THE ECHR ACT 2003: IRELAND AND THE POST WAR HUMAN RIGHTS PROJECT[1]

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Abstract: This article analyses the various phases of development of the European Convention on Human Rights Act 2003 and considers both what has been achieved as well as a potential new direction in Irish human rights jurisprudence.

It is now 18 years since the European Convention on Human Rights Act 2003 ('the 2003 Act') came into force and, since 18 is the age of majority, it is perhaps appropriate to look at how the young adult is faring. But the story does not start in 2003. Like all good series, there is a prequel. It is necessary to go back, at least to 1998 and eastwards, to the enactment in our neighbouring jurisdiction of the Human Rights Act ('HRA') of that year, which came into force in the jurisdictions making up the United Kingdom (with some fanfare) in the year 2000. We are generally not immune from legal developments in the UK, and the general enthusiasm in legal circles among practitioners and academic lawyers in the UK for the HRA 1998 was inevitably felt here and had, I suggest, a distorting effect on our understanding of the place and potential impact of the 2003 Act.

It is, perhaps, important to put that development in its broader political and social context. When Lord Scarman called for a bill of rights in his Hamlyn lectures in 1974, the proposal did not get traction at that time.[2] From one side of the political divide, there was a longstanding and deep-seated scepticism of any form of judicially enforceable rights. There was, I think, a view that there was a fundamental principle that a person was free to do anything that was not positively prohibited and that freedom, therefore, lay in the absence of laws. This scepticism about judicial enforcement of rights stretched back at least as far as A.V. Dicey. Dicey's name was, and is, rightly controversial in Ireland. However, I think we tend to underestimate the significant intellectual achievement that his pioneering work on the Constitution of the UK entailed.[3] He said something, then in the context of Home Rule and in the light of his experience in the US system, that is of wider application. Federalism, he said, involves law, and law requires adjudication and enforcement, which means judicial involvement and, to that extent, a transfer of power from Parliament.[4]

It is not always appreciated or acknowledged that what we argue constitute rights is contestable, unless we adhere to the view that they are divinely ordained and their limits prescribed. Even if there is broad agreement about the existence of certain rights, the nature

[1] This is an edited and updated version of a paper delivered to the Annual Conference of the Immigration Asylum and Citizenship Bar Association on 26th November 2021.
[2] Leslie Scarman L, 'English Law - The New Dimension' Hamlyn Lecture Series (Twenty Sixth Series, Stevens and Stevens Ltd., 1974).
[3] Albert Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan and Co 1885).
[4] ibid 166: 'Federalism .. means legalism -the predominance of the judiciary in the constitution -the prevalence of a spirit of legality among the people'. See also Lord Bingham, 'Dicey Revisited' in Tom Bingham, Lives of the Law: Selected Essays and Speeches 2000-2010 (Oxford, 2011), where Lord Bingham expresses the opinion at 49 that, on balance, Dicey would have opposed the Human Rights Act of 1998: 'he would have needed much persuasion that the rights of British citizens required any protection beyond that offered by the ordinary law of the land'.

and extent of the application of such rights in particular circumstances is contestable. Permitting judicial enforcement of rights as interpreted by the Judiciary inevitably involves conferring power upon the courts, and in a zero sum world, the transfer of some power from Parliament to the Judiciary. Most countries in Europe, certainly in the aftermath of World War II, have come to accept such rebalancing as broadly beneficial. However, it should not be surprising that, in Dicey's homeland, there were those who were firmly attached to the belief that Parliamentary democracy was the finest system for the protection of what were then called civil liberties. On the other side of the traditional political divide, there had been a longstanding antipathy to court-based proceedings, perhaps rooted in the experience of the struggles of the trade union movement. Even in the late 20th Century there was, and remained, a strong tradition of thought that it was preferable to protect the rights of people through collective action and the operation of the democratic process — parliamentary action — rather than empowering what was characterised as an elitist and, to some extent, conservative Judiciary.[5]

In the late 20th Century, however, there was a significant shift in politics and movement, particularly among the largely urban professions, towards an increasingly liberal, metropolitan and internationalist outlook, and the project of judicial enforcement of rights, deemed fundamental and recognised at an international level, fitted with that development. If this, in very broad and crude terms, was the political context for the 1998 Act, the legal context was the growing appreciation of the achievements of what might be called the post war project of human rights protection, at least in the West and the countries which sought to align themselves with it.

The method by which the European Convention was introduced into the law of the United Kingdom has been described, correctly in my view, as both elegant and clever.[6] The Convention was not directly incorporated as a constitutional document or enacted as legislation. Consistent with the principle of the supremacy of Parliament under the United Kingdom system, there were perhaps four key features of the Act. First, was the introduction under section 3 of the HRA of an interpretative obligation which is phrased so that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' The Convention rights were identified in section 1 as rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the Convention, subject to any designated derogation or reservation. Second, section 4 of the Act permitted a court to make a declaration of incompatibility of legislation with the Convention rights which, in theory, left it to Parliament to remedy the position. In that sense, it could be said that such an approach was consistent with the effect of a decision of the European Court of Human Rights ('ECtHR') operating at the level of international law. A decision of the ECtHR obliged the contracting state to adjust its laws to conform with the finding of the Court. A third limb of the Act was an obligation on public authorities under section 6 to conduct themselves in accordance with the Convention rights, and the

[5] There is also a vibrant intellectual tradition that questions legal recognition and judicial enforcement of human rights. See Richard Bellamy, *Political Constitutionalism; A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) and Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) which is deserving of more consideration than it has received in Ireland, but my purpose here is only to sketch what I perceived, perhaps inaccurately, as the broader political context to the adoption in the UK of the HRA.

[6] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (Oxford University Press 2014) 104.

provision of a remedy - including damages - for any failure to do so. Fourth and finally, in this regard, section 2 provided that a court or tribunal determining an issue in connection with a Convention right was obliged to take into account ('must take into account') any decision of the Court of Human Rights (or the Commission or Committee of Ministers, as the case may be).

The immediate impetus for the incorporation of the Convention into Irish law came from the Good Friday/Belfast Agreement in 1998 and the commitment it contained to the same level of human rights protection North and South.[7] The ECHR has had a significant impact in Northern Ireland, both prior to 1998 and thereafter. This is, in part, thanks to the effort of those like the late Professor Kevin Boyle who pioneered the use of the route of making complaints under the Convention in the 1970s. Recently, we celebrated 100 years of women at the Bar and, on that occasion, I recalled the efforts of Sheelagh Murnaghan, one of the first women barristers to practise at the Northern Ireland Bar. She was also a Liberal MP for Queens University and sought on four occasions to introduce a bill of rights in Northern Ireland which was rejected each time, no doubt with some invocation of the spirit of Dicey. Kevin Boyle was strongly involved in the Civil Rights Association in the late 1960s and was very committed to peaceful means of advancing its aims.[8]

It is, I think, a legitimate question as to how matters in Northern Ireland might have developed if in the 1960s there had been an equivalent of the Human Rights Act. In any event, the European Convention on Human Rights and, consequently, the Human Rights Act, have both been correctly seen as important in the context of the recent history of Northern Ireland. However, it was arguable that it was not necessary to take any particular, still less grand, step to comply with the obligations which Ireland had undertaken and, indeed, it is also arguable that the combination of the Constitution and the 2003 Act now provides a greater level of protection for rights in the Republic than in the North. Nonetheless, it seemed to follow from the genesis of the obligation that when this jurisdiction came to honour its commitment under the Good Friday / Belfast Agreement, it would choose incorporation through a statute which is similar in structure to the HRA 1998 which, in this jurisdiction, meant that it would operate at a sub-constitutional level.[9]

As is well known, the 2003 Act contains an interpretive obligation. Under section 2 of the Act, courts are to interpret any statutory provision or rule of law in a manner 'compatible with the State's obligations under the Convention provisions.' The 'Convention provisions' were defined as Articles 2 to 14 and Protocols 4, 6 and 7 of the Convention. The Act also contains, in section 3, an obligation on the part of the organs of State to perform their obligations 'in a manner compatible with the State's obligations under the Convention provisions.' Section 5 permits the making by the High Court, Court of Appeal or Supreme Court of a declaration of incompatibility and includes the possibility of an *ex gratia* award of

[7] The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (1998) states under Strand Three, 'Rights, Safeguards and Equality of Opportunity': 'The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction (…) The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland.'

[8] See Mike Chinoy, *Are You With Me? Kevin Boyle and the Rise of the Human Rights Movement* (Lilliput 2020).

[9] Nineteenth Amendment of Constitution Act, 1998, which allowed the State to consent to be bound by the British-Irish Agreement done at Belfast on 10 April 1998 and provided that certain further amendments to the Constitution, notably to Articles 2 and 3, would come into effect when that agreement entered into force.

compensation resulting from such incompatibility. Finally, and again similarly to the HRA, the 2003 Act contains an interpretation provision providing that judicial notice should be taken of the Convention and the decisions of the ECHR, the Commission and the Committee of Ministers, and provides that a court, when interpreting and applying the Convention provisions, shall take 'due account' of the principles laid down in those declarations, decisions, advisory opinions and judgments. Thus, not only was the method of incorporation similar to the UK Act, but the structure of each Act was almost identical. However, just as the genesis of the legislation was different in the two jurisdictions, the Irish legislation operated in a different constitutional setting and was subtly different in its detail, although this was not always appreciated.

There have been a number of phases in the reaction of Irish law and lawyers to the provisions of the 2003 Act, four of which will now be discussed.

First Phase: Unrealistic Expectations?

Initially, the reaction to the incorporation of the Act relayed and amplified the enthusiasm expressed in commentary on the UK Act. The view was expressed that the introduction of the Convention into Irish law would allow for an expansion of what were described as human rights provisions and assist in the avoidance of what were considered unhelpful provisions of the Irish Constitution, and/or interpretations of the Constitution by the courts. It was believed that this would lead to an unlocking of the latent potential of the Constitution. However, the Act was also criticised as not going far enough and, in addition, the Irish courts were criticised as not being as adventurous as the UK courts were perceived to be in applying the Act.

Looking back, what is striking (to me at least) is that much of the commentary, apparently dazzled by the structural similarities between the provisions contained in both Acts, did not really address the specific provisions of the Irish statute. Pausing there, it is noteworthy that, notwithstanding the structural similarity between the Acts identified above, there are some distinctions which make it surprising that much of the commentary and many legal submissions treat the two Acts as identical:

1. The UK Act contains two specific provisions which are not replicated in the Irish Act. They provide that, in dealing with issues of free speech and religion, the courts shall pay 'particular regard' to the rights involved;[10]
2. The Irish Act in its long title acknowledges that its purpose is to implement the Convention in Irish law 'subject to the Constitution', language that obviously does not appear in the UK Act and is, and has been held to be, significant;
3. The interpretive provision under section 2 is stated to be 'subject to the rules of law relating to such interpretation and application'. This, again, is a significant difference, given that the main driver of both Acts is the interpretive obligation;

[10] S. 12(4) Human Rights Act 1998 (UK) states: 'The court must have particular regard to the importance of the Convention right to freedom of expression…'; and S. 13(1) Human Rights Act 1998 (UK) states: 'If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.'

4. The Irish Act provides for an *ex gratia* award in the case of a declaration of incompatibility;
5. 'Organ of State' is defined to exclude the President, the Oireachtas, the Houses of the Oireachtas and any committee thereof and the courts;
6. The Convention provisions are defined to include Articles 2 to 14 and Protocols 4, 6 and 7, whereas the UK Act does not include Article 13; and
7. Perhaps most significantly for present purposes - both the interpretive provision under section 2 and the performance obligation on organs of State under section 3 are expressed as an obligation to so interpret or perform functions in a manner which is 'compatible with the State's obligations under the Convention provisions.' This is certainly different from the UK Act, which provides for an obligation to interpret so far as possible in a way which is 'compatible with the Convention rights.' The importance of this distinction is easily missed, and I will return to it.

Second Phase: Reality Dawns

One issue on which I have not yet touched and which was latent in much of the discussion of both Acts was the precise role of the courts in respect of the interpretation of the Acts and the Convention provisions. A first question was what was meant by the obligation to take 'due account' of the Convention jurisprudence. It was clear that the courts in neither jurisdiction were 'bound', in the sense that that term was understood in the common law, to follow any decision of the Court of Human Rights. Did the obligation to take due account of the Strasbourg case law mean that the courts would be free to depart from the interpretation of the Convention by the ECtHR, whether by refusing to follow decisions with which the Court disagreed, or by going further and beyond the interpretation currently adopted in Strasbourg? During the debates on the adoption of the Human Rights Act in the UK, there was one influential intervention by the then Lord Chancellor, Lord Irvine, subsequently much quoted, who expressed his view that one of the benefits of incorporation was that UK judges could take a lead in the interpretation of the Convention and of the development of the law in that regard.[11] The UK House of Lords and subsequently, Supreme Court, initially took a view which was set out in the judgment of Lord Bingham, perhaps the most influential member of that court then, or indeed, in recent years, and which has been described as the Mirror Principle. The principle, first set out in *R (Ullah) v. Special Adjudicator*,[12] asserted that where the ECtHR had taken a position, the duty of the domestic courts was to 'keep pace with Strasbourg jurisprudence as it evolves over time: no more but certainly no less.'[13]

In *Al-Skeini v. Secretary of State for Defence*,[14] Lord Brown suggested that the statement could be inverted to read 'no less but certainly no more.'[15] The position was subsequently synthesised in *Manchester City Council v. Pinnock,*[16] where it was said that a UK court could decide not to follow Strasbourg authority where it 'lacked its customary clarity' or was in conflict with a fundamental substantive or procedural aspect of UK law or, moreover, where it was clear

[11] Human Rights Act HL Deb 03 November 1997 vol 582 cc1227-312.
[12] *R (Ullah) v. Special Adjudicator* [2004] UKHL 26.
[13] ibid [20].
[14] *R(Al-Skeini) v. Secretary of State for Defence* [2007] UKHL 26.
[15] ibid [106].
[16] *Manchester City Council v. Pinnock* [2010] UKSC 45.

that the Strasbourg Court had misunderstood the domestic law.[17] Once it became clear that, while the Mirror Principle required UK courts by and large to accept the Strasbourg case law, the principle also meant that the courts should be very slow to anticipate where that authority might go, the Mirror Principle tended to be criticised by those who wanted to see an expansive role taken by the courts and an equally expansive reading of the Convention provisions. The major case in this area in Ireland is the Supreme Court decision of *McD v. L*.[18] The case involved a claim of access by a donor father to a child then being cared for by a same sex couple. The High Court had rejected the claim, in part by relying on the status of the couple and child as a family unit under Article 8 of the Convention. The Supreme Court reversed the decision of the High Court on two fundamental grounds. First, Murray CJ found that the 2003 Act did not amount to a freestanding right to assert a Convention right. In a simple but very important sentence he said: 'The role of the Convention as an interpretive tool in the interpretation of our law stems from a statute, not the Convention itself, and can only be used within the ambit of the Act of 2003.'[19] This might appear to be a basic, indeed, obvious statement, but it is fundamental to an understanding of what are rather loosely called Convention claims in Irish law and was, of course, fatal to the argument which sought to simply and directly invoke Article 8 rights without reference to any provision rule of law or issue of interpretation. Fennelly J, for his part , went on to consider the position which would apply if there was an issue of interpretation of a statute or rule of law, or a contention that a public authority had not conducted itself in accordance with the Convention provisions as defined under the Act. In short, Fennelly J endorsed the decision in *Ullah* and adopted the Mirror Principle into Irish law. These two judgments from judges with particularly impressive experience in the European Courts are an essential bedrock of the Irish law on the interpretation and application of the 2003 Act.

The decision in *McD v. L* was criticised at the time and was seen as disappointing in some quarters but in my view, it is an example of the Court performing its proper function of analysing the law rigorously and applying it faithfully. To explain this last point, the observation that the issue in Irish law that requires consideration is the effect, in any case, of the Act of 2003, is central to a proper understanding of the operation of the Convention in Irish law. For reasons discussed below, it also reinforces the correctness of the Mirror Principle as an approach to Strasbourg jurisprudence, at least as far as Irish law is concerned. The focus on the 2003 Act also casts a light on other issues that have been the subject of some debate in the UK, and which have spilled over into Ireland. While the Mirror Principle deals with the question of existing clear and consistent case law from Strasbourg, what is the position when that case law concludes that a particular area or issue is within the State's margin of appreciation? It has been argued that the concept of margin of appreciation was one which only applied at the level of international law as it was a margin of appreciation accorded by an international court to a contracting state. On this argument, there was no room for a margin of appreciation in national law, and it was for a court to consider whether any particular law was incompatible with the Convention rights or, in the language of the statute, Convention provisions. Indeed, the House of Lords appeared to have taken that approach, at least in a Northern Ireland case, *Re G Adoption (Unmarried Couple)* [2008] UK HL

[17] ibid [48].
[18] *McD v. L & anor* [2009] IESC 81 (Supreme Court, 10 December 2009).
[19] ibid [55].

38.[20] That position was criticised by Philip Sales, now Lord Sales and a member of the UKSC, but then a High Court judge, on the basis that he considered it was inconsistent with the interpretation of the Human Rights Act and a principle now described as the principle of legality. He argued that that principle should apply:

> so as to narrow the concept of Convention rights under the HRA to those rights recognised by the European Court of Human Rights under international law rather than to interpret the concept in an expanded sense to confer upon domestic courts a right to modify legislation under s.3 of the HRA when a domestic court disagreed with a judgment made by parliament, but the European Court itself would accept the choice made by parliament as legitimate.[21]

The Mirror Principle was criticised by some who would have seen the UK and Irish courts engaging in a development of the Convention on the assumed basis that would lead to an increased protection for human rights. Such a formulation is, in my view, somewhat question – begging, but time does not permit an extended analysis here. However, as time went on the principle came under pressure from sources that might not have been anticipated. There were increasing signs that members of the UK Supreme Court might be prepared to go beyond Strasbourg ie to do *more* in Lord Bingham's formulation, but were also willing to do *less*, ie to refrain from applying the jurisprudence of the ECtHR where it was considered that it was wrongly decided; not that the ECtHR misunderstood UK law, but that the ECtHR was wrong in its interpretation of the Convention itself. The trend of decisions and *dicta* have been recently collected in a useful article by Lewis Graham in 2021, who suggested that there was at least temporarily a majority in the Supreme Court for this approach.[22] The argument against the Mirror Principle received substantial support from no less a source than Lord Irvine.[23] However, his intervention was replied to by Lord Sales again who, in 2012, produced a strong and closely reasoned defence of the principle and argued that the Human Rights Act of 1998 should not be understood as a freestanding domestic provision which the courts were free to interpret as they thought fit, but rather one intended to produce what he described as a 'domestic remedial regime in respect of the rights to which the United Kingdom is subject in international law under the ECHR.'[24] He concluded that this was also justified by what he described as rule of law reasons, including the following:

> If the domestic courts are perceived to be giving different meanings to Convention rights than the ECtHR gives them, there is a serious risk that public confidence in the courts and respect for human rights would be adversely affected, so undermining more substantive interpretations of rule of law values. It is likely that disappointed litigants and political actors hostile to recognition of legal enforceable human rights would seize upon

[20] See in this regard Aileen Kavanagh, 'Strasbourg , the House of Lords or Elected Politicians : Who decides about rights after Re P' (2009)72 M.L.R. 828 and, more generally, Alan Greene, 'Through the Looking Glass ? Irish and UK Approaches to Strasbourg Jurisprudence' (2016) 55 Ir Jur 112.
[21] Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 L.Q.R. 598 at 614.
[22] Lewis Graham, 'The modern mirror principle' (2021) Public Law 523.
[23] Irvine, 'A British Interpretation of Convention Rights' (2012) P.L. 237.
[24] Philip Sales, '*Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine'* (2012) Public Law 253, 260.

> differences between the two divergent streams of authority in order to use each to criticise the other, and so discredit both. The Supreme Court would particularly be at risk of being diminished in the eyes of European states and institutions; and the general authority of the ECHR system and convention rights would be at greater risk of being diminished in the eyes of the British public. It therefore seems in accordance with human rights values given effect by the HRA drawn from the ECHR, that the Mirror Principle should be adopted.[25]

A recent judgment delivered by Lord Reed indicates that the current position of the UKSC appears to be that the equivalent of a margin of appreciation is allowed in the domestic context.[26] Indeed, in 2021, the UKSC delivered an important judgment, *R (on the application of Elan-Cane) v Secretary of State for the Home Department*, which comprehensively disapproved of the *dicta* in *Re G* describing them as: best understood as *obiter*; based on a misunderstanding of the nature of the margin of appreciation doctrine; difficult to reconcile with the structure and purpose of the Human Rights Act; resulting in an encroachment upon Parliamentary sovereignty which Parliament is unlikely to have intended; undermining legal certainty; and inconsistent with the prevailing approach of the House of Lords and the UK Supreme Court both prior and subsequent to that decision.[27] The judgment also reaffirmed the Mirror Principle. This is mentioned to provide a background to a consideration of the position in Ireland. It is suggested that the guidance given in the judgment of Murray CJ in *McD v L* leads to a similar conclusion to that argued for by Lord Sales and now firmly restated in *Elan-Cane*, where, indeed, Lord Reed made reference to the Irish Act as explicitly defining the domestic obligations it imposed by reference to compatibility with the State's obligations under the Convention.[28]

The Irish Act does not contain any provisions seeking to inform the Irish courts as to how they should interpret the Convention in the area of free speech and religion, as the UK Act does. It also provides that the 'Convention provisions', which are defined by the Act include Articles 2 to 14 of the Convention and three protocols, are subject to any derogation or reservation made by Ireland. If Ireland were to enter a reservation in respect of any part of the Convention, that act, itself a matter of international law, would have the immediate effect of removing those provisions from the domestic Act for the duration of the reservation. This, in itself, indicates an intention that the Convention would be given effect in national law in a way identical to the way in which it operates from time to time in international law. Finally, and perhaps most importantly, the Irish Act (in both section 2, the interpretive principle, and section 3, the obligation to act in accordance with the Convention) is *not* expressed in terms that legislation or any rule of law must be interpreted, or any relevant body must perform its functions 'in accordance with the Convention'. Rather, it specifies an obligation to interpret the relevant statute or rule of law or perform functions 'in a manner compatible with the State's obligations under the Convention provisions'.

These provisions seem, therefore, to indicate that the object of the Irish Act was to produce a domestic remedial regime in respect of the rights to which Ireland was subject in international law under the ECHR, and thus to require the application of the Mirror Principle

[25] ibid 261.
[26] *R (on the application of SC, CB and 8 children) v. Secretary of State for Work and Pensions and ors* [2021] UKSC 26
[27] *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC.
[28] ibid [88].

as indeed Fennelly J had concluded in *McL*. The second phase, therefore, involved the setting of the domestic law of the European Convention on Human Rights on a sound and solid footing.

Third Phase: Constitutional Development

As my former classmate, long-time friend, and newest colleague on the Supreme Court, Mr. Justice Hogan, perceptively observed more than 15 years ago, 'on an even more fundamental level, the legal system is going to have to resolve the interaction between the ECHR and the Constitution'.[29] The Supreme Court took a substantial step towards answering that question (in line with the position advocated by Gerard Hogan), in *Carmody v. Minister for Justice, Equality & Law Reform & ors.*[30] At issue there was the sequence in which the Court should address parallel claims that a provision breached a citizens' constitutional rights but also constituted a breach of the Convention provisions. The traditional approach to constitutional claims required that if a court could decide an issue on a non-constitutional issue, it should not reach the constitutional issue. This is a rule of avoidance adopted in many jurisdictions. However, the Court in *Carmody* concluded that the position of the 2003 Act was to put the Convention claim as the default claim. The Act in its long title acknowledged that the Act was 'subject to the Constitution' and, under section 5, a court could only make a declaration of incompatibility 'where no other legal remedy is adequate and available.' The Court concluded that this required a court to consider whether any particular provision was inconsistent with the Constitution prior to considering the question of incompatibility with the Convention provisions:

> If a Court concludes that the statutory provisions in issue are incompatible with the Constitution and such a finding will resolve the issues between the parties as regards all the statutory provisions impugned, then that is the remedy which the Constitution envisages the party should have. Any such declaration means that the provisions in question are invalid and do not have the force of law. The question of a declaration pursuant to s. 5 concerning such provisions cannot then arise. If, in such a case, a Court decides that the statutory provisions impugned are not inconsistent with the Constitution then it is open to the Court to consider the application for a declaration pursuant to s. 5 if the provisions of the section including the absence of any other legal remedy, are otherwise met.[31]

Given the high degree of overlap between rights protected under the Constitution, and rights protected under the Convention, this interpretation of section 5 had the effect of prioritising the constitutional analysis. In cases in which it was held that a statutory provision was invalid, then that resolved the issue. In cases where it was held to be valid, much of the legal analysis was done, and it would rarely be the case that the Convention claim would require protracted debate, and rarer still, that it would result in a declaration of incompatibility of a statute which had been found not to be constitutionally valid. While this approach had the effect of bringing the constitutional claim to the foreground, where it deserved to be, it also had the consequence that the analysis contained in the ECHR jurisprudence had an effect upon the

[29] Gerard Hogan, 'The Value of Declarations of Incompatibility and the Rule of Avoidance' (2006) 28 D.U.L.J. 408, 8.
[30] [2009] IESC 71, [2010] 1 I.R. 635.
[31] [2009] IESC 71, [2010] 1 I.R. 635, 6.

interpretation of the Constitution. This is not, in principle, surprising, and had been predicted by, among others, the then Chief Justice Ronan Keane who, in 2003, observed that on a number of occasions the Irish courts had already had regard to Convention case law in interpreting the Constitution.[32] If indeed it was the case that there was a significant overlap between the rights guaranteed by both instruments, it is not surprising that a court would find helpful the analysis adopted under the Convention when considering the parallel right protected by the Constitution. In that regard, decisions like *DPP v. Gormley and White,*[33] *Simpson v. Governor of Mountjoy & ors,*[34] and, most recently, *Nash v.* DPP,[35] and *O'Callaghan v. Ireland,*[36] show clear signs of developed Convention jurisprudence being taken into account in the interpretation and application of the Constitution, sometimes in very significant ways. In *O'Callaghan*, MacMenamin J. said it was recently pointed out in the judgment of this Court in *Fox*:[37]

> … just as there can be distinctions between the nature of constitutional and Convention rights so too there can be close similarities, where an analysis of Irish, ECtHR and major common law jurisprudence leads to a conclusion that the nature and scope of a right can be very close indeed. This case gives us an example of where the essence of the constitutional and Convention rights are very similar.[38]

In *Nash,* this Court held that, in principle, since the Constitution guaranteed a right to a speedy trial and gave remedies for that, such remedies could include a claim for damages if appropriate. Notwithstanding this statement, the ECtHR recently considered the judgment in *Nash* in *Keaney v. Ireland,* and did not accept that the cause of action identified there was sufficiently clear cut so that it could be said that an applicant that failed to exhaust domestic remedies if he/she had not pursued such a claim.[39] In *O'Callaghan*, the Court concluded there had been a breach of the right and awarded damages. It remains to be seen what the ECtHR will make of this development.

However, this third phase which has prioritised constitutional claims, has led to the conclusion, which some more sober commentators predicted at the turn of the millennium: since the Irish Constitution guarantees most but not all of the rights protected by the Convention, it is unrealistic to think that the 2003 Act would have a similar impact on the legal system and claims, at least as directly as the HRA was having in the UK. However, the impact of Convention case law has had a subtle but significant impact on the development of Irish constitutional law.

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[32] Ronan Keane, 'Issues for the Judiciary in the Application of the ECHR Act 2003', (Human Rights Commission and Law Society of Ireland Conference, 16 October 2004).
[33] [2014] IESC 17, [2014] 2 I.R. 591.
[34] [2019] IESC 81, [2020] 1 I.L.R.M. 81.
[35] [2017] IESC 51, [2017] I.R. 320.
[36] [2021] IESC 73 (Unreported, Supreme Court, Clarke C.J., O'Donnell, MacMenamin, Dunne and Baker JJ., 30th September, 2021).
[37] *Fox v. The Minister for Justice and Equality & ors* [2021] IESC 61 (Supreme Court,14th September 2021).
[38] [2021] IESC 73 (Unreported, Supreme Court, Clarke C.J., O'Donnell, MacMenamin, Dunne and Baker JJ., 30th September, 2021) [87].
[39] App No 72060/17 (ECHR, 30 April 2020). The concurring judgment of Judge O'Leary is noteworthy.

A Fourth Phase: Incipient Separation?

The limits of this constitutional approach may be starting to become apparent. Perhaps the most interesting recent decision is the judgment of Clarke CJ for a unanimous court, in *Fox v. Minister for Justice & Equality & ors,*[40] indeed the last judgment delivered by Clarke CJ before his recent retirement. *Fox* was a case in which the relatives of Seamus Ludlow, who was killed, it appears, by Loyalist paramilitaries in the early years of the Troubles, sought an order requiring, among other things, an investigation into the circumstances in which they contended there had been an inadequate investigation into his death. The argument obviously relied very heavily on the extensive jurisprudence of the ECtHR, which has developed procedural rights from Article 2 of the Convention guaranteeing the right to life. However, there were significant hurdles in the way of a claim under the 2003 Act both in respect of retrospectivity and time bars. Accordingly, the claimant sought to argue that the extensive Strasbourg jurisprudence was, as it were, latent within the constitutional guarantee of the right to life under Article 40.3 of the Constitution. It was argued that the Court should find that jurisprudence which had developed incrementally by the Court of Human Rights over 20 years, was to be found within the Irish Constitution which should consequently be held to guarantee the same effective rights. Clarke CJ rejected that contention, finding that the ECHR and the Irish Constitution are different documents adopted for different reasons and purposes. As he said in a sentence that may come to be as important as Murray CJ's observation in *McD*: '[T]he Irish Constitution is, after all, an autonomous human rights instrument with its own provisions, its own values and its own established jurisprudential methodologies.'[41] The reference to jurisprudential methodologies is perhaps particularly noteworthy. It should not be forgotten that the Court of Human Rights contends for and has adopted an 'evolutive interpretation' of the Convention. In my view, this line of jurisprudence could be subject to more rigorous analysis than has been the case until now.[42] However, the question of the correct interpretation of an international agreement by a supranational court is one issue; it is however, quite different, if it is sought to be said that the product of any such interpretation becomes almost automatically, or even presumptively, a part of the jurisprudence on the Irish Constitution. Any such approach to interpretation would, I think, strain the boundaries of the legitimacy of the courts' function, which is central to acceptance of the courts' decisions.

Fox is therefore potentially quite a significant case in suggesting a new direction in Irish human rights jurisprudence. The manner in which a Convention claim can be raised in Irish law has now been firmly established. The relative position of claims under the Constitution and the 2003 Act has also been charted and it is now possible to recognise that there are differences between the Constitution and the Convention. It is not merely that, while there is a significant area of overlap between the two instruments, there are areas covered by only one or the other. It is also the case that, even within the area of overlap, there will be differences of approach. *Fox* therefore suggests that it can be anticipated that future claims will be brought both under the Constitution and the 2003 Act and that the Convention claim and jurisprudence will have to be carefully and separately analysed.

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[40] Supra note 40.

[41] *Fox v. The Minister for Justice and Equality & ors* [2021] IESC 61 (Supreme Court, 14th September 2021) [12.14].

[42] European Court of Human Rights, 'What are the Limits to the Evolutive Interpretation of the Convention' (Dialogue between judges, European Court of Human Rights, Council of Europe, 2011).

These developments may have disappointed those who may have harboured hopes that the 2003 Act would ignite a firestorm of judicial activity, giving a lead in the expansive interpretation of the Convention. In my view, the courts may have done something more modest, but arguably more important: the application of the Convention in Irish law has been put on very clear and firm foundations.

To take the *modest* achievements first, there is, I think, a significant benefit in having a more developed ECHR analysis since that facilitates the consideration of a case if and when it goes to Strasbourg. Because of the relatively few complaints made from Ireland to the ECtHR and the smaller number of complaints deemed admissible and violations found, there is a tendency to treat the decisions of the ECtHR on Irish cases as isolated events. But the cases are themselves important in dealing with aspects of Irish law and the legal system and, in any event, it is possible that the numbers of cases may increase. There is a positive benefit in placing an issue in its correct context and explaining the factual and legal background in terms which are familiar to, and can be readily assessed and analysed by the ECtHR. In cases where there is a measure of dialogue between the Irish courts and the ECtHR, it is important that we speak a common language. If the ECtHR is only presented with a constitutional analysis of an issue, it is possible that the reasoning may be misunderstood or avoided when the Court comes to make its own ruling by reference to the Convention. The *importance* of placing the analysis under the 2003 Act on a sound footing can perhaps be appreciated by comparing the position today to that in 2003. At that point, history was supposed to be over. Communism had collapsed in Europe and the remaining story was supposedly the relentless advance of western liberal democratic ideas. Today, we see a much different picture. Things that we would have regarded as fundamental and beyond argument are now regularly challenged. Whereas in the latter part of the 20th century it might have been thought that the fundamental rights guaranteed by the Convention were no longer at issue, that cannot be said today. In those circumstances it is worth reminding ourselves of the importance of what can be called the European post-war human rights project. In 2012, Lord Sales wrote that the project involved:-

> an attempt to identify and promote common (western European) standards to deal with situations where popular politics failed to meet human needs or to respect the human rights which arise from the recognition of those needs and to foster a broad congruence in the constitutional arrangements to be shared by a range of neighbouring states based on democracy, rule of law and the respect for human rights.[43]

But he added perceptively that 'the pressure on those arrangements is likely now to mount in an increasingly zero sum world and they require constant support and reinforcement. The ECHR and the Council of Europe provide institutions peer review and group pressure between states and governing elites that maintain them.'[44]

In 2003, there were, what I think, unrealistic expectations about what could be done with the Act, and more generally what could, or should, be done by courts. But whether you were disappointed by the development of Irish case law in the last two decades or quietly relieved

[43] Philip Sales, 'Strasbourg jurisprudence and the Human Rights Act: a response to Lord Irvine' (2012) Public Law 253, 266.
[44] ibid.

by it or enthusiastically support it, one benefit of that case law is, I suggest, a continued focus on what has been a remarkable achievement in the protection of human rights in an increasingly uncertain world. Those fundamental rights require to be supported, reinforced and defended as much, if not more, today - a task which requires a solid and firm base, something the case law of the Irish courts has sought to provide in the last 18 years.

There is much work to be done.