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**Evaluation of ECHR incorporation into Irish Domestic Law**

by

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The Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) was signed in November 1950 and entered into force on September 3, 1953. The Convention is principally concerned with civil and political rights, although it does also make provision for some matters pertaining to economic and social rights. From its foundation Ireland had played a key role in the drafting and adoption of the Convention and was among the first ten countries to ratify it. Ten ratifications were necessary for the Convention to enter into force. Ireland was also the first State to make a declaration under article 46 of the Convention, by which it recognised the jurisdiction of the European Court of Human Rights. It has been said by one commentator that at that time of making this declaration that officials in the Department of Justice had assured the government of the day that there was virtually no chance Ireland could actually be brought before the Court, given their perception that Irish legislation was consistent with the provisions of the Convention “[b]ut they insisted on the symbolic importance of such a gesture”.<sup>1</sup> How wrong can one person be!

Ireland was the respondent State in the first case to be litigated before the European Court of Human Rights, that of *Lawless v. Ireland*<sup>2</sup>. (*In that case the detention without trial of the applicant was held not to be in contravention of the Convention of Human rights in circumstances where Ireland had validly derogated from some of its provisions in the face of an emergency at home*)

Although Ireland is a party to the Convention, it did not become part of domestic law prior to the coming into force of the European Convention on Human Rights Act 2003, This was because of Ireland’s position as a dualist State .i.e. a legal system which sees national and international law as essentially two systems and which requires domestic legislation to incorporate a treaty into domestic law.

For example, in the case of *Norris v Attorney General (2a)* the Supreme Court held that certain provisions of Victorian legislation ( which continued to be the law after Irish independence) prohibiting certain homosexual conduct were not contrary to the Irish Constitution , notwithstanding the fact that legislation in question had been held to be contrary to the Convention. Although the Irish Government was obliged to accept the rulings of the European Court in judgments affecting it, the Convention was not directly exercisable by parties before the Irish courts and the decisions of the European Court of Human Rights could not be relied upon in the Irish courts to place an obligation Irish State to take action in a matter affecting parties in civil or criminal proceedings..

In the case of *Re O Laigheis*<sup>3</sup> the Supreme Court of Ireland, held that as the Irish legislature had not made that the Convention is part of the domestic law, the courts could not give direct effect to it. That is not to say that the Irish courts or the legislature did not pay heed to the jurisprudence of the European Court of Human Rights. On the contrary, the judgments of the court in Strasbourg had great influence in Ireland For example, the establishment of a civil legal aid service in 1980 followed a decision by the European Court of Human Rights in *Airey v. Ireland*<sup>4</sup> (*in that case the failure of the state to provide legal aid for an indigent litigant was held to be in contrary to her right to a fair trial It is interesting to note that in the USA the Supreme*

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<sup>1</sup> William A. Schabas *Ireland, the European Convention on Human Rights and the Personal Contribution of Seán Mac Bride Human Rights, Democracy, and Transition: Essays in Honour of Stephen Livingstone*, (Oxford: Oxford University Press, 2006)

<sup>2</sup> Judgment of 1 July, 1961  
2(a) (1984)I.R.36  
2(a) (1984)I.R.36

<sup>3</sup> [1960] IR 93

<sup>4</sup> [1979] 2 E.H.R.R. 305

*Court*

*adopted a different view in the case of Lassiter v North Carolina 452 U.S.1981).*) As the jurisprudence of the Strasbourg Court grew, the Irish courts before had shown an increasing willingness to consider arguments based on the Convention and on the jurisprudence of the Court of Human Rights even before the enactment of the European Court of Human Rights Act, 2003 For example in *O'Leary v. Attorney General*<sup>5</sup> the High Court considered how the presumption of innocence guaranteed under Article 6 of the Convention had been interpreted by the Court in Strasbourg in construing that principle in Irish law.

In that case constitutional challenge was taken to statutory provisions of an act which allowed the opinion of a senior member of the police that a person was a member of an unlawful organization to be evidence “until the contrary is proved” of such membership

The Convention was incorporated into Irish Law by the enactment of The European Convention on Human Rights Act 2003 and became law on the 1<sup>st</sup> January, 2004. The purpose of the Act was to give effect to the Convention in Irish law, thereby enabling breaches of its provisions to be litigated in Irish courts and it is now possible for a party to take proceedings in the Irish courts alleging a breach of rights under the Convention The Convention has been incorporated into Irish law in an indirect manner; the model used by the legislature is that of “interpretative incorporation”. In effect that means that the provisions of the Convention must cede to the primacy of the Irish Constitution which was enacted by the People of Ireland in 1937. The Irish courts are not under any obligation to give effect to Convention rights if they conflict with rights established under the Constitution. The manner in which the Convention takes effect in Ireland has therefore been described as at a sub-constitutional level.

In 1996, the Constitutional Review Group in Ireland considered whether and in what way the Convention should be incorporated into Irish law. The Group stated that entirely replacing the existing fundamental rights provisions in the Constitution with those rights guaranteed under the Convention would lead to the diminution of some individual rights which are more extensively protected by the Constitution of Ireland than under the equivalent provisions of the Convention. The Constitutional Review Group recommended that the text of the Convention should be used where the right in question is not expressly protected by the Constitution of Ireland, where the standard of protection is superior to that guaranteed by the Constitution, or where the wording of an Article of the Constitution protecting a specific right might be improved. The government did not adopt the recommendations of the Review Group and opted for an interpretative model of incorporation. This method of incorporation generated much criticism from various quarters.

A further criticism of the Act is that it excludes the District Court as a forum where a remedy can be sought for breaches of the Convention. The Irish Human Rights Commission had argued when the Bill was being debated that it should be possible to raise Convention points in all courts and to plead breach of the Convention as a general shield in the lower courts. The Commission recommended that the Bill should provide for a case stated procedure when this raises a new issue not previously decided and on which the lower court may wish to seek guidance<sup>6</sup>.

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<sup>5</sup> [1993] 1 I.R. 102. ( in *X v United Kingdom* 5214/71 the court stated that a provision in U.K. legislation under which a man living with or habitually in the company of a prostitute is presumed to be living on the earnings of prostitution unless he proves otherwise “creates a rebuttable presumption of fact which the defence may, in turn, disprove. The provision in question is not, therefore ,as such a presumption of guilt) @ p 110

<sup>6</sup> See William Binchy, *The Bill, the advantages and disadvantages of the approach taken, and possible alternatives*, Paper delivered to the Law Society Conference on the European Convention on Human Rights Bill 2001, 19 October 2002.

The incorporation of the Convention by the Act is not retrospective in nature. However, as noted above, it is now established that Irish courts will be open to analysis of the Convention and of the case law from the European Court of Human Rights, especially when used as a means of bolstering or clarifying existing constitutional rights in respect of law that came into force prior to the Act. The Act seeks to give what is described in the long title as “further effect” to the ECHR by the adoption of three strategies.

First, section 2 of the Act requires the Irish courts to interpret Irish law in a manner compatible with the State’s obligations under the Convention provisions “in so far as possible.” This applies to any rule of law whether statute or otherwise in force immediately before the passing of the Act or coming into force thereafter.

Secondly section 3 of the Act obliges every “organ of the State” (meaning every organ of the State apart from the courts) to perform its functions “in a manner compatible with the State’s obligations under the Convention” and provides for an award of damages in the High Court or the Circuit Court where there is a breach and no other remedy is available.

Thirdly section 5 of the Act it allows the High Court or the Supreme Court, where no other legal remedy is “adequate and available”, to make a declaration that a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions. However it is for the Oireachtas and not the courts to decide whether the legislation is to be amended. The effect of declarations of incompatibility will be considered further below.

The 1937 Constitution of Ireland which contains a wide ambit of fundamental rights in its articles and there is a very considerable overlapping between human rights provided in the Irish Constitution and the rights set out in the Convention. In the main Convention rights are already reflected in the Constitution of Ireland (Articles 40-44 thereof) but it must be said that there is a divergence in the jurisprudence of the courts’ interpretation of how widely some rights are to be construed. For example the definition of the family has been given a wider mean by the European Court of Human Rights than it has by the Irish courts. The European Court has interpreted protection of family life to extend to *de facto* families, whereas Article 41 of the Irish Constitution gives a special protection to the family based on marriage. Therefore while the incorporation of the Convention into domestic law is an achievement it is unlikely to make any significant difference in strict legal terms given the existing provisions of our fundamental rights guarantees in the Constitution. Nevertheless, incorporation is important for symbolic reasons for relations in the island of Ireland and is also shows our willingness to abide by the highest international human rights standards.

Notwithstanding that, there have been changes to Irish legislation arising out of applications to the European Court of Human Rights: *Johnston v. Ireland*<sup>7</sup> led to the enactment of the Status of Children Act, 1987 which effectively abolished discrimination against children born outside of marriage and the decision of the Court in *Keegan v. Ireland*<sup>8</sup> paved the way for consultation procedures for unmarried fathers in the adoption process<sup>9</sup>. (In the Keegan case The Supreme Court held that the father of a child born to an unmarried couple had no right to be heard in adoption proceedings involving that child. However The Court of Human Rights held that the notion of the “family in Article 8 of the Convention was not confined to a marriage based family and that the applicant’s right to” respect for family life” guaranteed by article 8 of the Convention had been violated as well as his rights under Article 6(1) of the Convention which guarantees that “in the determination of his Civil rights and obligations.... Everyone is

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<sup>7</sup> (1987) 9 EHRR 203

<sup>8</sup> (1994) 18 EHRR 342

<sup>9</sup> The Adoption Act 1998

entitled to a fair and public hearing” Although the legislature in Ireland may have felt, in light of decisions against it by the European Court of Human Rights, a need to amend or repeal legislation encroaching on a right under the Convention., the Irish courts are not bound to follow the decisions of the European Court of Human Rights and have shown a decided preference to examine the status of rights by reference to the Constitution, even where a such ruling may appear to go against the principles expanded by the European Court.

Judicial notice is to be taken of the Convention provisions and in interpreting and applying these provisions, the courts shall take due account, *inter alia*, of judgments of the European Court of Human Rights. In addition, as already mentioned ,the High Court and Supreme Court in Ireland now may make what is termed a “declaration of incompatibility” where it is not possible for the court to interpret and apply a statutory provision or rule of law in a manner which complies with Ireland’s obligations under the Convention. However, the declaration does not affect the validity of the said law and rectifying the incompatible nature of the statutory provision or the rule is does not lie with the courts, but with the legislature. In a very recent decision such a declaration was given in respect of legislation, under which a transsexual person was not entitled to have her birth certificate record her as being female failed to give “meaningful recognition “to her new female identity and was incompatible with the Convention and in particular with Article 8 which guarantees her right to respect for private life. (Foy judgment McKechnie J 19 Oct. 2007.)

In the recent case of *Zappone and Anor v. Revenue Commissioner and Ors*<sup>10</sup> where a same-sex lesbian couple tried to get recognition for their Canadian marriage in Ireland, the High Court rejected their claim that such a right existed under the ECHR. Article 12 of the Convention secures the fundamental right of a man and woman to marry and to found a family. However the Court in *Zappone* said that it is necessary to remember the clear terms in which Article 12 is expressed. It refers expressly that the right to marry is “according to the national laws governing the exercise of this right.” And said clearly, there is a wide margin of appreciation given to contracting states in this area. Regardless of this finding, the Court again looked to the Constitution first and foremost when finding that a right to same-sex marriage does not exist and one may argue that the consideration of the plaintiffs’ rights under the Convention was an ancillary consideration for the Court.#

Ireland’s incorporation of the European Convention on Human Rights into domestic law may be seen as a reaffirming by the State of its commitment to the highest international standards in human rights.<sup>11</sup> Others have argued that a failure to fully implement the Convention into Irish law has weakened its effect as the Irish courts have continued to seek clarity on issues of human rights through Constitutional interpretation rather than by relying on the provisions of the Convention. This is largely due to the primacy of Constitutional rights over Convention rights in law.

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<sup>10</sup> (High Court 14 December 2006)

<sup>11</sup> See G. Hogan *Incorporation of the ECHR: Some issues of Methodology and Process* Published in Kilkelly *ECHR and Irish Law*, (Jordans, 2004)