost iconic status by the ECJ and the EU as a whole.\(^\text{28}\) It has provided a symbolic point of reference capable of providing the basis for engaging with human rights in the European context. The fact that the EU has been concerned to debate, on a number of occasions, the possibility of becoming a signatory to the ECHR testifies to the Convention’s influential status.\(^\text{29}\) That remains a constitutional ambition under the Lisbon Treaty.

From a perspective of scrutiny, the EU has embraced a number of initiatives. Admittedly, these have arisen in more recent times and are open to critique given their limited effectiveness and indeed remit. But the Network of Independent Experts on Human Rights (now defunct), the EU Monitoring Centre on Racism and Xenophobia and now the Fundamental Rights Agency, show how some monitoring processes of both the EU institutions and the Member States have been constructed.

It is when we turn to enforcement that the lack of commitment becomes more patent. The EU has been generally unwilling to assume responsibility as an agent of justice for human rights vis-à-vis its Member States. The ECJ may now operate, as we have already stated, on the basis that ‘fundamental rights form an integral part of the general principles of law’,\(^\text{30}\) and that ‘respect for human rights is . . . a condition of the lawfulness of Community acts’.\(^\text{31}\) It may well, on occasion, have protected the rights of individuals and corporations. But it does so in very limited circumstances (as we will see in the next section). We should not discount completely, however, the value of indirect enforcement through, for instance, the advance of a European social model based on a conception of citizenship extending beyond basic rights and towards a condition of non-discrimination and equality. This has offered some opportunity for specific human rights advancement.\(^\text{32}\) The commitment to tackle racism also warrants recognition. Whether or not a chimera, internal initiatives do suggest, therefore, that respect for

\(^\text{28}\) For the ECJ’s position, see a recent reiteration in Case C-305/05, Ordre des barreaux francophones et germanophones and Others [2007] ECR 1-305, para 29.


\(^\text{31}\) \textit{ibid}, para 34.

human rights has become more than a rhetorical flourish.\textsuperscript{33} But in general the possibilities for meaningful enforcement are embarrassingly narrow.

Much of course was made of the introduction of Article 7 TEU in this respect. Establishing a mechanism for enforcement that enables the EU to respond to a ‘serious and persistent breach’ of Article 6(1) principles, or even a ‘clear risk of serious breach’, suggested a constitutional recognition of political responsibility. However, thanks to Article 46(e) TEU the measure is explicitly non-justiciable save for its procedural provisions. Nor has the new Fundamental Rights Agency been provided with the mandate to monitor Member States in respect of possible breaches. The Commission’s declaration that Article 7 helped ‘equip the Union institutions with the means of ensuring that all Member States respect’, \textit{inter alia}, human rights, is palpably not the case. It remains a dead-letter for all meaningful purposes.\textsuperscript{34}

In sum, therefore, the divergence between these external and internal dimensions characterises the central tension at work in the EU’s human rights policy (if it can be singular in these circumstances). It represents a bifurcation that remains destabilising. Over the past 60 years, the EU’s human rights regime has developed along considerably ambiguous lines. The institutions may be seen to have assumed a form of responsibility that incorporates elements of a duty to act to respect human rights wherever possible but they have done so whilst embracing a contradictory, incoherent system of application.

B ‘Individual’, ‘Constitutional’ or ‘Institutional’ Justice?

The very brief review of the EU’s relationship with human rights points to the existence of a number of other urgent systemic problems. As one would expect, these are different from those experienced in the Convention system already described. Nonetheless, despite fundamental differences between the two systems, we suggest that the problems in the EU also stem from an unresolved tension between applied models of justice.

As with the Council of Europe, individual and constitutional justice models vie with each other for dominance. The individual justice model has been evident in the rhetoric of important texts, such as the EU Charter of Fundamental Rights,\textsuperscript{35} and in the jurisprudence of the ECJ. So the Court has acknowledged that rights and duties attach to individuals as much as states under the EC Treaty. Equally, individuals purportedly have the specific right to effective judicial review, on the basis that ‘the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States’.\textsuperscript{36}

A number of factors, however, serve seriously to undermine this model. Framing one set of systemic problems for the EU, and taking three forms, these can be characterised as issues of access to justice.

First, there is the limitation on \textit{locus standi}. Although the principle of effective judicial protection is a general principle of Community law, confirmed, according to

\textsuperscript{33} We cannot provide a review of these issues here. However, our point is that human rights related activity has developed as an important aspect of the EU’s work during its history.

\textsuperscript{34} See A. Williams ‘The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK’s Invasion of Iraq’, (2006) 31 \textit{European Law Review} 1 for a critique of Art 7 following the example of the Iraq War.

\textsuperscript{35} The Preamble to the Charter refers to the EU placing ‘the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice’.

\textsuperscript{36} Case C-50/00P, \textit{Unión de Pequeños Agricultores v Council} [2002] ECR I-6677 (UPA), paras 38 and 39.
the ECJ, by the constitutional traditions common to the Member States, Articles 6 and 13 of the ECHR, and Article 47 of the EU Charter of Fundamental Rights, there remain structural barriers to effective access. The difficulty for an individual to bring an action for the review of the legality of acts of EU institutions directly to the ECJ is notorious. Article 230 EC has been interpreted by the Court as imposing a heavy burden on individuals to demonstrate that they have been affected by a measure ‘by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons’. Interested parties who cannot fulfil this test are excluded. As Advocate General Francis Jacob suggested, this has the potential of leaving people without effective judicial protection. Similarly, the only other route to ECJ review, a request by a national court to the ECJ for a preliminary ruling under article 234 EC, is not a ‘remedy available to individual applicants as a matter of right’. Although the ECHR requirement that domestic remedies be exhausted is not applicable, the structural restraints lay further obstacles in the path of those who wish to assert their human rights. Whichever avenue for review is taken, long delays attach to these procedures and there are significant cost implications. It is hardly surprising therefore that the human rights challenges heard by the ECJ have been few in number and, of those, many have emanated from well-resourced corporations.

Second, there remain significant areas where the ECJ has no, or restricted, jurisdiction over the actions of the EU institutions and the Member States. In the Third Pillar of Justice and Home Affairs in particular, the Court is precluded from ruling on restrictions to free movement of persons based on ‘the maintenance of law and order and the safeguarding of internal security’. Similarly, judicial review for acts in the area of police and judicial cooperation in criminal matters are subject to varying restrictions. In these fields, therefore, the EU system interprets its commitment to respect human rights through a sharp political lens.

Third, despite the fact that the EU has expanded its operations, becoming increasingly engaged in overseeing the activities of states outside its frontiers, no judicial remedies are readily available for any person who finds their rights violated in such circumstances. The difficult question of attributability, which has been played out in cases involving extraterritoriality both in the ECtHR and the UK House of Lords, is rendered even more problematic by the general exclusion of the ECJ’s jurisdiction in the EU’s Common Foreign and Security Policy under Article 46 TEU.

The development of a constitutional justice model approach to human rights in the EU has run parallel to the ambivalent profile of the individual justice alternative. Attempts to construct a constitution for Europe over the past few years have incorporated a much greater commitment to human rights as a fundamental value. The revised Article 2 TEU, proposed through the Lisbon Treaty, states that the ‘Union’s aim is to promote peace, its values and the well-being of its peoples’. Respect for human rights is one of these values. This suggests that ‘promotion’ of human rights should become an

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37 See, for instance, Case C-432/05, Unibet [2007] ECR I-2271, para 37.
39 See UPA, op cit n 36 supra, Opinion of AG Jacobs, para 62.
40 ibid, para 42.
41 EC Treaty, Art 68(2).
42 See the cases of Behrami v France (Application No 71412/01) and Saramati v France and Others (Application No 78166/01), 2 May 2007 and R (Al-Jedda) v Secretary of State for Defence [2007] UKHL 58, [2008] AC 332.
acknowledged and legitimate aim for the EU, providing the Union and indeed the ECJ with the authority to develop its human rights policy and presence. The additional intentions of the EU to ‘recognise’ the EU Charter on Fundamental Rights and to accede to the ECHR, lend further credence to the argument that the commitment to respect human rights is spreading rather than receding. These proposals would suggest a continuing development of the ECJ’s commitment expressed over the years to construct a ‘new legal order’. The ECJ summed up its own view in Opinion 1/91 (re the EEA Agreement) by stating that ‘the EEC Treaty... constitutes the constitutional charter of a Community based on the rule of law’. Unsurprisingly perhaps, there are those who therefore argue that the ECJ should assume the position of Constitutional Court for the EU. We see a more recent expression of this in Advocate General Maduro’s opinion delivered in the controversial case of Kadi, which involved the decision by the Council, following UN Security Council resolutions, to place restrictions on the funds of named individuals suspected of links with terrorist organisations. Maduro makes clear that ‘although the Court takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty’. He went on to say, ‘The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community’.

In its recent judgment in Kadi, the ECJ confirmed that the constitutional principles of the EC Treaty included ‘the principle that all Community acts must respect fundamental rights’ and noted that such respect constituted ‘a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty’. Notwithstanding these statements, the constitutional justice model as it stands is, like the individual model, also subject to systemic problems. First, its prospect of developing successfully remains undermined by the highly restricted opportunities for the ECJ to control the cases it chooses to review in human rights matters. The problems identified above for individual justice will continue to ensure that matters reaching the Court’s attention are likely to be few in number. Even when reaching the Court, the structural restrictions of delay and expense will continue to favour the well-resourced corporate world rather than any social justice institution, let alone a suffering individual. Equally, the continuing restrictions on jurisdiction will ensure that the Court will not even be able to review many acts which potentially or actually threaten human rights. None of these factors, which are all concerned with access in one form or another, will be addressed in any meaningful way by the proposals in the Lisbon Treaty. The potential for evolving jurisprudence designed to address the most serious

46 ibid, para 24. See, also Opinion 2/94, op cit n 19 supra, paras 30, 34 and 35.
47 ibid, para 37.
48 Conjoined cases C-402/05P and C-415/05P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council, Judgment of the Court (Grand Chamber), 3 September 2008, para 285.
alleged violations of human rights and have a real impact on the activities of the EU and its Member States in this field is therefore likely to be haphazard at best. It is hardly plausible that it would be capable of creating a legal momentum that could truly impact upon the EU as a site for the effective protection of human rights.

Second, the failure to come to terms with the nature of the EU’s relationship with, and indeed commitment to, the Council of Europe and its human rights system has established a prominent obstacle to any effective constitutional justice model being created. Although the ECJ may have ambitions to occupy the position of a constitutional court, it has never come to terms with the consequences of such an approach for human rights generally in Europe. In the sense that the ECJ follows ECHR case-law reasonably conscientiously, but remains unbefallen to the Strasbourg Court’s interpretation of the Convention, a comfortable peace with the ECtHR may well have developed. But the ECJ retains the power and the inclination to take its own path, as was seen in the case of Omega. Sionaidh Douglas-Scott has suggested that this is not necessarily a problem and that a plural landscape for constitutional justice models may serve the interests of human rights. With the ECJ now less concerned with the establishment of a common market, its role as a guardian of human rights might be given greater substance. Advocate General Maduro’s opinion and the ECJ’s judgment in Kadi gives such a view considerable weight. Nonetheless, it remains questionable whether the ECJ has either the authority or the will to focus on developing a human rights jurisprudence and mark a significant departure from its long-held restricted stance. The ethos of EU law remains structurally conditioned to avoid dealing with human rights as a priority.

Even if a new unrestrained era for the Court were possible, perhaps after adoption of the Lisbon Treaty (although if accession takes place this might be less rather than more likely), there remains the wider concern of the political will by all the institutions to support a policy constructed on such constitutional lines. Again the evidence to date is that the EU as an independent entity simply will not identify respect for human rights as a priority for action. All those potential mechanisms for standard setting, scrutiny and enforcement, upon which human rights litigation and practice ultimately depend, have largely been eschewed in favour of the main purpose of the EU: the construction of an internal market. The economic interpretation of ‘well-being’ is still predominant. It is this that has underpinned the EU, has provided its raison d’être and established the parameters for judgment in EU law. Advocating a plural order, where the two European systems apply their own constitutional models, has therefore more chance of creating confusion and undermining human rights than establishing an improved European human rights regime. Indeed, if such an arrangement were so attractive one has to wonder why the clamour for accession to the ECHR has been so sustained by human rights advocates over the past 30 years or more.

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49 For instance, those claims that the case of Omega (Case C-36/02, Omega v Bonn [2004] ECR I-9609) solidified a right to human dignity should really be scrutinised. No such individual right has been established, certainly not one that could logically attract any application beyond the circumstances of that case. The deference paid to a national authority’s interpretation of human dignity may suggest a willingness to give greater reign to human rights, but in the absence of any definition or indeed substance evaluated by the Court, it is extremely difficult if not impossible to understand how this might give rise to a more substantive approach to the respect for human rights both specifically and in general.

The two justice models vying with each other in the EU context must not, however, be viewed as exhausting all the options. Rather, it is our claim that a third model serves to expose the limitations for the development of either model, or for placing human rights at the core of the EU system. With some hesitation we call this the ‘institutional justice model’. By this we mean an approach to human rights that seeks to do justice to the institution rather than to individuals or the people of Europe in general. Any benefit accruing to the development of human rights has been largely incidental. In other words, for the EU, adherence to the rhetoric of human rights, even the actual implementation of human rights standards on occasion, is the product of a desire to legitimate and substantiate its own claims as a site of legitimate governance.

In this model, the EU is a perceived institutional ‘good’ worthy of preservation. The recognition of human rights, whether from an individual or constitutional perspective, has been considered necessary as part of that conception of the ‘good’. But history tells us that this was the result more of the desire to avoid fundamental challenges to the validity of EU law than to enhance human rights protection through the Union. The application of human rights was to be determined more by the project of constructing an internal market. So even with significant jurisprudential moments, the desire to establish the application of fundamental rights was tempered with the need to ‘secure the autonomy of the Community polity’. It could be accepted at face value that significant advances have been made through case-law with regard to specific rights. But, even though the Court has been able to progress the protection of certain rights on occasion, this has been through a haphazard and reactive process. The discernment of a progressive approach by some commentators rests on very flimsy evidence.

Thus, the ‘justice’ being pursued in relation to human rights—even if ‘justice’ here suggests an inherent contradiction—has been directed more at authenticating the EU as an institution of political and legal importance in Europe, and indeed the world, than promoting and protecting human rights per se. Some have interpreted the ECJ approach in particular as the furtherance of market integration through human rights. But we suggest that this critique, although still apposite, does not capture the deeper nuances of the problem. In particular, we maintain that the EU has sought to represent itself not only as the means of constructing a single market but also as an authentic institutional site of governance through the simultaneous application of the individual and constitutional justice models and, it has been claimed, a global justice one as well. By holding itself out as a paragon of virtue in all directions, it has been confident in asserting its ‘right’ to exist and its claim that the EU project is necessarily good for Europe.

The ECJ has had a pivotal role to play in this representation. Its original interventions to pace out the parameters of authority for the EU and its law have been fundamental for the development of a ‘new legal order’ with constitutional legitimacy.

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51 Carol Harlow refers to a form of ‘economic constitutionalism’ which does not capture the meaning we ascribe to the institutional model. The latter reflects a deeper commitment not just to a perceived end (say, a liberal capitalist system focused around a single market) but also a presence that entitles the EU to act on issues that transcend this one-dimensional vision. See C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, (2006) 17 European Journal of International Law 187, at 212.


The parallel stories of the principles of supremacy and direct effect, on the one hand, and the establishment of external competence, on the other, are familiar enough. However, such matters of legal authority and competence could never hope fully to satisfy any perceived need for social and political authenticity. They were necessary but not sufficient to fulfil the aims of the EU. It is only in the search for an authenticity that the discourse of human rights became of particular institutional importance. Working alongside the rhetoric if not practice of democracy, the rule of law and the free market, the language of respect for human rights has developed into an essential precondition promoted by the EU and the ECJ in support of their claims for institutional authenticity and legitimacy internally and externally.

But, notwithstanding this legitimisation through human rights—which internally has relied heavily on its attachment to the ECHR, whereas externally it has not been so bound—the purpose was not predominantly to construct a justice system on either a constitutional or individual model as we have described them. Although both of these are present in the EU’s system, the model that has acquired greater purchase has been institutional in character. Legitimisation has not been for justice as traditionally conceived, but for a new level of governance in relation to Member States and their constituents that must be axiomatically ‘just’ if it were to survive. Justice to human rights has always and remains subsidiary to the greater justice that the Union claimed it could deliver for Europe. So, with the combination of the difficulty faced by the ECJ in applying human rights norms other than in the context of the operation of European law, the restricted mandate of the Fundamental Rights Agency, the politised context for the development of human rights (for example in relation to the saga of extraordinary rendition which demonstrated the impotence of the EU in crucial human rights problems), the incoherence between external and internal approaches in the construction, scrutiny and enforcement of human rights, and the specific irony of subjecting accession states to considerable scrutiny before entry and little afterwards, we encounter a fundamental problem. They all speak of a human rights model that is preconditionally focused on the preservation of the institution rather than the attainment of any other form of justice.

Such a critique might appear harsh given the many instances where the ECJ has recently been keen to promote human rights, and the undoubted good works that the EU has done within and outside its domain over the years. But the underlying argument holds good. Respect for human rights remains an ambivalent commitment because it is founded not on an individual or constitutional model of justice. And ignoring particularly the latter will assuredly destabilise any technical discussions concerning the EU’s future relationship with the Strasbourg system.

IV Conclusion

This article has so far sought to chart key problems with both the ECHR and the EU’s systems of promotion and enforcement of human rights. It has been suggested that both are afflicted by a number of core problems although of different natures. For the
ECHR, the gravitational pull of the unachievable individual justice model lies at the heart of its difficulties. For the EU, neither the constitutional nor the individual justice models adequately captures the way human rights have evolved politically and legally. Institutional legitimisation seems to require ambivalence about the central nature of human rights in a manner without parallel in the Convention system. Although, with its focus squarely on civil and political rights, the Council of Europe may not be wholly unambiguous over the scope of human rights, its core business is clear. The EU simply cannot say the same for itself. This may be a product of the EU’s broader remit and vision as regards its role in world as well as in European affairs. It may also reflect the EU’s greater opportunities to act for human rights because of its desire to acquire an identity both within and outside its borders. Whatever the cause, there are clear distinctions between the two systems in relation to both practice and rationale.

Given these fundamental conclusions, can the Convention system and the EU’s human rights regime really live together? What would closer association through accession by the EU to the ECHR accomplish? Would such a move resolve the core problems or exacerbate them? And what would the implications be for human rights themselves? A full examination of these questions would require more in-depth treatment than is possible here. But the debate should not be dominated by discussion of the technical means by which the EU should accede to the Convention. This may raise significant organisational problems but it is surely the underlying political and legal philosophy of this development that will dictate whether this results in anything other than confusion. On the face of it, accession will simply add to the ECtHR’s core problems, not least case overload. For the EU, accession will not of itself improve the extent to which it delivers on its commitment to respect human rights. It might even complicate the issue of human rights norms, since the interpretation of the ECHR as applied to EU institutions may well obviate the development of a wider conception through the EU Charter. Would the institutional emphasis also be displaced in any way towards an individual or constitutional model? This seems unlikely given the continuing structural problems associated with the realisation of human rights in the EU.

The only development capable of salvaging both systems, we suggest, is radical reform addressing the very basis of their relationship which would go far beyond the current conception of technical partnership. Inevitably, this would require consideration of the core problems of both systems. For the EU, clarity would have to be established on how human rights are to be conceived. This would need to include consideration of how agreement could be reached between the varying dimensions of both the EU and the Council of Europe. The EU’s internal, market-friendly version of human rights might be fused reasonably successfully with ECHR notions. But the role of economic social and cultural rights in the Council of Europe would also have to be addressed, including how such additional rights could become actionable transnationally. At present these rights are considered by the EU only insofar as their observance is deemed to further the needs of the internal market, or at least not interfere with the principle of equal liberty. The approach to discrimination here, and whether it can become the basis for judicial as well as political action regardless of context, would be a particularly demanding test. Neither system has an adequate European approach to the subject at present. The EU is hamstrung by its preoccupation with the single market and the tepid ‘best practice’ sharing process that seems to typify a lack of institutional commitment to eradicating even the most egregious forms of racism. The ECHR system, on the other hand, has been slow to incorporate...
discrimination as a fundamental violation of human rights in its own right with France, UK, Sweden, Poland and a majority of others yet to sign and ratify Protocol 12. A clear process of adjudication privileging human rights as constructs of justice, rather than facilitators of integration alone, is also required. In other words, there needs to be a real sense of human rights operating as the conscience of Europe. The individual and institutional approach exemplified to date by the ECHR and EU systems, respectively, would need to change in order to allow the constitutional model to develop. Inevitably, this would require the ceding of power from the EU to the Council of Europe and to the ECtHR, since the ECJ does not possess the clarity of vision which would unlock this ethical dimension at present. Recent case-law, in particular Kadi, might suggest that the ECJ has the capability to develop a unique approach in this respect. But the institutional dimension, more concerned with the preservation of the EU rather than the protection and promotion of human rights, still remains too strong. So in the Advocate General’s opinion in Kadi the rhetoric of the vitality of human rights is still tempered by its association with the integrity of EU law. Consequently, both the ECHR and EU need a constitutional approach to human rights if the latter are not to remain forever contingent. A great deal of further work is clearly required therefore to determine what shape this constitutional model could, and should, take. At present, there is little evidence of progress to this end by either institution. Too much concern over ‘territory’ and spheres of influence have hampered any real discussion between the two, with the Council of Europe clearly concerned that it will become subsumed by the EU leviathan. It is our contention that such concerns now need to be placed to one side. Similarly, the view of some commentators that the continuation of the current form of pluralism is an attractive alternative to constitutional settlement, should be received with caution at best, since it might just result in the entrenchment, rather than the alleviation, of the structural problems we have identified. Much of the analysis that has been presented is essentially concerned with making the best of a complex relationship, in particular by attempting to manage conflicts between the two courts. But the result may well be counter-productive. For although it may achieve some degree of mutual appreciation and respect, it will not address the fundamental problems we have identified. Indeed, it is more likely to give credence to the view that reform is unnecessary, or at least the two systems can co-exist happily. In our view, this is a dangerous position to take. The search for an effective unifying constitutional model is paramount if justice is to be done to human rights in Europe.

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