The Protection of Fundamental Rights: Reflections in a Friendly Mirror[1]

Delivered by Mr. Justice Donal O'Donnell, Chief Justice, at the Conference of the Heads of the Supreme Courts of European Union Member States on 21 February 2022

In 2015, the then President of the Tribunal Constitucional de España spoke about the post-war project of human rights in Europe and said that "the one thing that characterises this so called multilevel protection model is the fact that it is complex and sophisticated".[2] He also said that "it is therefore hardly surprising that all this may generate a sense of confusion, or sometimes unease, among our fellow citizens, who fully understand the essential nature and universal vocation of human rights but who find it hard to accept that the content and level of protection may vary depending on the court which is responsible for dealing with the case and there is no certainty as to which one will adjudicate on that case or when."[3]

I want to look at the issue from the point of view of a national judge and to do so focusing on only three instruments which we encounter regularly, and which allow for the strongest form of enforcement of human rights by action in domestic courts resulting in decisions which are binding on the parties and in particular on the State: that is the position of the national constitution, the Charter of the European Union and the European Convention on Human Rights.

[1] Delivered as part of a conference workshop titled: 'The protection of fundamental rights: the challenges of the articulation of national law and European Laws'.
[2] Excmo. Sr. D. Fransisco Pérez de los Cobos Orihuel, Solemn Hearing on the occasion of the opening of the judicial year of the European Court of Human Rights, 30th January 2015 at p.5, available at: https://www.echr.coe.int/Documents/Speech_20150130_Perez_Cobos_Orihuel_ENG.pdf
[3] Ibid. at p. 6.

The role of the national judge in the protection of human rights has been described by one distinguished author as primordial.[4] It is important to remind ourselves of the basic fact that the enforcement of rights under the national constitution, the Charter and the Convention ultimately depends upon national courts.

Pausing briefly there, can I say that in Ireland we have a constitution which dates from 1937 and which followed the adoption of a written constitution in 1922 on the achievement of independence. So we have now reached the 100th anniversary of the adoption of a written constitution guaranteeing fundamental rights enforceable by actions in courts. This makes Ireland one of the countries with the longest continuous history of constitutional guarantees of judicially enforceable fundamental rights, second only in the common law world to the United States.

A recent historical study of constitutions recounts that in 1922, the committee charged with drafting the Irish Free State Constitution consulted the constitutions of at least 18 other jurisdictions, and then published that survey.[5] In 1933, the Indian nationalist Benegal Shiva Rao came across the book while in London and obtained the rights to print an Indian edition in Madras in 1934 which in turn influenced the drafting of the Indian Constitution. While this might be a matter of some pride, I do not refer to this to boast, but rather to make an entirely different point. Of the 18 constitutions surveyed as exemplars in 1922, virtually none now exist.

There are, of course, many reasons why a constitution fails, most often because the regime establishing it has been overthrown or superseded, but nevertheless, this fact highlights that the protection of human rights by legal action is not only complex and sophisticated, it is also *fragile*. Today we see something perhaps unimaginable during the period when the post war consensus on the European project on protection of human rights held sway; the content of those rights is now in dispute, and the model of judicial enforcement is challenged.

[4] O'Leary, 'Courts, Charters and Conventions, Making Sense of the Fundamental Rights in the EU' (2016) 56 Ir. Jur 4.
[5] Linda Colley, The Gun, The Ship and The Pen (2021)

One other feature of the Irish constitutional regime which is of perhaps more general interest is the fact that the 1937 Constitution, unsurprisingly, was heavily influenced by Catholic social teaching. Today, the Constitution protects a right to contraception (identified by judicial interpretation)[6], divorce, abortion and same sex marriage (all as a result of the amendment process where amendments were adopted after a constitutional referendum).

Accordingly, I suggest that an important and sometimes overlooked feature of a constitution to be successful is that it must be *flexible*. In the words of the great American judge Oliver Wendell Holmes, *"there must be some play at the joints"*.

Flexibility in interpretation is the final point I wish to make. When I survey the work of the European Court of Human Rights, and the CJEU, it is with essentially, an admiring and, I hope, friendly eye. Much has been achieved, but a friendly eye is not an uncritical one. Friends are, after all, the people who can tell you quietly that this haircut, or this outfit, is not as stylish as you thought. An old Irish saying captures this idea: *is maith an scáthán súil charad* - a friend's eye is a good mirror.

In recent years both the European Court of Human Rights and the CJEU have tended to emphasise the necessity for judicial dialogue with national courts. I wholeheartedly agree, but lawyers like to speak. It is perhaps particularly important to remind ourselves of the observation that 50% of communication is listening. What then should the Court of Human Rights and the CJEU hear? The European Court of Human Rights has in recent years tended to reemphasise the concept of margin of appreciation. This is, after all, an application of flexibility and allows some play at the joints in the complex inter-relationship between different states, and national courts, and the Court of Human Rights. The Charter of the European Union is of course not an international agreement between contracting states, but neither is it akin to a constitution of a nation state or even the Federal Constitution of the United States. It explicitly draws on the common constitutional values of all member states, respects the diversity of culture and traditions of the people and the national identities of the member states, and the principle of subsidiarity. The interpretation and application of the Charter should, in my view,

[6] *McGee v. Attorney General* [1973] I.R. 284.

recognise the fact that if the Charter embodies those values shared by the member states, it must be a floor and not a ceiling.

Furthermore, it is, I think, unduly simplistic to think of the rights guaranteed as always being measured in the same scale so that, for example, a national constitution's statement of rights is measured at four units of human rights protection and a similar provision in the Charter at seven units. The interaction is much more complex, and the assessment must be looked at in a much broader way. If the Charter is interpreted in an inflexible way that seeks to impose a single solution on member states which is inconsistent with the traditional understanding of such rights, and moreover speaking as it were *de haut en bas*, then there is a real risk that the system will not merely become inflexible but will become dangerously brittle.

The requirement for tolerance and flexibility is all the more important because the European Court of Human Rights has adopted what it describes as an evolutive interpretation of the Convention, while the CJEU speaks of teleological interpretation. These are of course matters for the courts themselves, and can be seen in one sense as a response to the need for flexibility.

But it is important to recognise the limits on any approach to interpretation, especially when it involves a large number of countries with differing traditions in respect of rights, which are both fundamental and highly sensitive. The need to recognise the limits of the interpretative approach is not simply a matter of prudence and practicality, it is fundamentally an issue of principle. The important principle that undermines democracy, particularly postwar democracy encompassing protection of human rights, is the principle of the rule of law. That principle means that the text, and the shared understanding of it, must remain central to its interpretation and application. The process of careful and sensitive interpretation of a legal text is perhaps a value that all lawyers and all legal systems recognise and adhere to. The shared understanding of law – fundamental law – is something citizens are entitled to rely on.

This is a more modest approach than some aspire to and can of course limit the capacity of courts to devise creative routes to achieve outcomes that some

commentators and indeed some judges, might consider desirable. But judicial enforcement of human rights, as Alexander Hamilton observed, is the weakest branch of government and depends fundamentally on public confidence in its judgment.[7] What undermines that public confidence, as President Perez de los Cobos observed, is the belief that interpretation is no more than personal judgement which may vary from court to court and time to time. If fundamental rights are to be defended, particularly in an uncertain world, then they are best defended from the strong ground that the national court is enforcing what the contracting states, the people of the Union or the citizens of a state, have directly or indirectly agreed upon and identified as both fundamental and basic. The protection of human rights is certainly complex and sophisticated, but is also *fragile*, requires *flexibility*, and *fidelity* to the lawyerly skills of careful, sensitive and faithful interpretation and application of the law.

[7] Hamilton, The Federalist, No. 78.