The Convention and Irish courts: a prospective retrospective

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Round Hall
Four Courts

President Kelly,

Minister McEntee,

President Lenaerts,

Chief Justice,

Distinguished Guests

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It is a real honour to represent the European Court of Human Rights at this centenary event. As the Irish President of that Court, it is a particular privilege to address you today.

Writing to the judiciary committee established in 1923 to design the new court system, W.T. Cosgrave, then President of the Executive Council, emphasised that:

> "[T]here is nothing more prized among our newly won liberties than the liberty to construct a system of judiciary […] according to the dictates of our own needs and after a pattern of our own designing."[1]

How curious it would have been for members of that committee to have had sight of today's programme.

100 years hence, the enduring and independent court structure which they would conceive would be celebrated in front of a distinguished audience, including presidents of Supreme Courts of EU Member States, with short interventions from the Belgian President of a European Court based in Luxembourg, who came to Monkstown as a young man to master English, and the Irish President of a different European Court, based in Strasbourg, who honed her French in Belgium.

In contrast to EU law, a subsection of Article 29 of the Constitution and the dualist nature of the Irish legal system meant that the Convention was

[1] Accessed via https://www.courts.ie/courts-justice-act-1924.

not to be considered as part of domestic law for many decades. It was and is not directly applicable within the national legal order.[2]

When the Convention was incorporated, as part of the new constitutional settlement on the island of Ireland which stemmed from the Good Friday Agreement, incorporation was at sub-constitutional level and subject to the very deliberate terms specified in the 2003 Act.[3]

This choice dictated and continues to dictate the legal effects of the Convention within this jurisdiction, its interaction with the Constitution and both the manner in which Convention arguments must be framed before Irish courts, but also the terms of Irish courts' engagement therewith.

One author has described the 2003 ECHR Act as giving "the maximum possible influence to the Convention that is consistent with the terms of the Constitution".[4]

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[2] See *State (Sumers Jenning) v. Furlong* [1966] 1 IR 183 or *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97.
[3] See further O'Donnell J. in *DPP v. Fitzpatrick* [2012] IECCA 74, at § 22, citing M. Cahill, "*McD and L* and the incorporation of the ECHR" (2010) *Irish Jurist* 222, 229. In *P.C. v. Ireland*, No. 26922/19, § 103, 1 September 2022, the applicant criticised the domestic legal system, and specifically the model chosen by the respondent State for implementing the Convention directly within its legal order, as well as the remedial scheme of the 2003 Act. Rejecting this argument, the ECtHR recalled: "[…] its case-law to the effect that there is no requirement on the Contracting States to incorporate the Convention so as to make it a part of their domestic law (see among others *Christine Goodwin v. the United Kingdom* [GC], No. 28957/95, § 113, ECHR 2002-VI)."
[4] See M. Cahill, « The Rule of Law or the Rule of Rights? Five ECHR Misconceptions the Courts Convincingly Refute" in *Judicial Power in Ireland*, Dublin, Institute of Public Administration, 2018.

Before touching on those judicial terms of engagement, it is important to stress that Ireland was both an outlier and a pioneer when it came to the Convention.

On the one hand, Ireland's experience before and during the Second World War, and its national ambitions and preoccupations in its aftermath, distinguished it from the other original signatory States. It was an actor "relatively new to independent statehood, […] anxious to assert itself on the international stage and [with very few] outlets for international engagement."[5]

On the other hand, Ireland's pioneering status was reflected in its being one of the first Convention signatories, the first State to recognise the jurisdiction of the European Court of Human Rights, the first State to see the Court's jurisdiction exercised with reference to it as a respondent State in *Lawless,*[6] and the first State to introduce an inter-State case which culminated in a Court judgment.[7] Furthermore, an Irish constitutional version of the living instrument doctrine had begun to appear in Supreme

[5] See I. O'Malley, « Ireland and the ECHR » (2023) 7 *Irish Judicial Studies Journal* 10, at 12.
[6] See *Lawless v. Ireland (No.1)*, No. 332/57 (ECHR, 14 November 1960), *Lawless v. Ireland* (No.2), App No 332/57 (ECHR, 7 April 1961), and *Lawless v. Ireland* (No.3), No. 332/57 1 July 1961. See generally S. Egan, L Thornton and J. Walsh, *Ireland and the European Convention on Human Rights*, Bloomsbury Professional, 2014.
[7] *Ireland v. the United Kingdom,* 18 January 1978, Series A no. 25.; a judgment which was the subject of the first revision request involving an inter-State case: *Ireland v. the United Kingdom (revision),* No. 5310/71, 20 March 2018.

Court judgments in the early 1970s, several years before its Strasbourg enunciation in *Tyrer* in 1978.[8]

When the Convention was referred to, in a recent Supreme Court judgment in *Costello*, on the constitutionality of the ratification of CETA, it was considered as "long [being] a favourite of the law and our constitutional order".[9]

And yet this "favouritism" expressed itself for some time in terms akin to those employed by an overly strict parent, rather than an admiring or liberal one.[10]

In 1957, in *Re O'Laighleis*, the then Chief Justice insisted that:

> "the Oireachtas [Parliament] has not determined that the Convention […] is to be part of the domestic law of the State" and that "[n]o argument can prevail against the express command of

[8] See Walsh J. in *McGee v. The Attorney General* [1973] IR 284 [318]: "It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts" or O'Higgins C.J. in *State (Healy) v Donoghue* [1976] 325: "this preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a constitution which can absorb or be adapted to such changes."

[9] *Costello v. Government of Ireland, Ireland and the Attorney General* [2022] IESC 44, per Hogan J. at § 179.

[10] This is perhaps a reflection of the fact that accession to the jurisdiction of the Strasbourg court in 1952 and the enactment much later of the ECHR Act in 2003 were, in the eyes of some in the Irish constitutional system, "what Joyce is to literature" (*Costello v. Government of Ireland, Ireland and the Attorney General* [2022] IESC 44, per Hogan J. at § 179) – in other words, not easily replicated.

> section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws".[11]

This position, which was recalled and endorsed by a subsequent Chief Justice in 1983 when giving the lead judgment in *Norris v. Attorney General*, put paid to the applicant's argument that the finding by the Strasbourg court of a violation of Article 8 in the almost identical case of *Dudgeon v. the United Kingdom* two years previously[12] should have been followed. According to the Chief Justice:

> "Neither the Convention […] nor [*Dudgeon*] is in any way relevant to the question which we have to consider in this case".[13]

In their early phase of relations, the Irish and Strasbourg courts thus appeared to stand in relative isolation from one another.

No doubt, each court system duly recognised the role and standing of the other[14]. But they were not – in those early times – in any true sense interlocutors.

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[11] [1960] IR 93.

[12] *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45.

[13] [1983] IESC 3.

[14] See, for example, the judgment in *Pine Valley Developments Ltd and Others v. Ireland* (Article 50), 9 February 1993, § 34, Series A no. 246-B. The Government had made the argument that the company's outline planning permission had been retrospectively validated, and that statements to the contrary made in the Supreme Court were merely *obiter dicta*. The ECtHR held, § 52, that it "must, whatever the weight of those observations in domestic law, be guided by such pronouncements of the national authorities as exist on the subject, especially those emanating from members of the highest court of the land."

The "persuasive influence" of the Strasbourg court was of course increasingly referenced by a cohort of Irish judges. The first members of that cohort might have been regarded, at least on the type of questions which tended to find their way to Strasbourg throughout the 1980s and 1990s, on the "liberal" side of Irish legislative and judicial debates of that time.[15]

They would later be joined by judges returning to the superior courts after stints on the Strasbourg and Luxembourg benches; judges for whom European law was no longer a foreign legal tongue.

However, in these early years, the Strasbourg and Irish courts were operating on different frequencies – frequencies then set by the Constitution and the Convention – with questions of interaction either underdeveloped or unresolved.[16]

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[15] See, for example, the accommodating stance of Henchy J in *Norris* when it came to the Convention and Strasbourg jurisprudence. Although in agreement with the majority on the legal effect of the *Dudgeon* judgment, he stated: "That does not mean that this Court is not open to the persuasive influence that may be drawn from decisions of other courts, such as the European Court of Human Rights, which deal with problems similar or analogous to that now before us." See also Costello J, pioneering a Convention style test of proportionality in an Irish constitutional setting in *Heaney v. Ireland* [1994] 3 IR 593. Similarly, on the nature and degree of significance that the Irish courts came to give to the Convention and to Strasbourg authority in the period pre-dating the ECHR Act, 2003, see Mc Guinness J in *Gilligan v. Criminal Assets Bureau* [1998] IR 185, in which she observed: "While there can be no question but that this Court is entitled to have regard to decisions of the Court of Human Rights in construing provisions of the Constitution there can be no question of any decision of the European Court of Human Rights furnishing in and of itself a basis for declaring legislation unconstitutional".

[16] Compare, in *Norris v. Ireland*, how the reasoning of the majority of the Supreme Court rested to a significant extent on what was seen as the pervading ethos of the Constitution, while that of the Strasbourg court, which found a violation of Article 8, looked to whether there was a pressing need in a democratic society supporting the impugned criminalisation, an assessment carried out against the background of evolving attitudes to homosexuality across Council of Europe States. See also the defence of the Supreme Court's constitutional position by the respondent Government in *Open Door and Dublin Well Woman v. Ireland*, and the ECtHR's insistence on its power of external, subsidiary review of the impugned and far-reaching restriction of Article 10 freedoms in the light of Convention principles and standards. *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 64-80 Series A no. 246-A.

Turning to the terms of domestic engagement with the Convention laid down by the Irish courts, several points recur to this day.

Firstly, the Convention is an international treaty to which Ireland is a signatory. But, unlike EU law, neither the Convention nor the judgments of the ECtHR benefit from direct effect.[17] To borrow the words of my soon to be successor on the Strasbourg bench, who I salute warmly, one can understand "the temptation of using the Convention authorities as a form of *prêt-à-porter* jurisprudence".[18] However, that type of approach has repeatedly earned rebukes from the Irish courts.

Secondly, the Irish courts will, in response to Convention arguments properly framed, engage in their duty of interpretation in conformity. But they will not creatively extend or amend existing legislation.[19]

Thirdly, a point which relates to the aforementioned absence of direct effect, applicants before the Irish courts cannot seek declarations that

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[17] See, variously, the leading judgment of Murray CJ in *J. McD. V. P.L.* [2010] 2 IR 199, applied and endorsed by the superior courts in *In re the ECHR Act 2003, Byrne & ors. v. An Taoiseach* [2011] 1 IR 190, *DPP v. Fitzpatrick* [2012] IECCA 74, *Mulligan v. Governor of Portlaoise Prison* [2013] 4 IR 1, at 47, per MacMenamin J, *Jaimee Middlekamp v. Minister for Justice and Equality and IHREC* [2023] IESC 2, at § 19, where Hogan J. emphasises that the Constitution "remains the fundamental law and ultimate source of human rights protection", or O'Malley J in *AC v. Hickey* [2019] IESC 38.
[18] See U. Ní Raifertaigh, "Ireland and the ECHR – An Irish Judge's Perspective", Bilateral meeting in Dublin of the Irish Supreme Court and the ECtHR, Dublin, 20th October 2022.
[19] The Supreme Court has made clear that s. 2 of the 2003 Act does not mandate "judicial legislation" – *Ryan v. Claire County Council* [2014] IESC 67, at § 49 or, *O'Donnell v. South Dublin County Council* [2015] IESC 28, at § 85. See, for discussion, Cahill, cited above, p.8 and, for regret at what they consider a restrictive approach to the interpretative obligation, F. De Londras, "Using the ECHR in the Irish Courts: More Whisper than Bang?" PILA Seminar, Dublin, 13 May 2011, and also O. Doyle and D. Ryan, "Judicial Interpretation of the ECHR Act 2003: Reflections and Analysis" (2011) 33 DULJ 369, who contrast the less restrictive approach of the UKSC.

statutory provisions deny their rights enshrined in the Convention. They must stick to the terms of the 2003 Act and seek declarations of incompatibility.

Added to what can be quite punchy criticisms from the Irish bench regarding how applicants, and their counsel, have relied on the Convention, are important statements in myriad cases in the Irish reports to the effect that the Constitution offers a wider range of remedies than the ECHR and the 2003 Act,[20] that Convention protections are already in place under the Constitution[21] or that the Convention cannot act as some form of shadow or substitute Constitution.[22]

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Some of you may be wondering why, on the occasion of a celebration, I am emphasising what some might wrongly construe as the negative side of the Convention/Irish court relationship.

[20] See O'Donnell J. (Hogan and Birmingham JJ. concurring) in *DPP v. Donnelly* [2012] IECCA 78, at § 22.
[21] See Hogan J. in *DF v. An Garda* (No. 3) [2014] IEHC 213.
[22] See, variously, McKechnie J. in *Gorry v. Minister for Justice and Equality* [2020] IRESC 55, O'Malley, J. in *AC v. Hickey* [2019] IESC 38, or Hogan J. in *Clare County Council v. McDonagh* [2022] IESC 2, at § 52. In § 1 of the latter judgment Hogan J. noted that it was being delivered "100 years since the first Provisional Government for an independent Irish State was called into being".

There is a risk too that this recounting of how the two systems previously interacted, and the contrast with the primacy, unity and effectiveness of EU law, will point to the relative weakness of the Convention. Or it may feed a certain, and in previous times or in some circles, prevailing narrative. Reaching for the Strasbourg court judgments in *Norris*, *Open Door* or *O'Keeffe*, that narrative at times depicted the Irish courts as failing to protect what Strasbourg was later seen to have championed or guaranteed.

However, I have two points to make in response.

Firstly, while this is a jubilee celebration, critical reflection, if also constructive, is not only to be welcomed, but it is also vital for the future.

Secondly, providing a true sense of the Irish courts' history of engagement with the Convention, even against the background of the rather blinkered narrative I've just outlined, should not blind us to a relationship which has endured for over 70 years and to the concrete fruits of that engagement seen from the perspective of a now 100-year-old court system, as well as the Convention system of which it forms a part.

The figures in Strasbourg speak for themselves. The rights protection afforded by the Irish courts in recent years does too.

For the time being, there are only 2 applications pending against Ireland at the ECtHR. 2 out of over 65, 500 pending cases.

Based on our primary statistical measure of Convention embeddedness across the 46 domestic systems – namely the number of applications pending against a given State per 10,000 inhabitants – Ireland's ratio in 2023 was 0.04. This ranks it 45th lowest of all 46 Convention States, 0.01 off the United Kingdom.

It is important of course to add, given ongoing debates and reflections in this system on the costs of and obstacles to access to justice, that the road to Strasbourg from this State is not paved with extensive legal aid or a vibrant civil society in a position to finance public interest or ground-breaking litigation. The "paupers and millionaires" concern about access to justice can influence whether the road to Strasbourg is taken.[23]

However, the paucity of applications must also reflect both the embeddedness of Convention standards in this jurisdiction and a high degree of confidence in the independence and operation of the Irish court system.[24]

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[23] See Kelly P., then President of the High Court, *The Bar Review*, February 2018, Vol. 23(1) at p. 11, discussed at length by Twomey J. in *Tom McEvaddy Property Limited Trading as Nexus Homes (in liquidation) v. National Asset Loan Management* [2019] IEHC 125. See also P. Kelly, Review of the Administration of Civil Justice, October 2020.

[24] See the 2023 Eurobarometer survey on the Perceived independence of national justice systems within the EU, pursuant to which approximately 75 % of those surveyed in Ireland rated the Irish courts as fairly or very good. See also the more detailed findings of https://commission.europa.eu/document/db44e228-db4e-43f5-99ce-17ca3f2f2933_en and those of the Council of Europe's CEPEJ.

The number and nature of the applications pending before the ECtHR in recent years, the number of violations found[25] and the response of the domestic authorities to any such findings, as well as to Strasbourg general principles and even carefully formulated obiter,[26] point clearly to a relationship calling for a fresher and more vibrant narrative than the narrow one I just recounted.

As regards the Convention system, perception and self-perception have evolved greatly over the past 10 to 15 years. It is deeply understood that the mission of upholding human rights and fundamental freedoms is a common endeavour. That the responsibility for ensuring that rights are practical and effective is a shared one, with the primary responsibility lying in each jurisdiction with national authorities, including national courts.

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Central to the effective functioning of the Convention system in this State is the positive and engaged interaction between two normative levels, Ireland's Constitution and Europe's Convention.

[25] See https://www.echr.coe.int/documents/d/echr/CP_Ireland_ENG.
[26] See, for example, despite finding no violation of the relevant Convention provisions relied on by the applicants, or finding the applications inadmissible, the comments and corrections of the Court in *Mills v. Ireland*, no. 50468/16, § 34, 2 November 2017 and *Doyle v. Ireland*, no. 51979/17, § 101, 23 May 2019.

The interface between Irish law and the Convention – subject to an EU law proviso which I will add in my conclusion – is now the 2003 Act. Its provisions, to varying degrees and in different ways, act as sluice gates in terms of legal challenges before the Irish courts, the form and sequencing of the legal arguments presented therein and the judicial reasoning which may ensue.

Two recent examples of effective engagement with the Convention in this jurisdiction bring us beyond the formal legal structures of the relationship between the ECHR and a State Party like Ireland and speak instead to the Convention's concrete and profound impact.

Firstly, notwithstanding the perfectly legitimate Chinese walls which the Irish courts have sought to maintain between the provisions of the Constitution and the Convention, the fact remains that those walls can appear healthily porous when it comes to concretely analysing the reasoning in a given case.

Clare County Council v. McDonagh concerned an appeal against an injunction issued by the local authority to remove the applicants' caravans from a public road. For starters, the sidestepping by the applicant of the more

extensive provisions of the Constitution concerning the inviolability of one's dwelling, in preference for the Convention, was duly criticised.[27]

However, for all that the judgment of the Supreme Court emphasised the absence of the Convention's constitutional status within the State, which was seen to contrast unfavourably with the status of the EU Charter, the appeal was granted by the Supreme Court after extensive analysis of the applicant's claim both from the perspective of Article 40.5 of the Constitution and Article 8 ECHR. It is a judgment infused with Convention case-law on Article 8 and which largely follows Convention methodology, albeit woven into the constitutional claim.

A similar pattern – albeit with even more trenchant criticism of how the case was pleaded by the applicant and his counsel and apparently thicker Chinese walls – can be found in *Simpson v. Governor of Mountjoy Prison and others*.[28] In that judgment the Supreme Court held that the practice of requiring prisoners to slop out in Mountjoy prison infringed the prisoner's constitutional right to privacy, as well as the values of dignity and autonomy.[29]

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[27] *Clare County Council v. McDonagh* [2022] IESC 2, per Hogan J. at §§ 46 – 54. It is worth recalling that the Convention's vocation to provide a minimum standard of protection across Council of Europe States should never be forgotten. As per Article 53 ECHR, nothing precludes High Contracting Parties, including Ireland, securing higher levels of protection of human rights and fundamental freedoms which may be ensured under domestic law.

[28] [2019] IESC 81.

[29] Prison law in Ireland was said to have entered adulthood following the *Simpson* judgment - see M. Rogan, "Prison Law in Ireland Enters Adulthood: *Simpson v Governor of Mountjoy Prison*", (2021) 3 *Irish Supreme Court Review* 121 – 140.

Reflecting the terms of European orientated judgments from the 1990s onwards, one Supreme Court judgment read:

> "[…], there will indeed be instances where illustrations and citations from ECtHR jurisprudence can assist a court established under the Constitution in considering issues arising in a constitutional claim".[30]

Convention rights have thus been used to inform or expand the parameters of equivalent or similar constitutional rights.[31] The State commits to protecting the substance of Convention rights, while the precise remedies and protection mechanisms are left to the State.

The paramount point in these cases is not the preferred legal basis for the practical and effective protection of human rights and fundamental freedoms, but the fact and quality of that protection.

My second illustration points to more sensitive judicial language of engagement. Notwithstanding the concern to preserve the primacy of national constitutional rights protection, there is growing recognition that,

[30] *Simpson*, cited above, per MacMenamin J. at § 60.
[31] See, for another example, *The People (DPP) v. Gormley* [2014] 2 IR 591, on the inspiration drawn from case-law on Article 6 of the Convention regarding whether the concept of constitutional fairness and criminal process required legal representation.

at least in certain cases or on certain issues, there might be some merit in Irish courts:

> "using similar language and structure to that adopted by the ECtHR in analysing rights guaranteed by both the Constitution and the ECHR."[32]

This, according to the present and former Chief Justices, could enhance judicial dialogue and minimise the risk of misinterpretation at international level.[33]

A similar philosophy, marked by openness to criticism or comment from the Strasbourg bench, can be gleaned in the Court of Appeal and Supreme Court judgments in *O'Callaghan v. Ireland*, in which damages were awarded, for the first time, for breach of the constitutional right to a trial with reasonable expedition. This was after a long and difficult dialogue between the Strasbourg and Irish courts regarding the question of available and effective remedies.[34] In the Supreme Court, MacMenamin J. observed:

> "However uncomfortable some of the observations [in that case-law], there are occasions when an external critique can be useful in

[32] See Clarke CJ in *Fox v. the Minister for Justice and Equality, Ireland and the Attorney General* [2021] IESC 61, at § 257.
[33] See Clarke CJ, ibid and O'Donnell, D., writing extra-judicially, "The ECHR Act 2003: Ireland and the Post War Human Rights Project" (2022) 6(2) Irish Judicial Studies Journal 1.
[34] [2021] IESC 68. See, for an overview of that somewhat difficult dialogue, the concurring opinion in *Keaney v. Ireland*, No. 72060/17, 30 April 2020.

> creating an insight into the way in which our own legal system can sometimes be perceived. […] An over-defensive system, which cannot criticise itself and provide remedies when necessary, will not long retain public trust. In an era when the rule of law is sometimes under challenge, the maintenance of such trust is fundamental."[35]

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Given that my intervention is intended as a prospective retrospective, what does the future hold?

I'll limit myself to four points.

Firstly, the recurring and trenchant criticism by the superior courts of the terms of engagement chosen by some applicants makes for interesting - and as long as one is not counsel on the receiving end - even amusing reading.

However, the recurring nature of the rebuke points to an important point which affects the work of all judges – national and European, EU and non-EU – here present.

[35] *O'Callaghan v. Ireland* [2021] IESC 68, at § 119.

The protection of human rights, democracy and the rule of law in 2024 requires judges, counsel, applicants and national authorities to engage with multiple and complex sources of law.

There is a duty on those who develop, interpret and apply the law – not least European judges – to make our multi-level protection system as accessible, workable and effective as possible.

The recurring expression of judicial concern in this jurisdiction also points to the need, in a common law system with a written Constitution, which is a member of the EU and has ratified the ECHR, to ensure that education modules at undergraduate and professional level equip jurists and lawyers capable of assisting the courts and national authorities in navigating the complexity of that multi-level system.

If the lawyers who work within the triangular constitutional order which results from this State's membership of both the EU and the ECHR do not fully grasp how it should work, we need to reflect on why this is the case and how to remedy the problem.[36]

[36] See variously, on this point, S. O'Leary, "Courts, Charters and Conventions: Making Sense of Fundamental Rights in the EU" (2016) 56 *Irish Jurist* 4-41; S. O'Leary, "Courts, Lawyers and Legal Principles: Ireland's Contribution to European Courts and European Case-law" (2018) 41 *DULJ* 103 and T. Flynn, *The Triangular Constitution: Constitutional Pluralism in Ireland, the EU and the ECHR,* Hart Publishing 2019.

Secondly, the ECHR clearly does not enjoy constitutional status, direct effect or primacy in this jurisdiction.

However, because of how European law, writ large, has developed, the legal effects of the Convention in this jurisdiction extend beyond the terms of the 2003 Act.

The terms of engagement between the EU Charter and the ECHR[37] mean that the latter can apply within this jurisdiction via the Charter or EU law, where the issue falls within the scope of application of EU law. As regards what exactly falls within that scope, this is a question which develops over time depending on Treaty amendments, the exercise by the EU of its legislative competences, and the interpretation by the CJEU of those competences,[38] as well as the "values" provision in Article 2 TEU.[39]

If, in the words of President Lenaerts, the EU Charter is the "shadow" of EU law within its scope of application,[40] out with that scope it is to national constitutions and the ECHR that citizens have and will turn.

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[37] See Article 6 TEU and the terms of the EU Charter itself, which contains two specific provisions (Articles 52(3) and 53) that provide interpretative guidance regarding the interaction between the Charter and the Convention.
[38] See, in a case which is pending, on the competence of the CJEU to adjudicate in the field of CFSP, Joined Cases C-29/22 P and C-44/22 P *KS, KD v. Council of the EU, European Commission and EEAS*, EU:C:2023:901 for the Opinion of the Advocate General.
[39] See, an infringement action which is pending - Case C-769/22 *European Commission v. Hungary*, in which the EU Commission appears to rely on Article 2 TEU as a self-standing provision.
[40] See K. Lenaerts, "The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection", Solemn hearing for the opening of the Judicial Year, 26 January 2018: "Unlike the system set out by the Convention, when it comes to the EU Member States, fundamental rights are not self-standing. Not all national measures may be examined in the light of the Charter, but only those that fall within the scope of EU law. Metaphorically speaking, the Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter. So, where a national measure falls outside the scope of that law, it also falls outside the scope of

It is clear that the Convention and the Constitution cannot overlook EU law; but neither can EU law ignore the former two. In this triangular relationship of courts and legal orders, which all seek, in essence, the same objective, being hierarchical is and will be unhelpful.

Thirdly, Irish terms of engagement with the Convention provide for "sequencing". For our European visitors, this means that in any action challenging the constitutionality of a legislative provision or rule of law, together with the compatibility of the provision with the Convention, the constitutional claim must be considered first.[41]

This sequencing rule has been accepted by the Strasbourg court as falling within the State's margin of appreciation.[42] Nationally it has been seen as a means of tackling the question of the interaction between the ECHR and the Constitution, prioritising constitutional analysis.[43]

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the Charter. This does not mean, however, that fundamental rights are left unprotected, since the compatibility of that measure with fundamental rights may be examined in the light of the relevant national constitution and the Convention."

[41] See *Carmody v. Minister for Justice, Equality and Law Reform* [2010] 1 IR 653.

[42] *P.C. v. Ireland*, cited above, § 107: "The Supreme Court upheld the applicant's challenge to the statutory disqualification on another ground relied on by him. It then stated that it was unnecessary to proceed to a full consideration of the Convention arguments that had been raised before it as this would not bring the case any further (see paragraph 20 above). This cannot be regarded as an omission on the part of the Supreme Court. In its case-law this Court has acknowledged that the domestic authorities have a margin of appreciation in conforming with their obligations under Article 13 (…). *It considers that this margin must be taken as encompassing the discretion of a domestic court that is competent to determine constitutional issues alongside Convention issues to uphold a challenge to legislation on some but not all of the grounds raised by litigants before it.* Taking such an approach in a case is not inconsistent with the duty of the respondent State to ensure the availability of a remedy for alleged violations of Convention rights." (emphasis added)

[43] See G. Hogan, "The Value of Declarations of Incompatibility and the Rule of Avoidance" (2006) 28 *DULJ* 408, on the need for resolution and D. O'Donnell, "The ECHR Act 2003: Ireland and the Post-War Human Rights Project", cited above, on the form which that resolution has taken.

However, while Ireland's sequencing rule may make sense internally, it may also mean that superior court judgments have less of an impact externally than would otherwise have been the case had they been speaking the language of the Convention or engaged more fully with Convention complaints.[44]

If, as some contend, the Strasbourg Court's use of evolutive interpretation and the living instrument doctrine, could be subject to more rigorous analysis than has been the case until now,[45] sequencing means that Convention arguments may, in many cases, never be reached. Questions worth exploring, even if not central to the statutory or constitutional solution preferred by the highest courts, may be left in abeyance in judgments which may not be picked up as easily by the Strasbourg court in key cases concerning other States.[46] The best route to more rigour – which is rightly expected of the Strasbourg court - is more extensive judicial dialogue in appropriate domestic court judgments.[47]

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[44] This, in essence, was one of the central points made by Clarke CJ in *Fox*, cited above, and was reiterated by O'Donnell CJ in his 2023 article in *Irish Judicial Studies Journal*, at 11 – 12.

[45] Ibid., 11.

[46] *Friends of the Irish Environment CLG v. the Government of Ireland, Ireland and the Attorney General* [2020] IESC 49 is not a perfect example, as the Supreme Court refused to engage with the applicants' constitutional and Convention arguments in full, but it is a topical and a telling one. The Irish Supreme Court was the first to speak after the Dutch Hoge Raad in *Urgenda (State of the Netherlands v. Stichting Urgenda,* 20 December 2019, NL:HR:2019:2007), such that its failure to counter argue, if that is what it felt inclined to do, on Articles 2 and 8 ECHR, left a gap later filled by other courts, via their constitutions (see *Neubauer and Others v. Federal Republic of Germany*, Order of the First Senate of 24 March 2021, 1 BvR 2656/18 DE:BVerfG:2021:rs20210324.1bvr265618) or via those same provisions of the Convention (see *VZW Klimaatzaak v. the Kingdom of Belgium and Others*, now on appeal).

[47] A positive example of useful engagement is to be found in the recent judgment of O'Donnell CJ in *O'Meara* where, despite finding the impugned provision unconstitutional, he went on to examine the Convention dimensions of the applicants' complaints (*O'Meara and ors. v. The Minister for Social Protection, Ireland and the Attorney General* [2024] IESC 1, at § 39 et seq.). It is noticeable that the analysis focuses principally on UK precedents which examined the relevant provisions of the Convention rather than on the case-law of the ECtHR itself.

My fourth and final point picks up on a message conveyed by President Higgins to the Parliamentary Assembly of the Council of Europe in 2022:

> "[…] the European Convention on Human Rights must remain the cornerstone of human rights' protection across Europe. To those who suggest that there is a tension between the principles of parliamentary democracy and the international protection of human rights, I respond unequivocally that parliaments flourish in an environment where rights are vindicated, upheld and promoted, not where they are delayed, judged or even rejected. […] [The Convention] must be re-invoked, extended, bolstered and re-asserted, becom[ing] part of the discourse of the European Street."[48]

Ireland today vaunts a court system which provides, overall, effective access to justice and balanced protection of individual rights and the general interest, run by independent and impartial judges and a dedicated Courts Service which I also salute today.

It is a 100-year-old system of which we should be proud. This is not only because of - but it is also thanks to - our engagements in Europe and the benefits which we have, as a State and a people, derived therefrom.

[48] https://rm.coe.int/pace-october-plenary-address-president-michael-d-higgins/1680a91a51.

A European judge would rightly be described as vainglorious if he or she laboured the "European benefits" point. However, he or she would not be fulfilling their duty if they did not warn of two things in these turbulent, but sadly not unprecedented, times, given the unique vantage point which they occupy.

Firstly, the language of national courts such as yours counts. Signs of pushback – perceived or real - against external judicial intervention can be quickly harnessed by other courts or authorities sharing the same Convention legal space. This can be done not to safeguard Convention rights but instead to bolster the language of national or parliamentary sovereignty, national or constitutional identity and the illegitimacy of bodies perceived as encroaching on either.[49] When such discourse takes hold, courts, but particularly international courts, are sitting ducks.

If, as Judge O'Malley has rightly suggested, the Convention is a conversation across generations but also across the peoples, courts and judges of Convention and EU States, how fluid will our future European conversation be if we all cleave to our own history and its unique needs, to our own legal language, or to our own notions of sovereignty, exceptionalism and identity? It would be tragic for small European States like ours to embrace Europe and multi-lateralism on their journeys to truly

[49] For comments on the *Costello* judgment and what he perceived as pushback therein see C. O' Cinneide, "What has the ECHR ever done for us? The Particular and Specific Importance of the Convention in Protecting Rights Across a Democratic Europe" (2023) 7 *Irish Judicial Studies Journal* 32.

independent statehood, only to neglect both once their independent destinations had been reached.

Secondly, the beneficiaries of a court system such as the one we celebrate today should not underestimate how quickly the essential scaffolding of modern, effective, pluralist and tolerant democracies, underpinned by the rule of law, can be dismantled and ultimately removed.

Courts, which form an essential part of that scaffolding, cannot alone resist the dismantling process, but they do and will play a fundamental part in seeking to uphold the constitutional and European values which, ultimately, we gather today to celebrate.