

# ‘WHAT HAS THE ECHR EVER DONE FOR US?’: THE PARTICULAR AND SPECIFIC IMPORTANCE OF THE CONVENTION IN PROTECTING RIGHTS ACROSS A DEMOCRATIC EUROPE

*Abstract: The European Convention on Human Rights (ECHR) was recently described by Hogan J. as having ‘long been a favourite of the law and our constitutional order’. The importance and value of the Convention is generally acknowledged in Ireland, even as it comes under increasing criticism elsewhere. However, recent case-law has raised issues about the exact nature of the relationship between the Convention and Irish law. In addressing these issues, it is necessary to consider wider questions about the legitimacy of the Convention system of rights protection, and to identify the very real ‘added value’ it provides to well-established national mechanisms for upholding rights, democracy and rule of law.*

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## Introduction

In what follows, this paper explores the relationship between the European Convention on Human Rights (‘ECHR’) and Irish law, with specific reference to the status of the jurisprudence of the European Court of Human Rights (‘ECtHR’). It then proceeds to examine the legitimacy challenges that the ECHR system of rights protection is increasingly facing across Europe, and analyses how the authority of the ECtHR can be justified.

## The ECHR and Ireland: ‘A Favourite of our Law and the Constitutional Order’

Speaking on the 11th October 2022 to the Parliamentary Assembly of the Council of Europe, an tUachtarán Micheál D. Higgins commented as follows:

[W]e live in a world where the legitimacy of the ECHR and ECtHR continues to be undermined. Let me take this occasion to state Ireland’s view very clearly: the European Convention on Human Rights must remain the cornerstone of human rights’ protection across Europe’. He went on to describe the Convention as a ‘bedrock’, that ‘must be re-invoked, extended, bolstered and re-asserted.’<sup>1</sup>

These comments represent a striking affirmation of the worth of the Convention. They also reflect the embedded view of successive Irish governments, starting with Seán MacBride’s active and enthusiastic involvement in the Convention’s birth process as Minister for External Affairs in the late 1940s,<sup>2</sup> and repeatedly reiterated by various ministers ever since

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<sup>1</sup> President Michael D. O’Higgins, ‘Reasserting the Moral Weight of the Council of Europe’ (Fourth part of the 2022 Ordinary Session of the Council of Europe Parliamentary Assembly, Strasbourg, 10–14 October 2022) <<https://rm.coe.int/higgins-pdt-ireland-pa-october-2022-2753-1532-5702-1/1680a87426>> Accessed 18 July 2023.

<sup>2</sup> William Schabas, ‘Ireland, The European Convention on Human Rights, and the Personal Contribution of Seán MacBride’, in John Morison and others (eds), *Judges, Transition, and Human Rights* (OUP 2007), 251–274.

in various domestic and international fora.<sup>3</sup> Ireland has been a positively engaged participant in the ECHR system of rights protection since the first case to reach the newly established ECtHR in 1960, namely *Lawless v Ireland*.<sup>4</sup> It loses relatively few cases before the Court,<sup>5</sup> but has a reasonably good record of compliance with judgments that have found it to be in violation of the Convention – some of which, such as *Airey*,<sup>6</sup> and *Norris*,<sup>7</sup> have had a significant impact on the development of Irish law and society.

The value of the Convention as viewed through Irish eyes is also reflected in the provisions of the constitutionally endorsed Belfast Agreement,<sup>8</sup> which (i) affirm that respect for ECHR rights is an essential ‘safeguard’ for the functioning of devolved institutions in Northern Ireland and the integrity of the Irish peace process more generally,<sup>9</sup> and (ii) commit Ireland to consider incorporating Convention rights into domestic law,<sup>10</sup> a step achieved by the European Convention on Human Rights Act 2003 (‘the 2003 Act’). This is an exceptional legislative measure: no other set of international human rights commitments has been transplanted into national law and made directly enforceable in domestic law. In the absence of any express constitutional recognition of the status of the Convention, the 2003 Act clarifies when and how national courts can take account of Convention rights in interpreting legislation and reviewing the actions of public authorities. It thus domesticates such rights, and in the words of O’Donnell CJ, puts the application of the Convention in Irish law ‘on very clear and firm foundations’.<sup>11</sup>

More generally, there is general acceptance within Irish law and politics of both (i) the binding nature of ECtHR judgments at the level of international law and (ii) the highly persuasive character of the Court’s jurisprudence as a reference point in determining the scope and substance of rights protection within domestic law.<sup>12</sup> Unlike other international human rights treaties, the ECHR is not viewed from the internal perspective of Irish law as a purely ‘external’ international legal norm, exercising at best a diffuse and indirect influence over the development of national law. Instead, the Convention is treated as part of the domestic legal household, so to speak. The political branches of the state generally endeavour to maintain conformity with Strasbourg case-law in utilising their legislative and executive powers. Furthermore, national courts take this jurisprudence into account both when applying Convention rights in line with the 2003 Act and also, more indirectly, when interpreting the constitutional rights provisions of Bunreacht na hÉireann.<sup>13</sup>

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<sup>3</sup> See the comments made by the Minister for Foreign Affairs, Simon Coveney T.D., on 19 September 2022 welcoming the election of Judge Síofra O’Leary as President of the ECtHR. <<https://www.gov.ie/en/press-release/8912e-ms-justice-siofra-oleary-elected-as-president-of-the-european-court-of-human-rights/>> Accessed 22 August 2023.

<sup>4</sup> (1961) 1 EHRR 15.

<sup>5</sup> 28 individual complaints came before the Court from Ireland in 2022: 27 were deemed to be inadmissible or otherwise struck out, while one complaint resulted in a finding of non-violation <<https://www.echr.coe.int/statistical-reports>> accessed 25 June 2023.

<sup>6</sup> *Airey v Ireland* (1980) 2 EHRR 305.

<sup>7</sup> *Norris v Ireland* (1989) 13 EHRR 186.

<sup>8</sup> Article 29.7 of Bunreacht na hÉireann, inserted by the Nineteenth Amendment to the Constitution as approved by referendum on 22 May 1998 and signed into law on 3 June 1998.

<sup>9</sup> Belfast Agreement, *Strand One: Safeguards*, para 5(b).

<sup>10</sup> *ibid*, *Strand Three: Rights, Safeguards and Equality of Opportunity – Human Rights*, para 9.

<sup>11</sup> Donal O’Donnell, ‘The ECHR Act 2003: Ireland and the Post War Human Rights Project’ (2022) 6(2) IJSJ 1-13, 12.

<sup>12</sup> For discussion of this distinction between the status of the ECtHR’s judgments in international and national law, see *Costello v Government of Ireland* [2022] IESC 44 – in particular [179] – [186] (Hogan J).

<sup>13</sup> *Fox v Minister for Justice* [2021] IESC 61 (Clarke CJ).

The status thus accorded to Strasbourg jurisprudence rarely if ever generates political controversy, or provokes much in the way of legal angst – bar the odd bout of vague judicial grumbling about elements of the Strasbourg interpretative approach.<sup>14</sup> Recent Supreme Court jurisprudence has emphasised that Irish courts should not focus on Convention jurisprudence at the expense of domestic constitutional rights standards,<sup>15</sup> or assume that the former should ‘almost automatically, or even presumptively’ form part of the latter – to use O’Donnell CJ’s phrasing.<sup>16</sup> Convention rights and constitutional law remain distinct and separate legal strands within the tapestry of Irish law. However, this recent case-law has simultaneously affirmed that Irish courts should take ECtHR case-law into account when interpreting constitutional rights provisions, and should follow the lead of Strasbourg in applying the provisions of the 2003 Act.<sup>17</sup> More generally, Ireland’s adherence to the ECHR continues to be viewed as an unqualified good – not least because of how it reflects a wider national commitment to human rights and rule of law values.<sup>18</sup> As Hogan J puts it with his customary neat turn of phrase in *Costello v Ireland*, the ECHR ‘has long been a favourite of the law and our constitutional order.’<sup>19</sup>

## The Increasingly Contested Status of the ECHR

In this respect, Ireland’s stance vis-à-vis the ECHR is broadly analogous to that of many other European states. Some care needs to be taken in making generalisations in this regard.<sup>20</sup> However, the binding status in international law of ECtHR judgments has been acknowledged by all state parties to the Convention. Similarly, national courts can now review the conformity of the actions of public authorities with Convention rights in every member state – with such rights, as in Ireland under the 2003 Act, generally having sub-constitutional status.<sup>21</sup> Furthermore, national courts are usually willing to interpret and apply constitutional rights provisions in ways that align with Strasbourg case-law, or at least which do not undercut it – while, like the Irish Supreme Court, being at pains to assert their final authority to determine the requirements of national law.<sup>22</sup>

This is not to say that all political or legal actors across Europe are as warmly inclined to Strasbourg as their Irish counterparts tend to be. There is a tendency in some states for the Convention to be regarded as an alien, intrusive, and destabilising influence – and thus

<sup>14</sup> Adrian Hardiman, ‘The Jurisdiction of the European Court of Human Rights and the case of *O’Keefe v. Hickey*’, in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester, 2017), 94–107; Conor O’Mahony, ‘Subsidiarity of ECHR and *O’Keefe v. Ireland*: A response to Mr Justice Hardiman’ in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester, 2017), 108–120.

<sup>15</sup> *Gorry v Minister for Justice* [2020] IESC 55; *Fox v Minister for Justice* [2021] IESC 61 (14 September 2021).

<sup>16</sup> O’Donnell (n 11) 11.

<sup>17</sup> Hogan J was at pains in *Clare County Council v McDonagh* [2022] IESC 2 (31 January 2022) to emphasise that Irish courts should not focus on Convention jurisprudence to the neglect of domestic constitutional law in adjudicating rights claims. However, in giving the judgment of the Court, Hogan J also gave close consideration to the relevant Strasbourg case-law in interpreting Article 40.5 of *Bunreacht na hÉireann*, in particular the ECtHR’s decision in *Winterstein v France* App No 27013/07 (ECHR, 17 October 2013).

<sup>18</sup> O’Donnell (n 11).

<sup>19</sup> [2022] IESC 44, [179].

<sup>20</sup> See in general Colm O’Cinneide, ‘Constitutional Interpretation in European Countries and the Influence of the European Convention on Human Rights and the European Union’, in Kate O’Regan, Sujit Choudhry and Carlos Bernal (eds) *Elgar Research Handbook on Constitutional Interpretation* (OUP 2023) (forthcoming).

<sup>21</sup> *ibid.* See also Giuseppe Martinico, ‘Is the European Convention Going to Be “Supreme”? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’ (2012) 23(2) *European Journal of International Law* 401.

<sup>22</sup> See in general Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015).

ECrtHR jurisprudence is sometimes held at arms' length by national judges.<sup>23</sup> However, the Irish experience generally aligns with similar experience elsewhere, especially when it comes to the readiness of national political and legal actors to ensure domestic law evolves in line with Strasbourg requirements – even if the Irish embrace of the ECHR is sometimes more enthusiastic and less qualified than that of some other states.<sup>24</sup>

Having said that all that, if we return to the starting point of this paper, President Higgins's comments also contain a frank acknowledgment that the ECHR system of rights protection has come under increasing attack in recent years - as reflected in his acknowledgement that the Court 'continues to be undermined', and that the legitimacy of the Convention needs to be 'bolstered and re-asserted'. Over the last decade or so, the Court in particular has attracted growing criticism, that goes beyond minor grumbling about the specifics of particular judgments. It has been accused of over-reaching, of indulging in 'human rights imperialism' by over-extending the scope and substance of Convention rights, and of arrogating legal-decision authority to itself which should be exercised by national authorities. Prominent among these critics have been certain UK government ministers: the political sore opened eighteen years ago by the Court's controversial 'prisoner voting rights' judgment of *Hirst v UK (No 2)* has never really been closed.<sup>25</sup> In late 2021, the UK government published a consultation paper on reform of UK human rights law, which contained some strikingly aggressive criticism of the Court and in particular its interpretation of the scope of certain Convention rights and their associated positive obligations.<sup>26</sup> More recently, the recent grant of a Rule 39 interim order by the Court, which stopped the transfer of asylum-seekers to Rwanda, has triggered another bout of political attacks – including calls for the UK to leave the Convention system.<sup>27</sup> Such criticism has not only come from politicians within the UK. A number of legal academics and prominent ex-judges, including two former members of the UK Supreme Court, have been highly critical of what they see as the 'activist' and 'overreaching' nature of some of the Strasbourg jurisprudence.<sup>28</sup> Furthermore, similar grumbings can increasingly be detected from outside the UK. Some other national governments have supported calls for reform of the Strasbourg system, and criticism of the ECHR is increasingly becoming common in political and legal debate across Europe.<sup>29</sup>

## Answering the Critics: The Turn to 'Subsidiarity'

It is worthwhile emphasising that these recent attacks on the Court often feature plenty of sound and fury, but little in the way of tangible proposals for reform at either the level of international or domestic law.<sup>30</sup> Critics of the Court can be frustratingly vague when

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<sup>23</sup> O'Conneide (n 20).

<sup>24</sup> Compare e.g. the Italian experience, as outlined in Giorgio Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law: An Italian Perspective* (Intersentia 2013).

<sup>25</sup> (2006) 42 EHRR 41.

<sup>26</sup> *Human Rights Reform: A New Bill of Rights* (HMG 2021).

<sup>27</sup> Alexander Butler, 'European Judges Vow to FIGHT UK Plan to Ignore Rwanda Migrant Flights' *Daily Mail* (21 April 2023). (Capitalisation in the original.)

<sup>28</sup> See e.g. Lord Hoffmann, 'The Universality of Human Rights' (2009) 125 LQR 416-432; Jonathan Sumption, *Trials of the State: Law in a Time of Crisis* (Profile, 2019); Richard Ekins, 'Human Rights and the Morality of Law', (*Judicial Power Project*, 7 June 2019) <<https://judicialpowerproject.org.uk/human-rights-and-the-morality-of-law-richard-ekins/>> Accessed 18 July 2023.

<sup>29</sup> Jacques Hartmann, 'A Danish Crusade for the Reform of the European Court of Human Rights', (*EJIL: Talk!*, 14 November 2017), <<https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/>> accessed 18 July 2023.

<sup>30</sup> The recent shelving of plans for a new 'UK Bill of Rights', which was designed to dilute the influence of Strasbourg jurisprudence on British law, is perhaps an example of this tendency.

sketching out their constructive proposals as to how the Strasbourg system should function, and often show little appreciation or understanding of why and how the Court's case-law has developed as it has. They also throw around vague, ill-defined concepts like 'judicial activism' and 'mission creep' – while often insisting that the ECtHR adhere to interpretative techniques, such as a close focus on deciphering the original intent of the post-war framers of the Convention, that are manifestly unsuitable for application in an international law context.<sup>31</sup>

In addition, the Strasbourg Court has been responsive to some of the criticism directed towards its jurisprudence. Robert Spano, the former President of the Court, has emphasised in recent extra-judicial writing that the Court has entered an 'age of subsidiarity' and has 'to a considerable extent recalibrated the methodological parameters of its jurisprudence towards a more democratically incentive review mechanism' – whereby the Court will require 'strong reasons' in the form of clear defects in national democratic processes as they relate to rights protection before it will 'substitute its judgment for the one adopted by the national authorities'.<sup>32</sup> This turn is clearly reflected in the Court's jurisprudence over the last decade, which has shown some signs of being more deferential towards the decisions of national authorities.<sup>33</sup> It also is reflected in the Strasbourg Court's willingness to engage in judicial dialogue with national courts, and to accord greater leeway to national decision-making that has clearly engaged in a constructive manner with Convention norms and gives appropriate weight to human rights values more generally.<sup>34</sup>

Some commentators have expressed concern about the potential for this turn to dilute rights protection under the Convention.<sup>35</sup> However, the Court's qualified embrace of subsidiarity could be viewed as reflecting a healthy sense of the *Zeitgeist* – and a recognition that the embedding of Convention rights within domestic law may make it less necessary that the Court adopt a 'spearhead' role in advancing the legal protection of fundamental rights. It certainly makes the Court less vulnerable to accusations of 'judicial imperialism', even if such accusations invariably have a subjective dimension to them that may be imperious to fine finessing of existing case-law. Furthermore, the Convention still attracts high levels of support and even admiration across Europe – including even in the UK, where much of the legal profession and academia remain strongly supportive of the Convention system. Many state parties, including Ireland, have been reluctant to endorse proposals for radical reform

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<sup>31</sup> See Rick Lawson, 'A Living Instrument: The Evolutive Doctrine – Some Introductory Remarks', (Opening of the ECHR Judicial Year Seminar, Leiden, 31 January 2020) <[https://www.echr.coe.int/documents/d/echr/Speech\\_20200131\\_Lawson\\_JY\\_ENG](https://www.echr.coe.int/documents/d/echr/Speech_20200131_Lawson_JY_ENG)> accessed 18 July 2023.

<sup>32</sup> Robert Spano, 'The Democratic Virtues of Human Rights Law - A response to Lord Sumption's Reith Lectures' (2020) 2 E.H.R.L.R. 132-139; Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) Human Rights Law Review 487-502; Robert Spano, 'The Future of the European Court of Human Rights — Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18(3) Human Rights Law Review 473-494.

<sup>33</sup> Laurence R. Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) European Journal of International Law 797-827; Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, 'Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten' (2021) 32(3) European Journal of International Law 897-906.

<sup>34</sup> Jeff King, 'Deference, Dialogue and Animal Defenders International' (UK Constitutional Law Association, 25 April 2013) <<https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/>> accessed 18 July 2023.

<sup>35</sup> Helfer and Voeten (n 33).

of the Strasbourg system put forward by states such as Denmark.<sup>36</sup> As a consequence, the Court has thus far remained afloat even in the current populist era, reflecting the legitimacy surplus it has accumulated over time.

## What is the ‘Added Value’ of the ECHR? Lingering Legitimacy Concerns

Having said all that, the recent controversy that surrounds the Court reflects the existence of a genuine legitimacy issue. Under the provisions of the ECHR, the Court is charged with being the final interpreter of Convention rights. Given the potential scope of such rights, this means that the Court has wide-ranging authority to determine many disputed human rights issues. However, such issues are often also the subject of political and legal contestation at the domestic level, before national legislatures, courts and other state organs. In other words, Strasbourg rights adjudication often ‘doubles up’ with domestic decision-making about rights. And this inevitably generates some difficult questions, which go right to the question of the legitimacy of the ECHR system of rights protection as currently constituted.

Given this ‘doubling up’ of roles, what added value does the ECHR bring to rights protection in domestic law, given that national decision-makers – judicial or political – would seem to be *prima facie* better placed to determine contested rights issues than a distant and often overburdened court in Strasbourg?<sup>37</sup> Furthermore, how can the authoritative status of Court judgments, and the key role played by Strasbourg in determining fundamental rights disputes across Europe, be reconciled with the orthodox assumption that such authority should be exercised through institutions to whom power has been allocated by an exercise of the popular democratic will – ie national legislatures, executives and courts, depending on the specific separation of powers allocation in place under a given constitutional order?<sup>38</sup> What exactly does the Court contribute to the defence of human rights in Europe, especially in states such as Ireland with well-developed domestic systems of rights protection? And why should national authorities defer to the Court, when they have their own mechanisms for vindicating rights through the work of national courts, legislatures and other bodies?

These are all important and valid questions to ask, not least because they go right to the heart of concerns about the Court’s legitimacy. They are relevant even in states like Ireland, where the status of the Convention is not the subject of sustained political and legal contestation – as illustrated by the recent debate within the Supreme Court in *Costello v Ireland* as to how the authority exercised by the Strasbourg Court could be reconciled with the national sovereignty provisions of Article 6 of the Bunreacht.<sup>39</sup> In essence, these questions raise the issue of how

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<sup>36</sup> Hartmann (n 29).

<sup>37</sup> This point was strongly made by Lord Hoffmann in his 2009 Judicial Studies Institute Lecture in London: see Hoffmann, ‘The Universality of Human Rights’ (n 28).

<sup>38</sup> In this regard, it should be noted that it is relatively rare for state ratification of the ECHR to be mandated or endorsed by express constitutional provisions: O’Cinneide (n 20).

<sup>39</sup> [2022] IESC 44. In the absence of any (referendum-inserted) express constitutional provision providing for ECHR accession, Hogan J suggested that ratification of the Convention and acceptance of the ECtHR’s jurisdiction represented an exceptional stretching of the power of the executive to enter into binding treaty arrangements under Article 29.4.2°, which was best viewed as justified only on account of the special status of the Convention and the non-binding status of ECtHR judgments at the level of national law: [179]-[186]. In contrast, O’Donnell CJ took the view that accession fell squarely within the scope of the executive’s treaty-making powers under Article 29.4.2°. The rest of the Court were happy to cite the non-binding status of ECtHR judgments as a justification of the constitutionality of ECHR accession.

the ECtHR's authority can be normatively justified, given the *de facto* constraints the Court's jurisprudence exerts on the freedom of national authorities to decide contested human rights issues. And they have become more pressing in an era characterised by sharp political conflict about the scope of such rights, as well as growing national sovereignist pushback against supranational modes of regulation and control.<sup>40</sup>

## Justifying the Authority of Strasbourg

In responding to these questions, it is important to look beyond the formal legal structure of the relationship between the ECHR and its state parties. At times, the authority of the Strasbourg Court is justified simply on the basis that states have voluntarily acceded to the Convention and agreed to be bound by judgments of the Court in line with the requirements of Article 46(1) ECHR. However, this can only be at best a partial answer to the legitimacy questions surrounding the Court: state consent to being bound by decisions of the Court cannot serve by itself as a blank cheque to legitimate the Court's authority as it has developed and evolved over time. Instead, it is necessary to focus on the interaction between the ECHR and national law – and to look at the concrete dynamics of how Strasbourg case-law impacts upon the legal systems of state parties to the Convention. A close examination of the substance of this relationship shows how the legitimacy concerns surrounding the Court can be answered, and helps to clarify what 'added value' Strasbourg brings to the protection of rights at national level.

To start with, the very existence of the ECHR system of rights protection has intrinsic value. It is symbolically important that even stable, rule of law respecting democracies like Ireland are willing to accept international scrutiny of their human rights record and accept the conclusions of a supranational court. However, the Strasbourg framework also has tangible, practical and instrumental value. As specified in the Preamble to the Convention, it serves as a 'collective enforcement' mechanism to ensure state parties adhere to their commitment to respect basic rights and the 'common heritage of political traditions, ideals, freedom and the rule of law' that public governance across Europe is supposed to embody and respect.<sup>41</sup> And it does this by (i) distilling highly abstract 'European' values into evolving, 'living' legal norms; (ii) opening up potentially insular national legal systems to new and more dynamic understandings of rights, equality, rule of law and associated concepts; and (iii) providing an external review and checking mechanism which can prod even well-performing states to do better, and to confront their blind spots.

The Strasbourg Court plays a key role in this process. In essence, the Court's 'living instrument' interpretative approach puts flesh on the abstract bones of the rights guarantees set out in the text of the Convention. It gives a purposive reading to these provisions, emphasising the need for such rights to be effectively protected at national level, and develops its case-law by reference to its pre-existing jurisprudence, the existing practice of state parties (the famously cloudy concept of 'European consensus'), and the underlying values which provide the foundation of the Convention system.<sup>42</sup> This interpretative approach keeps the Convention relevant to contemporary conditions, and ensures the ECtHR's case-law is open to new and evolving concepts of rights – meaning that, for example, Strasbourg jurisprudence has served as a vector for the spread of legal protection

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<sup>40</sup> With the Supreme Court's judgment in *Costello*, *ibid*, being an interesting example of such pushback.

<sup>41</sup> *Austria v. Italy* App No 788/60, admissibility decision of 11 January 1961, 18.

<sup>42</sup> See in general Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015).

against discrimination on the basis of sexual orientation,<sup>43</sup> disability,<sup>44</sup> and other ‘suspect’ grounds, while also playing an agenda-setting role in relation to new legal, social and technological developments which have the potential to impact negatively on fundamental rights.<sup>45</sup>

However, the Court does not manufacture its jurisprudence in regal isolation. Its case-law has evolved through the incremental unfolding of the individual complaints procedure over time, with the Court adjusting track in response to dialogic signals from national courts and the governments of state parties – as well as responding to the inevitable aporia, internal tensions and demands for clarification and/or extension generated by such a quasi-common law, accumulative, piecemeal process of legal norm generation. It has inevitably been a reflexive and iterative process, with the Court responding to the particular legal issues brought before it from the different member states and generating specific feedback loops with national courts and other key legal actors.<sup>46</sup> Furthermore, it is a process that is heavily influenced by the reactions and responses of state parties, mediated through the highly political character of the Council of Europe mechanisms which assess whether states are complying with Strasbourg jurisprudence – not to mention the various reform processes launched over the last decade, which have provided a vehicle for states to push back against elements of the Strasbourg jurisprudence which they dislike.<sup>47</sup> All this means that Strasbourg jurisprudence gradually crystallises the abstract norms set out in the Convention text into tangible, relevant and relatively concrete legal norms – capable of being applied not just by the Court, but also by national courts aligning domestic law with the requirements of the Convention.<sup>48</sup> This jurisprudence emerges from an iterative process, in which state parties play a significant role. And, crucially, it is national legislatures, executives and courts who ultimately determine how Strasbourg jurisprudence is infused into the bloodstream of domestic law, in line with the requirements of their own democratic constitutional legal orders.<sup>49</sup>

All this means that the ECHR has come to perform a specific and distinct function in European legal systems. It has become an authoritative, established and credible legal mechanism for giving substance to otherwise vague and abstract human rights guarantees, and for prodding domestic legal and political actors to align national law with the cautiously evolutive understanding of rights developed by the Court. As such, it opens up potential national ‘blind spots’ to challenge and contestation. As Kjaer argues, ‘nation-state law...in essence remains oriented toward the upholding of already established normative expectations’, but ‘transnational law’ (such as the Strasbourg jurisprudence) functions as a ‘learning process’, helping national law adopt and adjust to the existence of other normative

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<sup>43</sup> *Dudgeon v UK* (1983) 5 EHRR 573; *Karner v Austria* (2003) 38 EHRR 528.

<sup>44</sup> *Price v UK* App No 33394/96 (10 July 2001); *Guberina v Croatia* App No 23682/13 (22 March 2016).

<sup>45</sup> *Glukhin v Russia* App No 11519/20 (4 July 2023) (facial recognition technology).

<sup>46</sup> Magnus Esmark and others, ‘Adjudicating National Contexts – Domestic Particularity in the Practices of the European Court of Human Rights?’ (2022) 23(4) *German L.J.* 465 – 492.

<sup>47</sup> Richard Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights’ (2014) 25(4) *European Journal of International Law* 1019–1042.

<sup>48</sup> Janneke Gerards, ‘The European Court of Human Rights and the National Courts: Giving Sense to the Notion of “Shared Responsibility”’, in Janneke Gerards and Joseph Fleuren (eds) *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis* (Intersentia 2014), 13–93.

<sup>49</sup> Bellamy (n 47).

expectations that lie outside its traditional purview.<sup>50</sup> This captures well what ‘added value’ Strasbourg brings to existing domestic frameworks of rights protection, and why it is generally acknowledged to be an invaluable part of European frameworks for protecting rights, democracy and the rule of law.

In this regard, it is striking how many decisions of the Strasbourg Court over time have been implemented by national authorities without much fuss – and also how many of these judgments are now recognised in retrospect to have brought about desirable and necessary changes in domestic law. This dynamic is reflected in the Irish experience, in cases such as *Airey* and *Norris*. But the same is also arguably true of the UK.<sup>51</sup> In general, as the President of the Court, Síofra O’Leary, recently commented, Strasbourg jurisprudence has often provided fresh ‘oxygen’ to wilting national rights standards.<sup>52</sup> And it is this added value of the ECHR, taken together with the ‘final say’ exercised by national authorities over the extent of its influence on domestic law, that underpins the legitimacy of the ECHR process.

## Conclusion

As such, President Higgins is right to acclaim the ECHR as a ‘cornerstone of human rights’ protection across Europe’. Similarly, the Irish courts are right to give considerable weight to Strasbourg jurisprudence both in applying the 2003 Act and interpreting domestic constitutional rights, while insisting on their own final authority to determine the content of Irish law. The balance thus struck between (i) absorbing the fresh ‘oxygen’ provided by Strasbourg jurisprudence while (ii) affirming the ultimate authority of the constitutionally established organs of the Irish state reinforces the legitimacy of the relationship between the ECHR and Irish law – and helps to shore up the Convention’s particular and distinct status as a ‘favourite of national law and the constitutional order’, even as beyond Ireland it increasingly faces substantial political and legal challenges.

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<sup>50</sup> Poul F. Kjaer, ‘The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, and the Political in the Transnational Space’ (2010) 2 *Wisconsin L. Rev.* 489-532.

<sup>51</sup> See in general Colm O’Cinneide, ‘Human Rights and the UK Constitution’, in Jeffrey Jowell and Colm O’Cinneide, *The Changing Constitution* (9th edn, OUP 2019), 58-93.

<sup>52</sup> Síofra O’Leary, ‘Legal Tales of European Integration: the ECHR and Modern Ireland’ (Iveagh House EU 50 Lecture, 1 February 2023)

<[https://www.echr.coe.int/documents/d/echr/Speech\\_20230201\\_OLeary\\_Iveagh\\_House\\_EU50\\_Lecture\\_ENG](https://www.echr.coe.int/documents/d/echr/Speech_20230201_OLeary_Iveagh_House_EU50_Lecture_ENG)> accessed 18 July 2023.