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THE INCORPORATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS INTO IRISH LAW

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THE INCORPORATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS INTO IRISH LAW

Ph.D.

Eimear Theresa Brown

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Summary

This is a study of the "incorporation" of the European Convention on Human Rights into Irish law effected by the European Convention on Human Rights Act 2003 ("the ECHR Act"). The primary reason for incorporation was diplomatic and linked to the Good Friday Agreement. The Convention and its jurisprudence reveal that incorporation is not compulsory, although it should, in theory, make it easier for people to vindicate their Convention rights in a domestic forum. Further, Ireland's record before the European Court of Human Rights ("the ECtHR"), while relatively good, reveals that problems exist in relation to Article 6 ECHR, particularly in the area of the right to the speedy determination of legal disputes.

Prior to the 2003 Act, the Irish courts consistently refused to take cognisance of the Convention in any case where that would have challenged the Irish position. Furthermore, they considered themselves to be constrained from doing so by the dualist approach to international law embodied in Article 29 of the Constitution. This hypothesis is tested by way of an examination of the prominent pre-ECHR Act cases in which the Convention was relied upon. A detailed analysis of the dicta of the presiding judges revealed a predominantly hostile attitude to Convention arguments; at best, the ECHR was regarded as one of many international norms which might be denoted as having "persuasive" authority (although they were generally only considered to be persuasive where they validated the position under Irish law, and not when they contradicted it).

A number of factors affect the domestic impact of this international human rights Convention. The model of incorporation (e.g. incorporation at constitutional level, at supra-legislative level, as an ordinary law etc), while an important consideration, is not the only determining factor. Others include judicial attitudes to the use of international law principles in regulating disputes in the domestic forum (which views may be influenced by notions of national sovereignty, educational factors, and familiarity with the international norm in question). However, such attitudes are difficult to assess in reality, because they are so rarely articulated by the courts. From a comparison of the case law of the ECtHR and the European Court of Justice ("the ECJ"), it would appear that, to date, the ECtHR has been less successful in "constitutionalising" the ECHR

than the Court of Justice has been in constitutionalising the Treaties. Another major factor affecting the domestic success of international human rights instruments (and human rights protection in general) is the political situation in the country: where the state is in a state of political upheaval or faces a terrorist threat such documents are less likely to influence judicial decisions. The existence of a power of judicial review, both of legislation and administrative action, will also enhance rights protection: this is apparent from a comparative study of constitutional review of legislation in France, Germany and Ireland, and from an examination of the UK and Irish case law on the question of the standard of review of administrative action applicable in human rights cases. On the latter point, the case law shows that the Irish courts have been slower to accept that any approach other than the traditional irrationality test is necessary.

The provisions of the ECHR Act appear incompatible with the Irish legal system and may breach the obligation to provide an effective domestic remedy for breach of Convention rights. The post- Act case law indicates that its application is restricted by a ban on retrospectivity; an examination of the case law to date reveals a tendency to limit the Act's application in line with UK interpretations of the HRA. There have been relatively few cases in which the ECHR Act has been relied upon, and fewer still where such arguments could be considered important to the judgment. At most, the ECHR was used to bolster arguments based on Irish law. The post- ECHR Act cases studied were located by way of legal databases including westlaw.ie, justis.com, bailii.org and firstlaw.ie (the latter two being particularly useful in locating unreported judgments). Additional cases were located thanks to legal practitioners, who supplied pleadings for cases whose reports are not yet (and may never be) available. Finally, in order to predict the Act's future impact on Irish law, the thesis concludes with a study of the key elemetns in one particular area, the right to freedom of speech, and concludes that the differences between Irish and Convention law are not so great as once they seemed thanks in part to a more state-friendly approach by the ECtHR. The method used in this case is an analysis of recent judgments of the ECtHR in this area in conjunction with Irish case law and legislation. Reference is also made to relevant HRA cases. In conclusion, it appears that the Convention's domestic impact has been much less than if it had been incorporated at constitutional level, and it may be that the Act's only legacy will lie in expanding judicial interpretations of the Constitution.

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Introduction: Sources of Fundamental Rights in Ireland

> "Law is the bedrock of a nation; it tells us who we are, what we value, who has power and who hasn't."[1]

If law is, indeed, the bedrock of a nation, then in Ireland the bedrock of our law is Bunreacht na hÉireann, the Constitution promulgated in 1937 as the most fundamental law of the State. It not only heralded independence for the twenty-six counties, but was the first meaningful guarantor of fundamental rights in the jurisdiction. Granted, the Irish Free State Constitution of 1922 had contained rights provisions,[2] but that document was inherently weak and subservient to Ireland's obligations pursuant to the Treaty[3] establishing the Free State. Any provision of the Constitution, or amendment thereto, which ran contrary to the Treaty was to be considered "absolutely void and inoperative".[4] Article 50 of the 1922 Constitution provided for an eight-year period during which the Constitution could be amended by ordinary legislation, inverting the hierarchy of norms and making a mockery of the supremacy of the Constitution.[5] The 1922 Constitution was much amended, with 27 amending acts passed,[6] the seventeenth of which involved the insertion of the notorious Article 2A. That Article provided for the establishment of a standing military court with the power to impose the death penalty.

This is not a study in Irish history – legal or political. The foregoing is merely an attempt to illustrate that when the 1937 Constitution first came into force, there was no long-standing tradition of fundamental rights protection in Ireland other than that provided for by the British common law. There was certainly no tradition of reviewing government action where it interfered with personal rights, or of assessing the

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[1] Helena Kennedy, *Just Law* (Random House, 2004), at 3.

[2] The Constitution of the Irish Free State, 1922 (Dublin: Stationery Office, 1936). The main rights provisions may be found in Articles 6-9 of the 1922 Constitution: Article 6 protected the right to liberty; Article 7 the right to inviolability of the dwelling; Article 9 freedom of expression, and Article 10 the right to free elementary education.

[3] On 11 October 1921 delegates of the Dáil signed "Articles of agreement for a treaty between Great Britain and Ireland." The Westminster Parliament subsequently approved the Treaty on 16 December, with a narrow majority of the Dáil approving its terms on 7 January 1922 (by 64 votes to 57).

[4] Article 2 of the 1922 Constitution.

[5] In 1929 this eight year period was extended to 16 years.

[6] Basil Chubb, *The Constitution and Constitutional Change in Ireland* (Institute of Public Administration, 1978), at 15.

compatibility of legislation with such rights. The personal rights section of the 1937 Constitution is contained in Articles 40-44 (although other Articles have also been held to create enforceable rights[7]). They have been described as "clearly among the most important provisions contained in the 1937 Constitution."[8] However, the terms of the 1937 Constitution's bill of rights are far from absolute: the rights expressed in Articles 40-44 are often expressed in relatively weak terms, and are "diluted" with broad and uncertain qualifying clauses such as "'save in accordance with law', 'subject to public order and morality', and 'in the public interest', that can make them...'an empty promise'."[9] Nevertheless, the 1937 Constitution had a major advantage over its predecessor: it was rigid where the 1922 document was flexible, and clearly states that laws repugnant to the Constitution are void.[10]

The judges under the 1922 Constitution had been schooled in parliamentary supremacy, and their powers of judicial review of legislation for compatibility with the Constitution – though supported by that document – were undermined by the legislature's power to amend it at will. Thus, the courts of the Irish Free State were not noted for their stalwart protection of human rights, be they constitutional or common law. Although Articles 65 and 66 expressly permit the High and Supreme Courts to review the constitutionality of legislation, it appears that it took some time for this reluctance to exert the judicial power to pass away; it has frequently been remarked that the post 1937 jurisprudence reveals two main phases in judicial interpretation of the Constitution: a relatively "cautious, even inhibited, approach" from 1938 until the mid 1960s, which was followed by a "sudden burst of creativity".[11] Given the long tradition of parliamentary supremacy, the courts took to their new role relatively quickly, and invalidated a host of legislative provisions, even during their more conservative period.[12] The 1937 Constitution may only have engineered a relatively

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[7] E.g. Article 38.1 is inextricably linked to the right to a fair trial in due course of law.

[8] Francis X Beytagh, *Constitutionalism in Contemporary Ireland: An American Perspective* (Round Hall Sweet & Maxwell, 1997), at 31.

[9] Chubb (n6) at 43-44. The idea that the qualifying clauses that accompany many of the rights set out in the 1937 Constitution renders them "an empty promise" was suggested by KC Wheare, *Modern Constitutions* (2nd Edition, Oxford University Press, 1966), 38 at 42.

[10] On this point, *see* JM Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd Edition, Allen Figgis & Co Ltd, 1967), at 17.

[11] *See*, e.g., Chubb (n6) at 73; and Beytagh (n8) at 43ff.

[12] E.g. In *National Union of Railwaymen v. Sullivan* [1947] IR 77, the Trade Union Act was held to violate the citizen's right to freedom of association under Article 40.6, in that it removed the choice as

supple separation of powers,[13] but even from the early stages there was every indication that the Irish courts would not easily cede their newfound competences.[14]

Articles 40-44 are far from exhaustive in the manner in which they set out fundamental personal rights, particularly when compared to the international human rights conventions popular in the aftermath of World War II.[15] They contain some of the major civil and political rights, including the right to property, the right to life, the right to the protection of one's reputation and the inviolability of the dwelling. However, they arguably omit more than they include. The courts circumvented this oversight by finding that the Constitution was inspired by a higher power, a natural law which implied a number of personal rights.[16] In a host of cases, beginning with the seminal case of *Ryan v. Attorney General*,[17] the courts accepted that the wording of Article 40.3.2° indicated that the list of rights contained in that Article was not exhaustive:

> "The State shall, *in particular*, by its law protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." [Emphasis added.]

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to which union to join (if any). Kelly notes that "the number of statutory provisions declared unconstitutional since 1937 is not inconsiderable" (at 25).

[13] In a system based on a strict separation of powers, such as that of the United States of America, there is an absolute division of competences between the executive and the legislature. Under the Irish system, the legislature and the executive are "fused"; *see* David Gwynn Morgan, *Constitutional Law of Ireland* (2nd Edition, Round Hall Press, 1990), at 33.

[14] An early skirmish between the legislative and judicial powers took place in *Buckley v. Attorney General* [1950] IR 67, when the former attempted to intervene in a matter of which the latter was seized. The High Court was engaged in determining ownership of moneys owned by the old Sinn Fein organisation which had since split. The Sinn Fein Funds Act required the Court, on the application of the Attorney General, to hand over the money to be paid into a fund for persons injured during the Civil War. The High Court refused, on the basis that the court could not abdicate its power to decide a matter of which it had been duly seized. The Supreme Court agreed. (NB both courts also adverted to the fact that the legislation also infringed the property rights of citizens.)

[15] E.g. the United Nations' International Covenant on Civil and Political Rights (the ICCPR), and, of course, the document which is the focus of this thesis: the European Convention on Human Rights. The ICCPR was adopted and opened for signature by General Assembly Resolution 2200A (XXI) of 16 December 1966, and entered into force on 23 March 1976. The full text of the ICCPR is available at http://www.ohchr.org/english/law/ccpr.htm viewed on 1 May 2007).

[16] An early indication of the natural law approach may be found in the dissenting judgment of Kennedy CJ in *The State (Ryan) v. Lennon* [1935] IR 170; (1935) ILTR 125, in which the Chief Justice accepted that legislation which offended against "the Natural Law" would be "necessarily unconstitutional" (*see* [1935] IR 170, at 204-205). In spite of the fact that this judgment was a dissent, it remains one of the most important in the legal history of the State; *see* Gerard Hogan, "A Desert Island Case Set in the Silver Sea. *The State (Ryan) v. Lennon* (1934)" in Eoin O'Dell (ed) *Leading Cases of the Twentieth Century* (Round Hall, 2000), 80, at 91-98.

[17] [1965] IR 294.

In the High Court, Kenny J concluded that these additional rights could be identified as those "which result from the Christian and democratic nature of the State";[18] he therefore accepted the plaintiff's argument that she had a right to bodily integrity which, though unenumerated, was nevertheless protected by the Constitution.[19] This conclusion was upheld on appeal.

The idea that natural law informed the Constitution was accepted in a number of subsequent decisions, all of which adopted a more or less Christian approach to the concept. A number of unenumerated rights were "discovered" in this way, including a right of access to the courts,[20] the right to work and earn a livelihood, the right to marry, the right to marital privacy (and subsequently the right to personal privacy). This practice of "discovering" (not to say judicially creating) rights has been the subject of considerable commentary and criticism[21] – invoking as it does the spectre of judicial activism. However, it would appear that the trend of locating new rights in this manner is losing popularity: Hogan and Whyte note that most of the new rights were recognised during the decade immediately following the *Ryan* case, while only three were held to exist during the 1980s and another three during the 1990s.[22] Indeed, the popularity of natural law as a tool of constitutional interpretation seems to be lately on the wane.[23] However, it is not likely that any Irish court would attempt to reverse that earlier jurisprudence in order to invalidate (or even question) the existence of the rights accepted so far by the courts.

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[18] [1965] IR 294, at 312.

[19] As is well known, this was a somewhat hollow victory for Mrs Ryan, as neither the High Court nor the Supreme Court agreed with her argument that the State's plan to fluoridate the water supply in her area constituted a health risk.

[20] *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345.

[21] On this point, *see*, *inter alia*, Desmond Clarke, "The Role of Natural Law in Irish Constitutional Law" (1982) 17 *Irish Jurist* 187; Gerard Hogan, "Unenumerated Rights: *Ryan*'s Case Re-Evaluated" (1990-92) 25-27 *Irish Jurist* 95; and Richard Humphreys, "Interpreting Natural Rights" (1993-5) *Irish Jurist* 221.

[22] GW Hogan and GF Whyte, *JM Kelly: The Irish Constitution* (4th Edition, LexisNexis Butterworths, 2003), at 1417.

[23] *See In Re the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill, 1995* [1995] 1 IR 1; [1995] 2 ILRM 81.

The European Convention on Human Rights and Fundamental Freedoms

> "Where human rights are respected and adequately enforced in domestic law, international implementation and supervision are not necessary."[24]

Given the large number of fundamental rights protected under the Constitution, what, then, was the purpose of ratifying the European Convention on Human Rights – a minimal international standard of rights protection – let alone making it part of Irish law? In the first place, it is worth noting that there is often a certain pragmatism involved in acceding to such treaties; they improve a nation's image as a defender of human rights, as a "team player" on the world stage.[25] Whatever the reasons for its ratification, it is plain that this multilateral international treaty has already affected Ireland via the applications against the State heard by the European Court of Human Rights (hereinafter often referred to as "the ECtHR"). The cases in which Ireland has been brought before the European Court of Human Rights are discussed later in this thesis;[26] for the moment, it suffices to say that there have been occasions on which Irish law and practice have been held to breach the Convention.

It is well known that the European Convention on Human Rights came about as a response to the horrors of World War II, and the regional human rights instrument undoubtedly took some inspiration from the earlier 1948 United Nations Declaration of Human Rights. The events of that war, and in particular the Holocaust, while not the first instance of widespread human rights abuses and genocide,[27] were arguably the most shocking as far as the countries of western Europe were concerned, perpetrated as they were in their own back yard in a supposedly modern, enlightened, technological age. The discovery of the extent of the systematic slaughter carried out in Nazi concentration camps was a stinging reminder to the nations of Europe that

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[24] Andrew Z Drzemczewski, *European Human Rights Convention in Domestic Law* (Clarendon Press, Oxford, 1983), at 9.

[25] Nowadays, there is another compelling reason for States to ratify the European Convention on Human Rights – it is a precondition to entry to the European Union and to the Council of Europe.

[26] *See* Chapter 1.

[27] Such actions are as old as recorded history, as evidenced by Alexander the Great's treatment of Thebes; after the city resisted him, he razed it to the ground, killing 6,000 of the inhabitants and enslaving another 30,000: Ian Worthington, *Alexander the Great: Man and God* (Pearson Longman, 2004), at 43-44.

nations simply could not be trusted to respect fundamental rights, even those of their own citizens, without some form of external, international enforcement mechanism.[28]

The ECHR was adopted in Rome in 1950 and entered into force on 3 September 1953, when the requisite ten ratifications had been deposited. The drafters of the Convention had focused mainly on the less contentious[29] civil and political rights[30], yet despite this the ECHR was innovative for its day and broad in scope – according to Professors Buergenthal and Sohn, "[T]he international guarantees envisaged under the Convention were at the time thought to be quite revolutionary in nature. Consequently, there was little hope that a substantial number of governments would accept them unless they were convinced that in doing so they were not taking any serious risks."[31] The rights protected by the Convention include the right to life,[32] the right to freedom from torture or inhuman or degrading treatment or punishment,[33] the right to freedom from slavery and servitude,[34] the right to liberty and security,[35] the right to a fair trial,[36] the right not to be found guilty of any criminal offence which was not an offence at the time it was committed,[37] the right to respect for private and family life,[38] the right to freedom of thought, conscience and religion,[39] freedom of expression,[40] of assembly and association,[41] the right to marry,[42] the right to an effective remedy before a

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[28] On the influence of the events of World War II on the development of mechanisms for the protection of human rights generally, *see* Scott Davidson, *Human Rights* (Open University Press, 1993) at 11ff.

[29] The Universal Declaration of Human Rights recognises both civil and political rights, on the one hand, and socio-economic and cultural rights on the other; each set of rights has a separate United Nations International Covenant, namely the International Covenant on Civil and Political Rights (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR). However, Henry J Steiner and Philip Alston note that "this formal consensus masks a deep and enduring disagreement over the proper status of economic, social and cultural rights", whereby the relative importance of the two sets of rights is still in many ways linked to Cold War attitudes (*see* Henry J Steiner and Philip Alston, *International Human Rights in Context* (Second Edition, Oxford University Press, 2000), at 237-238ff.

[30] *See* Appendix for the text of the Convention.

[31] LB Sohn and Thomas Buergenthal, *International Protection of Human Rights* (Bobbs & Merrill, 1973), also quoted by Drzemczewski in his book, at FN 1.

[32] Article 2 ECHR.

[33] Article 3 ECHR.

[34] Article 4 ECHR.

[35] Article 5 ECHR.

[36] Article 6 ECHR.

[37] Article 7 ECHR.

[38] Article 8 ECHR.

[39] Article 9 ECHR.

[40] Article 10 ECHR.

[41] Article 11 ECHR.

[42] Article 12 ECHR.

national authority where a Convention right has been violated,[43] and the right to freedom from discrimination in the exercise of one's Convention rights.[44] In addition, a number of additional Protocols – amendments in which additional rights were given protection – were subsequently added.[45] The ECHR has now been ratified by 46 Contracting States – the change in Europe's political climate has led to an increase in the number of ratifications, from 23 in 1989 to the current figure.[46]

Perhaps the most controversial feature of the ECHR is also that which sets it apart from many other human rights instruments: its Court, to which not only inter state applications but also *individual petitions* can be made.[47] Initially, the right of individual petition was optional, but now any country seeking to accede to the Council of Europe must accept not only the Convention but also the jurisdiction of the Court to hear individual complaints.[48] Largely because of its Court, the ECHR "blazed a trail in the international protection of human rights."[49] The process by which these petitions are filtered and decided was later streamlined by Protocol No. 11 which, *inter alia*, has

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[43] Article 13 ECHR.

[44] Article 14 ECHR. Article 14 is arguably one of the weaker provisions of the Convention; it is not an autonomous guarantee of equality, merely a guarantee that those living in Contracting Parties will be free from discrimination in the exercise of their Convention rights. The Council of Europe has sought to remedy this lacuna with the introduction of a separate, stand alone anti-discrimination provision in Protocol 12. For a discussion of the merits of this protocol, *see*, *inter alia*, Robert Wintermute, "'Within the Ambit': How Big *Is* the 'Gap' in Article 14 European Convention on Human Rights?" [2004] EHRLR 366; Robert Wintermute, "Filling the Article 14 'Gap': Government Ratification and Judicial Control of Protocol No. 12 ECHR" [2004] EHRLR 484.

[45] E.g. Article 1 of Protocol No 1 protects the right to property; Protocol 6 involves the abolition of the death penalty in the Contracting Party. Because these Protocols place additional obligations on the State, they are naturally not binding until duly signed and ratified in the normal way.

[46] The current number of ratifications can be viewed at http://conventions.coe.int/Treaty/CommunChercheSigasp?NT=005&CM=8dDF=10/26/2006&CL=ENG . This was the figure on 28 October 2006. The increase in ratifications of the Convention has led to a corresponding increase in applications to Strasbourg; a situation which has contributed to the overloading of the system to the extent that it is, "by its own account, in crisis": Marie-Bénédicte Dembour, "'Finishing Off' Cases: The Radical Solution to the Problem of the Expanding ECtHR Caseload" [2002] EHRLR 604, at 604.

[47] It is also possible for one Contracting Party to make a complaint about another. Such complaints are rare, but one was made by Ireland in *Ireland v. United Kingdom* (1978) 2 EHRR 25 arising out of the detention and treatment of a number of nationalists in Northern Ireland. The Court of Human Rights held that the UK was in breach of Article 3 in meting out inhuman and degrading treatment, including sleep deprivation, deprivation of food and drink, subjection to noise, hooding (keeping a dark bag over a detainee's head while he/she was not being questioned, and wall-standing (forcing detainees to stand in a "stress position" for hours, with most of their weight on their fingers.

[48] This was one of the effects of Protocol No 11, which came into force on 1 November 1998. For an overview of the impact of that Protocol, *see* Andrew Drzemczewski, "The internal organisation of the European Court of Human Rights: the composition of chambers and the Grand Chamber" [2000] EHRLR 233.

[49] Alpha Connelly, "Ireland and the European Convention on Human Rights: An Overview" in Liz Heffernan (ed) (with James Kingston) *Human Rights: A European Perspective* (Round Hall Press, 1994), 34 at 35.

done away with the European Commission of Human Rights – the organ which originally decided on the admissibility of each application – and established a single, full-time, permanent Court.[50] The Convention mechanism's success lies in the fact that the governments of the High Contracting Parties have actually cooperated with Strasbourg,[51] rather than merely paying lip service to its ideals, as is the case with some international human rights agreements.[52]

Anyone who wishes to make a complaint that his/her Convention rights have been violated must do so by way of an application to the Secretary of the European Court of Human Rights, which ought to contain a number of important if self-evident details, including his/her name and address, a concise statement of the facts of the case, and the Convention provisions on which the applicant intends to rely.[53] In order for the application to be admissible, the applicant must be a victim,[54] the complaint must concern a Convention issue, the applicant must have exhausted domestic remedies, and

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[50] This Court has been divided into Committees (with three judges) to sift through applications; Chambers (seven judges), which can look at both the admissibility and the merits of the case; the Grand Chamber (17 judges) to judge the most important cases; and the Plenary Court (all judges, i.e. 41), which has a purely administrative role and can, for example, adopt new rules of procedure. For a comprehensive discussion of the reforms brought about by Protocol No.11, see Andrew Drzemczewski, "The Internal Organisation of the European Court of Human Rights: the Composition of Chambers and the Grand Chamber" [2000] *European Human Rights Law Review*, 233.

[51] AH Robertson and JG Merrills, *Human Rights in the World* (Fourth Edition, Manchester University Press, 1996), at 155. They also point out that, "[I]mportant as they may be for the individual concerned" the cases brought before the Strasbourg Court are of marginal significance when compared with the large-scale human rights violations which occur elsewhere in the world.

[52] Although most countries in the world have ratified the Convention Against Torture, Amnesty International estimates that over half of the States in the world employ torture as an interrogation technique – see www.amnesty.org. "Amnesty International's research suggests that torture is as prevalent today as when the United Nations Convention against [sic] Torture and Cruel, Inhuman and Degrading Treatment or Punishment (the "Convention Against Torture"), was adopted in 1984"; Anki Wetterhall (ed), *Final Report of the International Conference Against Torture*, viewed at http://web.amnesty.org/library/index/ENGACT400051997 on 11 October 2005.

[53] The application should also include details of all remedies which have been sought in the respondent State, the name of the respondent State, the relevant domestic law, and the object of the application (e.g. is the applicant seeking the repeal of legislation, or compensation?). For full details on how to make a complaint to the European Court of Human Rights, *see* John Wadham, Helen Mountfield and Anna Edmundson, *Blackstone's Guide to the Human Rights Act 1998* (3rd Edition, Oxford University Press, 2003), at 216-218.

[54] The applicant can be either an actual, potential or indirect victim of a violation of the Convention right. An actual victim is an individual who has been personally affected by the breach; a potential victim is someone who is at risk of being the victim of a direct violation of his/her Convention rights (e.g. in *Norris v. Ireland* (1988) 13 EHRR 146, the applicant had never actually been prosecuted under the statutory ban on homosexual conduct between males; however, he was permanently at risk of such prosecution as long as the law remained valid). An indirect victim is someone who is immediately affected by a breach which directly affects another (*see* Wadham, Mountfield and Edmundson (n53), at 219). An example of the last category is the applicant in *Finucane v. United Kingdom* (2003) 37 EHRR 29; her husband had been murdered with the collusion of agents of the State in violation of his Article 2 right to life. The failure to adequately investigate that crime made Mrs Finucane an indirect victim.

the complaint must have been brought within six months of the infringement of the Convention right, or the last judgment made in the applicant's pursuit of Convention remedies.[55] Furthermore, Protocol 14 envisages an additional criterion, i.e. that the applicant has suffered a "significant disadvantage" in the infringement of his/her Convention rights.[56] Once a complaint has been declared admissible, the Court will rule on the merits of the case. The Protocol has been ratified by 45 Contracting Parties, but is not yet in force.[57]

The existence of the individual petition mechanism is the cornerstone of the entire Convention system and also, arguably, makes it the most effective regional instrument for the protection of human rights in the world. However, complaints should only be brought before the Strasbourg Court as a last resort: an applicant must exhaust all available national remedies before turning to the ECtHR.[58] This is because the primary purpose of the instrument is not to establish an international control mechanism, but to ensure that the municipal laws and authorities do not breach the boundaries agreed by them at international level.[59] In short, the object of the ECHR is to ensure the existence of machinery at *national level* to protect human rights and to provide a remedy in case of a breach of the Convention within the Contracting States. This point was reiterated in a Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights:

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[55] Wadham, Mountfield and Edmundson, 218-222.

[56] *See* Protocol 14, Article 12: applications may be declared inadmissible if "the applicant has not suffered a significant disadvantage, unless the respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by the domestic tribunal." This Protocol was adopted by the Council of Ministers on 12 May 2004 as part of a package intended to improve the efficiency of the individual petition system, which was by then literally drowning in applications: more than 40,000 new applications were lodged in 2003 alone; *see* Marie-Aude Beernaert, "Protocol 14 and New Strasbourg Procedures: Toward Greater Efficiency? And at What Price?" [2004] EHRLR 544, at 544-545. Beernaert argues that this new criterion has the potential to "impinge on the very essence of the Convention mechanism, its distinct and unique achievement, namely the right of individual petition" (at 553).

[57] For details, *see* the website of the Council of Europe (viewed 28 October 2006). http://conventions.coe.int/Treaty/CommunChercheSigasp?NT=005&CM=8dDF=10/26/2006&CL=ENG

[58] This requirement that an applicant exhaust domestic remedies is discussed by Anna Austin, a lawyer at the Registry of the European Court of Human Rights, in her paper, "Ireland to Strasbourg, Form and Substance of the Convention System", Law Society Conference, 14 October 2000, at 1-4.

[59] See Andrew Drzemczewski at 9, where he develops Professor GIAD Draper's view that this represents "the farthest point that has been reached in the protection of human rights on the international plane."

> "The European Court of Human Rights is the nerve centre of a system of human rights protection which radiates out through the domestic legal orders of virtually all European States. It sets common legal standards. The system operates under the principle of subsidiarity; primary responsibility for securing the rights and freedoms set out in the Convention lies with the domestic authorities and particularly the judiciary...Where this national protection fails, individuals may bring their complaints to Strasbourg."[60]

At the international level, Ireland has an excellent record and has been an active adherent to the Convention since its inception. The then Irish Minister for External Affairs signed the ECHR on 4 November 1950, and Ireland ratified the Convention on 25 February 1953 – one of the first states to do so - and also accepted the compulsory jurisdiction of the European Court of Human Rights. Along with Sweden, Ireland was the first state to allow its citizens the right of individual petition to the Strasbourg Court. Indeed, the first case to come before the Court was an Irish one: *Lawless v. Ireland*,[61] although, unfortunately for the applicant, the fact that Ireland had at that time elected to derogate from the Article 5 right to liberty meant that Strasbourg had no jurisdiction to condemn internment.[62] It is significant to note that the United Kingdom only accepted the ECtHR's jurisdiction to hear individual petitions in 1966; France, one of the countries credited with pioneering the idea of individual rights,[63] only accepted it in 1981, when the Socialist government of Francois Mitterrand swept to power after decades of Gaullist rule.

The Domestic Effect of the ECHR Through the Medium of EU Law

Even without any Act of the Oireachtas or constitutional amendment, the Convention arguably had some measure of domestic effect via the medium of European Union

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[60] *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG (2001) 1, 27 September 2001, at 5.

[61] (1979-1980) 1 EHRR 15.

[62] The Applicant took his case to Strasbourg after unsuccessfully attempting to invoke the provisions of the ECHR before the Irish Supreme Court in *In re Ó Láighléis* [1960] IR 93. The implications of this case are discussed later.

[63] See the famous *Déclaration des droits de l'homme et du citoyen* of 1789. The document was "revolutionary" in the sense of both its content and provenance: it dates from the aftermath of the French Revolution. It is based on the tenet that "government is a necessary evil...and as little of it as possible is desirable" (Scott Davidson, *Human Rights* (Open University Press, 1993) at 5).

("EU") law.[64] Over the past few decades it has become abundantly clear that the Union and in particular its Court, the European Court of Justice (hereinafter referred to as the ECJ) are additional forces to be reckoned with in the area of human rights enforcement.[65] The human rights profile of the Union was given a more official basis with the amendment of the Treaty on European Union to include Article 6, which declares that respect for fundamental rights is one of the basic principles on which the EU is founded, and Article 7, which allows certain sanctions to be imposed on Member States found to be in persistent breach of those principles.[66] Recent developments have cemented this trend, with the adoption of the EU Charter on Fundamental Rights, and the publication of the Draft Constitutional Treaty, Title II of which deals with fundamental rights.[67]

The history of the evolution of the ECJ's human rights jurisprudence has been told many times, so its repetition here will be as brief as possible. The manner in which the ECJ declared fundamental rights to be a general principle of EU law is well known: it was in response to a threatened revolt by the German Constitutional Court that could have destabilised the very foundations of EU law and undermined forever the twin doctrines of direct effect and supremacy.[68] Indeed, it had been the determination to protect the primacy of the law of the European Communities at all costs that led to the revolt by the more rights-oriented courts of those Member States: an oft-cited example of this is the case of *Stork v. The High Authority*.[69] In that case, it was confirmed that the High Authority of the European Coal and Steel Community (the ECSC) was not competent to examine a complaint that the ECSC had breached certain provisions of

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[64] This position is not universally accepted: it has been argued that the Treaty on European Union failed to "provide any safeguard whatsoever" at domestic level for EU citizens: *see* Keith Dale Ewing and Ken Dale-Risk, *Human Rights in Scotland: Text, Cases and Materials* (W Green & Son Ltd, 2004), at 1. In the interests of expediency, the term European Union (or "EU") law is generally used throughout this section, even though, at times, the term "European Community law" may technically be more accurate.

[65] It is by now well accepted that there are "three spheres of human rights protection in Ireland": Bríd Moriarty and Dr Anne-Marie Mooney Cotter (general editors), *Law Society of Ireland: Human Rights Law* (Oxford University Press, 2004), at 1ff.

[66] Controversial measures were taken against Austria in 2000 following the election of a coalition government containing Jorg Haider's right-wing Freedom Party. After that, Article 7 TEU was amended to include "more detailed and fairer procedures" where it is sought to make such a determination against a Member State. *See*, *inter alia*, Paul Craig and Gráinne de Búrca, *EU Law Text Cases and Materials* (Third Edition, Oxford, 2003) at 350.

[67] Article 2 of this Title mandates that the EU seek accession to the ECHR, even though the two legal orders are separate and distinct.

[68] Anthony Arnull, *The European Union and its Court of Justice* (Oxford University Press, 1999) at 207.

[69] Case 1/58 [1959] ECR 17.

the German Constitution.[70] The implication was clear: the fact that a measure adopted by an institution of one of the three Communities then in place[71] breached the fundamental rights guarantees of the Constitution of a Member State could not render that measure invalid; nor were the institutions under any duty to have regard to national constitutions when making their decisions. In the similar *Geitling* case, the Court arguably went further by not only stating that a principle established by the German Basic Law could not apply to the case before it, but that no analogous protection existed under Community law.[72] On 18 October 1967 Germany's Constitutional Court held that since the Community order had no system of human rights protection, it had no lawful democratic basis.[73]

The ECJ was forced to act: in a series of decisions, commencing with *Stauder v. City of Ulm*,[74] the Court began to lay the foundations of its human rights jurisprudence by declaring that fundamental rights were, indeed, part of the general principles[75] governing Community law.[76] Luxembourg took the principle further in *Internationale Handelsgesellschaft*,[77] in which the Court managed to pre-empt any challenge to "the unity and efficacy of Community Law" by once again prohibiting the use of national law "to judge the validity of instruments promulgated by the Community institutions",[78] even where that national law concerned fundamental rights. However, the ECJ went on to hold that Community measures *could* be examined for conformity with Community law, whose rights guarantees were "analogous" to those of domestic

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[70] The complaint centred mainly on an alleged breach of Articles 2 and 12 of the German Basic Law, which grant every German citizen the right to the free development of his personality and to the free choice of his trade, occupation or profession.

[71] The institutions in place at the time were the European Economic Community (the EEC), the (defunct) European Coal and Steel Community (the ECSC) and the European Atomic Energy Community (Euratom).

[72] Cases 36, 37, 38, and 40/59 *Geitling v. High Authority* [1960] 423.

[73] *Bundeserichtshof*, in BverGE, 1967 at 223 (Order of 18 October 1967), discussed by G Federico Mancini, "The Making of a Constitution for Europe" (1989) 26 *CMLRev (Common Market Law Review)* 595 at 595 ff.

[74] Case 29/69 [1969] ECR 419; [1970] CMLR 112.

[75] A number of other general principles have been recognised by the Court, including proportionality, legitimate expectations, non-discrimination, and transparency. *See* Craig and de Búrca, Chapter 9 (371ff).

[76] At paragraph 7 of the judgment. The reference to fundamental rights is, admittedly, somewhat oblique; the Court stated, "the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the court."

[77] Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125; [1972] CMLR 255.

[78] At paragraph 3 of the judgment.

law, since "respect for fundamental rights has an integral part in the general principles of law protected by the Court of Justice".[79] Thus, in theory at least, the Court could strike down Community measures for violating one of the general principles, i.e. respect for fundamental rights. An interesting post-script to this case is that, in spite of the ECJ's reiteration of the importance of fundamental rights, the Court's application of the proportionality principle to the facts differed from that of the German court to which the case returned following the reference: the ECJ took the view that the restriction in question[80] was proportionate to the general interest, while the German court concluded that the proportionality principle, as formulated by German law, had indeed been breached.[81]

The ECJ's approach gradually evolved towards one where the common constitutional principles became less important, and "the Court now feels at liberty to draw upon international human rights law (primarily in the form of the ECHR) without explicitly linking it to the common constitutional traditions."[82] It is submitted that, when examining national measures for conformity with fundamental rights, the ECJ is, in the vast majority of cases, actually purporting to apply the ECHR and the jurisprudence of the Court of Human Rights. One reason for the ECHR's popularity in Luxembourg may be the sheer convenience of adopting a ready-made bill of rights, to which all the Member States had already agreed, and which already constituted a minimum standard to be applied to their countries.[83] Whatever the reason, the ECJ's preference for the Convention as a standard of fundamental rights was clear from the earliest cases.[84] Preliminary references to the ECJ sometimes contain direct questions as to whether a

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[79] At paragraph 4.

[80] The case involved the imposition of quotas on the export of maize. In order to obtain the necessary licence under Council Regulation 120/67, a trader had to pay a deposit, which would be forfeit if he did not export the correct quantity within a set period of time.

[81] *See* Craig and de Búrca, at 322.

[82] Patrick M Twomey, "The European Union: Three Pillars Without a Human Rights Foundation" from D O'Keeffe and P Twomey (eds) *Legal Issues of the Maastricht Treaty* (Wiley: Chancery, 1994), 121 at 124.

[83] Besselink argues that the Court has failed to incorporate the rights standards of the Member States in two crucial areas: in deciding what justifications may be advanced for restricting rights, and in defining which rights are to be considered "fundamental". Leonard FM Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union" (1998) 35 *CMLRev (Common Market Law Review)* 629, at 633.

[84] E.g. Case 4/73 *Nold v. Commission* [1974] ECR 491; Case 36/75 *Rutili v. Minister for the Interior* [1975] ECR 1219. The most notable example of this Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, in which the Court made reference to Articles of the Irish and Italian Constitutions and of the German Basic Law (at paragraph 20 of the ECJ's judgment).

provision of the Convention has been breached.[85] It is certainly clear that the ECHR is "the key reference for the protection of fundamental rights within the Community legal order...[It is] the hard core".[86] Indeed, the ECJ is often content to follow the jurisprudence of the ECtHR, at least in certain areas.[87] This remained the case even after the EU adopted its own Charter of Fundamental Rights.[88] In view of the fact that both courts purport to apply the same rules, there are concerns that there could one day be a clash between the varying interpretations of the courts; such a clash was lately avoided in the *Bosphorus Hava* case.[89]

Craig and de Búrca argue that there are at least two, and probably three, instances when the ECJ will intervene to consider the compatibility of domestic measures with the Court's concept of fundamental rights: "first, when considering the compatibility

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[85] E.g. in Case C-466/00 *Arben Kaba v. Secretary of State for the Home Department* [2003] ECR I-2219; [2003] 1 CMLR 38, the applicant was a Kosovan man married to a French national living in London. He was refused indefinite leave to remain with his wife in the UK, and the question referred to the ECJ by the British Immigration Adjudicator was whether the requirements of Article 6 ECHR had been complied with by the procedures followed.

[86] Koen Lenaerts, "Fundamental Rights in the European Union" (2000) 25 *ELRev (European Law Review)* 575 at 578.

[87] E.g. in Joined Cases C-122/99P and C-125/99P *D and Sweden v Council of the European Union* [2001] ECR I-4319, a case involving an attempt to have a homosexual partnership recognised as equivalent to marriage (so that the partner could obtain certain benefits to which spouses were entitled), the Court of First Instance (the CFI), the ECJ and Advocate General Mischo were all persuaded by the relevant ECtHR case law on Article 8 of the Convention. In the circumstances, D was unsuccessful, the Court of Human Rights being as yet unconvinced that stable gay relationships warranted the level of protection sought; a view which was accepted by the ECJ. (*See*, in particular, paragraph 12 of the Court's judgment.) A similar approach had been taken by the ECJ in the earlier case of Case C-13/94, *P v. S and Cornwall County Council* [1996] ECR I-2143, in which the ECJ expressly relied upon the ECtHR's definition of a transsexual in *Rees v. United Kingdom* (1987) 9 EHRR 56.

[88] *See*, generally, Cathryn Costello and Eimear Brown, "ECHR and the European Union" from Ursula Kilkelly (ed) *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 35.

[89] Application No 45036/98 *Bosphorus Hava Yollari Turizim ve Ticaret AS v. Ireland* 30 June 2005. In that case, the applicant company, a Turkish airline, complained that its right to property had been violated by EU law. They had leased an aeroplane from a company in the former Yugoslavia, which was impounded upon landing at Dublin airport. This was because of UN sanctions, which were in turn enforced by EU measures: Article 8 of EC Council Regulation 990/93/EEC required the Member States to impound all vessels and aircraft belonging to persons or undertakings operating from the former Federal Republic of Yugoslavia. The owners of the plane were a Yugoslav airline, so the plane qualified. Bosphorus' challenge to the impoundment was successful in the High Court ([1994] 2 ILRM 551). However, the State appealed to the Supreme Court, and on a reference to the ECJ that Court ruled that the Regulation was a proportionate interference with Bosphorus' right to property ([1996] 3 CMLR 257). This determined the matter: the aircraft had been lawfully impounded. On an application to the Court of Human Rights, that Court accepted that the ECJ provided an equivalent level of protection for fundamental rights. However, Costello argues that this in fact allows the Court of Human Rights to scrutinise EU actions for compatibility with the Convention in cases where they do not provide such protection: *see* Cathryn Costello, "The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" (2006) 6(1) HRLR 87. On the potential for conflict between the two courts, *see* also Iris Canor, "*Primus Inter Pares*: Who is the Ultimate Guardian of Fundamental Rights in Europe?" (2000) 25 *ELRev* 3, and Koen Lenaerts and Eddy Eddy de Smijter, "A 'Bill of Rights' for the European Union" (2001) 38 *CMLR (Common Market Law Review)* 273.

of national laws with provisions of Community law which reflect certain fundamental principles or rights; and, secondly, where the States are implementing a Community law or scheme, and thus in some sense acting as agents on the Community's behalf."[90] The third, more controversial situation, is where Member States *derogate* from the requirements of EU law.[91] The circumstances in which Irish domestic law may be examined by the ECJ for conformity with the fundamental rights provisions upheld by the Union have received ample attention elsewhere[92] and are not a matter for discussion here. The material point is that the Convention did have some measure of domestic effect prior to the coming into force of the European Convention on Human Rights Act 2003. It would indeed be interesting to assess the relative impact of the Convention via the medium of EU law as compared with the political effect of an adverse judgment of the Court of Human Rights itself. However, this thesis is purely concerned with the impact of the Convention on domestic law through its incorporation into Irish law in the 2003 Act.

Thesis Aims and Vocabulary

The title of this thesis is "The Incorporation of the European Convention on Human Rights into Irish Law". The aim is to assess the potential impact of that international human rights document on the fundamental rights jurisprudence of this jurisdiction now that the Irish courts are free to have regard to the provisions of the ECHR. While the incorporation of the Convention into English law achieved great fanfare,[93] in this jurisdiction it raised barely a murmur. It has been suggested that the method of incorporation chosen by Ireland is inappropriate to our legal system and is likely to be

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[90] Craig and de Búrca, at 341. NB, an alternative categorisation of the circumstances in which the ECJ can and cannot intervene to protect fundamental rights has been attempted by Andrew Clapham; *see* "A Human Rights Policy for the European Community" (1990) 10 *Yearbook of European Law* (Clarendon Press, Oxford, 1991) 309, at 317ff.

[91] *Ibid.*

[92] *See*, e.g. Diarmuid Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Round Hall Sweet & Maxwell, 1997);

[93] The large number of English textbooks attesting to the different situations in which the Act may have an impact is testament to that; e.g. it has been suggested that the Convention may be used in a variety of ways by anti-racism activists: *see* Barry Clarke (ed) *Challenging Racism: Using the Human Rights Act* (Lawrence & Wishart Limited, 2003). Other works consider the Human Rights Act's impact on various aspects of domestic law, including education (e.g. Simon Whitbourn, *Education and the Human Rights Act 1998* (National Foundation for Educational Research, 2003); employment law (e.g. Robin Allen QC and Rachel Crasnow *Employment Law and Human Rights* (Oxford University Press, 2002)).

ineffective in ensuring the protection of Convention rights at domestic level.[94] The purpose of this thesis is to examine the validity of that claim, by assessing whether incorporation was necessary (Chapter 1), and by examining the factors that are likely to facilitate the absorption of the Convention into the legal system (Chapters 2-4). The argument advanced in Chapters 2 and 3 is that there are factors which act almost as conditions precedent for the acceptance of international human rights instruments as valid tools by an incorporating legal system: a receptive attitude among the country's judiciary, and an entrenched power of judicial review. The likely impact of the Convention on Irish law will be assessed by way of an examination of the 2003 Act and the manner in which the courts have thus far interpreted it (Chapter 5) and by an assessment of cases in which the ECHR Act has been relied upon to date (Chapter 6). Given that the Act has been in force for less than three years, it is difficult to say whether, and to what extent, it will provoke change in Irish law. It would be interesting to examine the Strasbourg case law on each and every Convention right in order to assess whether the standards applied in Ireland are similar or less (or more) exacting of the State than those required by Strasbourg. However, such a study would be extremely lengthy; with that in mind, Chapter 7 contains a case study of one particular Convention Article, Article 10, and asks whether the Irish law on freedom of expression complies with the Convention standards.[95] Freedom of expression has been chosen because that right has been the subject of proposals for law reform in recent times,[96] and because it has generally been regarded as one of the fields in which the Court of Human Rights excelled, and the Irish courts did not.

Unsurprisingly, extensive reference is made to the Convention itself and to the European Convention on Human Rights Act 2003 (hereafter frequently referred to as "the ECHR Act" or "the 2003 Act") during the course of this thesis. Detailed reference

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[94] This view has been expressed, *inter alia*, by Suzanne Egan, "The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation" (2003) 10(1) *DULJ* 230. Others are more optimistic: *see*, e.g. Mr Justice Nial Fennelly, "Introduction to the European Convention on Human Rights Act 2003", Speech to the Law Society Conference on the European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, at 16: "I find it impossible to minimise the potential of the Act to have great influence on our law and legal system."

[95] The reason that Article 10 ECHR has been singled out is that there have been notoriously few Irish cases in relation to the constitutional provisions on freedom of speech, and no law has ever been invalidated on the basis of those provisions – leading to allegations that the Irish Constitution is, somehow, "weak" on free speech.

[96] E.g. the Defamation Bill 2006 and the Privacy Bill 2006.

is also made to the UK Human Rights Act 1998. For that reason, all three documents are included in the Appendix.

One important point should be made in relation to vocabulary: the word "incorporation", which is frequently used in relation to the European Convention on Human Rights Act, is a misnomer. The European Convention on Human Rights Act is intended to "give further effect" to the Convention in Irish law. It does not amount to full incorporation of the ECHR into Irish law, nor was it intended to do so. While debate rages about many aspects of the Act and its likely impact, the non-incorporation of the Convention into Irish law by the Act is the one topic on which all are agreed. Prior to the coming into force of the Act, the then Chief Justice remarked:

> "At the most fundamental level, it adopts the same approach as the 1998 [UK Human Rights Act] in refraining from incorporating the European Convention into Irish law."[97]

The Convention thus does not have full force of law in Ireland, where the situation is similar to that of the UK post- the coming into force of the HRA: *see*, *inter alia*, Lord Hoffman's remark that:

> "[T]he Convention, as an international treaty, is not part of English domestic law...That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention but they are domestic rights, not international rights. Their source is statute, not the Convention."[98]

This point has been accepted in the Supreme Court.[99] However, at the risk of frustrating the reader, but in the interests of expediency, reference may occasionally be made to the "incorporation" of the ECHR into Irish law within these pages, notwithstanding the technical inaccuracy of that term.

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[97] Ronan Keane CJ, "Issues for the Judiciary in the Application of the ECHR Act, 2003", Speech to the Law Society and Human Rights Commission Conference on New Human Rights Legislation, 18 October 2003, at 1 of the paper.

[98] *In re McKerr* [2004] 1 WLR 807, at paragraph 66 of His Lordship's judgment.

[99] *Dublin City Council v. Fennell* [2005] 1 IR 604, *per* Kearns J at 621ff. This has been followed in subsequent cases, e.g. *Gallagher v. Casey* [2006] ILRM 431.

Chapter I

Arguments in Favour of Incorporation

In recent years, the position of fundamental rights in Ireland can hardly be said to have been in mortal peril. Why, therefore, was it decided to give domestic effect to the European Convention on Human Rights? Was it necessary at all, or merely desirable? The purpose of this chapter is to ask if there was any need to give the Convention any status in Irish law, and, if so, why? The question will be approached in two main parts: first, the issue will be approached from an "international" point of view: was there any international obligation on Ireland to incorporate the Convention, either under domestic law or under another treaty? If not, did Ireland's record before the Court of Human Rights make it desirable to do so in order to avoid future judgments? Secondly, this chapter will examine whether there is any truth to the suggestion that the Irish courts, pre-incorporation, habitually took into account the ECHR and the jurisprudence of its Court, and whether there were any other objective and sound reasons in favour of incorporation.

The International Law Position

The international treaty is the primary method by which states limit their sovereignty in relation to external[1] (and even, on occasion, internal[2]) affairs. Where a treaty has been concluded on a particular point, for example on extradition of suspects between two countries, it is generally recognised that the relevant treaty will be the "authoritative starting point for legal reasoning about any dispute to which it is relevant."[3] Once it has been duly ratified and has entered into force according to its

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[1] For example, states often agree to limit their capacity to make decisions in the field of foreign affairs through the conclusion of peace treaties, military alliances, trade agreements etc.

[2] The EC Treaty is, of course, a prime example of a multilateral agreement by which many states have ceded sovereignty on a range of domestic matters which were previously dealt with exclusively by the national authorities. It should be noted, however, that this treaty is not a typical international treaty, in that both the EC Treaty and the subsequent amendments and additions to it created a *sui generis* supranational organisation which is at present unique. On the development of the (somewhat unusual) EU institutions, *see*, e.g., Gráinne de Búrca, "The Institutional Development of the EU: A Constitutional Analysis" from Paul Craig and Gráinne de Búrca (eds) *The Evolution of EU Law* (Oxford University Press, 1999), chapter 2.

[3] Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Second Edition, Oxford University Press, 2000) p105.

terms,[4] the treaty is binding on the Contracting States. This idea is expressed in the maxim on which treaty law is founded: *pacta sunt servanda*. According to Steiner and Alston, this maxim "embodies a widespread recognition that commitments publicly, formally, and (more or less) voluntarily made by a nation should be honoured."[5] This principle of customary international law has been codified by Article 26 of the Vienna Convention on the Law of Treaties.[6] The Vienna Convention has been ratified by 90 states as of March 2000, [7] including many contracting parties to the ECHR, and even some states which have not specifically ratified it, such as the United States, accept it as generally codifying the international law of treaties.[8]

Perhaps the most important aspect of the rules of international law in this area is the principle that states cannot use any provisions of the national law or constitution to derogate from their international law obligations. Thus the members of the Council of Europe cannot under any circumstances rely upon national measures to excuse a breach of their obligations under the ECHR.[9] The situation is summarised by Brownlie in his seminal work on international law as follows:

> "The law in this respect is well settled. A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. The acts of the legislature and other sources of internal rules and decision-making are not to be regarded as acts of some third party for which the state is not responsible, and any other principle would facilitate the evasion of obligations...The same

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[4] Most multi-lateral treaties only enter into force once they have been ratified by a requisite minimum number of states parties, including the ECHR and the treaty establishing the new International Criminal Court. For a comprehensive explanation of treaty law, *see* Anthony Aust, *Modern Treaty Law and Practice* (Oxford University Press, 2000).

[5] Steiner and Alston, at p106. Although treaty commitments are theoretically voluntary, duress does not seem to be a defence in international treaty law in the same way as it is in contract. If duress were a defence, then treaties concluded by countries as a result of military, political or economic pressure could be "rescinded" by the weaker party at an opportune time.

[6] UN Doc, A/CONF, 39/29, (1969) 63 *American Journal of International Law* 875. Article 26 states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[7] Steiner and Alston, 106.

[8] *Ibid.*

[9] NB This is to be distinguished from a situation where a state validly enters a reservation in relation to one or more provisions of a treaty, so long as the entry of such reservation is permitted by the terms of the agreement itself. For example, the UK entered a reservation as regards the First Protocol to the ECHR, accepting the right to education "only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure" (see Robert Blackburn, "The United Kingdom" from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 935 at 939).

principle applies when the provisions of a constitution are relied upon; in the words of the Permanent Court [of International Justice]:

> 'It should...be observed that...a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.'"[10]

This observation is of interest when we consider the method of incorporation chosen by the United Kingdom. The particular mechanism used by the UK Human Rights Act will be discussed in more detail later in this thesis, but for now it suffices to observe that it allows the executive to place Bills before Parliament which it accepts are in conflict with the ECHR, and to ask that these proposals become law anyway.[11] This aspect of the HRA has lead to arguments that domestic UK law has primacy over the Convention,[12] a proposition which is accurate to the extent that the executive may, with the collusion of Parliament, expressly derogate from the State's obligations under the ECHR in the way described above.

This notion that the State may not derogate from its treaty obligations by way of domestic law is also of more general importance in the case of the ECHR: Article 13 requires Contracting States to provide an effective remedy in cases where the substantive provisions have been breached. This obligation applies to all Contracting Parties to the Convention, and is more onerous than it at first sight appears, since it has serious implications for the validity of the method used to incorporate the ECHR into national law. Indeed, if the mode of incorporation does not ensure an effective remedy when a Convention right has been breached, it may well constitute a breach of Article 13 in itself, which would be extremely embarrassing for the state concerned. The possibility that the Irish method of incorporating the Convention does not satisfy the requirements of Article 13 is discussed later in this thesis. However, no provision of the ECHR actually goes so far as to require Contracting Parties to incorporate the Convention into domestic law; rather, in accordance with the principle of subsidiarity, each State is free to choose how best to give effect to its obligations under the Convention.

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[10] Ian Brownlie, *Principles of Public International Law* (Fifth Edition, Clarendon Press, Oxford, 1998), 34.

[11] For full details, *see* section 19, Human Rights Act 1998, at 106 of the Appendix.

[12] *See*, for example, Dominic Kennedy, "Domestic Law has Primacy, Lords Told" *The Times*, Wednesday October 16 2002, 7.

If the European Convention itself does not require Contracting Parties to incorporate the Convention into domestic law, did any other treaty mandate that Ireland take such a step? It is now generally accepted that the real reason the process of incorporation was begun was the result neither of legal pragmatism nor an ideological approach to the protection of human rights, but of political necessity. Under the Good Friday Agreement of 1998,[13] the Irish government promised to take steps to "strengthen the protection of human rights in its jurisdiction" and to "ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland." Following the enactment of the UK Human Rights Act, 1998, the government decided that the best way to be seen to fulfil its obligation under the Agreement was to incorporate the ECHR into Irish law. Contrary to popular belief, there was no specific obligation on the State to do so; no promise to incorporate the Convention was part of the Agreement. It is arguable that incorporation was not necessary to ensure this equivalent level of protection: as the then Attorney General, Michael McDowell, was at pains to point out, the fact that Ireland was the last signatory of the ECHR to incorporate it into domestic law "belie[d] the fundamental realities of constitutional human rights protection in Ireland."[14] Indeed, as has already been explained, with its long constitutional tradition of enumerated and unenumerated rights, and its excellent record before the Strasbourg Court, Ireland could hardly be said to be lagging behind in the protection of human rights.

Hogan has explained the reason for incorporation is a diplomatic one, based on the importance of selecting "a neutral yardstick of fundamental rights protection."[15] Bunreacht na hÉireann's links with De Valera and with Roman Catholic social teaching meant that it was unlikely to be viewed as a "politically neutral template."[16] Given the high esteem in which the Constitution is held by all institutions and political parties in the State, it is probable that incorporation would never have been deemed necessary were it not for the Good Friday Agreement. But what of Ireland's record

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[13] Also known as "the Belfast Agreement".
[14] Opening Address by the Attorney General, Michael McDowell SC to the Law Society of Ireland Conference on *The Incorporation of the European Convention on Human Rights into Irish Law*, at 1.
[15] Gerard Hogan SC, "The Belfast Agreement and the Future Incorporation of the European Convention of Human Rights in the Republic of Ireland" in *Legislative Change and the Belfast Agreement* (SLS Legal Publications, NI), 20 at 33.
[16] *Ibid.*

before the Court of Human Rights? Was it so bad that incorporation was necessary to prevent further judgments against the State by Strasbourg?

Ireland v. Strasbourg: Ireland's Record Before the European Court of Human Rights

In the first place, it is worth noting that Ireland's record before the Court of Human Rights is relatively good, particularly when compared with those of other Contracting Parties. In its statistics for 2004, the Court of Human Rights identified a category of Contracting Parties known as "high case-count States", i.e. countries against which more than 2,000 applications were pending. Of these "high case-count States", the highest proportion of applications came from the Russian Federation and Poland (each with a 14% share), with Turkey and Romania just behind (at 12% each).[17]

Of course, the fact that a Contracting Party generates a large number of applications does not mean that that country has a poor record before the ECtHR; in fact, it may indicate the opposite – that the citizens of those nations are particularly well informed of their rights and the possibility of vindicating them at the international level.[18] However, it is difficult to paint a pretty complexion onto countries which generate large numbers of applications to Strasbourg, and one must wonder whether the fact that the system is overburdened in general must be attributed in part to the failings of the national authorities to provide adequate protection for Convention rights at domestic level – or at least, their failure to be seen to do so.[19] One must also consider the impact of population levels on the number of applications from any given place: the Russian Federation is a vast country with a huge population, whereas Ireland is

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[17] The other "high case-count States" of 2004 were France (6% share), the Ukraine (6%), Italy (5%), Germany (5%), the United Kingdom (3%); other States combined to make up the remaining 23%; *see* *European Court of Human Rights Statistics 2004*, at 11, published April 2005, viewed at www.echr.coe.int/NR/rdonlyres/F2B964EE-57C5-4C86-8B8F-8B4B6095D89C/0/MicrosoftWordstatistical_charts_2004_internet_.pdf on 11 October 2005.

[18] Marie-Bénédicte Dembour and Magda Kryzanowska-Mierzewska also question whether a high number of applications to Strasbourg is "a negative or a positive phenonmenon": Marie-Bénédicte Dembour and Magda Kryzanowska-Mierzewska, "Ten Years On: The Popularity of the Convention in Poland" [2004] EHRLR 400, at 401.

[19] On this point, *see* Marie-Aude Beernaert, "Protocol 14 and New Strasbourg Procedures: Toward Greater Efficiency? And at What Price?" [2004] EHRLR 544, at 546, where she asks "If the Strasbourg system is suffering under a spiralling workload, is this not because there is something wrong with the capacity of national authorities to offer adequate protection of the Convention rights or, at the very least, with the faith of individuals in the capacity of national courts to offer an effective domestic remedy for their human rights complaints?"

small. There may be additional cultural factors, or a persistent failure on the part of the respondent state to redress the problems causing the complaints.[20] In fact, for 2004, Ireland was found to be in violation of at least one Convention Article in 100% of the Court's judgments in which she appeared as respondent - a figure which appears horrifying until we realise that Ireland was respondent state in only two cases that year.[21] Statistics, taken out of context, are notoriously misleading. For the same year Turkey was found to be in breach of at least one Article in 154 cases (out of 171 heard by the Court), Poland in 74 (out of 79), France in 59 (out of 75), and Italy in 36 (out of 47).[22]

How can we explain Ireland's well-nigh spotless record? O'Connell suggests that the low level of applications to Strasbourg can be linked to an Irish view of "European law" as an "external amorphous concept",[23] although others view this assessment as too pessimistic.[24] Gerard Hogan points to the "very high degree of overlap" between the guarantees in the 1937 Constitution and those in the Convention, and also to the fact that the Irish courts have an effective method of protecting human rights in the long-standing tradition of judicial review of legislation for compatibility with the Constitution.[25] Most significantly, the existence of constitutional review means that the Superior Courts have inherent jurisdiction to strike down legislation that offends against the principles set down in Bunreacht na hÉireann.

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[20] Dembour and Kryzanowska-Mierzewska note that most applications from Italy concern the unacceptable length of judicial proceedings; those from Turkey often involve alleged violations of Articles 2 and 3 ECHR (*ibid*). They argue that the high level of applications from Poland, however, may be explained on different grounds, including the absence of an indigenous "legal culture", the presence of a "victim mentality" and "the desire to vent one's grievances against the communist regime" (at 414).

[21] *See European Court of Human Rights Statistics 2004*, published April 2005, viewed at www.echr.coe.int/NR/rdonlyres/F2B964EE-57C5-4C86-8B8F-8B4B6095D89C/0/MicrosoftWordstatistical_charts_2004_internet_.pdf on 11 October 2005.

[22] *Ibid.* Other bad offenders for 2004 included Bulgaria (25 violations out of 27 cases), the Czech Republic (27 out of 28), Hungary (20 out of 20), and the United Kingdom (19 out of 23).

[23] Donncha O'Connell, "Ireland", from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 423, at 468.

[24] Gerard Hogan, "Incorporation of the ECHR: Some Issues of Methodology and Process" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 13, at 14.

[25] Gerard Hogan, SC, "The Incorporation of the ECHR into Irish Domestic Law", Law Society of Ireland Conference Paper, October 14, 2000, pp1-2. Dr Hogan points out that Ireland has one of the longest experiences of constitutional judicial review in the world, second only to the United States.

However, Michael Farrell argues that while there is "certainly some merit in the constitutional argument,"[26] another major factor had kept down the number of cases taken against Ireland in the ECtHR in the first place: "the time and cost involved."[27] He states that if one allows for the time needed to exhaust domestic remedies, litigants can expect a total of seven or eight years before a decision can be expected,[28] and in David Norris' case[29] it took almost 16 years from beginning to end, and a further five elapsed before the Irish government acted to decriminalise male homosexual behaviour between consenting adults. Further, six years ago the average cost of taking a case to the ECtHR was estimated in a British government White Paper as around £35,000stg[30] - a prohibitive amount which the applicant may never recover, even if successful at the final stage.[31] The Court of Human Rights may provide legal aid, but will only make this decision towards the end of the admissibility stage.[32] As will be seen below, the Court can also award costs to successful applicants; however, these are not normally very great.[33] The costs awarded by the Court of Human Rights tend to be extremely low, and undoubtedly fall far short of the actual cost of the proceedings for applicants who are legally represented.[34] Whatever the reason, it is

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[26] The argument that the existence of a written Constitution has stemmed the flow of applications to Strasbourg is also put forward by John Gleeson in his article, "The European Convention on Human Rights: Its Practical Relevance" (1993) *Irish Journal of European Law* 248, at 249.

[27] Michael Farrell, "Semi-detached or Joined-up Rights? Making the European Convention a Reality for Irish Lawyers – and their Clients", Law Society Conference Paper, 14 October 2000.

[28] *Supra.*

[29] *See Norris v. Attorney General* [1984] IR 36 for the judgment of the Supreme Court, and *Norris v. Ireland* (1988) 13 EHRR 146 for that of the Court of Human Rights. The offence of buggery was finally abolished by section 2 of the Criminal Law (Sexual Offences) Act 1993.

[30] *Supra.* The White Paper was entitled "Rights Brought Home, The Human Rights Bill", October 1997. The reference to the costs of Strasbourg proceedings is at paragraph 1.14.

[31] The Strasbourg Court has been famously reluctant to award compensation to successful applicants. A notable exception to this was the Irish case of *Pine Valley Developments v. Ireland* (1991) 14 EHRR 319, where the applicants' pecuniary loss was easily quantifiable.

[32] John Wadham, Helen Mountfield and Anna Edmundson, *Blackstone's Guide to the Human Rights Act 1998* (3rd Edition, Oxford University Press, 2003), at 225.

[33] The one advantage an applicant has over a plaintiff in domestic proceedings is that the ECtHR never awards costs against applicants, even where they are unsuccessful (Wadham, Mountfield and Edmundson, at 225).

[34] The applicant in Application No 18273/04 *Barry v. Ireland*, Judgment of 15 December 2005received the relatively generous award of 7,000 Euro in relation to costs and expenses; in *O'Reilly and Others v. Ireland* (2005) 40 EHRR 40 the applicants were jointly awarded 400 Euro in respect of costs and expenses; in Application No 42297/98 *McMullen v. Ireland* Judgment of 29 October 2004 an unrepresented applicant was given 353.26 Euro to cover the cost of photocopying, postage and telephone calls; in *Johnston v. Ireland* (1986) 9 EHRR 203, the applicants were together awarded £12,000 in respect of legal costs and expenses. Open Door Counselling and Dublin Well Women (*Open Door Counselling v. Ireland* (1992) 15 EHRR 244) received unusually high amounts in respect of costs; Open Door received £68,985.75 less 6,900 French francs already paid by way of legal aid; Dublin Well Woman was given £100,000 less 52,577 in French francs, again already paid by way of legal aid; the applicant in *DG v. Ireland* (2002) 35 EHRR 1153 received 16,138.96 in respect of costs and expenses.

clear that "recourse to the Strasbourg institutions has not been a popular option for those seeking to have their Convention rights vindicated."[35] It is thus hoped that incorporation of the Convention and the consequent provision of a domestic remedy will better ensure the protection of Convention rights.[36]

Since 1953, the Strasbourg Court has only found Ireland to be in breach of the Convention on twelve occasions,[37] a record which seems all the more impressive when compared with that of the Council of Europe's worst offenders. In five other cases, including *Lawless v. Ireland*,[38] Ireland has been vindicated by the ECtHR: *see Murphy v. Ireland*,[39] *McElhinney v. Ireland*,[40] and *Bosphorus Hava v. Ireland*.[41] The cases in which Ireland has been held to be in breach of the Convention can be classed in three broad categories: the early cases, which predominantly concerned Article 8 rights to privacy and family life; the Article 6(1) right to a fair trial (and to all that that entails); and an "other" category encompassing a number of Articles which have only been successfully pleaded against Ireland on one occasion.

The early cases in which Ireland was found to be in breach of the Convention are well known, and have been discussed in detail elsewhere,[42] but a brief overview is necessary in order to discern where Irish law and practice has failed to uphold a Convention standard in the past, as this may help to identify problem areas for the

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[35] Ursula Kilkelly, "Introduction" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), at lvi.

[36] *See*, e.g., *ibid.*

[37] The cases Ireland lost before the Court are: *Airey v. Ireland* (1979) 2 EHRR 305; *Johnston v. Ireland* (1986) 9 EHRR 203; *Norris v. Ireland* (1988) 13 EHRR 146; *Pine Valley Developments v. Ireland* (1991) 14 EHRR 319; *Open Door Counselling v. Ireland* (1992) 15 EHRR 244; *Keegan v. Ireland* (1994) 18 EHRR 342; *Heaney and McGuinness v. Ireland and Quinn v. Ireland* (2001) 2 EHRR 12; *DG v. Ireland* (2002) 35 EHRR 1153; *Doran v. Ireland* (2006) 42 EHRR 13; *O'Reilly and Others v. Ireland* (2005) 40 EHRR 40; Application No 18273/04 *Barry v. Ireland*, Judgment of 15 December 2005; Application No 42297/98 *McMullen v. Ireland* Judgment of 29 October 2004.

[38] (1979-80) 1 EHRR 15. For a detailed examination of this case, *see* Brian Doolan, *Lawless v. Ireland (1957-1961): The First Case Before the European Court of Human Rights: An International Miscarriage of Justice?* (Ashgate, Dartmouth, 2001). He credits the case with being a "foundation stone of constitutional rights in Ireland" (at 230).

[39] (2004) 38 EHRR 212. This case involved Ireland's restrictions on certain types of advertising, and will be discussed in greater detail at a later point.

[40] (2002) 34 EHRR 322. In *McElhinney*, the ECtHR held that Ireland's recognition of sovereign immunity for the torts of foreign governments was not contrary to Article 6 ECHR. The fifth case in which Ireland won before the ECtHR, *Independent Newspapers v. Ireland* Application No. 55120/00, Judgment of 16 June 2005, is discussed in detail in Chapter 7.

[41] Application No 45036/98, 30 June 2005.

[42] *See*, e.g. Donncha O'Connell, "Review of the Cases from the Republic of Ireland in Strasbourg over the Last Decade" in Gerard Quinn (ed.) *Irish Human Rights Yearbook 1995* (Round Hall, Sweet & Maxwell, 1995).

future. Most early cases were broadly concerned with the Article 8 right to family life, such as *Airey v. Ireland*,[43] the case credited with leading to the establishment of the civil legal aid system in Ireland.[44] Mrs Airey had been unable to obtain a judicial separation from her violent husband, from whom she had been separated for many years, because she could not afford legal representation.[45] The Court of Human Rights held that she had therefore been denied an effective right of access to the courts in breach of Article 6(1); given that she had also been denied a means of protection for her right to family life, there had also been a breach of Article 8.[46]

Article 8 rights were also at the core of *Johnston v. Ireland*,[47] in which the applicants challenged a number of aspects of Irish law. The first named applicant was separated from his wife and had lived for a number of years with the second named applicant. The third named applicant was their infant daughter. They argued that Irish law failed to respect their status as a family by, *inter alia*, failing to allow for divorce, which would have allowed the first two parties to marry, and by discriminating against the rights of their illegitimate child.[48] The ECtHR rejected a number of these claims: the Article 12 right to marry did not include the right to the dissolution of marriage;[49] nor had Irish law failed to respect the first and second named applicants' right to family life.[50] However, the less favourable status of the third named applicant amounted to an attack on the Article 8 rights of all three parties: "the normal development of the

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[43] *Airey v. Ireland* (1979) 2 EHRR 305.

[44] The Court of Human Rights did not prescribe this solution – nor did it have authority to do so (paragraph 26) – but it was, in reality, the only effective way of dealing with the problem.

[45] The problem was exacerbated because, at that time, such decrees could only be granted by the High Court, which increased the costs payable.

[46] *Airey v. Ireland* (1979) 2 EHRR 305, at paragraph 33. The Court recognised that "As regards marriage, husband and wife are in principle under a duty to cohabit but are entitled, in certain cases, to petition for a decree of judicial separation; this amounts to recognition of the fact that the protection of their private or family life may sometimes necessitate their being relieved from the duty to live together" (also at 33).

[47] *Johnston v. Ireland* (1986) 9 EHRR 203.

[48] At that time, the Guardianship of Infants Act 1964 allowed the fathers of non-marital children to apply to the District Court in respect of access, but not to be appointed guardian. The mother's guardianship was assured as the principle *mater semper certa est* applied in Irish law.

[49] *Johnston v. Ireland* (1986) 9 EHRR 203, paragraph 51ff. Interestingly, in *F v. Switzerland* (1987) 10 EHRR 411, the Court of Human Rights held that the respondent had violated Article 12 ECHR in circumstances where the applicant was prevented by law from marrying for a fourth time until three years had elapsed since his third divorce. The State had argued that the provision sought to ensure marriage stability – a legitimate aim which was nevertheless found to be unreasonable and disproportionate. It has been suggested that the *Johnston* and *F* decisions, taken together, indicate that "the Convention will allow the state to restrict access to divorce, but not unduly restrict access to marriage or remarry." *See* Jonathan Herring, *Family Law* (Longman, 2001), at 102. A similar point was made in *Dennis v. Dennis* [2000] 2 FLR 231.

[50] Paragraphs 55ff.

natural family ties between the first and second applicants with their daughter requires, in the Court's opinion, that she should be placed, legally and socially, in a position akin to that of a legitimate child."[51] In so finding, the Court was influenced by efforts in other Council of Europe states to reduce discrimination against non-marital children, and the fact that the Irish government itself had recently produced the Status of Children Bill.[52] *Keegan v. Ireland*[53] had a similar theme. It concerned a complaint by an unmarried father that Irish law, which allowed his daughter to be adopted without his knowledge and consent, breached his Article 8 rights. The Court of Human Rights had little difficulty in reaching the same conclusion, particularly as the facts of the case showed that the applicant had established *de facto* family life with the child. In the circumstances, the fact that the mother could place the child for adoption, and the fact that only her consent mattered, was an interference with the applicant's right to enjoy family life with his daughter.

Finally, one Irish case invoked the right to privacy contained in Article 8: *Norris v. Ireland*[54] involved a challenge to the Offences Against the Person Act, a Victorian statute criminalizing certain behaviour, including male homosexual acts, which was still in force in Ireland. Norris had unsuccessfully challenged the constitutionality of the relevant provisions.[55] His application to the Court of Human Rights met with more success: in accordance with its earlier jurisprudence,[56] the Court held that the legislation infringed the applicant's right to private life.

By contrast, later cases against Ireland predominantly concern the Article 6 right to a fair trial. That Article protects a host of attendant rights, including the privilege against self-incrimination and the right to speedy resolution of legal disputes. Both *Heaney and McGuinness v. Ireland*[57] and *Quinn v. Ireland*[58] concerned an interference with two elements of the right to a fair trial: the right to silence and the right to freedom from self-incrimination. All three applicants had been convicted under section 52 of

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[51] Paragraph 74.
[52] Paragraph 74. This Bill later became law as the Status of Children Act, 1985.
[53] (1994) 18 EHRR 342.
[54] (1988) 13 EHRR 146.
[55] *Norris v. Attorney General* [1984] IR 36.
[56] Including, e:g. *Dudgeon v. United Kingdom* (1981) 4 EHRR, in which the same provisions had been challenged by a man from Northern Ireland.
[57] (2001) 2 EHRR 12.
[58] Application No 36887/97 *Quinn v. Ireland* Judgment of 21 December 2000.

the Offences Against the State Act, 1939, which makes it a criminal offence to refuse to give an account of one's movements once the section has been invoked. All three were sentenced to six months' imprisonment under the section, although they were not convicted of any other offence (including the offences about which they had been interrogated[59]). The Court of Human Rights held that the section placed the applicants in an impossible situation; either they answer the question or they spend six months in jail. Given that Irish law was, at the material time, unclear as to whether the information a person was compelled to give could be used against that person, there was a clear infringement of Article 6.[60] Nor could the State's security and public order concerns justify "a provision which extinguishes the very essence of the applicant's rights to silence and against self-incrimination guaranteed by Article 6(1) of the Convention."[61]

Article 6 also formed the basis for a number of recent applications concerning the right to a speedy trial in both criminal and civil matters. Indeed, it would seem that the Irish legal system may not have the resources to ensure that cases are heard within a reasonable time. The first criminal delay case to come before the Court of Human Rights was *Barry v. Ireland*.[62] The applicant was a doctor who had been accused of the sexual assault of several female patients. The first such formal complaints to the police were made in 1995, and, at the time of the judgment of the Court of Human rights in 2005, the criminal proceedings against him had still not finished. The applicant instituted judicial review proceedings in an attempt to obtain an order prohibiting his prosecution on the grounds, *inter alia*, of "gross and inexcusable delay", but these were unsuccessful.[63] The applicant's complaint to Strasbourg focused mainly on his Article 6 right to a speedy trial and his Article 13 right to an effective remedy at domestic level. The government argued that time did not begin to

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[59] Messrs Heaney and McGuinness were charged with membership of an unlawful organisation (the IRA), but were acquitted in the Special Criminal Court.

[60] The Irish government argued that any uncertainty on this point had been cleared up by the case of *Re National Irish Bank Limited* [1999] 1 ILRM 343, in which the Supreme Court held that confessions of bank officials compelled pursuant to section 10 of the Companies Act 1990 would not generally be admissible in a subsequent criminal trial unless the judge was satisfied that the confession was voluntary. The Court of Human Rights found that this was irrelevant in the context of the instant applications, as the *NIB* decision had not been handed down at that time; *see* (2001) 2 EHRR 12 at paragraph 53.

[61] (2001) 2 EHRR 12, at paragraph 58.

[62] Application No 18273/04 *Barry v. Ireland*, Judgment of 15 December 2005.

[63] The High Court refused the order sought on 14 February 2003, and on 17 December 2003 the Supreme Court rejected the applicant's appeal.

run in respect of the criminal charges until the applicant was informed of the charges against him in 1997. The Court disagreed; having regard to its earlier jurisprudence,[64] time began to run in respect of a criminal charge as soon as the suspect's situation had been "substantially affected".[65] Therefore, the Court could take into consideration the period since 6 June 1995, when the applicant's home and office were searched on foot of a warrant.

The Court reiterated its traditional approach to such cases – "that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities".[66] The ECtHR accepted that the complexity of the criminal investigation might have explained the two-year delay between the laying of the complaints and the charging of the applicant, but not the subsequent eight-year delay before the trial. Nor could the applicant's recourse to judicial review – termed by the State a "'blunderbuss' attack on every aspect of his prosecution" be wholly to blame for the delay.[67] The Court found that the State authorities were wholly or partly to blame for "several periods of excessive delay".[68] Having regard to the seriousness of the charges, the possibility of a substantial prison sentence if convicted, and the restrictions on the applicant's life,[69] the State had failed to deal with the case within the "reasonable time" required by Article 6(1).[70]

The *Barry* case therefore makes it abundantly clear that the Irish authorities should be careful to ensure trial with reasonable expedition, particularly in serious criminal cases. The current safeguards appear to be inadequate to ensure this. Interestingly, the Court of Human Rights was also unimpressed by the State's assertion that the option of taking judicial review proceedings to halt a prosecution constituted an adequate domestic remedy. In the Court's view, the option of taking such proceedings could not, of itself, amount to an adequate remedy. In any case, the possibility of obtaining

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[64] *Eckle v. Germany* (1983) 5 EHRR 1.
[65] *Ibid*, at paragraph 73.
[66] (2005) 40 EHRR 40, at paragraph 36.
[67] (2005) 40 EHRR 40, at paragraph 39.
[68] (2005) 40 EHRR 40, at paragraph 44.
[69] The ECtHR noted that the applicant had been unable to pursue his profession as a doctor (although his advancing years made this unlikely anyway – at the time of the judgment, he was over 80 years old), and had been subject to bail conditions (paragraph 46).
[70] Paragraphs 45-47.

an order of prohibition was almost unrelated to the right to trial within a reasonable time: they could not in any way speed up the decision of the criminal courts, only stay future proceedings.[71] Nor were they any sort of remedy for delays that had already occurred.[72] Furthermore, as exemplified by the applicant's case, judicial review proceedings could themselves be very lengthy.[73]

The length of civil trials in this jurisdiction has also come under scrutiny in recent years. The first such complaint was made in *Doran v. Ireland*,[74] in which the applicants experienced delays of eight years and five months in their civil action. They had bought land with planning permission; unfortunately, there were errors on the site maps, and they did not have access to the site from the road, with the effect that the applicants had to stop building and sell the site. They sued the vendors, the vendors' solicitors, and their own solicitors for negligence, breach of contract, misrepresentation and breach of warranty.[75] They were ultimately successful and were awarded £200,000 in pecuniary damages and £10,000 in respect of non-pecuniary loss for the stress and anxiety caused by the defendants' negligence.[76] The Court of Human Rights took the view that the case was not sufficiently complicated as to justify the delays involved,[77] nor had the applicants contributed to the delay in any significant way.[78] Inevitably, the length of proceedings constituted a breach of the Article 6 right to trial within a reasonable time. There had also been a violation of Article 13 ECHR.[79]

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[71] Paragraph 52.
[72] Paragraph 53.
[73] Paragraph 52. The applicant obtained leave to apply for judicial review on 17 November 1997, and the Supreme Court's judgment was not handed down until December 2003, a wait of just over six years.
[74] *Doran v. Ireland* (2006) 42 EHRR 13.
[75] For the factual background to the case, *see* (2006) 42 EHRR 13, paragraphs 10-12.
[76] Paragraph 30.
[77] Paragraph 45. The ECtHR noted that the case had "established a novel duty of care by a vendor's solicitor to a legally represented purchaser, [but] the Court does not find that any such legal novelty can explain the length of the applicants' proceedings".
[78] Part of the delay was due to the fact that the presiding judge was assigned to the Beef Tribunal for quite some time, with the effect that the first instance hearing took over a year from beginning to end, and another year elapsed before judgment was delivered. Paragraphs 46-47. Interestingly, the Court was firmly of the view that the period necessary for taxation of costs should be included in the length of proceedings.
[79] The State argued that there was a domestic law remedy, in the form of an action for a breach of the constitutional right to a decision within a reasonable time. The ECtHR was not convinced: no domestic law provided for damages following a successful constitutional case, nor had Ireland clarified the basis on which the State would be liable to pay damages.

A second similar complaint was made in *O'Reilly and Ors v. Ireland*.[80] The applicants complained of undue delay in circumstances where their proceedings against a local authority had taken four years and eleven months.[81] The Court of Human Rights, applying its usual test regarding the length of proceedings, noted that the applicant's case was "neither procedurally nor factually complex".[82] Furthermore, it appears that the Court holds the State accountable where its judiciary take an unreasonable time to discharge its duties: the Court viewed with disfavour the fact that it had taken the High Court one year and eight months to deliver its judgment, and that the appeal to the Supreme Court was delayed for over a year to accommodate another case.[83] The Court of Human Rights was emphatically of the view that court delays were the responsibility of the State: "the Court recalls that States are obliged to organise their legal systems so as to allow the courts to comply with the reasonable time requirement of Article 6 so that even a principle of domestic law or practice requiring the parties to take initiatives to advance the proceedings does not dispense the State from this obligation."[84] Once again, there was an absence of domestic remedies in relation to the length of domestic civil proceedings; Ireland was therefore in breach of Article 6 and Article 13.

The period of delay was even more extreme in the case of *McMullen v. Ireland*:[85] a period of sixteen years elapsed between the date on which the applicant instituted a negligence claim against his former solicitors and the determination of the successful solicitors' bankruptcy proceedings against the applicant. This period was excessive, particularly since the case only involved two parties and one relatively simple question to be tried (whether the defendant solicitors had given the applicant negligent advice in the context of a landlord and tenant dispute).[86] In spite of the fact that the applicant had contributed "in no small part" to the delay, the ECtHR placed the ultimate

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[80] *O'Reilly and Others v. Ireland* (2005) 40 EHRR 40.

[81] The applicants had sought to compel the local authority to repair the public road on which their homes, businesses and farms were located. These domestic proceedings ultimately failed in the Supreme Court, on the basis that the Council did not have the resources to repair all 600 roads in the area which were in poor condition, and the Court ought not to make orders of mandamus in cases where the public body concerned did not have the money to comply, and where the order would require the co-operation of other government bodies (*O'Reilly and Others v. Ireland* (2005) 40 EHRR 40, at paragraphs 9-22). The parties were responsible for their own costs.

[82] *O'Reilly and Others v. Ireland* (2005) 40 EHRR 40, at paragraph 31.

[83] *O'Reilly and Others v. Ireland* (2005) 40 EHRR 40, at paragraph 33.

[84] *O'Reilly and Others v. Ireland* (2005) 40 EHRR 40, at paragraph 32.

[85] Application No 42297/98 *McMullen v. Ireland* Judgment of 29 October 2004.

[86] Application No 42297/98 *McMullen v. Ireland* Judgment of 29 October 2004, at paragraphs 31-34.

responsibility on the State, and its obligation to organise the system so as to allow the courts to comply with the reasonable time requirement.[87] This case is interesting because it was less clear-cut than *O'Reilly* and *Doran*, in that the Court of Human Rights accepted that more of the delay was the fault of the applicant. It shows that, the applicant's fault notwithstanding, the State will still be deemed liable for delay where a substantial part of that time can be attributed to delays in obtaining court time and other administrative problems.

Both *O'Reilly* and *Doran* took place before the coming into force of the Court and Court Officers Act 2002, and it may be that the existence of the avenues open under this Act will amount to a remedy for the purposes of Article 13. However, it must be remembered that that Article refers to an *effective* remedy; so, even if the 2002 Act increases the possible remedies in respect of the delay of civil proceedings, they will not be considered to be effective unless they have a real and discernable impact on delays and bring them within a range that is considered "reasonable" by the Court of Human Rights.

The other cases in which the ECtHR censured Ireland involved a range of Convention rights. In *Pine Valley Developments v. Ireland*,[88] the State was chastised for failing to respect the applicants' property rights under Article 1 of the First Protocol to the Convention taken in conjunction with Article 14, in circumstances where the State refused detailed planning permission of lands acquired by the applicants (in relation to which outline permission had been granted).[89] The applicants in *Open Door Counselling v. Ireland*[90] successfully argued that the absolute Irish ban on abortion

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[87] Paragraphs 37-38. It is true that "a number of specific and lengthy delays in the proceedings [were] attributable to the domestic authorities" (paragraph 39).
[88] *Pine Valley Developments v. Ireland* (1991) 14 EHRR 319.
[89] The first named applicant had bought land with outline planning permission, then sold it on for the same price to Healy Holdings. The County Council refused detailed planning permission, and appeals against this refusal were unsuccessful, and the land was sold on by the receiver of Healy Holdings for an eleventh of what the company had paid for it. Proceedings against the Minister for the Environment proved fruitless; the applicants argued that they ought to have the benefit of section 6(1) of the Local Government (Planning and Development) Act 1982, which allowed for the retrospective validation of planning permission where it was necessary to avoid an attack on constitutional rights. The Supreme Court held that the section did not apply to the applicants. The Court of Human Rights held that this situation amounted to a discriminatory interference with the applicants' right to property.
[90] (1992) 15 EHRR 244.

information amounted to a breach of the Article 10 right to freedom of expression.[91] In *DG v. Ireland*,[92] the applicant persuaded the Court that his incarceration in a young offenders' institute breached his right to liberty (he had committed no offence).[93]

The Incorporation Debate: Arguments in Favour of Incorporation

In spite of the fact that incorporation was not mandated by the Convention, there were many cogent and compelling arguments in favour of incorporation. It is, however, a particularly faithful method of compliance according to the Strasbourg Court,[94] and it has been argued that the success of the Protocol 11 reforms to the ECHR system will rely heavily on full State implementation of the Convention, including incorporation and the provision of effective remedies at national level.[95] Prior to the enactment of the 2003 Act, many arguments were advanced in favour of incorporation: that it would save the applicant time and money in seeking redress in a "remote and unfamiliar"

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[91] The case was effectively the European leg of *SPUC v. Open Door Counselling* [1988] IR 593. In *SPUC v. Open Door*, the High Court had granted an injunction against the defendants prohibiting them from counselling or assisting pregnant women to obtain an abortion or to obtain further advice on how to obtain an abortion. This injunction was upheld by a unanimous Supreme Court. The applicants alleged that this injunction breached their Article 10 right to freedom of expression. The Court of Human Rights agreed. While the State had "a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life", this discretion was not unfettered or unreviewable (paragraph 68). Given the absolute nature of the prohibition on the applicants, combined with the fact that it was not a criminal offence for women to travel abroad to have an abortion, and the fact that the same information was available from other sources, including telephone directories and magazines, the ban had gone too far and amounted to a breach of Article 10 (paragraphs 72-80).

[92] (2002) 35 EHRR 1153.

[93] Due to his troubled behaviour, the High Court had remanded the applicant to Saint Patrick's, a young offenders institution, because there was no suitable secure unit in which the applicant could be cared for in Ireland at that time. The Court of Human Rights had little difficulty in finding that the applicant's Article 5 right to liberty had been breached; nor did his detention come within one of the exceptions authorised by Article 5(1)(d), which allows "the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority". The fact that he had no enforceable right to compensation at domestic level also breached Article 5(5).

[94] *See Ireland v. United Kingdom* (1979-80) 2 EHRR 25, at paragraph 239, where the Court of Human Rights interpreted Article 1 ECHR as follows:

> "By substituting the words 'shall secure' for the words 'undertake to secure' in the text of Article 1, the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States. That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law."

[95] This view was expressed by Anna Austin, a lawyer at the Registry of the new ECtHR, at the University College Dublin Conference on the European Convention on Human Rights: Perspectives from England, Scotland and Ireland, 18 October 2002. Ms Austin pointed out that applications to Strasbourg have increased by 130% since 1998, and that with some 30,000 applications pending the time has come for the court to reassess its role as a distributor of justice in individual cases.

forum;[96] that it would pre-empt any potentially humiliating result before an international court so far as the Contracting State is concerned;[97] that since Ireland, following the enactment of the UK Human Rights Act, was for a few years the only State Party which has not yet incorporated our reluctance to do so had become a source of embarrassment.

The Constitution Review Group deemed one of the most obvious advantages of incorporation to be the increased protection of the rights of the individual (perhaps because, given the large degree of overlap between the two documents, most rights would be protected by both the Constitution and the ECHR).[98] The Review Group also noted that, where the provisions of the ECHR were more detailed, these would "fill the gaps" in domestic law. Furthermore, litigants would be able to cite decisions of the ECtHR as direct precedents;[99] and awareness and respect for human rights would be increased among the judiciary.[100] They also considered the fact that incorporation had already been effected by most other European States, and that it would lead, indirectly, to a broader interpretation of the Constitution which would be more in line with the ECHR.

As against this, it is worth noting that there are strong arguments against the international standardisation of legal norms:

> "It is important to recognise that law is cultural and located in deeper soil than many politicians understand. To be effective, laws have to resonate with the value system of a people and with their historic pulse. Harmonisation and homogenisation of law even within Europe poses problems when approaches come out of very different traditions."[101]

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[96] See Joseph Jaconelli, "The European Convention on Human Rights as Irish Municipal Law" (1987) *Irish Jurist* 13, at 14ff.

[97] Jason Coppel was of the view that the Human Rights Act would reduce the number of applications taken to Strasbourg against the UK – see his book, *The Human Rights Act 1998: Enforcing the Convention in the Domestic Courts* (Chichester: John Wiley & Sons, 1999), at 107.

[98] *Report of the Constitution Review Group*, May 1996.

[99] This point is of questionable value, since the Strasbourg Court itself does not, strictly speaking, operate on a system of binding precedent. In this way its judgments resemble those of the civil code legal systems more closely than our own.

[100] It is reasonable to assume that, given the long tradition of fundamental rights protection in the State, Irish judges would be highly insulted to hear that their appreciation of human rights was so severely lacking!

[101] Helena Kennedy, *Just Law* (Random House, 2004), at 5-6.

This point is even more true of fundamental rights than other types of law: the culture and history of a place cause some rights to resonate more deeply with the populace of a given country than others.[102] In addition, too much attention to a uniform set of norms ignores the possibility that this could lead to a *levelling down* of the standard of protection as opposed to a levelling up.[103] Furthermore, the argument that incorporation both increases rights protection domestically and decreases the likely number of applications to Strasbourg is not necessarily accurate: it is highly likely that there will be many instances where the domestic courts and the ECtHR will arrive at different interpretations of the nature and scope of Convention rights; it is also fair to say that one of the few points of consensus among Irish commentators is that the ECHR Act certainly will not remove the need to go to the Court of Human Rights altogether.[104]

Nevertheless, there were practical reasons for incorporation. Firstly, and perhaps most significantly, the remedies offered under the Strasbourg system are arguably inadequate from the applicant's perspective. Strasbourg has no real enforcement mechanism, no effective way of ensuring that its decisions are complied with; its judgments are binding as a matter of international law alone.[105] There are no sheriffs

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[102] JHH Weiler, explains the situation as follows:

> "[B]eyond a certain core, reflected in Europe by the European Convention on Human Rights (ECHR), the definition of fundamental human rights often differs from polity to polity. These differences…reflect fundamental societal choices and form an important part in the different identities of polities and societies. They are often that part of social identity about which people care a great deal … America is saying something very important about itself (good and/or bad) when it insists on the right of the individual to engage in…extremist, even injurious, speech. Germany says something very important about itself (good and/or bad) when it would deny the individual such a right."

"Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space" from JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Oxford University Press, 1999), 102, at 102-106.

[103] Gerard Hogan SC, "The Incorporation of the ECHR into Irish Domestic Law", Law Society Conference Paper, 14 October 2000, at 4. *See* also Gerard Hogan, "Incorporation of the ECHR: Some Issues of Methodology and Process" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 13, at 16. Indeed, an international treaty seeking to attract ratifications by as many nations as possible must inevitably apply a minimum standard.

[104] On this point *see*, e.g. Michael Farrell, "Judicial Review", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 89, at 93, and James MacGuill, "Implications for Criminal Law", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 52, at 61.

[105] See Patrick Dillon-Malone, "Individual Remedies and the Strasbourg System in an Irish Context" in Liz Heffernan (ed) (with James Kingston) *Human Rights: A European Perspective* (Round Hall Press, 1994), 48 at 52-54.

to ensure their execution, no real way of punishing an errant State which chooses to ignore the ruling of the ECtHR. There are some signs that the Court is growing more intolerant of States that ignore its interim orders to preserve applicants' rights;[106] however, in the event of a State breaching such an order there is little Strasbourg can do other than declare a breach of Article 34[107] by the State in question. Furthermore, applicants to Strasbourg have a long wait before their case is heard: the popularity of the Court of Human Rights has created such a backlog in cases that the system has justifiably been described as "in crisis".[108] The measures proposed by the Council of Europe to tackle this situation have potentially unwelcome implications for the right of individual petition – the cornerstone of the system – and make the necessity of an adequate domestic remedy for breaches of Convention rights all the more necessary.[109]

In spite of the guarantee of "just satisfaction" in Article 41,[110] the system is more concerned with moral victories than financial redress. Indeed, the successful applicant may not even recoup the costs of the action, and the possibility of compensation is remote, unless this is easily quantifiable by the Court – e.g. the *Pine Valley* applicants were awarded £1,200,000 for pecuniary damage.[111] Even where an applicant wins the case and claims pecuniary damages, the Court will not automatically award this

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[106] *See*, e.g. *Mamatkulov and Abdurasulovic v. Turkey* (2005) 41 EHRR 25, *Times Law Report* of 13 March 2003. In that case, the Court took a dim view of Turkey's actions in extraditing the applicants to Uzbekistan before the ECtHR had had the opportunity to determine their application, even though the Court had already indicated its desire that they remain in Turkey until the Court could hear the matter. Although the Court had insufficient evidence before it to hold that the extradition breached the applicants' Article 3 rights, it nonetheless held that they had been denied the opportunity to make further arguments in support of their case. Turkey had thus violated their Article 34 right to individual petition, and had interfered with the Court's own power to ensure the effective implementation of the Convention (paragraph 108). The Court's displeasure was clear: the applicants were awarded Euro 5,000 each along with Euro 15,000 in costs (minus E2,613.17 that had been provided by way of legal aid).

[107] Article 34 reads: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the high contracting parties of the rights set forth in the Convention or the protocols thereto. The high contracting parties undertake not to hinder in any way the effective exercise of this right."

[108] Marie-Bénédicte Dembour, "'Finishing Off' Cases: The Radical Solution to the Problem of the Expanding ECtHR Caseload" [2002] EHRLR 604, at 604ff.

[109] These measures may be found in Protocol 14 of the Convention, adopted on 12 May 2004, and include the introduction of single-judge courts with the power to declare individual applications inadmissible. On a more sinister note, Article 12 of Protocol 14 adds an additional admissibility criterion, which is that an application may be declared inadmissible if "the applicant has not suffered a significant disadvantage, unless the respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by the domestic tribunal."

[110] *See* Appendix, at 16.

[111] Admittedly, one of the applicants in that case was also awarded 50,000 Euro in non-pecuniary damages.

amount without further scrutiny: in *Open Door Counselling*, the second named applicant sought £62,172 in respect of loss of income, but was only awarded £25,000 because the Court was unsure as to how the applicant had calculated that figure. As Connelly remarks, "the Court can hardly be described as generous in the awards it gives for less easily quantified non-pecuniary loss such as emotional stress and feelings of injustice."[112] Ample examples of low non-pecuniary awards can be found from the Irish cases before Strasbourg: in *Barry v. Ireland* (discussed *supra*),[113] the applicant claimed 75,000 Euro in respect of non-pecuniary damages, and was awarded 8,000; in *O'Reilly*, the applicants claimed, and were awarded, 1,000 Euro each;[114] in *McMullen*, the applicant claimed 85,000 Euro and was given 8,000;[115] in *DG*, the applicant claimed 63,500 Euro and received 5,000;[116] In those cases where the only remedy would be legislative or constitutional reform within the Contracting State, the Court has considered its own duty discharged by the finding that a breach of the Convention has occurred.[117] Typically, the amounts awarded by way of compensation by the domestic courts are much higher. However, as we shall see, the amount of compensation available under the new Act will not necessarily be generous either – at least where the applicant has sought a declaration of incompatibility.

A brief survey of the successful applications against Ireland reveals that the majority of the early cases involved Article 8 rights, namely those involving privacy and family life.[118] It is therefore arguable that Ireland is somewhat out of step with the rest of Europe as regards these issues – particularly in its persistent failure to accord the *de facto* family the same rights as its marital counterpart.[119] It could also be argued that,

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[112] Alpha Connelly, "Ireland and the European Convention" in Brice Dickson (ed) *Human Rights and the European Convention: The Effects of the Convention in the United Kingdom and Ireland* (Sweet & Maxwell, 1997), 185 at 207

[113] Application No 18273/04 *Barry v. Ireland*, Judgment of 15 December 2005.

[114] It is unusual for the Court of Human Rights to award the damages sought; however, the applicants in *O'Reilly v. Ireland* were more than reasonable in the amount claimed, which undoubtedly had an effect on the Court.

[115] Application No 42297/98 *McMullen v. Ireland* Judgment of 29 October 2004.

[116] (2002) 35 EHRR 1153.

[117] *Norris v. Ireland* (1988) 13 EHRR 146.

[118] *Norris v. Ireland* (1988) 13 EHRR 146, *Johnston v. Ireland* (1986) 9 EHRR 203, *Keegan v. Ireland* (1994) 18 EHRR 342, and arguably *Airey v. Ireland* (1979) 2 EHRR 305 all have elements of this theme.

[119] On the breadth of Strasbourg's definition of family life, *see* Dr Ursula Kilkelly, "Children, their Families and the European Convention on Human Rights" Conference Paper to the Irish Centre for European Law, TCD, 5 February 2001; *see* also Kath O'Donnell, "Protection of Family Life: Positive Approaches and the ECHR" (1995) 17(3) *Journal of Social Welfare and Family Law* 261; Eimear Brown, "Committed Relationships and the Law: The Impact of the European Convention on Human

until recently, Irish domestic law offered a lower level of protection to the right of freedom of expression than Strasbourg.[120] Some form of incorporation was thus desirable in that it would better facilitate the vindication of those rights which enjoy a higher level of protection under the ECHR, without lowering the constitutional standard of protection where this is higher.

Another interesting argument in favour of incorporation was that it would allow Ireland to participate in the judicial dialogue between Strasbourg and the Contracting States and may be able to shape the Convention rights in a manner consistent with our national sensitivities.[121] While it is uncertain how much Irish judges could actually influence the European Court with their interpretation of the ECHR, it is nonetheless possible that there are gains to be made from such an exchange of views. It is certainly true that the ECtHR has referred to Irish decisions in the past. For example, in *T and V v. United Kingdom*,[122] the Strasbourg Court referred to the Irish case of *The State (O) v. O'Brien*,[123] in which the Supreme Court held that section 3 of the Children Act, 1908, had not survived the enactment of the Constitution. That section provides that a sentence of death shall not be pronounced against a young person, but that in lieu thereof the court shall sentence the young person to be detained "during His Majesty's pleasure" and that, if so sentenced, the young person shall be detained in such place and on such conditions as the Chief Secretary may direct and that, while so detained, the young person shall be deemed to be in legal custody. The Prosecutor, O, was a young person within the meaning of the Act and was convicted of murder and sentenced "until the pleasure of the government be made known". In 1957 he was certified to be insane and detained in the Central Mental Hospital. In 1969 he applied to the High Court for an order of habeas corpus, which O'Keeffe P granted, on the basis that the power to select punishment was an integral part of the administration of

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Rights" from Oran Doyle and William Binchy (eds) *Committed Relationships and the Law* (Four Courts Press, Forthcoming).

[120] In fact, it will be argued in Chapter 7 that the standards currently applied in both jurisdictions are now somewhat similar. This may be because the Court of Human Rights is increasingly sensitive to the justifications for the restrictions on the right to freedom of expression, to the detriment of the right itself.

[121] This point was originally made in the UK context by Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department at the second reading of the HRA in the House of Lords (HL2R, 16 February 1998). See Parosha Chandran, *A Guide to the Human Rights Act, 1998* (Butterworths, 1999), at p24.

[122] (2000) 30 EHRR 121.

[123] [1973] IR 50.

justice in criminal cases, and section 103 purported to vest that power in the executive. The respondent appealed to the Supreme Court but lost,[124] again on the basis that all judicial power was now vested in the courts.[125] The Court of Human Rights had regard to this decision when holding that the analogous English provisions were in breach of the Article 6 right to be tried by an independent and impartial tribunal.[126]

Furthermore, there is an argument that the legislature might be more willing to initiate legal reform if the impetus to do so came from its own courts rather than from an international tribunal. There exists in Ireland a fairly consistent and pervasive "habit of obedience" to the decisions of the courts on the part of the executive and legislative powers, which might help to accelerate change.[127] While this is a reasonable point, the ECHR Act will not necessarily be 100% effective in effecting reform where Irish law does not accord with Convention standards, since a declaration of incompatibility will not have any effect on the validity of the provision in question.

The Pre-Incorporation Status of the ECHR in Ireland

The Convention's position in Irish law prior to the coming into force of the ECHR Act is succinctly summarised by Leo Flynn:

> "Neither the Convention nor the decisions of the European Court of Human Rights [were] a binding source of law in the Irish domestic legal order."[128]

Ireland's dualist approach to international law left the ECHR bereft of binding authority. A treaty ratified by Ireland does not have domestic legal force unless some other act is done to bring it into force in this jurisdiction, such as an Act of the

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[124] The respondent lost by four votes to one, McLoughlin J dissenting.
[125] *Per* Walsh J, at [1973] IR 50, at 70.
[126] The English section in question was section 53(1) of the Children and Young Person's Act 1933 (as amended), which allowed persons aged under 18 who had been convicted of murder to be detained "at her Majesty's pleasure". The duration of the term was wholly within the discretion of the Home Secretary, who, as a member of the executive, could hardly be said to be independent of it.
[127] A clear recent example of this was the government's reaction to the judgment in *C(C) v. Ireland*, Unreported, Supreme Court, 23 May 2006, in which the Supreme Court declared that section 1(1) of the Criminal Law (Amendment) Act 1935 was unconstitutional, in that it imposed strict liability for the offence of unlawful carnal knowledge of a girl aged under 15 years. The legislative response was swift: the problem has been remedied by the Criminal Justice (Sexual Offences) Act 2006, which states that sex with a child aged under 15 is an offence; however, thanks to section 2(3), it is a defence for the adult to prove that he or she honestly believed that the child had reached the age of 15 at the time of the offence.
[128] Leo Flynn, "The Significance of the European Convention on Human Rights in the Irish Legal Order" (1994) *Irish Journal of European Law* 4, at 11.

Oireachtas[129] or a constitutional amendment.[130] The constitutional provision often relied on by the courts to support this dualist approach is Article 29.6, which reads:

> "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

In the words of Andrew Drzemczewski, therefore, the ECHR was "binding on the State but not within the State,"[131] a situation which was perfectly legitimate in the eyes of the Strasbourg authorities, since it has long been established that there is no obligation on Contracting States to incorporate the Convention into domestic law.[132] However, it is clear that incorporation represents a particularly faithful form of compliance with a country's treaty obligations, and a Council of Europe Evaluation Group has commented that "Courts throughout the Contracting States can and should apply the Convention and afford redress for breaches of it."[133] Furthermore, from an Irish perspective, it has been argued that the true intention of Article 29.6 was to *facilitate* "the 'patriating' of international human rights laws", that the framers intended such treaties would be made part of domestic law. On such an interpretation, it is not the Constitution which has been the bar to their incorporation, but rather the "non-exercise of a political option available under the Constitution".[134]

So what was the extent of the ECHR's influence on the decisions of the Irish courts prior to incorporation? If it was not part of our domestic law, what, if any, persuasive authority did it have? Since the leading case of *In re Ó Láighléis*[135], the Irish courts have repeatedly refused to apply the provisions of the Convention when invited to do so by counsel. In that case, the Supreme Court made reference to Articles 29.6 and Article 15.2.1 of the Constitution[136] (the latter provides that the sole and exclusive

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[129] E.g. the Genocide Act, 1973, which gives the UN Convention on Genocide effect in Irish domestic law.

[130] Article 29.3.3° of the Constitution facilitates Irish compliance with EU law: "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the obligations of membership of the Communities, or institutions thereof, from having the force of law in the State."

[131] *Supra*, at 172.

[132] Drzemczewski, emphatically states that although the *travaux préparatoires* seem to indicate that this point was scarcely (if at all) debated, "There exists *no* legal obligation for member states to incorporate the substantive provisions of the Convention into domestic law."

[133] *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG (2001) 1, 27 September 2001, at 5.

[134] Donncha O'Connell, "The ECHR Act 2003: A Critical Perspective" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 1, at 1-2.

[135] [1960] IR 93.

[136] It should be noted that although the Supreme Court's interpretation of these Articles represents the prevalent Irish view, it has been criticised as "unduly restrictive" by Donncha O'Connell: "The Irish

legislative power in the State is vested in the Oireachtas) to justify its conclusion that it could not have regard to the ECHR (or, indeed to the UN Declaration of Human Rights) when adjudicating on the lawfulness of the applicant's detention at Curragh Internment Camp. In an oft-quoted passage, Maguire CJ, ruled that:

> "The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to the domestic law or purports to grant rights or impose obligations additional to those of domestic law.
>
> "The Court accordingly cannot accept the idea that the primary domestic legislation is displaced by the State becoming a party to the Convention…Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law … Nor can the Court accept the contention that [Part II of the Offences Against the State (Amendment) Act, 1940[137]] is to be construed in the light of, and so as to produce conformity with, a convention [sic] entered into ten years afterwards. The intentions of the Oireachtas must be sought in the conditions which existed when it became law."[138]

This case was consistently followed: *see*, for example, *The State (Sumers Jenings) v. Furlong*,[139] *Application of Michael Woods*,[140] and, more recently, *Doyle v. Commissioner of An Garda Síochána*[141] and *Adam v. Minister for Justice Equality and Law Reform*.[142] As recently as July 2003, the High Court was relying on *Ó Láighléis* in order to resist attempts to raise Convention arguments. In *JD (A Minor) v. Judge Michael Connellan*,[143] the applicant argued that provisions allowing his detention as an "unruly" minor were unconstitutional and contrary to the ECHR (in particular, to

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Constitution and the ECHR: Belt and Braces or Blinkers?" (2000) *Irish Human Rights Review*, 90, at 103.

[137] Part II contained a number of controversial provisions, e.g. section 4 granted a Minister of State special powers of arrest and detention of those he deemed to be "engaged in activities which, in his opinion, [were] prejudicial to the preservation of public peace and order or to the security of the State." Under section 7 the Minister was empowered to make provision for internment camps.

[138] At p125 of the report.

[139] [1966] IR 183. Davitt P (Teevan J concurring) and Henchy J explicitly applied the dicta of Maguire CJ.

[140] [1970] IR 154. Like *Ó Láighléis*, this case also involved an application for *habeas corpus*.

[141] [1999] 1 IR 429.

[142] [2001] 3 IR 53.

[143] [2004] 1 ILRM 202. The case was decided on 27 June 2003.

Articles 40.3 of the Constitution and Articles 3, 5 and 6 of the Convention[144]).[145] This argument was doomed to failure: the High Court had already upheld the constitutionality of section 102(3) of the Children Act, 1908,[146] and Murphy J found that the applicant had not put forward any evidential basis to justify departing from the earlier decision. The learned judge also (correctly) held that since the Convention was not part of domestic law, it was not open to the applicant to use the ECHR to challenge the validity of legislation.

The former Chief Justice, Ronan Keane, has advanced the following (somewhat rose-tinted) view that Irish judges have always taken notice of the Convention in relevant cases:[147] "Even in the absence of an express statutory provision of this nature [i.e. Section 2(1) of the ECHR Act, which contains the obligation to interpret and apply Irish law in accordance with the Convention insofar as practicable], Irish courts have considered themselves entitled to have regard to the provisions of the Convention in interpreting and applying the law."[148] To illustrate his point, he refers to *The State (Healy) v. Donoghue*,[149] which concerned the effective (and wrongful) denial of the

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[144] Of the Convention grounds, the sole ground on which leave was granted was Article 6.

[145] The impugned provisions were sections 97(1) and 102(3) of the Children Act, 1908. The applicant argued that these sections could not have survived the enactment of the Constitution. Section 97(1) states that:

> "A court of summary jurisdiction, on remanding or committing for trial a child or young person who is not released on bail, shall, instead of committing him to prison, commit him to custody in a place of detention provided under this Part of the Act and named in the commitment, to be there detained for the period for which he is remanded or until he is thence delivered in due course of law, provided that in the case of a young person it shall not be obligatory on the court to so commit him if the court certifies that he is of so unruly a character that he cannot be safely so committed, or that he is of so depraved a character that he is not a fit person to be so detained."

Section 102 is in similar terms.

[146] *JG v. Governor of Mountjoy Prison* [1991] 1 IR 373. Murphy J held that similar considerations applied to section 97(1): the power to detain young persons in specified circumstances was not an unjust attack on the applicant's rights.

[147] *See* Ronan Keane CJ, "Issues for the Judiciary in the Application of the ECHR Act, 2003", Speech to the Law Society and Human Rights Commission Conference on New Human Rights Legislation, 18 October 2003.

[148] A similarly rosy view was evident in the UK. During the parliamentary debates on what was then the Human Rights Bill, the Lord Chancellor, Lord Irvine of Lairg, said, "The United Kingdom already accepts that Strasbourg rulings bind": Lord Chancellor, Lord Irvine of Lairg, addressing the House of Lords during the Opening Speeches at the second reading of the Human Rights Bill, from Jonathan Cooper and Adrian Marshall-Williams (eds) *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Hart Publishing, 2000) at 2. For the official report, *see* Official Report, House of Lords, 3 November 1997, vol 582, col 1227. For the official report, *see* Official Report, House of Lords, 3 November 1997, vol 582, col 1227. Presumably, Lord Irvine was referring to the binding effect of judgments of the Court of Human Rights on the United Kingdom as a state. It certainly could not be argued that the British courts accepted that such judgments bound *them*.

[149] [1976] IR 325.

right to legal aid in a criminal matter.[150] Using a tactic not dissimilar to post-incorporation pleadings, the prosecutor relied on Article 6(3)(c) of the Convention as an additional prop to his main argument, which was that his constitutional rights under Articles 38 and 40 had been breached. O'Higgins CJ based his judgment (which was in the prosecutor's favour) largely on the fair trial provisions of the Irish Constitution, using the ECHR merely as an illustration of the general international trend in favour of allowing all persons at risk of imprisonment the right to free legal representation where they do not have the means to pay for it themselves.[151] Significantly, in the next breath O'Higgins CJ referred to recent US decisions on this point, before returning to the constitutional argument.[152] One might reasonably surmise from the Chief Justice's judgment that he viewed the Convention as having no greater persuasive authority than those of his American counterparts. His colleagues paid even less attention to the prosecutor's Convention arguments, with Henchy J relying exclusively on the constitutional considerations,[153] and Griffin J concluding that, on the facts, the District Judge had acted in excess of his jurisdiction.[154] Kenny J referred to US case law and even the Magna Carta, but not to the ECHR![155]

Keane also uses *Ó Domhnaill v. Merrick*[156] as an example of an occasion where the majority of the Supreme Court thought themselves "entitled to have regard to the international obligations which the State had assumed under the Convention."[157] It is worth noting, as a preliminary point, that the majority judgment was that of Henchy J, with whom Griffin J concurred, and that both were unfavourably impressed by the "inordinate and inexcusable delay"[158] in the case. It is true that Henchy J, rather controversially, hinted that since the Statute of Limitations of 1957 was enacted after

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[150] The prosecutor had not been informed of his right to legal aid at his first trial, and although he was granted legal aid at a subsequent trial for a different offence, he was not represented because his solicitor had withdrawn from the legal aid scheme in the meantime. The prosecutor succeeded before the Supreme Court.

[151] At 348ff of the Report. At 351, the Chief Justice notes that, at the time Ireland ratified the ECHR, only those charged with murder were entitled to such assistance, before concluding that, "It is sufficient to say that the existence of the Convention demonstrates clearly that it was then generally recognised throughout Europe that, as one of his minimum rights, a poor person charged with a criminal offence had the right to have legal assistance provided for him without charge."

[152] *See* 351-352.

[153] At 353-356.

[154] At 357-361.

[155] At 363-364 of Kenny J's judgment.

[156] [1984] IR 151.

[157] At 4 of the article.

[158] At 157 of the Report.

Ireland's ratification of the Convention, that law should be construed and applied according to our Convention obligations in the absence of a contrary intent. Interestingly, neither side in the case had mentioned the Convention – Henchy J referred to it of his own volition.[159] This pro-ECHR attitude is somewhat unusual, and does, admittedly, support Keane's argument that Irish judges did bear the Convention in mind. However, one swallow does not make a summer, and not all members of the Court agreed with Henchy J's approach. McCarthy J was vociferous in his dissent on the Convention: after appearing to rap his colleague's knuckles for referring to the Convention when it had not been raised during the proceedings, and while accepting the general principle that statutes should, so far as possible be interpreted in a manner consistent with international law, he concluded:

> "As I have said, the matter was not argued during the course of this appeal, but since, as Mr. Justice Henchy has pointed out, the Convention is not part of the domestic law of the domestic law of the State (*In re Ó Láighléis*), I cannot subscribe to the view that the Statute of Limitations (passed in 1957, four years after the ratification of the Convention...) is to be limited by the terms of Article 6(1) of the Convention."[160]

Ó Domhnaill v. Merrick is not the only case involving Henchy J's comparatively "Convention friendly" views relied upon in Keane's thesis: Keane also relies on Henchy J's judgment in *The State (DPP) v. Walsh and Coneely*,[161] arguing that the case is authority for the idea that the Irish law of criminal contempt of court accords with Articles 5 and 10 of the ECHR.[162] That well-known case concerned contempt proceedings against members of an anti-death penalty group who published allegations that the Special Criminal Court lacked independence and had abused the rules of evidence during the trial of two persons accused of the capital murder of a policeman. When ordered to answer the contempt charges, the accused submitted that there was no jurisdiction to try them without a jury – an argument that went to the

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[159] *See* 159 of the Report. Nevertheless, even Henchy J was careful to refrain from expressing "a concluded opinion" on this point (at 159).
[160] At 166.
[161] [1981] IR 412.
[162] *See* 5 of Keane's article.

Supreme Court, who concluded that the High Court did, indeed, have the necessary jurisdiction in all the circumstances.[163]

In the course of his judgment, Henchy J makes extensive reference to US case law, and ultimately relies on the relevant Irish authorities; his reference to Keane's "presumption" is a cursory one at best:

> "In upholding the current position, to the extent of saying that it is for a judge and not for a jury to say if the established facts constitute a major criminal contempt, I would stress that, in both the factual and legal aspects of the hearing of the charge, the elementary requirements of justice would have to be observed. There is a presumption that our law in this respect is in conformity with the European Convention on Human Rights, particularly articles 5 and 10(2) thereof."

This somewhat laconic reference is hardly evidence that the Convention occupied a central place in the Irish judicial psyche.

Another case in which a pre-ECHR Act court referred to the Convention is *Desmond v. Glackin (No 1)*,[164] in which O'Hanlon J expressed the view that the grounds for restricting the constitutional right to express one's opinions (i.e. that they can be restricted in the interests of "public order and morality"[165]) corresponded to the legitimate grounds for limiting the right to freedom of expression in Article 10(2) ECHR.[166] The fact that O'Hanlon J quotes extensively from the Convention case law lends some support to the theory that the pre-incorporation decisions of the High Court were sometimes more generous to the Convention than those of the Supreme Court. However, it was hardly a major innovation for the High Court to say that the Convention and Constitution agree that the right to freedom of expression is not absolute and must sometimes yield to other considerations, such as the need to protect the authority of the courts. Rather, the judgment merely supports O'Connell's "belt and braces" argument, discussed *infra*. Ultimately, O'Hanlon's judgment rests on the facts of the case: although the respondent's remarks were "injudicious and indiscreet",

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[163] Henchy, Griffin and Kenny JJ felt that a jury trial was not necessary since the case did not concern any dispute as to the facts.
[164] [1993] 3 IR 1.
[165] Article 40.6.1°.
[166] At 28.

the applicant had failed to make out a case for attachment of the respondent for contempt of court.[167]

Keane also implies that Irish judges are more than willing to have regard to the ECHR when creating new unenumerated rights, on the basis that:

> "...Barrington J, speaking for the Supreme Court in *Doyle v. Commissioner of An Garda Síochána* [1999] 1 IR 249, indicated that it could be helpful to an Irish court to have regard to the Convention when it was attempting to identify the unspecified rights guaranteed by Article 40.3 of the Constitution."[168]

Were that the case, it would certainly seem to be a logical step for an Irish court to take; but, with respect, this view is not really consistent with the general tone of Barrington J's judgment. The plaintiff in *Doyle*[169] argued that he was an indirect victim of a violation by the United Kingdom of Article 2 ECHR (the right to life), on the basis that the UK had failed to ensure the adequate investigation of the Dublin-Monaghan bombings of 1974, in which the plaintiff's daughter and two granddaughters were killed.[170] In furtherance of this claim, the applicant had lodged an application with the European Commission of Human Rights, and then sought a declaration in the Irish courts that he was entitled to full discovery of all documents relating to the Gardaí's investigations of the bombings in order to facilitate his claim in Strasbourg.

In view of the previous authorities, and given his acceptance of the fact that the Convention did not form part of Irish law, Mr Doyle's reliance on the ECHR before the High and Supreme Courts can only be described as audacious. He was, unsurprisingly, unsuccessful in both Courts: in the High Court, Laffoy J concluded that the Convention was wholly irrelevant to the plaintiff's arguments. The only remotely relevant Convention provision was Article 25, which enjoins High Contracting Parties not to hinder the effective exercise of the right to petition the Strasbourg institutions; however, the right of individual petition could not alter the

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[167] At 33-34. The "injudicious" remarks had been made about a decision of the High Court that had already been made, although judicial review proceedings were pending.
[168] At 6 of Keane's article.
[169] [1999] 1 IR 249.
[170] Article 2 ECHR protects the right to life; the Court of Human Rights has accepted on several occasions that where the State authorities fail to adequately investigate a murder that failure may amount to a breach of Article 2: *see*, *inter alia*, *Finucane v. United Kingdom* (2003) 37 EHRR 29.

fact that the High Court lacked jurisdiction to order discovery against a body or person not named in the complaint to the European Commission on Human Rights.[171] The plaintiff's attempt to argue that his right to apply to the Commission depended upon the grant of discovery against the Gardaí failed once again in the Supreme Court. Barrington J accepted that "The Convention may overlap with certain provisions of Irish constitutional law and it may be helpful to an Irish court to look at the Convention when it is attempting to identify unspecified rights guaranteed by Article 40.3 of the Constitution."[172] However, Barrington J concluded by roundly dismissing the plaintiff's ECHR-based arguments on the settled ground that the Convention was not a part of Irish law,[173] and it is difficult to see how one can reasonably argue that this judgment adopted the positive attitude to the use of the ECHR by Irish judges that Keane argues existed pre-incorporation.

An examination of pre-incorporation case law in point confirms that the Irish courts did not habitually refer to the provisions of the ECHR even when considering parallel constitutional rights, often preferring to rely solely on the Irish law relating to the right in question. Despite one prominent judge's assertion that "[t]he Convention…is by no means *terra incognita* to Irish lawyers,"[174] it is more accurate to say, of pre-incorporation decisions, "Despite the occasional dicta…the Convention cannot be said to have implanted itself in Irish judicial minds."[175] On the contrary, the Irish courts consistently missed opportunities to have regard to the provisions of the Convention when these could have been helpful and insightful: Leo Flynn went so far as to identify a "pattern of regular omission" of the ECHR from domestic decisions which "undermine[d] any depiction of the Convention as a consistently important factor in the calculations of Irish decision-makers."[176]

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[171] At 259. The learned judge also doubted that the defendant had any relevant documentation that the respondents to the European action (i.e. the RUC and the United Kingdom) would not have in their possession.
[172] At 268.
[173] At 268-269: The judge noted that the status of the ECHR in Irish law "contrast[ed] sharply" with that of the European Union. He was, apparently, unaware of any domestic status the Convention might have through the medium of EU law.
[174] Mr Justice Hardiman, "Incorporation of the European Convention on Human Rights into Irish Law", Law Society Conference, 14 October 2000, at 3.
[175] Leo Flynn, "Ireland", at Chapter 5 of Conor A Gearty (ed) *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers, 1997), 177 at 193.
[176] *Supra*, at 211.

In their determination not to allow the Convention to be incorporated by the back door,[177] the Irish courts even refused to take cognisance not only of decisions of the ECtHR which were directly in point, but even of decisions of that Court against Ireland. An example of the *first* category is the famous case of *Norris v. Attorney General.*[178] As is well known, Senator Norris failed in his constitutional challenge to Sections 61 and 62 of the Offences Against the Person Act, 1861, and to the 1885 Criminal Law (Amendment) Act, which effectively criminalized homosexual behaviour between consenting male adults. The Supreme Court, by a majority of 3-2,[179] dismissed his claims that these Victorian provisions were unconstitutional and had not, therefore, been carried over into Irish law by Article 50 of the Constitution.

The Supreme Court judgment in *Norris* flew in the face of the Strasbourg decision in *Dudgeon v. United Kingdom,*[180] in which the exact same provisions, which also still applied in Northern Ireland (although not elsewhere in the UK), were found to be contrary to Article 8 of the Convention.[181] The Supreme Court were aware of the *Dudgeon* decision: it had been raised by Mary Robinson, counsel for Senator Norris. Mrs Robinson argued that *Dudgeon* "should be regarded by this Court as something more than a persuasive precedent and should be followed" and that "since Ireland ratified and confirmed the Convention, there arises a presumption that the Constitution is compatible with the Convention and that, in considering a question as to inconsistency under Article 50…regard should be had as to whether the laws being considered are consistent with the Convention itself."[182] However, O'Higgins CJ, for the majority, emphatically rejected this line of argument, taking the view that counsel's contention would allow the executive to change "both the Constitution and the law."[183] He concluded:

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[177] In *People (DPP) v. McKeever* Unreported, 11 July 1992, the Court of Criminal Appeal reiterated that the decision to incorporate the ECHR into Irish law is one that can legitimately only be taken by the Oireachtas.
[178] [1984] IR 36.
[179] O'Higgins CJ, Finlay P and Griffin J; Henchy and McCarthy JJ dissenting.
[180] (1981) 4 EHRR 149.
[181] This is the Article which guarantees, *inter alia*, respect for private life.
[182] At p66 of the report.
[183] *Ibid.*

> "Neither the Convention on Human Rights nor the decision of the European court in *Dudgeon v. United Kingdom* is in any way relevant to the question which we have to consider in this case."[184]

Nor did the Convention argument fare any better with the minority of the Supreme Court. The Convention-friendly Henchy J, who dissented as to the constitutionality of the impugned provisions, agreed with the majority on this point, pointing to the fact that not only did the Convention not form part of Irish law, but also to the lack of any counterpart to Article 8 ECHR in the Irish Constitution.[185] McCarthy J, who also dissented, reserved judgment on this point, preferring to base his judgment on the right of privacy derived from Article 40 of Bunreacht na hÉireann.[186]

The approach of the Supreme Court in *Norris* was perhaps not particularly surprising: an earlier High Court judgment had gone even further and refused to apply a Strasbourg decision against Ireland herself. In *E v. E*[187] the defendant argued that the State's failure to provide him with legal aid in order to defend his wife's claims for custody of their children and maintenance amounted to a breach of the ECHR. He contended that the State was bound for the future by cases in which it had been a party - in this case, by *Airey v. Ireland*,[188] which effectively led to the introduction of a limited civil legal aid system in Ireland,[189] and that he was entitled, in the circumstances, to legal aid.[190] O'Hanlon J rejected this argument on the ground that the defendant had failed to establish any existing right under Irish law that had been infringed.[191] Interestingly, however, O'Hanlon J suggested that the question of

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[184] At p67 of the report.
[185] At pp68-69 of the report.
[186] At p104 of the report.
[187] [1982] ILRM 497.
[188] (1972) 2 EHRR 305.
[189] The inadequacies of the civil legal aid scheme were criticised in Editorial, "The Submission of the Free Legal Advice Centres to the Council of Europe on the Crisis on Legal Aid Services in Ireland" (1990) *Irish Law Times* 289. The submission alleged that the system set up in the wake of the *Airey case* was so inadequate as to amount to a breach of Ireland's obligations under the ECHR.
[190] It is interesting to note that both Mr E and David Norris were represented by the same counsel, which may account for the similarities in the legal arguments in both cases. Unfortunately, the ECtHR did not set out any precise test for the circumstances in which it would be necessary to provide legal aid in order to vindicate a person's Article 6 rights; indeed, the Court explicitly resiled from doing so, and noted that in some cases it would be sufficient to allow litigants to appear in person (paragraph 26).
[191] The fact that this meant that the learned judge was effectively refusing to give effect to a Strasbourg decision against Ireland did not go unnoticed: *see* Ray Murphy, "The Incorporation of the ECHR into Irish Domestic Law" [2001] EHRLR 640, at 643. This judgment contrasts with a recent post-ECHR Act decision of Kelly J: *see O'Donoghue v. Legal Aid Board and Ors* Unreported, High Court, Kelly J, 21 December 2004.

whether "the State in setting up the Scheme of Civil Legal Aid and Advice did not go far enough in complying with the requirements of the European Convention, as interpreted by the Court of Human Rights in the *Airey* case...should properly be determined by...a reference to the matter of the European Commission of Human Rights initially, with the possibility of later determination by the Court of Human Rights."[192] Arguably, this decision seems at once hostile to the notion of regarding the ECHR as binding on the Irish courts and favourable to a situation analogous to that of EC law, which allows questions of Community law to be referred to the European Court of Justice (and now also to the Court of First Instance).

More recently, the Supreme Court has refused to follow another ruling of the Strasbourg Court against Ireland: in *WO'R v. EH*[193] the High Court stated a case to the Supreme Court which included the question:

> "Is the concept of *de facto* family ties as referred to in the European Court of Human Rights decision of *Keegan v. Ireland* (1994) 18 EHRR 342 afforded recognition under the Constitution and what rights, if any, accrued to the applicant arising from same?"

Hamilton CJ was adamant that the Strasbourg ruling was "not part of the domestic law of Ireland."[194] He added that Articles 41 and 42 of the Constitution referred only to the family based on marriage and concluded that the notion of a *de facto* family was unknown to Irish constitutional law.[195] However, unfair this may seem, it could not have been otherwise: there is a plethora of case law in which the Irish courts have referred to the family as being "based on marriage".[196]

These cases support Donncha O'Connell's argument that "notwithstanding discernable differences in approach by the High Court and Supreme Court, the Convention and decisions of the Strasbourg authorities thereunder [were] of no more than persuasive value in domestic proceedings, depending on the nature of the issue being considered

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[192] At 499-500 of the report.
[193] [1996] 2 IR 248.
[194] At page 270 of the report.
[195] However, the Chief Justice did point out that in *JK v. VW* [1990] 2 IR 437 the Supreme Court had recognised the *existence* of *de facto* families "and also the fact that a natural father who lived in such a family might have extensive rights of interest and concern..." (also at p270 of the report).
[196] *See*, e.g. *The State (Nicolaou) v. An Bord Uchtala* [1966] IR 567.

by the particular court."[197] Indeed, a survey of the pre-incorporation case law shows that the Irish courts did not even regard these sources as all that "persuasive".

Although the Irish courts consistently refused to act as though bound by the ECHR and the decisions of its organs, they did at times refer to them in order to bolster an argument based on Irish law. Leo Flynn refers to this approach as the "belt and braces" exercise,[198] since it involved using the Convention to emphasise the importance of the particular constitutional right at issue in the case. However, both Flynn[199] and O'Connell[200] point out that in this regard the ECHR enjoyed no higher status than the other international human rights instruments to which Ireland was a party. An examination of the case law appears to support this assertion: in *O'Leary v. Attorney General*[201] Costello J in the High Court referred to Article 11 of the UN Declaration of Human Rights, 1948, Article 6(2) of the ECHR, Article 8(2) of the American Convention on Human Rights of 1969, and Article 7 of the African Charter on Human Rights and Fundamental Freedoms to support his conclusion that the presumption of innocence of an accused in a criminal trial was protected by the Irish Constitution.[202] However, despite the fact that the learned judge cited a decision of the European Convention on Human Rights (*X v. United Kingdom*[203]) to underline his view that the legislature could legitimately restrict this right, he did not give any greater significance to the ECHR than he gave to the other instruments, two of which Ireland has not (for obvious geographical reasons) ratified.

Because of Ireland's dualist system, there was, of course, no legal reason why the courts had to give the Convention greater persuasive authority than any other international treaty to which Ireland was a party. However, the possible consequences

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[197] *Ibid,* Note 33, at 90.
[198] Leo Flynn, "The Significance of the European Convention on Human Rights in the Irish Legal Order" (1994) *Irish Journal of European Law* 4, at 12.
[199] *Supra*, at 13.
[200] *Supra*, at 95.
[201] [1993] 1 IR 102.
[202] It is interesting to note, in passing, that the Plaintiff, who had been convicted of IRA membership after being found in possession of posters saying "IRA calls the shots" ultimately lost the case; Costello J was of the opinion that Section 24 OASA, 1939, merely shifted an evidential burden of proof onto the accused, rather than the legal burden. It was therefore constitutionally permissible. The other provision complained of, Section 3(2) of the 1972 OASA, was held to be constitutional as it only made certain statements of belief admissible, but did not force the court to convict on the basis of exculpatory evidence.
[203] Decision 5124/71.

of breaching the Convention were real, and the courts might at least have borne this in mind in allowing the ECHR and its case law to inform their jurisprudence, if not to guide it. It is difficult to argue with Flynn's contention that, "If anything, such judicial references to the European Convention on Human Rights as one of a number of international documents on human rights seem[ed] intended simply as evidence of the high level of protection of rights afforded by the Irish Constitution."[204] It is arguable that decisions in which the ECHR is merely referred to as one of many examples of international law and practice undermined its importance: in discussing, on the one hand, the ECHR, to which Ireland is a party, and, on the other, the African Charter, to which Ireland patently is not, the courts implied that the one is of no more persuasive authority than the other; that the role of the ECHR is no more than that of "a minor, supporting player, whose words support those of the protagonist but add little, if anything, of value."[205]

One final suggestion as to how the courts could have lent the pre-incorporation ECHR greater weight is worth noting: GF Whyte argued that the international law principle of *pacta sunt servanda* could have made it possible for the Irish courts to apply the ECHR when to do otherwise would be to place Ireland in breach of her treaty obligations.[206] This principle of international law has widespread acceptance in many States, and in the UK one accepted rule of statutory interpretation is that Parliament intends to comply with its international obligations.[207] In the Irish context, Whyte bases his theory on Article 29.3 of the Constitution, which states that,

> "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States."

There seemed to be some support for this hypothesis in the subsequent case of *Ó Dómhnaill v. Merrick*,[208] where all three members of the Supreme Court accepted that as a general rule, statutes should be interpreted where possible in a manner consistent with the State's international law obligations, although McCarthy J did not agree that

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[204] *Supra*, at p13.
[205] The protagonist being the Irish Constitution. Leo Flynn, "Ireland", at Chapter 5 of CA Gearty (ed) *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers, 1997), p177 at p191.
[206] GF Whyte, "The Application of the European Convention on Human Rights Before the Irish Courts" [1982] 31 *ICLQ*, 856.
[207] Stephen Grosz, Jack Beatson QC, and Peter Duffy QC, *Human Rights: The 1998 Act and the European Convention* (London: Sweet & Maxwell, 2000), at p1.
[208] [1984] IR 151.

this meant that the Statute of Limitations had to be interpreted in accordance with the Convention.[209] Furthermore, Whyte's hypothesis has not re-surfaced in subsequent case law. It is submitted that the *pacta sunt servanda* argument was never going to have any realistic prospect of success in achieving a way for the domestic courts to make use of the ECHR, whatever possible application it might have in a case involving an established rule of international customary law.

For most Irish judges, the apparent impossibility (post-*Ó Láighléis*), of relying on the ECHR was not a problem. Many pre-incorporation authorities asserted that there was no difference between the ECHR jurisprudence and Irish constitutional jurisprudence. In *Callaghan v. Gerald Duckworth and Company Limited and Louis Blom Cooper*,[210] the second named defendant's preliminary application to have the libel action against him struck out relied to an unusual degree on the Convention;[211] the plaintiff accepted that the High Court was entitled to have regard to the provisions of the ECHR even though that document did not form part of Irish law.[212] This application was unsuccessful: it was argued before Ó Caoimh J, in the High Court, that the Irish courts had already held that domestic law appeared to accord with the requirements of the Convention;[213] indeed, in *de Rossa v. Independent Newspapers plc*[214] Hamilton CJ noted that both the Constitution and Convention protected the citizen's right to both his good name and freedom of expression.[215] It must be admitted that, in *de Rossa* at least, the Supreme Court was correct in its assessment that there was little difference between Irish and Convention law: the European Court of Human Rights was to approve the Supreme Court's judgment in the subsequent challenge taken by the newspaper.[216]

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[209] At p166 of the report.
[210] Unreported Judgment of the High Court, O Caoimh J, 31 July 2003.
[211] The second named defendant, Blom Cooper, was an eminent English QC; the fact that the Human Rights Act had, for some time, been in force in the UK, along with the fact that the coming into force of European Convention on Human Rights Act was anticipated in Ireland, may account for his apparent eagerness to rely on the Convention.
[212] *See* 26 of the unreported judgment.
[213] The learned judge, at 27, referred specifically to the judgment of O'Hanlon J in *Desmond v. Glackin* [1993] 3 IR 1, in which there was a challenge to the law in relation to contempt of court. On that occasion, O'Hanlon J remarked (at 28-29) "As Ireland has ratified the Convention and is a party to it, and as the law of contempt of court is based…on public policy, I think it is legitimate to assume that our public policy is in accord with the Convention or at least that the provisions of the Convention can be considered when determining issues of public policy."
[214] [1999] 4 IR 432. This case is discussed in greater detail later in this thesis.
[215] *De Rossa v. Independent Newspapers plc* [1999] 4 IR 432, at 456.
[216] *Independent News and Media plcs v. Ireland* Application No. 55120/00, Judgment of 16 June 2005.

Whatever its substantive impact may be, the mere enactment of the European Convention on Human Rights Act appears to have had a slight impact on judicial attitudes. Some of the cases that came before the courts after 31 December 2003 naturally had their origins prior to that date; as such, the Act could not apply to them. However, some judges, while recognising that the Act was irrelevant, nevertheless referred to the persuasive authority of the Convention itself: *see*, e.g., *Caldwell v. Judge Mahon and Ors*,[217] and *Murphy v. The British Broadcasting Corporation*.[218] It is possible that these decisions demonstrate the truism that law can shape opinion as well as the other way round.

For these reasons, it was indeed the case, pre-incorporation, that an Irish litigant would be better advised to have regard to the dicta of Dublin than to those of Strasbourg.[219]

The ECHR and Irish Legislation Pre-Incorporation

So much for the pre-ECHR Act jurisprudence. But given that the decisions of the Court of Human Rights were at least "binding on the state", surely the legislature, at least, must have responded to the requirements of the Convention? In theory, the Parliamentary draftsman should ensure that new legislation does not conflict with

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[217] Unreported, High Court, Hanna J, 15 February 2006.

[218] Unreported, High Court, McKechnie J, 21 December 2004. The applicant was charged with offences arising out of the Omagh bombing of 1998. Prior to the applicant's trial in the Special Criminal Court, the respondent had broadcast a television programme naming the applicant as a terrorist involved in the Omagh bombing. The application before McKechnie J was for the court to determine whether the applicant had locus standi to bring the proceedings in the High Court. The judge held that he did indeed have standing. In the course of argument, the respondent relied upon Article 10 ECHR. Even though the programmes had been broadcast prior to the coming into force of the ECHR Act, McKechnie J does not appear to have objected to their reliance on that Article. The defendants in *DPP v. Independent Newspapers and Ors* Unreported, High Court, Dunne J, 21 July 2005, also relied upon Convention arguments. The DPP alleged that the respondents had interfered with the administration of justice. The notice party to the proceedings had been found guilty of multiple counts of rape and sexual assault. Between the date of his conviction and his sentencing, the respondents published material that was highly prejudicial to the notice party. The conviction, publication and sentencing all took place before the coming into force of the ECHR Act, but the applicants argued that the Convention was nevertheless of persuasive authority. In the end, nothing turned on the Convention point; in any case, the Convention does not permit the media to interfere with another party's right to a fair trial.

[219] Leo Flynn, "Ireland", at Chapter 5 of CA Gearty (ed) *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers, 1997), p177, at p212.

Ireland's international treaty obligations.[220] Sadly, however, it would appear that the ECHR had little influence over the extent to which Irish law was reformed to keep pace with our Convention obligations. While the then Minister for Justice referred to the ECtHR decisions of *Malone v. United Kingdom*[221] and *Klass v. Federal Republic of Germany*[222] as reasons behind the Interception of Postal Packets and Telecommunications (Regulation) Act, 1993, some Senators were of the view that the Minister was rather more influenced by the High and Supreme Court actions taken against his predecessor by journalists whose phones had been tapped.[223] Even if the Strasbourg cases were the catalyst, they can hardly be said to have had an immediate impact: they dated from eight and thirteen years before the Regulations respectively. Connelly points out that there appeared to be no system for examining the ECtHR's judgments to verify if Irish law was consistent.[224] Flynn notes that the ECHR has been "highly influential in the formulations of the Law Reform Commission in its work, such as in its studies on libel and contempt of court;"[225] although he also admits that the Commission nevertheless chose to propose the new offence of blasphemous libel even though it felt that such an offence would be inconsistent with the terms of the Convention.[226] In any case, it is questionable how much sway the Law Reform Commission actually holds over the parliamentary draftsman.

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[220] Edward Donelan, "The Role of the Parliamentary Draftsman in Preparing Legislation in Ireland" (1992) 14 *DULJ* p1, at p5.

[221] (1985) 7 EHRR 14. The applicant was an antiques dealer who was charged with, and later acquitted of, of the offence of handling stolen goods. His telephone had been tapped during the investigation on foot of a warrant granted by the Home Secretary, whose had absolute discretion in the matter. The Court of Human Rights held, unanimously, that there had been a breach of the applicant's Article 8 right to privacy, and complained that the law did not fulfil the requirements of clarity and accessibility.

[222] (1979-1980) 2 EHRR 214. In that case, a German law allowed the authorities to open and inspect mail and to listen to telephone calls to protect, *inter alia*, against "imminent dangers" against the state. In order for this to be authorised by the Land authority or designated federal minister, there had to be some factual indications that it was necessary. The ECtHR accepted that the applicants, who were all lawyers, were all *potential* victims; however, there had been no breach of Article 8 in the circumstances. Furthermore, the measures pursued a legitimate aim; the Court thus accepted that the existence of legislation "granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional circumstances, necessary in a democratic society" (paragraph 48).

[223] See Seanad Éireann Parliamentary Debates, vol 132, col 787. The Irish judgment referred to is *Kennedy v. Attorney General* [1987] IR 587.

[224] Alpha Connelly, "Ireland and the European Convention" in Brice Dickson (ed) *Human Rights and the European Convention: The Effects of the Convention in the United Kingdom and Ireland* (Sweet & Maxwell, 1997), 185 at 205.

[225] Leo Flynn, "Ireland", at Chapter 5 of CA Gearty (ed) *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers, 1997), 177 at 188.

[226] Law Reform Commission, *Consultation Paper on the Crime of Libel* (Dublin, August 1991), 173.

It is true that many of the successful applications against Ireland eventually led to law reform within the jurisdiction: for example, *Airey v. Ireland*[227] led to the establishment of the (albeit extremely limited) system of civil legal aid; after five years of waiting, the Criminal Law (Sexual Offences) Act, 1993, was enacted to bring Ireland into line with the ECtHR judgment in *Norris*; the Status of Children Act of 1987 went some way towards granting equality to children born outside marriage post-*Johnston*; a constitutional amendment satisfied the Court's concern with freedom of information in *Open Door Counselling*; the *Keegan* case led to the reform of the Irish law on adoption to take greater account of the father's wishes.

However, it is arguable that even in these cases the adverse decision of the European Court of Human Rights was only one factor influencing legislative change, and possibly even a minor factor at that. Alpha Connelly points out that "Some of the successful applications have played a part in legislative and administrative reform in Ireland, but, in all cases, reform was also fuelled by domestic pressures and, with the possible exceptions of the decriminalisation of homosexual conduct in the wake of *Norris* and the proposed improvement in the rights of unmarried fathers as a result of *Keegan*, would probably have occurred when it did irrespective of the judgment of the European Court."[228] This argument appears all the more forceful when we consider that the Status of Children Bill was already before the Oireachtas when the *Johnston* decision was handed down, and that in most of the other areas, reform had already been suggested by both the Law Reform Commission and pressure groups within the country. The fact that it is politically expedient for a government to proclaim that legislation is the result of an attempt to promote human rights and a desire to abide by our international obligations should also not be forgotten. All in all, the situation is best summarised by Donncha O'Connell, who states that, "decisions of the European Court of Human Rights have accelerated legislative change rather than positively forced it."[229]

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[227] (1979) 2 EHRR 305.

[228] Alpha Connelly, "Ireland and the European Convention" in Brice Dickson (ed) *Human Rights and the European Convention: The Effects of the Convention in the United Kingdom and Ireland* (Sweet & Maxwell, 1997), 185 at 207.

[229] Donncha O'Connell, "Review of the Cases from the Republic of Ireland in Strasbourg over the Last Decade" in Gerard Quinn (ed), *Irish Human Rights Yearbook, 1995* (Round Hall, Sweet & Maxwell, 1995), 1 at 14.

This being the case, it is necessary to examine other factors that affect the degree to which the Convention is absorbed into domestic law, post incorporation. It is submitted that judicial attitudes to comity and the political situation in the country are important influences; furthermore, it is useless to incorporate additional human rights instruments if the domestic courts have no meaningful power of judicial review; finally, the method of incorporation used is also important in that it determines the normative status of the Convention in domestic law.

Chapter II

Factors Affecting the Post Incorporation Success of the ECHR: Judicial Attitudes, Comity and Politics

Introduction

The aim of the next three chapters is to discover how Ireland can maximise the positive effects of incorporation by learning from the example of the other Council of Europe Member States, all of which have already incorporated the ECHR. Conventional wisdom states that the method chosen to incorporate an international instrument will determine its status in the hierarchy of norms, and by extension impacts on its degree of influence as compared with the other sources of law within the State.[1] As will be apparent from Chapter 4, this is to some extent true; however, the hypothesis put forward in this chapter is that, while the model of incorporation chosen is important, it does not of itself determine the degree to which the ECHR is absorbed into national law. This chapter will ask what factors affect the absorption of international legal norms into the psyche of the domestic judge.

It is at least arguable that a more effective test to determine the influence of the Convention at national level should focus on the receptiveness of the domestic courts to arguments based on both the provisions and jurisprudence of the ECHR. One might try to examine the frequency with which the Convention and its case law are mentioned in the reported judgments of the domestic courts in States which have incorporated the Convention. However, even this approach is a little too simplistic: it is not sufficient to show that the Convention has been used to illustrate a point or to reinforce an assertion based on national law; for the ECHR to have true influence in the domestic legal sphere, litigants must have been able to rely on it in a meaningful sense. After all, the Irish courts referred to the Convention on a number of occasions

[1] The extent of this influence is affected by factors such as the Convention's ability to override national legislation, its self-executing character, and the possibility to invoke it before the courts: see HC Kruger, "Does the Convention Machinery Distinguish Between States which have and have not Incorporated it?" in JP Gardner, JP (ed) *Aspects of the Incorporation of the European Convention of Human Rights into Domestic Law* (London: The British Institute of International and Comparative Law and the British Institute of Human Rights, 1993) 13.

prior to incorporation without it ever having been a determinative influence. Indeed, in other States which already *have* incorporated the Convention it is not uncommon for the domestic courts to prefer to rely predominantly, or even exclusively, on the equivalent national provisions. For example, although he found examples of the Estonian courts referring to the ECHR to *support* legal reasoning, Rait Maruste "has never come across a decision where the Convention was used in the resolutive (operative) part of their decision."[2] In France, the criticism has been made that the Convention is not relied on as much as it could be, in part as a result of "persistent ignorance on the part of litigants, lawyers and judges."[3] Such ignorance is arguably both the cause and the result of the failure to refer to the Convention in appropriate cases. Finally, a practical problem with this test is that it does not take into account the fact that, in many civil code jurisdictions, the courts do not give such detailed decisions as their common law cousins, making it hard to see just how much (if any) weight is given to a treaty simply because it is mentioned in the course of proceedings.[4]

Another test which may be used in examining the influence of the Convention is the question of how often, if ever, it is used to supplement the national provisions on fundamental rights, in cases where the latter offer a lower level of protection.[5] This method allows the ECHR a realistic sphere of influence at national level. However, it is common for the national judiciary to take the view that since the domestic laws on human rights are broadly similar to the ECHR, there is no need to have regard to the

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[2] Rait Maruste, "Estonia", from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 277 at 287.

[3] Catherine Dupré, "France", from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 312 at 332.

[4] In judgments from civil code jurisdictions, the laws and treaties referred to are often listed without any great detail being given as to the relative weight to be attached to each.

[5] Indeed, it is arguable that if a ratifying State is not going to make some effort to bring domestic law into line with treaty provisions, there is little point in taking the step of ratification in the first place. Elizabeth Evatt notes that the United Nations' Human Rights Committee criticised the United States for ratifying the International Covenant on Civil and Political Rights without making any effort to update either Federal or State law, and for entering a number of reservations in relation to certain rights (notably the capital punishment of minors). *See* Elizabeth Evatt, "The Impact of International Human Rights on Domestic Law" from Murray Hunt, "Human Rights Review and the Public-Private Distinction" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002, 281, at 289. *See* also Human Rights Committee, *Concluding Observations on the Initial Report of the United States*, HRC Annual Report 1995 (A/50/40), paragraphs 278-279, and 292.

latter instrument. According to one author, such is the position in Greece, where the courts "tend to disregard the Convention on the erroneous assumption that constitutional protection suffices to remedy all injustices."[6] It *is* often the case that national constitutional provisions afford a higher level of protection to particular rights than the Convention Article which is their broad equivalent;[7] however, this is not always so, and in some states the attitude of the judiciary arguably verges on the xenophobic in their determination to have recourse only to domestic sources of law.

This chapter will examine some factors, other than the normative status of the Convention in domestic law, which have the potential to affect the degree to which the Convention is absorbed into the domestic legal system of an incorporating state. It is submitted that many other factors must be taken into account in order that any study on incorporation be complete. Such factors include (but are not necessarily limited to) judicial attitudes to the ECHR,[8] the political climate of the state in question, the tools available to the judiciary in reviewing incompatible decisions, and the existence (or absence) of a method of examining future legislation in terms of its compatibility with the Convention. It is proposed to study each of these factors in turn, in order that we may formulate a plan of action to increase the positive effects of incorporation in Ireland.

Judicial Attitudes to International Law in the Context of Domestic Law Disputes

The judges' role cannot be over-emphasised: the positioning of the ECHR in the hierarchy of norms notwithstanding, it is the judiciary who decide what part the Convention will play in domestic legal proceedings; only they can determine if it will

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[6] Krateros Ioannou, "Greece", from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 355 at 381.

[7] On the prevailing German preference for the Constitution as a source of rights, see JA Frowein, "Incorporation of the Convention into Domestic Law" in JP Gardner (ed) *Aspects of the Incorporation of the European Convention of Human Rights into Domestic Law* (London: The British Institute of International and Comparative Law and the British Institute of Human Rights, 1993) 3.

[8] It has been argued that the receptiveness of national courts to the decisions of a particular international tribunal is based on the acceptance of supranational law as real *law*, and that this is more likely to occur where the member states are homogenous in the sense that they possess "a particular set of political and economic beliefs and institutions that are uniquely congenial to the independent operation of the rule of law," as in the case of the European Union. See Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *American Journal of International Law* 205, at 234.

have a meaningful influence over the outcome of cases, or merely be used to prop up arguments grounded in national law. The mere fact that reference was made to the Convention in the course of a judgment is irrelevant in this context: in **England**, for example, the ECHR had been mentioned in more than 200 cases (prior to incorporation) without having any discernable impact on the result in the vast majority.[9] It is also, in reality, the judiciary who decide what level of "persuasive influence" the jurisprudence of the European Court of Human Rights will have over their decision-making. In particular, for the ECHR to have any influence within the state, the courts must be willing to look outside the domestic legal norms for their inspiration. Despite the fact that the military government ended in 1974, **Greek** judges have yet to take on board the implications of the Convention: it has been argued that this "phenomenon of extended non-application of the Convention can only be attributed to the inherent reluctance of Greek judges to accept that an international instrument may grant wider protection to the individual than the Greek Constitution."[10]

The notion that no human rights treaty can possibly grant a higher level of protection than the hallowed supreme national norm appears to be one which informs judicial attitudes to the ECHR in more than one state, at a conscious level or otherwise. However, it is submitted that refusal to take cognisance of the Convention and its case law by a court of an incorporating state has a deeper cause than patriotic pride in one's own constitution. Indeed, it is arguable that the attitude of the national judiciary to international law in general has a profound effect on the actual influence of international treaties in general (and the Convention in particular) on the local legal culture, and by extension on actual decisions. In those states where the courts frequently not only refer to, but actually *defer to*, principles of customary international law and treaties ratified by the state, the ECHR has necessarily gained a much stronger foothold than in states whose judiciaries appear positively hostile to arguments based

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[9] Nicolas Bratza, QC, "The Treatment of the European Convention on Human Rights by the English Courts" in JP Gardner (ed) *Aspects of the Incorporation of the European Convention of Human Rights into Domestic Law* (London: The British Institute of International and Comparative Law and the British Institute of Human Rights, 1993) 65 at 67.
[10] *See* Ioannou, (n6), at 364.

on international law.[11] It must be admitted that, prior to incorporation, Ireland had decidedly located herself in the latter camp.[12]

The reasons behind judicial reluctance to apply the Convention in some countries might be based upon outdated notions of the supremacy of state sovereignty. Steiner and Alston remark, "At its very threshold and to this day, the human rights movement has inevitably confronted antagonistic claims based on conceptions of sovereignty."[13] Indeed, this argument may go some way towards explaining the reluctance of Irish and (until the coming into force of the HRA in 2000) British judges to accept arguments based on Convention rights and case law, however short sighted this refusal may have been.[14] However, since the vast majority of Contracting Parties have now incorporated the Convention into domestic law, the sovereignty argument no longer holds water. Even discounting the incorporation issue, we should remember that the Convention system, like Community law, is to a large degree founded upon the desire to avoid "the excesses caused by unbridled State sovereignty." [15] Why, then, do the judges (and lawyers) in many of these states not take advantage of this new development? Any attempt to answer this question must necessarily take account of several factors which have the potential to influence judicial attitudes to international law.

One obvious influence is education: familiarity with the content and extent of the state's obligations under the Convention, and the impact of the form of incorporation chosen by the state mean that Convention arguments are more likely to be raised and understood.[16] Judges and lawyers must be made aware of the benefits of using the ECHR as part of any fundamental rights-based legal reasoning – not least because doing so would potentially decrease the number of applications to Strasbourg by

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[11] *See* Chapter 4.
[12] *See* Chapter 1.
[13] Henry J Steiner and Philip Alston, *International Human Rights in Context* (Second Edition, Oxford University Press, 2000), at 573.
[14] *See* Chapter 1. Naturally, it should not be forgotten that both Ireland and the UK are decidedly dualist in their outlook on international law, and this fact also contributed heavily to the feeling amongst the judiciary that the ECHR *could not* be applied by them domestically until the enactment of some measure to the contrary by the national legislature.
[15] Bruno de Witte, "Sovereignty and European Integration: the Weight of Legal Tradition" from Anne-Marie Slaughter, Alec Stone Sweet, and JHH Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford, 1998), 277 at 282. The author's remarks on sovereignty are made in the context of EC law, but it is submitted that they apply equally to the cession of sovereignty under the ECHR system.
[16] For an analysis of legal education in Germany, *see* Ingo von Munch, *Legal Education and the Legal Profession in Germany* (Nomos Verlagsgesellschaft, Baden-Baden, 2002).

unsatisfied litigants and by extension the number of embarrassing judgments against their country.[17] However, for this to be possible, sufficient copies of the Convention and its case law must be available in the national language and any minority languages used in the state. The populace, too, must generally be educated in the language of rights – it is a truism that a man who does not know his rights cannot demand them. The more frequently the Convention is cited before a court, the more quickly that court will be forced to inform itself of the reasoning behind such arguments (admittedly, this may be a somewhat circular argument – if judges showed themselves to be receptive to Convention-based arguments it is also likely that lawyers would raise such points more often).

Logically, therefore, we would expect the Convention to hold more weight in those states which ratified it at its inception than in newcomers to the Council of Europe. "Veterans" of the Convention system should, by now, be familiar with the provisions, mechanisms and case law of the ECHR (although long-term membership would not appear to have helped the ECHR gain ground in Turkey – see *infra*). By extension, time elapsed since the right of individual petition was accepted should also affect the Convention's influence, since adverse decisions handed down publicly by a respected international body are a sharp spur to reform for most sovereign states.[18] This was certainly the case in **Iceland**, where the Convention played a relatively subordinate role until the late 1980s and early 1990s, when the Court and Commission handed down three judgments against that state.[19]

However, once again, the nub of the issue is much deeper than questions of judicial education and the time elapsed since ratification or incorporation of the ECHR. The real question is one which has plagued jurists and political scientists down the ages: why should a court in one state choose to defer to the views of a foreign, or a supranational or international court? A partial answer to this conundrum has been suggested in a single word: comity. Judicial comity is a somewhat nebulous concept, which, despite being "the lubricant of transjudicial relations" is "a concept with almost

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[17] *See* Chapter 1. There is not necessarily an automatic link between incorporation of the ECHR into domestic law and a decrease in the number of applications to Strasbourg.
[18] France, for example, did not grant its citizens the right to make applications to Strasbourg until 1981.
[19] *See*, generally, Gudrun Gauksdottir, "Iceland" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 398.

as many meanings as sovereignty."[20] It has been defined as a decision by a court to decline jurisdiction over a dispute in favour of a court in another country where the matter "would be more appropriately adjudged elsewhere,"[21] and as an idea based on "respect for the integrity and competence of foreign tribunals."[22] However, while comity explains why the Irish Supreme Court may choose to refuse jurisdiction, say, in a case where the Australian High Court appears the more appropriate body to determine the dispute, it does not really tell us why, for example, the Spanish Constitutional Court should choose to follow a decision of the European Court of Human Rights (as it has done on occasion – see Chapter 4, *infra*). The inadequacy of the concept of judicial comity as an explanation for this second category of case becomes clearer given Slaughter's explanation that while comity "expresses an appreciation of different assignments and a global allocation of judicial responsibility…[i]t does not import subordination or even the more subtle constraints of ritual deference."[23] In the example involving the Spanish Constitutional Court, the national court *did* appear to be deferring to the interpretation of the Convention by the Convention's own court. It has also been suggested that the ECtHR is even more akin to fulfilling the role of "reviewing the handiwork of national courts in a more traditional hierarchical relationship" than the European Court of Justice, despite the latter's "wider substantive jurisdiction."[24] It is submitted that, if this interpretation is correct, it means that the Strasbourg Court has as much justification for claiming a role as a constitutional court of European human rights as the ECJ does for its assertions that it is the constitutional guardian of the Treaties that founded it.

Discovering why courts behave in the way they do in *any* field is a difficult task: judges are apt to "discourage sociological studies of their activities … Like members of a Magic Circle who face expulsion if they explain how the trick is done, judges are eager to protect their craft."[25] This remark was made of English judges, but it is

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[20] Anne-Marie Slaughter, "Court to Court" (1998) 92 *American Journal of International Law* 708 at 708.
[21] Antonin Scalia J, *Hartford Fire Inns Co. v. California*, 509 US 764, 817 (1993), cited by Slaughter in the above article at 708.
[22] US Court of Appeals for the Second Circuit, *Roby v. Corporation of Lloyds*, 996 F2d 1353, 1363 (2d Cir 1993), cited by Slaughter (n20) at 709 of above article.
[23] Slaughter (n20), at 711.
[24] Laurence R Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 *Yale Law Journal* 273,at 297.
[25] David Pannick, *Judges* (Oxford University Press, 1988), at 10.

probably true of most members of that profession, whatever their nationality – indeed, it is even easier for judges in civil law countries to disguise their reasoning, since their judgments are often short. France is a prime example of such a place: the *Code Civil* may easily be used to achieve different results in cases based on broadly similar facts, since no doctrine of binding precedent is recognised and no dissenting judgments are published.

Political scientists have undertaken attitudinal and biographical studies in an attempt to understand judicial behaviour. Attitudinal studies involve asking if "a given judge has in all past cases voted for a particular policy or group,"[26] thus facilitating a crude examination of that court's political impact. The biographical study forms part of the method used by JAG Griffith in his famous (and controversial) work, *The Politics of the Judiciary*, to highlight the fact that the broadly homogeneous characteristics of the English judiciary (upper middle class, wealthy, almost entirely white, overwhelmingly male, and mostly educated privately and at Oxbridge[27]) make it inevitable that they will decide certain types of cases in a certain way (namely a rather conservative one[28]). Griffith hypothesises that

> "When people like the members of the judiciary, broadly homogeneous in character, are faced with such situations [involving issues of a broadly political nature], they act in broadly similar ways. It will be part of my argument to suggest that behind these actions lies a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions."

Simple conservatism alone may partly explain why many English judges pre-HRA were resistant to arguments based on treaty law, since to concede that international

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[26] Martin Shapiro, "Political Jurisprudence" from Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2002), 19 at 33. The author freely admits the "glaring weaknesses" of such an approach – see 40 of his article.

[27] *See The Politics of the Judiciary* (Fifth Edition, Fontana Press, 1999) at p 21 for the results of a 1994 survey in which 80% of the judges surveyed had been educated privately, and then at Oxbridge (even more indicative of wealth and social class at the time they attended university than today – p18ff). 100% were white and only 5.1% were women. The average age of a Law Lord was 66.5.

[28] On this point, *see* John Griffith, *Judicial Politics Since 1920: A Chronicle* (Blackwell Publishers, 1993) for an examination of judicial responses to a changing political climate. It does appear to be true that the privileged classes in England tend to be more conservative (and are more likely to vote Conservative) than members of the working class. Loren P Beth argues that judicial conservatism is a universal phenomenon: "Judicial attitudes the world over are notoriously conservative, especially on matters involving the judiciary itself" (Loren P Beth, *The Development of Judicial Review in Ireland 1937-1966* (Institute of Public Administration, 1967), at 6).

law could in any way erode the principle of parliamentary sovereignty would have seemed a very radical idea.[29]

The most recent Irish study deals only with the judges of the Superior Courts.[30] However, it confirms a similar trend to Griffiths' study, in that the most likely candidate for a judge of the Irish Superior Courts is male, privately educated, middle-class and white.[31] In addition, most judges attended University College Dublin, where they studied Arts, and were practising senior counsel at the time of their appointment. Interestingly, the judges who took part in the study described their politics as "liberal", and were extremely reticent about declaring any political allegiance (probably because, as the author speculates, they feel that it is inappropriate for judges to do so[32]), in spite of a belief that "political connection" may have played a part in their appointment.[33]

Appointment to the bench appears to have some political element in most jurisdictions – even the Court of Human Rights itself is not immune[34] – but in some countries the political factor is, at least, less obvious. In France, for example, judges are civil servants and the judiciary is a career in itself; a special college[35] trains judges who need not have been practising lawyers at all before their investiture.[36] Entry to the

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[29] Although, once again, such an attitude betrays a misunderstanding of the extent to which a State's international obligations, freely entered into, should in theory bind the State much like a contract binds the parties to it.

[30] Jennifer Carroll, "You Be the Judge: A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 Part I" (2005) 10(5) *Bar Review* 153 and (2006)10(6) *Bar Review* 182. An earlier study was carried out in 1969 by Paul Bartholemew, *The Irish Judiciary* (Institute of Public Administration, 1971).

[31] Carroll, Part I, *ibid*, at 154. In strictness, Carroll does not refer to the judges as being white, but rather as being "of pure Irish ethnicity."

[32] Carroll, (n30) at 170.

[33] Carroll, (n30) at 154.

[34] The judges of the Court of Human Rights are nominated by the governments of the Contracting Parties; when a vacancy comes up, the Directorate General of Human Rights of the Council of Europe asks each state to submit the names of three candidates. The fact that appointments are for six year terms, which are renewable, has led to fears that appointees lack independence from their nominating state. Furthermore, the Council of Europe sets no minimum requirements in relation to qualifications, other than the vague stipulation in Article 21(1) that judges "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence." The consequence of this is that the qualifications and experience of nominees can vary widely. *See*, generally, Andrea Coomber, "Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights" [2003] EHRLR 486.

[35] The *Ecole Nationale de la Magistrature* (the National School of the Judiciary); NB this is the name used by the institution since 1970: John Bell, *French Legal Cultures* (Butterworths, 2001), at 38.

[36] Since 1959, entrants to the judicial college (*Ecole Nationale de la Magistrature*) are law graduates who have passed a competitive entrance examination; in earlier times, judges had to complete a two

college is based on a competitive examination, and is open to those leaving university as law graduates, those who have been civil servants for at least four years and who are aged over 46 years and five months, and those with at least eight years' experience in a private sector profession and who are aged over forty.[37] Their appointment is also less overtly political than in many other countries, Ireland included.[38] In such circumstances, it may be more difficult to establish a nexus between being a judge and class, privilege, and political views. Furthermore, the French system appears to have ensured much greater gender equality, with women making up around half of all professional judges; admittedly, although the majority of those occupying junior judicial posts are women, men continue to predominate at senior levels.[39] Nor is the French system obviously free from nepotism and the influence of the bourgeoisie: Bell suggests that the recruitment of women has actually led to an increase in the number of new judges from "bourgeois" families and from the capital;[40] in addition, the children and family of judges appear more likely to obtain a top position.[41]

In Germany, judges are not viewed as civil servants, although their employment is regulated by public law. In theory, any lawyer who has successfully passed two state examinations can move onto the bench; however, in reality, only those with exceptional marks in the second exam become judges. The prospective appointee must be a German citizen and must guarantee to uphold the liberal democratic constitutional order.[42] Promotion to the highest federal courts is only possible after 10 years in a court of first instance, and candidates for such promotions must be at least 35.[43] As

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year traineeship in a *cabinet d'avocat* (a lawyer's chambers): John Bell, *French Legal Cultures* (Butterworths, 2001), at 38.

[37] Bell, (n35) at 38.

[38] French judges are officially appointed by the President of the Republic after a proposal by the Minister for Justice; however, the original recommendation is really made by the *Conseil supérieur de la magistrature* (CSM), which is composed of 12 judges as well as the President of the Republic and the Minister for Justice. For more junior appointments, the recommendation is made by a separate commission which proposes names to the CSM: Catherine Elliot and Catherine Vernon, *French Legal System* (Longman, 2000), at 192-193.

[39] Bell (m35), at 38-39. Bell notes that by 2000, 49 % of judges were women.

[40] Bell (n35), at 39. *See* also V Roussel, "Scandales politiques et transformation des rapports entre magistrature et politique" (2000) 44/45 *Droit et société* 13, at 17-22.

[41] For the years 1945-1985, 26.2% of appointments to the highest positions in the *Cour de cassation* went to the children of judges; if one includes any family connection to a judge, that percentage rises to 47.7%: A Bancaud, *La haute magistrature judiciaire entre politique et sacerdoce*, at 21-22); Bell, (n35), at 38, footnote 17.

[42] Dr Anke Freckman and Dr Thomas Wegerich, *The German Legal System* (Sweet & Maxwell, 1999), at 112.

[43] Freckman and Wegerich, (n 42) at 113.

interesting as these distinctions may be, in the absence of extensive surveys as to the background of judges in the other Contracting States, it is not possible to conclude that a judge's background alone will make him or her more or less receptive to arguments based on international law.

Helfer and Slaughter argue that, in global terms, the form of "supranational adjudication" exercised in Europe by both the ECtHR and the European Court of Justice "is a remarkable and surprising success."[44] However, it is worth noting that this assessment is based on a comparison with the less effective International Court of Justice and the enforcement mechanisms (or rather, the absence of same) of the UN human rights conventions.[45] Nevertheless, their definition of what constitutes effective supranational adjudication[46] is attractive:

> "We define effective adjudication in terms of a court's basic ability to compel or cajole compliance with its judgments. In the supranational context, effective adjudication depends on a supranational tribunal's ability to secure such compliance by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf."[47]

That the ECJ deserves such fulsome praise is beyond dispute: in spite of some early reluctance on the part of some domestic courts and national authorities, the Luxembourg Court is a shining example of the type of effective supranational adjudication Helfer and Slaughter describe. However, it is submitted that the ECtHR has yet to attain quite the same level of influence in the minds of domestic judges.

The superior position of the ECJ so far as national courts are concerned is due to a number of factors, all of which are related to the unique nature of the relationship

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[44] Helfer and Slaughter (n24), at p276.

[45] The body charged with deciding if a violation of the International Covenant on Civil and Political Rights has been infringed is the United Nations Human Rights Committee, which is not a court, and, like the ECHR in its early years, individuals may only complain to this body if the State has accepted this right of individual complaint. (Now all members of the Council of Europe must accept this right.) For details of the individual petition system and on how to initiate proceedings in the Court of Human Rights, *see* Philip Leach, *Taking a Case to the European Court of Human Rights* (2nd Edition, Oxford University Press, 2005), particularly 19-94.

[46] They explain the difference between international and supranational adjudication as follows: "The distinguishing feature…is the greater transfer of or limitation of state sovereignty involved in the establishment of a supranational organisation" (at 287). Under this definition the ECtHR is certainly a supranational court, as evidenced by the existence of inter-state and individual applications, the binding nature of its judgments, and its ability to award compensation against the offending State where appropriate.

[47] Helfer and Slaughter (n24), at 278.

between the EU and its Member States, but some of which could, arguably, be appropriated by the Convention system to better ensure the compliance of domestic courts. First - and this factor is not one which the ECtHR can replicate - the ECJ is an integral part of a supranational, *sui generis*, and some would say semi-federal entity with its own law-making processes, government,[48] civil service and courts.[49] The Council of Europe is a much larger, much looser collection of states, not in any sense a "superstate" or even a confederation. Its aims under the ECHR are much narrower than those of the EU, in that they are for the most part confined to the field of human rights, and it has no power to make laws in the sense that the EU has – nor is it comprised of bodies such as the Commission, Parliament and Council of Ministers which take decisions on behalf of its member states. Despite its distinctive enforcement mechanism (the Court), its right of individual petition, and its independent ability to find facts, the ECHR regime more closely resembles a traditional multilateral treaty than an embryonic federal state. It is therefore easier for the national courts to disregard its decisions than it is for them to refuse to take cognisance of a judgment of the ECJ.

Secondly, the ECtHR lacks a major component of the ECJ's success in establishing itself as a sort of Superior Court of Europe: it has not formulated any doctrine similar to that of the direct effect and supremacy of EC law in relation to the Convention; nor, it must be admitted, is there any indication that the domestic courts of the Contracting Parties would quietly submit if Strasbourg were to do so. Indeed, to an extent one can point to the range of measures taken by the Contracting States to incorporate the Convention as proof that they did not consider its terms to be directly effective. It should be remembered that only rarely has the ECHR gained supremacy over all other national measures, even post-incorporation.[50] Furthermore, it is not appropriate to draw analogies between the models used to incorporate the Convention and the constitutional amendments and legislative changes that were necessary in most EU Member States to ensure direct effect and supremacy in that case: it is clear from an analysis of the models of incorporation of the ECHR that the Contracting States were

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[48] Albeit not in the form the word "government" is generally thought to connote – the structures of the EC, from its Parliament to its Commission to its Council of Ministers defy the general tendency to designate an arm of government as executive or legislature. *See* Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials*, Chapter 2 (Second Edition, Oxford University Press, 1998).
[49] The European Court of Justice (ECJ) and its Court of First Instance (CFI).
[50] Only in the Netherlands does the ECHR have supra-constitutional status – *see* Chapter 3.

not of a mind to cede anywhere near this level of sovereignty to the Council of Europe or its Court, nor have most of their judges been prepared to do so.[51]

Thirdly, Strasbourg has no preliminary reference procedure. The mechanism created under Article 234 of the EC Treaty is unique in that it allows the domestic courts of EU Member States to refer questions involving the interpretation of EC law to the ECJ. Although the ECJ is not supposed to rule on the substantive issues in the case referred to it, its interpretation of the law will often have this effect.[52] It must be stressed that the type of case heard by the two European Courts varies not just in terms of their content[53] but also in terms of access: the ECtHR has a status resembling (but not entirely analogous to) that of a supreme court of appeal in the field of human rights, to which anyone has access once he/she has exhausted all domestic remedies.[54] Access to the ECJ, however, is distinctly more limited: no individual litigant has a right of appeal to the Court; rather, it is a matter for the domestic court seized of the action to decide whether a referral is necessary.[55] (There is one qualification to this: while a lower court *may* choose to refer a point of law to Luxembourg, the highest domestic court *must* do so if a referral is necessary to the determination of the matter

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[51] For this analysis, *see* Chapter 4 of this thesis.

[52] One example of this is the case of *Bosphorus Hava Yollari v. Minister for Transport* [1996] 3 CMLR 257, where the ECJ decided that Article 8 of Regulation 990/93 (which imposed sanctions on Yugoslavia in a purported attempt to end war in the region) "applied to an aircraft owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, even though the owner had leased it for four years to another undertaking". This meant that the Irish Supreme Court had no choice but to uphold the confiscation of an aeroplane by the defendant in circumstances where the lessee of the plane was entirely innocent of any wrongdoing.

[53] The ECJ has, of course, developed it own fundamental rights jurisprudence. On this point, *see*, *inter alia*, Philip Alston (ed) *The EU and Human Rights* (Oxford University Press, 1999); FG Jacobs, "The Protection of Human Rights in the Member States of the European Community: The Impact of the Case Law of the Court of Justice" from James O'Reilly (ed) *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press, 1992), 243; Anthony Arnull, *The European Union and its Court of Justice* (Oxford University Press, 1999); G Federico Mancini, "The Making of a Constitution for Europe" (1989) 26 *CMLRev* 595; Leonard FM Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union" (1998) 35 *CMLRev* 629; L Neville Brown and Tom Kennedy, *Brown & Jacobs: The Court of Justice of the European Communities* (Fifth Edition, Sweet & Maxwell, 2000); Koen Lenaerts, "Fundamental Rights in the European Union" (2000) 25 *ELRev* 575; Robin CA White, "Human Rights: A Millennium Issue" (2000) 25 *EL.Rev* 25 SUPP (HUMAN RIGH) 1; Ian Rogers, "From the Human Rights Act to the Charter: Not Another Human Rights Instrument to Consider" (2002) 3 *EHR.LR* 343.

[54] This right of access was formerly dependent upon the state's acceptance of the right of individual petition; however, acceptance of this right is now mandatory for all parties seeking to ratify the Convention. It should also be noted that the requirement as to exhaustion of remedies does not involve an applicant taking his case to the highest domestic level where the national courts have consistently refused to intervene in cases of similar alleged breaches: on this point see, for example, *Akdivar v. Turkey* (1997) 23 EHRR 143, in which the Court stated that there is no obligation to have recourse to remedies which are "inadequate and ineffective" (paragraph 67).

[55] *See* Craig and de Búrca, (n48) 407.

before it.[56]) References must be in relation to one of three matters: the interpretation of the Treaty,[57] a question involving the validity and interpretation of acts of EC institutions,[58] or the interpretation of the statute of a body formed by an act of the Council of Ministers.[59] It should also be mentioned that Article 230 EC allows for an exceptional right of access to the ECJ when a Community Act is challenged. This mechanism is of less interest as it does not involve a dialogue between a domestic a and supranational court in the way that Article 234 does, and is also invoked much less frequently because of the difficulties involved. (Briefly, these difficulties relate principally to the conditions which must be satisfied to mount an Article 230 challenge: the act itself must be of a type which is open to challenge;[60] the institution or person must have standing;[61] the ECJ can only intervene "on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers;"[62] and certain time limits must be observed.[63])

The preliminary reference procedure has helped the ECJ consolidate its position as the constitutional court of the EU by allowing a constant dialogue with the national courts in a way that applications to Strasbourg do not. This is partly because the preliminary reference procedure has, to an extent, empowered domestic judges in relation to both their own governments and even their own superior courts. Applications to Strasbourg, on the other hand, involve reviewing the handiwork of the domestic judge in a critical way. It is possible, therefore, that judges feel more antagonism (or at least ambivalence) towards Strasbourg than towards Luxembourg. It is also possible that they feel less comfortable with the jurisprudence of the Court of Human Rights, in that

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[56] On the operation of the preliminary reference procedure, *see* Craig and de Búrca (n48) at 406ff.
[57] Article 234(1)(a) EC.
[58] Article 234(1)(b) EC.
[59] Article 234(1)(c) EC.
[60] This is not the case with *all* Community Acts: only those which have binding legal effects are reviewable, although this definition extends further than regulations, decisions and directives: *see* Case 22/70 *Commission v. Council* [1971] ECR 263 ("*ERTA*") at paragraph 53 of the judgment.
[61] "Privileged applicants" who appear always to have standing, even when the decision is addressed to another, are the Member States, Council and Commission. "Non-privileged applicants" include other parties to whom the impugned decision is addressed; those to whom the decision is not addressed but who are directly and individually concerned by it; and where the decision takes the form of a regulation which is of direct and individual concern to the applicant. See Craig and de Búrca, (n48) 457 and 461.
[62] Article 230(1) EC.
[63] Article 230(5) EC.

concepts such as the margin of appreciation[64] employed by the Court may make it more difficult for them to discover the appropriate course of action in future cases in order to avoid an adverse finding against their State.

A related point is that, despite emphasising its role as the Convention's supreme interpreter, it is arguable that the ECtHR has not succeeded in constitutionalising the ECHR to quite the same extent as the ECJ has done with the founding treaties of the EU. It is possible that the three differences outlined above between the two systems are at the root of the problem. Another explanation lies in the role chosen for the Court of Human Rights at its inception, when the current case load would have been unimaginable: the Court was originally intended to intervene on a case by case basis when requested to do so by individuals or Contracting States. However; it has been suggested that with its ever-increasing workload[65] the Strasbourg Court may very soon have to choose between its role as distributor of individual justice, or that of a constitutional court.[66] In short, for the system to cope, the ECtHR would become the apex of a hierarchy of courts, in which the domestic courts would follow and apply its statements of principle and interpretation of the Convention in a relationship similar to that between national constitutional courts and lower courts. As to the current status of

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[64] Nash and Furse articulate the purpose of the margin of appreciation as follows: "By conceding a margin of appreciation, the Court accepts that national authorities are generally in a better position to judge whether local conditions necessitate limiting, derogating or restricting the rights and freedoms guaranteed by the Convention. Accordingly, States have a degree of discretion when deciding whether their actions are reconcilable with their obligations. The margin of appreciation will vary according to the nature of the activities restricted and the aims pursued..." *See* Susan Nash and Mark Furse, *Essential Human Rights Cases* (2nd Edition, Jordans Publishing, 2002), at 7. For a sample of cases in which the margin of appreciation case has arisen, *see* p39ff. It should be noted that the Court of Human Rights has been criticised for its application of the margin of appreciation: Cavanaugh argues that the Court applies the doctrine in a "morally relativistic" manner, and uses the concept in order to avoid balancing moral issues in areas where there is no consensus among the Contracting States: *see* Kathleen Cavanaugh, "Policing the Margins: Rights Protection and the European Court of Human Rights" [2006] *European Human Rights Law Review* 422. By way of example, Cavanaugh points to the early cases on the rights of transsexuals such as *Rees v. United Kingdom* (1987) 9 EHRR 56, and *Cossey v. United Kingdom* (1991) 13 EHRR 622, in which the court held that the absence of a common standard allowed the Contracting Parties a wide margin of appreciation.

[65] Applications to Strasbourg have increased by 130% since 1998. In October 2002 there were 30,000 applications pending (figure given by Anna Austin at a UCD Conference on the European Convention on Human Rights, 18 October 2002), and the current number of pending applications stands at 89,000 according to the Court's official website (http://www.echr.coe.int/NR/rdonlyres/4A86AD6-D533-4632-B911-F65FCC575C78/01Stats2006.pdf).

[66] Austin, (n65). A similar point was made recently by Stephen Greer in his book *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006); Greer argues that the Court's core functions have evolved since the Cold War, to the extent that it not provides an "abstract constitutional model" promoting homogeneity in the application of Convention norms among the courts of the Contracting Parties (*see*, in particular, Chapter 4).

this process of constitutionalisation of the Convention, Helfer and Slaughter point to the judgment of *Loizidou v. Turkey*,[67] in which the Strasbourg Court described the ECHR as a "constitutional instrument of European public order"[68] to justify their assertion that the ECtHR "has succeeded in transforming a relatively empty docket into a relatively teeming one."[69] It is not disputed that the ECtHR has been hugely successful in its own right; but what concerns us here is the extent to which domestic courts take account of its decisions and of the very text of the Convention. Even Helfer and Slaughter concede that the legal effect given to Strasbourg's judgments at domestic level "varies considerably,"[70] while Shapiro asserts that, unlike the ECJ, the Court of Human Rights is still an international, and not a constitutional court.[71]

So how may the Strasbourg Court further the constitutionalisation of the Convention? It has been remarked that "What is innovative – what is constitutional – about the ECJ's jurisprudence is that it requires national judges to apply EC law as if it were an integral part of the national legal order."[72] The question that remains is whether the Court of Human Rights can persuade national judges to apply the ECHR in this way in the absence of direct effect and supremacy. On the other hand, it is possible to find areas in which Strasbourg *could* potentially extend its influence in the manner of its cousin in Luxembourg. For example, the acceptance of the ECJ's position on the *kompetenz-kompetenz* debate (i.e. that the ECJ, not the national courts, decides the *vires* of Community acts) is actually based not on constitutional foundations, but on a more orthodox international law rationale.[73] This is because "international law certainly would not give the States, *individually*, the right to have the final word concerning the competences of an international organisation, just as it would not give

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[67] (1997) 23 EHRR 513.
[68] In the French version of this decision, public order becomes *ordre public*, a much broader concept than the English translation implies.
[69] *Supra*, at p293.
[70] *Supra*, at p295.
[71] Martin Shapiro, "The Success of Judicial Review and Democracy" from Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2002), 149 at 155.
[72] Alec Stone Sweet. "Constitutional Dialogues in the European Community" from Anne-Marie Slaughter, Alec Stone Sweet, and JHH Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford, 1998) 305 at 306.
[73] JHH Weiler and Ulrich R Haltern, "Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial *Kompetenz-Kompetenz*" from Anne-Marie Slaughter, Alec Stone Sweet, and JHH Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford, 1998) 331 at 335.

such decisional finality to a State over any aspect of a Treaty to which it was party."[74] In a sense, it could be said that the ECtHR has already won the *kompetenz-kompetenz* debate, in that it is extremely doubtful that any national court would dispute that Strasbourg is the ultimate interpreter of the Convention. However, as we have already seen, the other, more important attribute of a constitutional court is that the lower courts which are subject to its jurisdiction submit to the rulings of that constitutional court and apply the principles it sets down. In this regard, the Court of Human Rights has experienced more mixed reviews, with great variation from country to country.[75]

As a general proposition, the Belgian courts have been more receptive than most to the idea that they should apply and defer to international law, at least since the famous 1971 case of *Fromagerie Franco-Suisse Le Ski v. Etat Belge* (the "*Le Ski*" case).[76] That case involved a conflict between Article 12 (now Article 25) of the EEC Treaty and a subsequently enacted Belgian law which retroactively ratified taxes on milk products from other EEC Member States. The *Cour de Cassation* (Supreme Court of Appeal) held that it was bound by the Treaty, which prohibited the introduction of taxes or duties on goods imported from other Member States and of measures having equivalent effect. In this landmark decision, the Court ruled that:

> "In the event of conflict between a norm of domestic law and a norm of international law which produces direct effects in the domestic legal system, the rule established by the treaty shall prevail. *The primacy of the treaty results from the very nature of international law*." [Emphasis added.]

Two points are worth noting in the context of this judgment: first, it was made in the case of a conflict between Belgian law and EC law; and secondly, the fact that Belgium is traditionally monist means that such a judgment is arguably less ground-breaking in that state than it would be in, say, Ireland.

To take these two observations in reverse, it is questionable how much emphasis one should place on the monist nature of the Belgian legal system: admittedly, it makes it easier for domestic courts to have regard to international law, but even in Belgium parliamentary assent is generally necessary for international treaties to have domestic

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[74] *Ibid.*
[75] *See* Chapter 4.
[76] Judgment of the *Cour de Cassation*, 27 May 1971, International Law Reports (1993) 203.

effect, unless they can squeeze into the rule set down above by the *Cour de Cassation*. Indeed, it is possible to surmise that the evolution of this progressive attitude to international treaties on the part of the domestic courts is linked to the contrasting "passive attitude" of the Constituent Assembly in this field.[77] It would be interesting to examine just how quickly and how frequently the Belgian parliament takes the time to assent to international treaties ratified by the state, but that must remain a question for another day.

However, on the first point, it would appear that the Belgian courts do not consider the *Le Ski* judgment confined to conflicts between EC law and domestic law: "Belgian courts have for a long time accepted their jurisdiction to apply and interpret international treaties, as well as to decide that they confer on individuals rights and obligations."[78] Of course, the terms of the judgment in the *Le Ski* case state that the international treaty must be such as to produce "direct effects" (in a non-EC law sense) at national level. It has been suggested that in order to fall within this definition, a rule has to be such as to force the state to act or refrain from acting, and also must have the potential to be used as a right which may be invoked domestically.[79] Silvio and Philippe Marcus Helmons argue that "It would be reasonable to say that this is indeed the case for many of the articles of the European Convention,"[80] and point to decisions of the *Cour de Cassation* in criminal cases where the Court, of its own initiative, referred to the duty to respect certain Convention rights, in particular those guaranteed by Article 6.[81] They admit that the *Le Ski* ruling means that whether or not an Article of the Convention has the necessary

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[77] Hervé Bribiosa, "Report on Belgium" from Anne-Marie Slaughter, Alec Stone Sweet, and JHH Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in its Social Context* (Hart Publishing, Oxford, 1998), 3, at 29. The author links this inactivity on the part of the legislature to differences of opinion regarding proposals to revise the Constitution, the co-existence of two communities, and the reluctance to guarantee the supremacy of international law in a constitutional provision, which reluctance stems from a Strasbourg decision questioning domestic laws on the use of language (30-31).

[78] Stone Sweet, (n72) at 6.

[79] Silvio Marcus-Helmons and Philippe Marcus-Helmons, "Belgium" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States* (Oxford University Press, 2001), 167 at 169. They draw on the theories of J Velu, "Les effets directs des instruments internationaux en matière de droits de l'homme" from *L'effet direct en droit belge des traités internationaux relatifs aux droits de l'homme* (Bruylant: University of Brussels, 1981), 56.

[80] *Ibid*, at 169.

[81] However, both the Supreme Court of Appeal and the ordinary courts have consistently held that Article 6 applies only to the main trial of the accused, and not to hearings before investigating authorities: Helmons and Helmons, (n79), 172.

"direct effects" depends on the language of the Article itself, but point to decisions where the courts have "implicitly" recognised that certain rights pass this test.[82] Once again, it would appear that EC law measures are more easily accepted by a domestic court than those of the Convention; however, it must nevertheless be admitted that the attitude of the Belgian courts to international law in general has been distinctly more open than that of their colleagues in other nations. This may be due in part to the awakening of an understanding among Belgian judges of how they themselves can be empowered by this branch of law: because certain Convention Articles may be directly applied and used to invalidate conflicting domestic norms, "[t]he Convention gave a strong impetus to the judge in his research of normative values, while simultaneously giving him, to a certain extent, the opportunity to work outside the confines of his legal system."[83] The absorption of Convention values into other national legal systems would no doubt be hastened if the national judiciaries were to adopt this Belgian view of the ECHR's role as a tool of their empowerment.

To take a contrasting example, the French courts have a history of hostility to the idea that international law can ever trump contrary domestic provisions, in spite of that state's monist Constitution. It has been remarked that, "France is one of the Member States in which Community law has had the greatest difficulty to be fully integrated and recognised as supreme to national law."[84] What is true of EC law is all the more so of arguments based on the ECHR, as will be seen in Chapter 4. Indeed, it has been noted that countries whose legal systems had a history of judicial review, such as Italy and Germany, were quicker to accept the Community Law concepts of direct effect and supremacy than those with a different legal culture.[85] This is arguably so because, if the courts have a strong power of judicial review, they are likely to be more activist in reviewing legislation against the new international norms it is sought to embrace. Hence, we may conclude that the existence of meaningful judicial review is a factor

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[82] *Ibid*, at 169. The authors again draw on the conclusions of J Velu, at 60 of his essay.

[83] Ivan Verougstraete, "Judicial Politics in Belgium" from Mary L Volcansek, *Judicial Politics and Policy-Making in Western Europe* (Frank Cass & Co Ltd, 1992), 93 at 102.

[84] Jens Plotner, "Report on France" from Anne-Marie Slaughter, Alec Stone Sweet, and JHH Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford, 1998), 41 at 41.

[85] Walter Mattli and Anne-Marie Slaughter, "The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints" from Anne-Marie Slaughter, Alec Stone Sweet, and JHH Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford, 1998), 253 at 272-273. In any event, this is true since the adoption of fundamental rights principles by the ECJ.

which influences the extent to which incorporation of the ECHR has real domestic effect. However, this is not the only way in which judicial review is important in the context of incorporation: indeed, it is arguable that judicial review is a necessary weapon in the hands of the judiciary if they are to ensure that the Convention principles are consistently applied at national level.

Many theories have been postulated to explain the acquiescence of national courts in the foundation of a new European legal order within the EC. These include the "legalist approach," which asserts that domestic judges have accepted legal integration because of the "compelling nature and clear legal logic" of the ECJ's jurisprudence.[86] Indeed, it would appear self-evident that national judges are more likely to respect (and, eventually, to follow) the judgments of an international or supranational court if such judgments are rational and well argued. It is submitted, however, that the judgments of the Court of Human Rights are just as compelling and indicative of legal expertise as those of the ECJ, if not more so, for the Court of Human Rights permits the publication of dissenting judgments which can assist the reader to grasp the issues at stake. On the other hand, the ECJ's judgments tend to be rather more succinct, with one single majority verdict delivered. Indeed, the reader is often forced to have regard to the Opinion of the Advocate General to obtain a more complete appreciation of the case. Assuming the legalist approach to be correct, a related factor could be the identity of the members of the court: "it will wield greater authority if [they] are known and respected by national judges."[87] This will obviously be the case if the members of the supranational tribunal are themselves judges, as they will therefore be known to their colleagues in their own country at least. Both the ECJ and the ECtHR are made up of judges from each of their respective Contracting States, so this is another area in which the ECJ has no discernable advantage over the Strasbourg Court.

Another idea behind the acceptance of the ECJ's jurisprudence by courts in Member States include the "neo-realism" theory, which postulates that judges are influenced by

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[86] Karen Alter, "Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration" from Anne-Marie Slaughter, Alec Stone Sweet, and JHH Weiler (eds) *The European Court and National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford, 1998), 227 at 230.
[87] Helfer and Slaughter, at 300.

the attitude of their government, who in turn are influenced by economic considerations, and thus will accept the will of the ECJ as it is economically beneficial to do so.[88] If this theory is accurate, it may remain difficult for the ECtHR to attain similar status in the eyes of the domestic courts, since its focus is purely on human rights and adherence to its judgments provides no discernable economic advantage beyond the fact that ratification of the ECHR is a condition of membership of the EU. (While this may be reason enough for would-be applicant states to join the Convention system, it is submitted that it is not a real incentive to follow the jurisprudence of the Strasbourg Court where a failure to do so would not be such as to give rise to a suspension of rights under Article 7 of the Treaty on European Union.[89])

Karen Alter's preferred model for rationalising national judges' acceptance of their international colleagues' position is that of "inter-court competition."[90] This theory postulates that legal integration benefits different courts in different ways: specifically, integration into the EU legal order has, Alter argues, benefited lower courts more so than higher courts. This is because "[l]ower courts can...magnify the influence of their jurisprudence by making references to the ECJ,"[91] thus magnifying their own importance vis-à-vis higher national courts, who will also be bound by the interpretation of the ECJ. Evidence for this theory is put forward in the form of evidence that higher courts generally refer fewer questions of interpretation to the ECJ, and refer "virtually no questions which could allow the European Court to expand the reach of European law into their own sphere of jurisdictional authority".[92]

However, it is submitted that as interesting as these theories are, none of them adequately explains why judges in one country are more receptive to arguments based on international, EC, or Convention law than their colleagues in other jurisdictions. It is possible that both the question and the answer as to why this occurs are both too

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[88] Alter (n86), at 234.
[89] Article 7 of the Treaty on European Union allows the Council to suspend some rights of a Member State for a serious and persistent breach of the fundamental principles upon which the EU is founded. According to Article 6 of the same Treaty, these principles are liberty, democracy, and respect for human rights and fundamental freedoms.
[90] Alter (n86), at 241 ff.
[91] *Ibid*, at 242. NB Inter-court competition can also occur horizontally, between courts charged with superintending different bodies of law, e.g. administrative courts vs. civil courts (*see* Mattli and Slaughter, (n88) at 262).
[92] Alter (n86), at 242.

complex to be explained in a few paltry paragraphs here. All we can do is look at some observations which appear relevant; for example, it has been noted that, in the context of Community law at least, courts appear to be influenced by "national policy preferences" beyond their control: Mattli and Slaughter note that "pro-Europe" countries like the Netherlands had little difficulty in accepting the concepts of direct effect and supremacy than those where the populations were less enthusiastic about European integration, such as Britain.[93] They also note that the prevailing judicial legal culture plays a part: this culture is composed of a number of characteristics, including relative judicial activism or restraint, which is in turn based on the existence or absence of a strong culture of judicial review, and which itself depends partly on the historical experience of the courts in the country in question.[94] They comment that "Individual judges within a particular national legal system can differ on [the question of how far they should depart from previous decisions]...but an entire legal culture – due largely to the influence of national history and tradition – can lean in one direction or the other."[95] The truth of this statement is evidenced by our example of Belgian receptiveness to international law concepts as distinct from the relative Irish hostility to such ideas.

In a broader sense, national culture is always relevant in determining judicial attitudes to international law: to take an extreme case from outside Europe, the divergent approaches of the United States of America and Iran to the Vienna Convention on the Law of Treaties during the Iran-US Claims Tribunal is just one example of how legal pluralism is inextricably linked with differing legal cultures.[96] Indeed, that particular

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[93] *Ibid*, at 268ff.

[94] *Supra*.

[95] Mattli and Slaughter, at 272.

[96] Sandra L Bunn-Livingstone, *Juricultural Pluralism vis-à-vis Treaty Law* (Martinus Nijhoff Publishers, 2002) at 95ff. The Tribunal was established under the Algiers Accords of January 1981, whereby the hostage crisis between the two nations was resolved and they agreed that one billion dollars of the Iranian assets being blocked by the US would be used to secure the payment by Iran of awards made by the Claims Tribunal to the US or to its citizens. This long process carried on for many years (and was still alive during the Clinton administration): *see* http://www.state.gov/r/pa/ho/pubs/8534.htm (website of the United States Department of State, viewed 10 May 2007). Both States agreed in principle that the Vienna Convention on the Law of Treaties applied to the proceedings; however, there were nevertheless disagreements on the application of that Convention. One such example was on the application of Article 31 of the Vienna Convention, which states that a treaty "should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty". Iran argued that the parties' subjective intentions should be the point of departure for interpretation, whereas the US (and the Tribunal) took the view that Article 31 stipulated that the words themselves be the starting point. For this and other examples of how the differing legal cultures of the US and Iran impacted on their view of international law, *see* John R Crook, "Applicable

case, although of no relevance to European law, also demonstrates how a nation's general culture permeates judicial reasoning and thus its approach to international law. Culture aside, there is another factor which has enormous potential to influence the manner in which international human rights documents are implemented at domestic level (or not, as the case may be): the political climate of the state in question.

The Domestic Political Climate and Human Rights Protection

> "In this country, amid the clash of arms, the laws are not silent. They may be changed, but they still speak the same language in war as in peace."[97]

These words of Lord Atkin ring in the memory as a resounding reminder that justice must be dispensed as impartially in times of war and political upheaval as in less turbulent times. However, the Law Lord's words ought to be heeded for more than just the speaker's eloquence: this phrase was, in fact, spoken as part of a *lone dissenting judgment* in a case concerning the use of the Defence Regulations to detain people during World War II. The majority of the House of Lords refused to review the reasonableness of a person's detention under the Regulations, even though the wording of the instrument clearly indicated that the state should have "reasonable cause to believe" that the person being detained had associations which were hostile to Britain's interests in the war. The judgment of the majority is proof that the political climate in a country can, and does, influence the level to which the law in general, and human rights in particular are respected. Even senior members of a country's judiciary, well-versed in the law, are no more insulated from the effects of patriotic zeal and xenophobia than any other citizen. In this section, we will first look at how adverse political conditions have influenced (and still influence) the domestic effectiveness of the ECHR, before examining the ways in which judges themselves are victims of their surroundings.

The political climate of the country in question has been one of the most crucial factors in determining the internal influence of the ECHR: **Turkey**, although a long-term member of the Council of Europe, having joined in 1949 and ratified the

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Law in International Arbitration: The Iran-US Claims Tribunal Experience" (1989) *American Journal of International Law* Vol 83(2), 278.

[97] *Liversidge v. Anderson* [1942] AC 206 at 244.

Convention shortly after its entry into force, has a poor human rights record.[98] The Turkish government has been accused of complicity in torture, murder and "disappearances" as a result of the mistreatment of left-wing political parties and the minority Kurdish people.[99] As Ozdek and Karacaoglu remark,

> "...[T]he history of the past fifty years in Turkey has reflected a continuing tension between the political requirements of the state in practice and the international formal norms and responsibilities to which it is a party. This tension will not be easily resolved in the near future despite the closer relations emerging between Turkey and Europe."[100]

Indeed, Turkey's lack of respect for human rights has more than once led the EU to hesitate over its application for membership.[101]

We must also consider the existence of threats like civil unrest, military coups, terrorism,[102] and organised crime within the state, which often militate against the application of human rights norms. During the past half-century, **Greece** has experienced a royalist regime, military dictatorship, and several transitory, unstable interludes. It has been noted that "the diversity of the legal and political systems known by Greece since 1953", the state's withdrawal from the Convention system at

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[98] After Italy, Turkey had the highest number of applications against it declared admissible for the period 1 November 1998 – 31 July 2001; i.e. 452 applications against Turkey were declared admissible. (Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG (2001)1 27 September 2001.) It is worth noting that Italy has also experienced great political instability since the end of the Second World War, albeit in a less dramatic way: the average life of a government has been 6 months.

[99] Since the establishment of the Turkish State, the treatment of the Kurds has been less than sensitive, with the use of their language and even the giving of Kurdish names to children banned: *see*, e.g. Carla Buckley, *Turkey and the European Convention on Human Rights* (Kurdish Human Rights Project, 2000), at 3. Unsurprisingly, this report found that a large number of the complaints against Turkey have concerned alleged violations of the human rights of Kurds by the agents of the State.

[100] Yasemin Ozdek and Emine Karacaoglu, "Turkey" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 879 at 914.

[101] For a study of the factors which can influence the European Parliament in its attitude to membership applications see Richard Corbett, MEP, *The European Parliament's Role in Closer EU Integration* (Macmillan, 1998), 262 (on human rights concerns in EU relations with non-members).

[102] There is no universally accepted definition of "terrorism" in international law, but Gearty suggests that "What the idea most obviously and uncontroversially connotes in its contemporary usage is the deliberate or reckless killing of civilians, or the doing of extensive damage to their property, with the intention of thereby communicating a political message to some sort of third party, usually but not necessarily a government": Conor Gearty, "Terrorism and Morality" [2003] EHRLR 377, at 377.

the time of the military dictatorship, and the changing status of the ECHR in Greek law,[103] have hardly helped consolidate the status of that document.[104]

The countries of Eastern Europe are currently experiencing a surge in organised crime.[105] This is a persistent, pervasive, Europe-wide problem, and while it is reasonable to desire the eradication of this sordid, if hardly new, phenomenon, governments must guard against the urge to go too far. For example, although the ECHR has the force of law in **Lithuania**,[106] a number of legal provisions in the field of criminal law appear unlikely to survive a challenge in Strasbourg: the 1997 Law on Prevention of Organised Crime permits judges to take a number of draconian steps against those *suspected* of involvement in organised crime, before any such link has been proved.[107] These steps include requiring a person to live only at his place of permanent residence, informing police of any transactions the value of which could exceed 2,000 *litas*,[108] and forbidding the person to drive a motor vehicle.[109]

Interestingly, what concerned Lord Atkin in *Liversidge v. Anderson* was not that the Regulations allowed detention on mere suspicion (and thus infringed the common law right to *habeas corpus*)[110] but rather the fact that the terms of the Regulations allowed

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[103] The first time it was incorporated, the ECHR had the status of an ordinary law; it now has supra-legislative status.

[104] George Bechlivanou, "Greece" in Mireille Delmas-Marty and C Chodiewitz (ed) *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Dordrecht: Nijhoff, 1992), 151 at p151. Conversely, although it too has experienced a right-wing dictatorship in living memory, Spain appears to have had more success in ensuring the protection of human rights (although Spain, too, has been the recipient of adverse decisions from Strasbourg) – see Chapter 4.

[105] The Russian Interior Ministry estimates that 40,000 Russian businesses are controlled by organised crime. Between 1990 and 1997, the number of known criminal groups in Russia increased from 785 to 9,000, with people trafficking a major concern: 10th UN Congress on the Prevention of Crime and the Treatment of Offenders: www.un.org/events/10thcongress/2088f.htm (accessed 22 October 2006). Organised crime in Eastern Europe is not a new phenomenon, but it has exploded since the fall of the "omnipresent police state": David L Carter, PhD, "International Organised Crime": www.cj.msu.edu/~outreach/security/orgcrime.html.

[106] The ECHR was given this status by Article 12 of the Law on International Treaties of the Republic of Lithuania, 1991, along with all other ratified treaties.

[107] *See* Vilenas Vadapalas, "Lithuania" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States* (Oxford University Press, 2001), 503 at 528-529.

[108] Euro 6905.60 (based on the exchange rate on 20 October 2006).

[109] Vadapalas (n107) at 528. It is interesting that such provisions exist even though most new members, including Lithuania, go through a lengthy pre-ratification process of ensuring compatibility between their legal systems and the requirements of the Convention: see, e.g., Andrew Z Drzemczewski, "Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model" (1995) 16 *HRLJ* p241. 243 focuses on Lithuania.

[110] It is worth noting that the case took place many years before the drafting of the ECHR.

state action to be reviewed on reasonableness grounds, a point that was not accepted by his colleagues. It would never have occurred to him, grounded as he was in both the doctrine of parliamentary sovereignty and in the teachings of his time, when judicial review of legislation on rights grounds was exceedingly rare in most of Europe, to suppose that the Regulations themselves were in some way repugnant. Admittedly, even the ECHR allows deviation from certain of its articles in times of national emergency,[111] but the point remains good: part of the reason that judges are influenced by the political climate of their country is that they are sworn to uphold the law, and if the legislature should choose to enact a draconian law rather than a liberal one (or vice versa), then the judge must uphold that law in the absence of any power to strike it down for offending the Constitution or human rights. In a sense, this is as it should be – after all, what right has an unelected member of the judiciary to review the will of the people's chosen representatives for conformity with his own views and prejudices? As Learned Hand J of the US Supreme Court said,

> "Liberty lies in the hearts of men and women: when it dies there, no constitution, no law, no court can save it; no constitution, no court, no law can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."[112]

But what if those who legislate were not democratically elected? What if they came to power through a military coup? Such was the case for many years in Greece, a country at the heart of Europe, in the latter part of the last century – not in some distant land back in the mists of time. Judicial review of legislation for conformity with human rights norms, be they domestic or otherwise, is thus of paramount importance, not just in the case of the dictatorship, but also in the supposedly liberal western democracy, where "good" men can do evil in the name of such causes as national security and world peace.

Of course, the fact remains that in a totalitarian regime it is highly unlikely that any judge could really purport to strike down a law of the incumbent junta; at least, not if he valued his liberty and life. This brings us to another way in which the political climate can influence the judiciary: in extreme cases, judges can be intimidated by agents of the state, or even removed from office. The way in which judges are

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[111] Article 15 ECHR. The text of that Article may be found at 9 of the Appendix.
[112] Learned Hand J, *The Spirit of Liberty* (New York, Knopf, 1960), at 190.

appointed varies from place to place, and it is not uncommon for dictators to install their favourites to uphold their laws. Despite the supposed return of democracy to Chile many years ago, it was not until recently that an investigation was begun into the involvement of the former dictator, General Pinochet, in the disappearance of thousands of Chileans during the first days of his regime, and it remains highly unlikely that justice will ever be done in that case.[113] While this is, admittedly, an extreme example from the other side of the world, it is possible to point to more familiar examples of political climate influencing the judiciary in a near neighbour of this state: Conor Gearty has pointed to the collapse of confidence in the UK's Thatcherite judiciary during the late 1980s, when anti-trade union decisions were regularly handed down and miscarriages of justice in criminal matters occurred.[114]

Neither Ireland nor the United Kingdom is immune from criticism over their response to terrorism. Both have adopted measures in response to terrorist threats that harbour the potential to impact, in a significant and adverse way, on the rights of citizens. In Northern Ireland, the "Diplock" courts were and remain a feature of the criminal justice system, as was internment without trial for a significant period.[115] In the Republic, the Special Criminal Court still hears cases – not only those involving allegations of terrorism, but also those involving organised crime.[116] The rationale

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[113] For information on how the Chilean political climate facilitated the breakdown of meaningful due process see, for example, Hugh O'Shaughnessy, *Pinochet: The Politics of Torture*, (Latin America Bureau, 2000); Naomi Roht Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pensylvania Press, 2005); and Andy Beckett, *Pinochet in Picadilly: Britain and Chile's Hidden History* (Faber and Faber, London, 2002). Lord Steyn has recently remarked that "The police state created by General Pinochet intimidated and compromised the judiciary and deprived citizens and residents of all meaningful redress to law": Lord Steyn, "Democracy, the Rule of Law and the Role of Judges" [2006] EHRLR 243, at 245-246.

[114] Conor Gearty was speaking at the ICEL Brian Walsh Memorial Lecture on the 26 November 2002. He referred to cases such as those involving the Birmingham Six, the Guildford Four, and Judith Ward, all of whom were famously and wrongly convicted of IRA activity.

[115] Internment without trial allowed the authorities to imprison suspects indefinitely without any form of trial. It was not a new development, being one of the emergency powers accorded to the regional parliament at Stormont by the Civil Authorities (Special Powers) Act 1922. On the operation of internment, *see*, generally, SC Greer and A White, *Abolishing the Diplock Courts* (Cobden Trust, 1986), at 1-2.

[116] Under the Offences Against the State Act 1939, not only may scheduled offences be tried in the Special Criminal Court, but the DPP may also elect to try non-scheduled offences in that court. The Irish courts have long upheld the validity of trying offences not traditionally viewed as "seditious" in the Special Criminal Court: *see*, e.g. *The People (DPP) v. Quilligan* [1986] IR 495, in which the Supreme Court held that the Offences Against the State Act 1939 permitted the trial of "non-subversive" offences provided the DPP was of the view that the ordinary courts were inadequate. In *Kavanagh v. Ireland* [1997] 1 ILRM 34, the Supreme Court ruled that, in deciding whether recourse should be had to the Special Criminal Court in respect of non scheduled offences, the question was not whether the offence was subversive but whether the DPP took the view that the ordinary courts were

behind both the "Diplock" and Special Criminal Court was, of course, an attempt by the states concerned to retain the power to try certain offences where the possibility of jury intimidation or tampering was high. However, the idea that judge-only courts can try the most serious offences known to our law is a deviation from the norm, and one which should be confined as much as possible.[117]

Both states have also introduced procedures to enable the authorities to recover assets which are believed to be either the proceeds of crime (such is the work of the Criminal Assets Bureau in Ireland, and the Assets Recovery Agency in the United Kingdom), or funds held for the promotion or facilitation of terrorism.[118] The latter was the target of the UK's Anti-terrorism Crime And Security Act 2001, which permits the seizure and detention of money and the freezing of assets belonging to terrorists.[119] The 2001 Act allows for cash to be detained in this way for up to two years before it is forfeited (or, one must suppose, in exceptional cases, given back); both seizure and forfeiture proceedings take place in a magistrate's court on the civil standard, and there is no requirement that there be proof beyond reasonable doubt that an offence has been

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inadequate to deal with the matter. Amnesty International has roundly criticised the use of the Special Criminal Court to try non- terrorist offences and has urged the disestablishment of the court: Amnesty International, *Submission to the Committee to Review the Offences Against the State Act and Other Matters*, 1 October 1999, viewed at http://web.amnesty.org/library/Index/ENGEUR290011999?open&of=ENG-IRL on 10 May 2007.

[117] The central importance of the right to trial by jury for serious offences has long been upheld as a central tenet of criminal justice. Lord Devlin described it as "the lamp that shows that freedom lives" (P Devlin, *Trial by Jury* (Stevens, 1956), at 164), while Blackstone insisted that trial by jury must be "looked upon as the glory of English law" (Blackstone, *Commentaries*, Book IV, at 350). Greer and White argue that, while jury trial may not be perfect, it is a better method of trial than any of the alternatives for a number of reasons, including the fact that "It maintains contact between the criminal justice process and ordinary people and sustains their confidence in it, a service which no other component of the legal system can duplicate" (Greer and White, n115, at 11).

[118] The Criminal Assets Bureau ("CAB") was established pursuant to the Criminal Assets Bureau Act 1996 with the aim of the "restraint of use, freezing, preservation or seizure of assets identified as deriving or suspected to derive, directly or indirectly, from criminal activity" (section 5(1)(a)). In short, CAB makes applications to court in order to obtain the preservation and/or disposal of property deemed to be the proceeds of crime. Such applications are dealt with under the Proceeds of Crime Act 1996. The first payments under the Irish scheme were made to the Minister for Finance in 2004: *see Criminal Assets Bureau, Annual Report 2004*, viewed at www.garda.ie/angarda/pub/cab2004.pdf on 13 May 2007. On the operation of CAB, *see* Patrick Hunt BL, "Criminal Assets Bureau and Taxation Matters", Paper to the Bar Council Taxation Conference, 2005. In the UK, the Assets Recovery Agency was established by section 1 of the Proceeds of Crime Act 2002, which allows similar confiscation orders to be made in that jurisdiction (section 6).

[119] Parts I and II of the Anti-Terrorism, Crime and Security Act 2001 ("the ACSA") provide for the forfeiture of terrorist property. The Act also contains a number of other far-reaching provisions, including section 22, which allows the deportation and removal of suspected "international terrorists", and section 23, which allows for the detention of such a suspect even where his/her removal from the State has been delayed through no fault of his/her own.

committed in connection with the cash.[120] The situation is similar in Ireland, where the Criminal Assets Bureau may seek forfeiture of property to the state once the court is satisfied, on the balance of probabilities, that it was wholly or partly the proceeds of crime. Other provisions (including the Offences Against the State Act, 1939, and the Terrorism Act, 2000) remain in force in Ireland and the UK respectively. The author's purpose is not to impugn the validity of these measures; rather, it is to note that neither lawmakers nor judges in this corner of the world are immune from the effects of political upheaval and terrorism, and that the responses to such challenges invariably connote some restriction on the fundamental rights of the citizen, and to argue that the wisdom of some such measures is certainly open to question.[121] Fundamentally, whether one agrees with the nature and scope of such measures or not, one must acknowledge that they do limit human rights. Their justification must therefore be of the strongest kind.

The situation can be summarised as follows:

> "...the harsh reality of life is that no judiciary is absolutely immune from the pressures that are subliminally applied when a State perceives itself to be under threat."[122]

The trend of political tensions and civil strife influencing judicial decisions is, unfortunately if predictably, a phenomenon to which Irish judges are not immune. James McGuill argues that evidence lies in the courts' tolerance of the "extraordinary shortcomings" of non-jury special trials throughout the 20th century, and Ireland's ambiguous position on the right to freedom from self-incrimination.[123] It has been argued, convincingly, that it is particularly easy to glean public and judicial support for less stringent domestic Irish procedural protections where the case involves politically sensitive issues such as allegations of terrorism, drug trafficking or the

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[120] Section 1 ACSA, and Schedule 1 ACSA. These procedures are similar to those used in the UK in relation to the proceedings of drug trafficking under the Drug Trafficking Act 1994.

[121] Writing about Northern Ireland, Dickson has argued that "failure properly to protect human rights in Northern Ireland made the troubles of the past 30 years or so *worse* than they might have been ... [A]buse of human rights exacerbates such a situation – it helps to feed and prolong it": Professor Brice Dickson, "The protection of human rights – lessons from Northern Ireland" [2000] EHRLR 213, at 213.

[122] James MacGuill, "Implications for Criminal Law", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 52, at 55.

[123] *See* MacGuill (n122), at 55 ff.

financial resources of the State.[124] As Warbrick notes, "one aspect of the use of terms like 'terrorist' or 'terrorism' is their denunciatory function";[125] we must be careful, then, about how and when such terms are used to garner support for draconian measures.

It would, in conclusion, seem naïve in the extreme to deny that a country's political situation influences the protection of human rights in general, and therefore, by extension, on the degree to which the ECHR will have a meaningful impact on the national judicial psyche. Given the apparent resolution of the conflict in Northern Ireland, the number of terrorism-related trials in the Irish courts has significantly diminished, along with the scope for judges to be accused of adopting a political stance in relation to those matters. However, Irish society has new concerns, and the public distaste for the relatively new phenomenon of "gangland" violence, which has clearly influenced the government,[126] arguably also has the potential to colour judicial reasoning. Furthermore, the rise of a new variety of international terrorism following September 11 prompted the enactment of draconian measures in the countries affected.[127] While Ireland has yet to be drawn into this new conflict directly,[128] her economic ties to the UK and US may force the authorities here to take measures to

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[124] MacGuill (n122) at 60.

[125] Colin Warbrick, "The Principles of the European Convention on Human Rights and the Response of States to Terrorism" [2002] EHRLR 287, at 288.

[126] An attempt to counter this phenomenon and to ease public fears may be seen in the Criminal Justice Bill 2007, which contains a number of draconian provisions including the power to detain suspects for up to seven days without charge, and harsher conditions in respect of bail (Part II of the Bill). The provisions of the Bill have been roundly criticised in academic circles as an unwarranted attack on the rights of the accused: *see*, e.g., Yvonne Marie Daly, "Criminal Justice Bill 2007: Effects on the Pre-Trial Process"; Patricia Brazil BL, "Bail, Electronic Monitoring and Crime Prevention Orders"; and Ivana Bacik, "The New Provisions on Sentencing" – all of which were papers given at the Trinity College Dublin Conference on the Criminal Justice Bill 2007: Implications for Law and Practice, 9 May 2007. At the time of writing, the Bill has been passed by the Oireachtas but has yet to be signed into law by the President.

[127] The most notable example being the US Patriot Act, properly cited as the "Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001". The provisions of that Act are too many and too controversial to be discussed here; suffice to say that the provisions of the legislation have been roundly criticised by the American Civil Liberties Union (otherwise known as the ACLU), which argues that the Act threatens a number of key constitutional rights, including the First Amendment rights to freedom of speech, religion, assembly and the press, the Fourth Amendment right to freedom from unreasonable searches and seizures, and the Fourteenth Amendment right to due process. The ACLU asserts that the Patriot Act expands the government power to conduct secret searches and to conduct telephone and internet surveillance, as well as giving the authorities increased access to personal, financial and medical data: *see* www.aclu.org/FilesPDFs/patriot%20act%20flyerpdf.

[128] It has been argued that the use of Shannon airport by US military aircraft during the Iraq War meant that the Irish government was illegally involving the State in a War in breach of the Constitution; however, this argument was rejected by the High Court in *Horgan v. An Taoiseach* [2003] 2 IR 468.

confirm their allegiances in at some future date. It thus remains to be seen whether the political and social concerns affecting modern Ireland will permit the absorption of the ECHR into the domestic legal culture, or whether the individual rights contained in that document will become the latest casualty of war.

Chapter III

Factors Affecting the Post Incorporation Success of the ECHR (2): The Power to Judicially Review Governmental Action

Of the tools available to the judiciaries of the Contracting Parties, one in particular has great potential to increase the domestic relevance of the ECHR: the existence and strength of judicial review. It is important to remember that this is a tool which may be used by the courts in order to protect our rights: it is not an end in itself.[1] There are two ways in which judicial review can be pivotal in the protection of human rights: in allowing the courts to strike down legislation for breaching those rights, and in permitting the courts to review the actions of the State and its agents where those actions unjustly infringe the rights of the individual. In Ireland, we know and employ both forms of judicial review, i.e. that understood by an English lawyer and that which really involves a study of the constitutionality of legislation or State actions. The arguments advanced in this chapter are twofold: first, that a strong tradition of the "control" of legislation with regard to human rights norms is a factor that will ensure that the ECHR becomes embedded as a basic legal standard in domestic legal culture; this is arguably an area where the Irish courts, given their long history of constitutional review, ought to excel. Secondly, it will be argued that the standard of review currently applied to administrative action by the Irish courts falls below what is necessary in order to protect fundamental rights, and that a more stringent standard of review ought to be applied to such action.

Judicial Review of Legislation

Jurists in most European states would understand judicial review to mean constitutional review, i.e. the manner in which a court or courts may rule on the validity of a piece of legislation under the Constitution, rather than with regard to any

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[1] This point is made by Grant Huscroft, "Rights, Bills of Rights, and the Role of Courts and Legislatures" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002), 3, at 5.

other principle such as reasonableness.[2] Some form of judicial review of legislation is now possible in most, if not all, of the Contracting States.[3] However, the form of review (abstract or concrete, posterior or anterior to promulgation etc) varies greatly from state to state, depending largely on the "shape" of the legal system and even on the history of the nation.[4] While it would be too simplistic to say that a highly developed culture of judicial review will necessarily improve the extent to which the ECHR is integrated into the domestic legal order, it is almost certainly true that if the system is one that does not allow judicial review of the constitutionality of legislation and acts by public authorities the likelihood that the ECHR will be able to restrict government action is slim. To an extent, the ability of the national judge to control government action via judicial review for conformity with a state's international obligations and the prevalent judicial attitude towards such norms are inextricably linked. It is submitted, however, that the presence of judicial (or constitutional) review is a weapon which could allow national judges to augment the domestic protection of human rights by conducting a type of review of legislation and other acts of state, with the ECHR taking the place of the national constitution where the former provides a greater level of protection.

This Chapter begins with a brief study of the nature and extent of the power of judicial review in a handful of the Contracting States and to determine how this power might best be used to further the domestic influence of the ECHR. To this end, it is appropriate to contrast the experiences of a state in which there is a strong power of judicial review, i.e. Germany, with one in which this power is relatively weak, namely France, and to attempt to explain the reasons behind these differences briefly. To

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[2] Shapiro argues that although the French *Conseil constitutionnel* exercises the power of constitutional review, there is really no general power of *judicial* review in that country; Martin Shapiro, "The Success of Judicial Review and Democracy" from Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2002), 149 at p152.

[3] The UK courts are not permitted to strike down legislation under any circumstances. The closest power they have is the ability to declare that legislation is "incompatible" with the European Convention on Human Rights under the Human Rights Act 1998, section 4 (Appendix, 92).

[4] The Austrian Constitution of 1920 is credited with granting judicial review its first real foothold in Europe. It was drafted by the famous jurist Hans Kelsen, who opted for a centralised system of constitutional review in which the power of review was reserved to a special constitutional court operating outside the ordinary judicial system, rather than the decentralised system of the United States, in which all courts have the power to review the constitutionality of laws: Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, 2005), at 10. The Irish system is somewhere between the two, but probably more closely resembles the American system, in that only two courts may consider the constitutional validity of any law (the High and Supreme Courts), but both of these courts are an integral part of the ordinary legal system.

begin with, however, it is important to emphasise that the forms of constitutional review existing in Europe are very different from the American model upon which the Irish system appears to be based. The principal difference is that under the US system, any judge in any court has the power to rule on the constitutionality of a law if requested to do so by a party to the action[5] (in Ireland, this power is limited to those courts directly established under the 1937 Constitution, namely the High and Supreme Courts). In most other European countries, however, the power to declare a law unconstitutional is confined to a single special constitutional court, most of which were established post-World War II.[6] The rationale behind this distinction is that, according to the logic of the seminal US decision of *Marbury v. Madison*,[7] each court is charged with defending the Constitution because that document is at the apex of the hierarchy of norms;[8] on the other hand, for the European judge sitting in an ordinary court, the highest norm is traditionally the will of the legislature.[9] It is not proposed to examine the US model in this chapter.[10]

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[5] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000), 32.

[6] According to Stone Sweet (n5), such courts were established in Austria in 1945, in Italy in 1948, in the Federal Republic of Germany in 1949, in France in 1958, in Portugal in 1976, in Spain in 1978, and in Belgium in 1985. Following the political upheaval of 1989, similar courts were set up in the Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, the Baltic States, and some parts of the former Yugoslavia: *ibid*, at p31.

[7] 5 US [1 Cranch] 137 [1803]. In that case, the US Supreme Court declared unconstitutional section 13 of the Judiciary Act, 1789, in that it purported to enlarge the Supreme Court's original jurisdiction beyond the scope allowed under the Constitution, on the basis that Congress could not pass any law contrary to the Constitution. For an analysis of the case, *see*, *inter alia*, Jean Edward Smith, *John Marshall: Definer of a Nation* (Henry Holt & Company, 1996); Peter Irons, *A People's History of the Supreme Court* (Penguin Books, 1999); and R Kent Neumyer, *John Marshall and the Heroic Age of the Supreme Court* (Louisiana State University Press, 2001). The US Supreme Court later expanded this doctrine by holding that States were obliged to uphold both the decisions of the Court and its interpretations of the Constitution: *Cooper v. Aaron* 358 US 1 [1958]; *see* Ralph Rogowski and Thomas Gawron, "Constitutional Litigation as Dispute Processing: Comparing the U.S. Supreme Court and the German Federal Constitutional Court", from Ralph Rogowski and Thomas Gawron (eds) *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* (Berghahn Books, 2002), 1, at 5.

[8] Interestingly, it has been argued that the principle of constitutional review of legislative acts has an older origin. Reference to a judicial power to strike down laws can be found in early English judgments such as that of Coke CJ in *Bonham's Case* (1610) Co Rep 113b, where the judge remarked that "when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void." A similar view was expressed by Hobart CJ in *Day v. Savadge* (1614) Hob 85, at 97. This approach arguably made of the judiciary a real third power; however, it was later abandoned in England; *see* Lord Irvine of Lairg, QC, "Judges and Decision-Makers: The Theory and Practice of *Wednesbury* Review" [1996] PL 59, at 61. It has been argued that those who participated in the ratification of the US Constitution accepted the concept of judicial review of Federal statutes: *see* Saikrishna Prakash and John Yoo, "The Origins of Judicial Review" (2003) 70(3) Summer *University of Chicago Law Review* 887.

[9] Stone Sweet (n5), at 33.

[10] There is not the time or space for such a study in this thesis. Furthermore, as an eminent American judge has remarked, "I am not sure that the American Bill of Rights…was the same kind of animal as

Under the general European model, the constitutional court has both exclusive and final jurisdiction in constitutional matters; its jurisdiction is limited to the resolution of constitutional disputes only; its judges are connected to but formally separate from both legislature and judiciary; and the court is often empowered to review legislation prior to its formal enactment (i.e. before it can do harm).[11] Where a court examines the constitutionality of a law either before it has entered into force, or even where it has been promulgated but not yet applied,[12] it is referred to as abstract review, because the constitutionality of the measure is examined in a vacuum prior to it having had any legal effects. Concrete review, on the other hand, takes place where an ordinary judge refers a constitutional question arising in a case before him to the constitutional judges.[13] In France, only abstract review is possible; in Germany, Italy and Spain, both the abstract and the concrete forms of review take place.[14] It is worth taking a brief look at the contrasting approach to judicial review of legislation adopted in two civil code countries: France and Germany. The Irish method will then be examined.

France

In France, a deep and abiding distrust of the judiciary, resulting from the blood-soaked history of the pre-Revolutionary national courts, meant that judicial review was long forbidden: "the Rousseauian orthodoxy of popular sovereignty[15] [was] so pervasive that judicial review was made a criminal offence in 1791."[16] The actions of past judiciaries meant that it was seen as innately political as opposed to judicial in both its character and effects by the political theorists of the day, who were "haunted by fears of a self-seeking, anti-democratic judiciary, [and viewed] any judicial interpretation

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most bills of rights that have been adopted nationally, and even internationally, in the last half of the twentieth century" (Justice Antonin Scalia, "The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002), 19, at 20).

[11] Stone Sweet (n5), at 33-34.

[12] Laws may be reviewed at this stage under the German, Italian and Spanish systems.

[13] Stone Sweet (n5), at 45.

[14] *Ibid.*

[15] According to Jean-Jacques Rousseau, sovereignty was shared among the people, with each individual having a share (popular sovereignty). This theory is to be contrasted with Montesquieu's theory of national sovereignty, under which sovereignty belongs to the entire nation as a single unit. Under the first theory, some activities of the citizen, such as voting, could be seen as duties; under the latter, they are construed as rights.

[16] Mary L Volcansek, "Judges, Courts and Policy-Making in Western Europe" from Mary L Volcansek, *Judicial Politics and Policy-Making in Western Europe* (Frank Cass & Co Ltd, 1992), 1 at 4.

or, *a fortiori*, invalidation of statutes [as] a political act."[17] This situation did not change until the approval of the Constitution of 5 October 1958, which, in addition to establishing the Fifth Republic, introduced a limited form of *a priori* judicial review. Under this system, a law can be referred to a special body known as the *Conseil constitutionnel* (Constitutional Council) after it has been approved by Parliament, but prior to its promulgation, for an assessment of its conformity with the Constitution. International treaties may also be referred to the Council prior to their ratification: this happened with the much-debated *Maastricht Treaty*, for example. This form of review has been described as "preventive judicial review,"[18] in that it may only take place during the narrow window before the law is promulgated. There is no provision under French law for any review of laws for consistency with the Constitution once they have become law, probably because the system has not yet succeeded in throwing off the shackles of the theory of parliamentary sovereignty.[19] Legislation may only be referred to the *Conseil constitutionnel* by certain specified persons: the President of the Republic, the Prime Minister, the President of the National Assembly (the lower House of Parliament), the President of the Senate (the Upper House), or by sixty members of either House. Access is thus strictly defined, another factor limiting the scope of review in France. Indeed, the provision that sixty members of either House may refer a law to the *Conseil* before its enactment was only introduced in 1974; this development was important in that it effectively opened up the right to challenge the constitutionality of legislation to the opposition parties.[20] Furthermore, there is a very narrow time limit for challenges: referrals must be made within 15 days of the Bill's adoption by Parliament.[21]

The Council is made up of nine members, not including the former Presidents of the Republic, who may sit as *ex officio* members: three members are selected by the President of the Republic, and three by each of the Presidents of the two Houses.

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[17] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, Oxford, 1989), at 137.
[18] Alan R Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge University Press, 1989), at 251.
[19] Mary L Volcansek, (n 16), at p4. *See* also Cappelletti (n17) at 251.
[20] NB at the time of this constitutional reform, the idea that the electorate might choose a President of one political colour and a Lower House majority (and by extension Prime Minister) of another would have been unthinkable. Thus, until 1974, all those possessing the right to seize the *Conseil* were members of the political majority (the Right).
[21] Stone Sweet (n5), at 47.

Members sit for nine years, for one term only – the long period of service is intended to ensure stability, while the single term is to secure the independence of the members, who will not be tempted to please those who nominated them in an effort to be reappointed. However, it can hardly be denied that appointment to the *Conseil constitutionnel* is to an extent dependent on political affiliations;[22] for that reason, and also because there is no requirement that members have any specialist qualifications,[23] legal or otherwise, its composition is open to criticism.

Nevertheless, despite somewhat tame beginnings, the Council has been known to flex its muscles. Perhaps its most notable achievement to date has been to incorporate a set of fundamental rights provisions into the Constitution by a decision of 16 July 1971. There is no express enumeration of personal rights in the Constitution of 1958, but in ruling on the constitutionality of a statute which purported to limit the right to freedom of association, the Council ruled that it could rely on the Preamble and the documents mentioned therein to invalidate such legislation. The Preamble of the 1958 Constitution makes reference to the Fundamental Principles Recognised by the Laws of the Republic, the political, social and economic principles set out in the 1946 Constitution of the Fourth Republic and, crucially, to the *Déclaration des droits de l'homme et du citoyen* of 1789.[24] Having taken the monumental step of incorporating these documents into the "*bloc de constitutionnalité*" against which laws and treaties were to be measured, the Council held the statute to be contrary to "the fundamental principles recognised by the laws of the Republic and the Declaration...of 1789."[25] Since this decision, the Council has been a force to be reckoned with. Furthermore, its reading of the sometimes contradictory principles established by the (individualistic) 1789 Declaration and the (relatively socialist) 1946 principles has proved crucial in influencing important matters of government policy – a somewhat ironic development given the French hostility to the political aura of judicial review. Perhaps the most striking and controversial example of the above was a decision of January 1982, in which the Council struck down a law which was to form the basis of the

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[22] Alec Stone remarks, "In practice, the single most important criterion for selection is partisan affiliation." *See* "Where Judicial Politics are Legislative Politics: The French Constitutional Council" from Mary L Volcansek, *Judicial Politics and Policy-Making in Western Europe* (Frank Cass & Co Ltd, 1992), p29 at p31.

[23] By 1992, only four professional judges had ever been appointed to the Council: see Stone, *ibid.*

[24] The Declaration of the Rights of Man and the Citizen.

[25] 71-44 DC, *Recueil des Decisions du Conseil constitutionnel* (1971) p9.

nationalisation of major companies in the fields of industry, banking, and investment, on the basis that the compensation scheme provided for was insufficient to vindicate the property rights of the owners, which were protected by Article 17 of the Declaration of 1789. This was in spite of the fact that the 1946 principles established an actual obligation to nationalise in certain cases. Controversially, the 1946 text was, at the time of drafting, intended to override certain aspects of the earlier document.[26]

In spite of the fact that the Council has developed its role as reviewer of the constitutionality of legislation and treaties, it must be recognised that this "concentrated"[27] system of review is necessarily limited. In spite of the fact that the *Conseil d'Etat* (Council of State[28]) has controlled the exercise of the statutory instrument-type norms enacted by the executive, and the *Cour de Cassation* (Supreme Court of Appeal[29]) has established a power of all courts to refuse to apply laws conflicting with the EU Treaties,[30] it cannot be said that there is a general power of review in the ordinary French courts. Furthermore, the development concerning the non-application of laws conflicting with the EU Treaties was slow to come about, and as yet there has been no analogous development regarding statutes whose terms run contrary to the Convention.[31]

Germany

Volcansek has argued that, despite the fact that "Judicial review, or the power of a court to determine the constitutional validity of a legislative act, is the most obvious manifestation of raw judicial power," this full-blooded type of review is only really permitted in Germany, Italy, and to a limited extent in Belgium.[32] It is therefore appropriate to turn to one of the strongest systems of constitutional review in Europe:

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[26] *See* Stone Sweet (n5) at 66-68 for a discussion of this decision. NB the legislation was upheld in a new form which took account of the Council's criticisms, but the whole experience had serious implications for the programme of the government of the day.
[27] This is the term used by Brewer-Carias (n18) to describe those systems in which the responsibility for reviewing the constitutionality of laws is confined to a single body.
[28] The Supreme Court in matters of administrative law.
[29] The Supreme Court in matters unrelated to administrative law.
[30] See Brewer-Carias (n18) at 260.
[31] Theoretically, such a power does exist; *see* section on France in Chapter 4.
[32] Mary L Volcansek, (n16), at 4.

that of the Federal Republic of Germany.[33] In Germany, as in France, a single organ is entrusted with the task of reviewing the compatibility of laws with the Federal Constitution of 1949. This Federal Constitutional Court, like the Irish Supreme Court, is the ultimate guardian of the Constitution. It has exclusive jurisdiction to review the conformity of both Federal laws and those of the *Lander*[34] with the Federal Constitution pursuant to Article 93(2) of the Constitution.[35] It is composed of sixteen members who sit for twelve years. Like their French counterparts, their appointment is to an extent political, in that eight are elected by the *Bundesrat* (Lower House at federal level) and eight by the *Bundestag* (the Upper House at federal level). However, the requirements as to legal qualifications are more stringent: six of the sixteen members must actually be federal judges, and the others must at least be qualified to act as federal judges. Furthermore, certain age limits apply, and members of the Federal Constitutional Court must be at least forty years of age, and at most sixty-eight.[36]

The Federal Constitutional Court has the capacity to hear a range of controversies, including constitutional review of disputes between state bodies, abstract or concrete judicial review, constitutional complaints by citizens, election disputes, or certain matters closely linked to the political power, such as the prohibition of political parties[37] and the impeachment of the President of Germany.[38] The Court may be requested to examine a norm or state act *in abstracto* in two circumstances: first, it may be asked to do so by the federal government, the government of a *Land*, or by one third of the members of the *Bundestag*; secondly, since 1969, any individual may come before the Court where one of his fundamental rights has been violated as a direct result of a law or act of state, once other judicial remedies have been

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[33] It appears that, for historical reasons, the German constitutional court was "given greater powers and a more central role than constitutional courts in other comparable western democracies"; Alfred Rinken, "The Federal Constitutional Court and the German Political System" from Ralph Rogowski and Thomas Gawron (eds) *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* (Berghahn Books, 2002), 55, at 61ff.

[34] Germany is made up of *Lander*, the equivalent of the individual State in the US or Belgium.

[35] However, each *Land*'s individual constitutional court may deal with violations of the constitution of that *Land*. See Brewer-Carias (n18), at 205.

[36] All figures from Stone Sweet (n5), at 49, Table 2.3.

[37] This is permissible under Article 21 II of the German Basic Law.

[38] Rinken (n33), at 62. The circumstances in which impeachment is possible are set out in Article 61 of the Basic Law.

exhausted.[39] Questions of constitutional law may also be referred to the Court by judges sitting in ordinary courts when the need arises. Where review is requested by one of the privileged actors listed above (i.e. the government etc), it must be done within 30 days of the adoption of the impugned measure.[40] The German Constitutional Court has had a huge impact on the national legal system, invalidating around 2,000 laws and a further 223 administrative and other legal rules. To date, the Court has reviewed about 20% of all federal laws and annulled 4.6% of them. (However, it should be noted that individual complaints to the Court are overwhelmingly unsuccessful: only around 3% of claims of this type have been successful. This may be due to the difficulty of proving that an individual complainant has suffered direct prejudice as the result of impugned act.)[41]

How can those seeking to promote the Convention as a source of rights benefit from robust traditions of judicial review such as the German model? It is submitted that if the national Constitutional Court can be persuaded to review the compatibility of legislation with the ECHR on a regular basis, the status and domestic effectiveness of that document would inevitably be strengthened. The German Constitutional Court has moved some way towards this position, in that it consents to hear individual complaints based upon Convention Articles, so long as the Article in question is the expression of pre-existing customary international law.[42] However, once again, this development *at first* appears to be more closely connected to German judicial attitudes than to the existence of a system of judicial review.[43] This proposition is supported by the fact that Italy, too, is one of the countries with a tradition of strong judicial review, but the Convention has yet to make much headway in the domestic Italian courts. The Italian Constitutional Court receives more than 1,000 applications per year and renders almost 250 formal judgments on average.[44] Furthermore, in terms of status, functions and composition, it is similar to the German Constitutional Court: it is the guarantor of

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[39] Brewer-Carias (n18), at 210.
[40] Stone Sweet (n5) at 47, figure 2.2.
[41] All statistics from Stone Sweet (n5) at 64.
[42] *See* Chapter 4.
[43] The German Court's competence is not delimited by either of the two main theories on the delimitation of curial competence (the political question doctrine and the doctrine of judicial self-restraint). Rather, the range of the Court's competence is determined under a legal-functional analysis under which the Court, the legislature and the executive are all guardians of the Basic Law, but in different ways. Rinken (n33), at 76ff.
[44] Statistics from Stone Sweet (n5) at 65.

the Constitution, it is independent from the other organs of State, and it is composed of 15 members, *all* of whom must have been practising judges for 20 years, or tenured professors of law. Unlike the German and French courts, however, membership of the Italian Court is influenced by the national judiciary, who name five members. (Of the others, five are nominated by the government, and five elected by the Parliament.) However, it should be noted that the Italian Constitutional Court is inherently weaker than many of its counterparts in other jurisdictions: it is *not* the guarantor of fundamental rights, it does not have the jurisdiction to rule on individual applications in the way that the German Court can, and it may only review enacted legislation if a question as to its constitutionality is referred to it by an ordinary judge.[45] It is thus clear that the Italian Court is not a defender of personal rights in the way that its German, Spanish and Austrian counterparts are.[46]

Ireland

The Constitution of 1937 contains a statement of the rights of citizens in Articles 40-44.[47] Under the 1937 Constitution, the Irish courts have a long tradition of upholding constitutional rights and of striking down legislation where it offends against those rights.[48] It was not always thus: the previous Constitution provided but weak protection for fundamental rights, and contained a dangerous provision – Article 2A – which permitted the State to derogate from any of its other provisions, even where

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[45] Brewer-Carias (n18) at 218-219.

[46] This view is expressed by Brewer-Carias, *ibid.*

[47] While Articles 40-44 are traditionally regarded as forming the "bill of rights" of the 1937 Constitution, Casey notes that constitutional rights also derive from other Articles – e.g. Article 38.1, which states that "No person shall be tried on any criminal charge save in due course of law", and is "a fount of rights" in the sphere of criminal procedure: James Casey, *Constitutional Law in Ireland* (3rd Edition, Round Hall Sweet & Maxwell, 2000), at 386. Furthermore, not all of the constitutional rights protected by the courts are expressed in written form: under the doctrine of unenumerated rights, the courts have held that Article 40.3 protects a host of rights that are not mentioned in the document, including the right to marry and found a family (*Murray v. Attorney General* [1985] IR 532), the right to earn a living (*Murtagh Properties v. Cleary* [1972] IR 330), the right to communicate (*Attorney General v. Paperlink* [1984] ILRM 373), the right to travel (*The State (M) v. Attorney General* [1979] IR 73), the right to privacy (*McGee v. Attorney General* [1974] IR 284 (marital privacy); *Norris v. Attorney General* [1984] IR 36). This practice of "creating" constitutional rights has been criticised on the basis that it undermines the legitimacy of judicial review: Gerard Hogan, "Constitutional Interpretation" from Frank Litton (ed) *The Constitution of Ireland 1937-1987* (Institute of Public Administration, 1988), 173, at 187-188.

[48] It has been argued that the inclusion of this "bill of rights" is the only material way in which the Irish Constitution differs from the unwritten British model: John Kelly, "Fundamental Rights and the Constitution" from Brian Farrell (ed) *De Valera's Constitution and Ours* (Gill & Macmillan, 1988), 163, at 163.

those provisions contravened fundamental rights. However, the current Constitution makes the courts its guardian, and the two highest jurisdictions – the High Court and Supreme Court – have the power to strike down legislation for contravening the terms of the most fundamental law in the State.[49] This may be done either before or after the law has been promulgated. Under Article 26 of the Constitution, the President has the power to refer a Bill to the Supreme Court prior to signing it into law if he/she thinks that some provision of the Bill infringes any aspect of the Constitution.[50] Laws are not immune from review after they have been promulgated: in such circumstances, a person whose rights are adversely affected by a provision may impugn its constitutionality – either as a sole cause of action or as part of other proceedings.

The cases in which the Irish courts have struck down legislation for contravening fundamental rights are many, and do not all bear repetition here.[51] They include cases as varied as *Cox v. Ireland*,[52] in which the Supreme Court struck down section 34 of the Offences Against the State Act, 1939, because it constituted an unjust interference with the plaintiff's rights,[53] and *Daly v. Revenue Commissioners*,[54] in which the High Court struck down section 26 of the Finance Act 1990 as it amounted to an attack on the plaintiff's property rights.[55]

Naturally, fundamental rights under the Constitution are not absolute; in a number of cases, the Constitution itself permits the legislature to limit a right in the interest of the common good. However, the legislature's power to qualify rights in this way will be

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[49] Technically, this power also existed under the 1922 Constitution, but it was effectively undermined by Article 50, which allowed the legislature to amend the Constitution by way of ordinary Acts for a certain period of time. *See* Introduction.

[50] The Article 26 reference is the only situation in which the Supreme Court sits as a court of first instance; in all other matters it is a court of final appellate jurisdiction. This Article has been used as a form of *a priori* constitutional review in many cases, including *Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 580;

[51] *See*, generally, Casey (n47), Chapter 12;

[52] [1992] 2 IR 503.

[53] The section stated that, if an employee of the State was convicted of a scheduled offence in the Special Criminal Court, he/she would forfeit his position and would be debarred from taking it up again for seven years. This penalty was in addition to any criminal sanctions imposed, and did not apply to any person who was not an employee of the State – or who had not been convicted in the Special Criminal Court.

[54] [1995] 3 IR 1; [1996] 1 ILRM 122.

[55] The section had been designed to cover a transitional provision when the year on which self-employed taxpayers were assessed, but was never repealed and involved a permanently unfair method of tax collection.

strictly construed,[56] and will be subjected to close scrutiny by the courts, which will strike it down if it is irrational or disproportionate.[57] The irrationality test involves asking, from an objective standpoint, "whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."[58] The irrationality test today seems less popular than the doctrine of proportionality, which requires the application of a three-step test where the legislature purports to limit fundamental rights. The proportionality test was first explicitly applied by Costello J in *Heaney v. Ireland*,[59] when he adopted the Canadian[60] formulation of the test:

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
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> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
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> (b) impair the right as little as possible, and
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> (c) be such that their effects on rights are proportional to the objective."[61]

The application of this test has not been uncontroversial: Hogan has argued that, while it reduces judicial subjectivity in assessing the extent to which fundamental rights may be infringed in the common interest, it also amounts to an abandonment of the

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[56] *See* GW Hogan and GF Whyte, *JM Kelly: The Irish Constitution* (4th Edition, LexisNexis Butterworths, 2003), at 1269-1270. This point has been made by the courts on many occasions, including *Irish Press v. Irish Ingersoll Publications* [1993] ILRM 747; *Murphy v. Greene* [1990] 2 IR 566, [1991] ILRM 404; *NUJ v. Sisk* [1992] 2 IR 171, [1992] ILRM 96; *Bailey v. Gallagher* [1996] 2 ILRM 433.

[57] Hogan and Whyte (n56), at 1270ff.

[58] *Tuohy v. Courtney* [1994] 3 IR 1, at 47 (also at [1994] 2 ILRM 503 at 514), *per* Finlay CJ. On that basis, the Supreme Court refused to strike down section 11 of the Statute of Limitations, 1957, which placed a six-year limitation on the bringing of actions for tort. It had been alleged that the imposition of limitation periods infringed the right of access to the courts. This decision was followed in *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1; [1995] 2 IRLM 81

[59] [1994] 3 IR 593; [1994] 2 ILRM 420 (HC) and [1996] 1 IR; [1997] 1 ILRM 117 (SC).

[60] *Chaulk v. R* (1990) 3 SCR 1303, at 1335-1336.

[61] [1994] 3 IR 593 at 607; this test was endorsed by the Supreme Court on appeal. The proportionality test was subsequently applied to legislation on many occasions since: *see*, e.g. *Iarnród Éireann v. Ireland* [1995] 2 ILRM 161; *Daly v. Revenue Commissioners* [1995] 3 IR 1; [1996] 1 ILRM 122; *Rock v. Ireland* [1997] 3 IR 484, [1998] 2 ILRM 35; *Murphy v. Independent Radio and Television Commission* [1999] 1 IR 12, [1998] 2 ILRM 360; *Re Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321, [2001] 1 ILRM 81. The test was also applied to a ministerial decision about the phased release of a patient from the Central Mental Hospital (after he had been found guilty but insane) in *Gallagher v. Director of the Central Mental Hospital (No 2)* [1996] 3 IR 10.

language of the Constitution.[62] However, Rivers has argued that the doctrine of proportionality should be combined with variable intensity review in order to address the problem of the test to be applied in Human Rights Act judicial review.[63] Rivers suggests that, where the limitation on a right is minor, there need not be any large gain to the public in order to justify it; however, where the infringement is substantial, there ought to be a substantial gain to the public interest if it is to be justified. It is submitted that the fact that the Irish courts are accustomed to the application of a proportionality test ought to make it easier for them to adopt a reasoned approach towards alleged violations of Convention rights. As is well known, the Court of Human Rights applies a three step test to the legislative measures (and State action[64]) which is alleged to violate a Convention right, by asking (1) whether the interference is prescribed by law; (2) whether it is necessary in a democratic society (i.e. whether is pursues a legitimate aim[65]); and (3) whether the means used are proportionate to the ends sought.

From the foregoing, it is possible to conclude that the Irish judiciary are in a better position than their European colleagues to bolster the impact of incorporation through the judicial review of legislation and acts of state for compatibility with the Convention. This is so because the Irish legal system is not compartmentalised into civil and administrative jurisdictions in the way that many other European legal systems are: the same courts (albeit in different guises) hear all cases in Ireland,

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[62] Gerard Hogan, "The Constitutionality of Property Rights and Proportionality" (1997) 32 Ir Jur (ns) 373 at 396.

[63] Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65(1) *CLJ* 174. Rivers argues that the British courts have yet to come to grips with a structured method of judicial review in such cases, and says that the "challenge has been to develop a general theory of discretion that preserves both the specifically judicial function of protecting fundamental legal rights and the proper contribution of legislative and executive bodies in determining the content of law" (at 207).

[64] The Irish courts can also adjudicate upon claims that a person's constitutional rights have been violated, either by the State or by another citizen (the "horizontal" application of constitutional rights). While the Constitution itself does not prescribe any remedy for such breaches, the courts frequently grant declaratory relief in such cases, along with awards of damages. On this point generally, *see* Hogan and Whyte (n 56) at 1302. Damages have been awarded in a number of cases, including *Meskell v. CIE* [1973] IR 121; and *Cotter v. Ahern* [1976-77] ILRM 248. Substantial damages are not guaranteed: much depends on the nature of the breach and the importance of the right; in *Kearney v. Minister for Justice* [1986] IR 116, [1987] ILRM 52, the court held that the plaintiff's right to communicate was breached when prison staff failed to deliver his post to him. He received only nominal damages as the breach had not occasioned him any pecuniary loss, and the default on the part of the respondent had not been vindictive.

[65] In relation to the UK's Human Rights Act, it has been suggested that the obligation to identify a legitimate aim may lie not on the state but on the court itself, as part of the obligation contained in section 3 of that Act (and section 2 of the Irish ECHR Act) to give effect to legislation in a manner compatible with Convention rights "So far as it is possible to do so": Richard Gordon QC, "Legitimate Aim: A Dimly Lit Road" [2002] EHRLR 421, at 426.

whether they involve private or state actors, or civil or criminal actions. Furthermore, both the High Court in all its forms (including that of the Central Criminal Court) and the Supreme Court are the recognised guardians of the Constitution. Why should they not also be the guardians of the Convention? However, for this to happen, it is arguable that the method of incorporation embodied in the European Convention on Human Rights Act 2003 is inadequate, providing as it does for a mere "declaration of incompatibility" where a law or state act breaches the Convention.[66] For judicial review to be effective as a method of maximising the Convention's domestic impact, the national courts would have to be obliged and empowered to strike down laws that breach the Convention in exactly the same way as they do unconstitutional enactments. Such a development may require a much more radical form of incorporation; indeed, it is debatable whether a mere law would be adequate to accomplish such a task, given the rules of statutory construction such as the *lex posterior* rule.[67] It may be that nothing short of incorporation at constitutional level would suffice. However, recent developments in England have raised the question as to whether it might be open to the courts to apply a standard of review that is more exacting on the State authorities.

Judicial Review of Administrative Action - "Anxious Scrutiny": A New Standard of Judicial Review in Rights Cases?

There are a number of grounds on which an administrative decision may be overturned by the courts: illegality (where the decision-maker goes beyond the limits of his/her legal power); procedural impropriety (where the decision-maker breaches the rules set down by the law or those of natural and constitutional justice); and the most controversial and important ground of review, irrationality or unreasonableness (where the court is permitted to examine the decision in order to assess whether it was so unreasonable/irrational that it ought never to have been made).[68] It is in this last area that the courts have lately been accused of "judicial activism".[69] The traditional

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[66] The method of incorporation used in Ireland and the operation of the declaration of incompatibility will be discussed in greater detail in Chapter 5 of this thesis.

[67] The implications of this rule, and the possible means of avoiding its operation, are discussed in Chapter 4.

[68] For a clear summary of the considerations in relation to each of these grounds in the area of asylum, *see* Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths, 2000), 224ff.

[69] Harvey suggests that judicial activism has increased the profile of judicial review: (n68), at 216.

standard of judicial review in the United Kingdom is that set down in the seminal case of *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* ("the *Wednesbury* case"):[70] the decision must be "so unreasonable that no reasonable authority could ever have come to it".[71] The *Wednesbury* judgment has been described as "the *locus classicus* of British administrative law";[72] a title that it has held unchallenged for many years. The limited grounds on which the UK courts could overturn administrative decisions was a consequence of the doctrine of parliamentary sovereignty, which limited the role of the judiciary in that jurisdiction.[73] The principles on which decisions could be judicially reviewed in the UK included a number of important restrictions: judicial review is not the same as an appeal; the judge has no right to substitute his assessment for that of the decision-maker; the court focuses on the decision's legality rather than its correctness, and on the way in which the decision was reached, rather than its substantive merits.[74]

The *Wednesbury* test was adopted by the Supreme Court in *The State (Keegan) v. Stardust Victims' Compensation Tribunal*.[75] The Irish formula of the test is equally demanding of the applicant for judicial review: the court must consider "whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense" (*per* Henchy J, *The State (Keegan) v. Stardust Victims' Compensation Tribunal*). Such tests imposed a heavy burden on anyone seeking to challenge the substance of a decision by a State authority.

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[70] [1948] 1KB 223.
[71] [1948] 1KB 223, at 234.
[72] Lord Irvine of Lairg, (n8), at 62.
[73] Genevra Richardson and Maurice Sunkin, "Judicial Review: Questions of Impact" [1996] Spr PL 79, at 86. Richardson and Sunkin note that the role of the courts in England and Wales appears particularly limited when contrasted with that of the courts in the United States of America. They add that "The UK courts are restricted to quashing the impugned decision, remitting the decision to the relevant body, ordering the relevant body to decide the matter afresh according to the law or fulfil their duty according to law, declaring the law, or prohibiting the body from acting" (at 86). This description applies equally well to the Irish courts in relation to traditional judicial review (as opposed to constitutional review).
[74] Lord Irvine of Lairg, (n8) at 60.
[75] [1986] IR 642, at 658. This test has been applied in a number of cases, including *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 23; *Doran v. Garda Commissioner* [1994] 1 ILRM 303; *Carrigaline Community TV Broadcasting Co v. Minister for Transport* [1997] 1 ILRM 161; *Ryan v. Compensation Tribunal* [1997] 1 ILRM 194.

However, during the 1980s and 1990s, a new trend emerged in a number of English decisions (discussed below);[76] this trend suggested that the subject matter of the decision, combined with the nature of the decision-making body, might vary the level of curial deference to which that decision was entitled. In short, in some cases it might be proper to apply a higher standard of unreasonableness in some cases – a "super-*Wednesbury* test", to be applied to areas such as economic policy – and a lower standard in other cases, making it easier for the courts to intervene where the impugned decision affected the applicant's human rights – a "sub-*Wednesbury*" test.[77] The argument that different standards or versions of the reasonableness test ought to apply dates to well before the incorporation of the European Convention on Human Rights into English law. Even prior to the incorporation of the European Convention on Human Rights, there were a number of occasions on which the English courts appeared close to recognising the existence of a more exacting standard of review where fundamental rights were concerned.

The first big departure from *Wednesbury* was *R v. Secretary of State for the Home Department ex parte Bugdaycay*,[78] where Lord Bridge stated that:

> "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put an applicant's life at risk, the basis of that decision must surely call for the most anxious scrutiny."[79]

In that case, four people who were in the United Kingdom illegally[80] challenged the decision to deport them. Three were unsuccessful, but the Court of Appeal overturned the decision to deport the fourth, who had argued that if sent back to the country from whence he had arrived (Kenya) he would be sent from there to Uganda, where he would be killed.[81]

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[76] *See*, *inter alia*, Bairbre O'Neill, "The Impact of a Written Constitution on Traditional Standards of Natural and Constitutional Justice" (2000) 8 *ISLR* 35.
[77] *See*, *inter alia*, Lord Irvine of Lairg, (n8) at 63ff.
[78] [1987] 1 AC 514.
[79] [1987] 1 AC 514, at 537.
[80] Three had obtained leave to enter the UK, but had outstayed that permission. Bugdaycay had entered on a student visa, Norman on a business visa, and Santis as a tourist. All three has subsequently applied for asylum. Musisi, on the other hand, had sought leave to enter as a visitor from Kenya, but was refused and immediately applied for asylum as a Ugandan refugee.
[81] There was evidence to suggest that the Kenyan government would return him to Uganda, such that his claims had some credence.

Subsequent cases also adopted and expounded this anxious scrutiny test, all the while refusing to apply the ECHR as a standard which might influence judicial review.[82] For example, in *R v. Ministry of Defence ex parte Smith*,[83] four former members of the British armed forces challenged their discharge from the navy and RAF. Their discharge was in accordance with the policy that homosexuality was a ground for discharging a person from the armed forces.[84] The applicants lost their case, but the Court of Appeal nevertheless took another step towards widening the scope of the irrationality principle.[85] In so doing, the Court of Appeal adopted the formula used by counsel for the applicants, David Pannick QC:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."[86]

What does the anxious scrutiny test entail? Importantly, the test only applies to cases where the impugned decision can be shown to infringe human rights. However, within that limited category of cases, the potential impact of the doctrine is radical. It is arguable that the anxious scrutiny test operates to shift the burden of proof away from the applicant for judicial review and onto the decision-maker who seeks to justify his/her ruling. This is so because, once the applicant raises a *prima facie* argument that his/her human rights will be adversely affected by the decision under review, it will be up to the respondent to show either that (a) the decision does not, in fact, breach the

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[82] Hilary Delany, "Significant Themes in Judicial Review of Administrative Action" (1998) 5(1) *DULJ* 73, at 84ff.

[83] [1996] 1 All ER 257; [1996] QB 517.

[84] Section 146(1) of the Criminal Justice and Public Order Act 1994 decriminalised homosexual acts by members of the armed forces; nevertheless, such acts were a ground for dismssal (section 146(6)), and the rule was applied even where there was no evidence of any such act – only of sexual orientation. This led Simon Brown LJ in the Divisional Court to remark that Lawrence of Arabia would no longer be welcome in the British armed forces (*R v. Secretary of State, ex parte Smith* [1995] 4 All ER 427, at 431, paragraph J).

[85] Martin Norris, "*Ex parte Smith*: Irrationality and Human Rights" [1996] PL 590, at 593. As Norris notes, this was probably of little comfort to the applicants.

[86] [1996] 1 All ER 257, at 263d.

applicant's human rights, or (b) that the infringement is justified by a sufficiently compelling public interest.[87] Imelda Higgins argues that option (a) is the only available argument open to the decision-maker if the right affected is sufficiently fundamental, such as the right to life, while option (b) can apply to a range of other rights the limitation of which may be objectively justified (based on the Convention jurisprudence, such rights would, presumably, include the right to liberty, freedom of expression etc).[88]

As Delany notes, however, some cases reflected a reluctance to allow the Convention to impose the additional requirement to act in accordance with that document.[89] One example of this is the judgment of the House of Lords in *R v. Secretary of State for the Home Department ex parte Brind*.[90] However, many judges did appear to accept that the courts had a duty to scrutinise carefully decisions with an impact on human rights: in *R v. Ministry of Defence ex parte Smith*,[91] the Court of Appeal rejected the applicant's contention that it was unreasonable to discharge them from the armed forces on the grounds of their sexuality. Simon Brown LJ expressed the view that the involvement of human rights did not lead to a lowering of the standard of unreasonableness; however, in such cases the decision-making body would need to demonstrate an important public interest justifying the restriction of fundamental rights.[92]

However, Delany argues that, even though the pre- Human Rights Act House refused to incorporate Convention principles, it did consider the extent to which the decision interfered with human rights. In a later case, Lord Bingham MR in the Court of Appeal also appeared open to allowing the subject matter of the decision (i.e. whether it was one which interfered with the applicant's human rights) to influence the standard of review:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a

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[87] Imelda Higgins BL, "If Not O'Keeffe, Then What?" (2003) 8(3) *Bar Review* 123, at 124ff.
[88] Higgins (n87), at 125.
[89] Delany (n82) at 84ff.
[90] [1991] 1 AC 696.
[91] [1996] QB 517.
[92] [1996] QB 517, at 538.

> reasonable decision-maker. But in judging whether the decision-maker has exceeded the margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."[93]

Such a position was not uncontroversial in England, and had the potential to lead to a shifting standard of review depending on whether the case involved human rights or not.[94]

It has been argued that an example of the more robust version of review may be found in *R v. Secretary of State for the Home Department, ex parte Simms*.[95] In that case, the applicants had been convicted of murder but were unable to meet with journalists in order to protest their innocence because of a Home Office policy that journalists could not meet with prisoners in a professional capacity. The House of Lords held that this policy was unlawful, as were the prison governors' decisions implementing it. Fordham and de la Mare regard *Simms* as the concretisation of the *Smith* test into one of legality, where the court effectively applied a Strasbourg proportionality test in asking whether there was a pressing social need for the restrictions.[96] They argue that the case allows the application of a high-intensity test in the case of any human right, and also involves asking whether the decision-maker has lawfully exercised his power[97] Assuming that the authors are correct in their assertion that *Simms* provided a higher standard of review, the question then remains as to whether this test was sufficiently stringent as to satisfy the requirements of the Convention under the

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[93] *R v. Secretary for State for the Environment ex parte NLGOA* [1996] QB 517 at 554.

[94] Delany, (n82), at 84ff. F Donson also makes this point: "Civil Liberties and Judicial Review: Can the Common Law Really Protect Rights?" from Leyland and Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997), 347ff. Bingham MR's formula was also employed by Lord Woolf MR in *R v. Saville, ex parte A* [2000] 1 WLR 1855.

[95] [1999] 3 WLR 328.

[96] Michael Fordham and Thomas de la Mare, "Anxious Scrutiny, the Principle of Legality and the Human Rights Act" [2000] 5 (1) *JR* 40, at 44ff. Mark Elliott agrees that the approaches in *Smith* and *Simms* are different: "*Smith* accepts the decision-maker's assessment of how the balance should be struck between the individual's rights and the competing public interest: only if that assessment is so implausible as to be irrational may the court intervene. In contrast, *Simms* requires the decision- or policy-maker to satisfy the court that the infringement serves a pressing social need and is unnecessary, in that it restricts the right no further than it is required. Crucially, therefore, the concept of reasonableness…is absent from the *Simms* test." *See* Mark Elliott, "Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] 6(3) *JR* 166, at 167.

[97] Michael Fordham and Thomas de la Mare, "Anxious Scrutiny, the Principle of Legality and the Human Rights Act" [2000] 5 (1) *JR* 40, at 45.

Human Rights Act. There are strong arguments why the standard in *Smith* and the earlier cases are too weak to provide the adequate standard: "It is simply not sufficient to say to judges that they must 'look carefully' to see that a measure is 'proportionate' or 'justified', any more than to 'look carefully' to see that it is 'reasonable' or 'rational'."[98] It is submitted that Fordham and de la Mare are correct in arguing that only the overt application of the proportionality test will suffice in cases involving human rights. The use of the various phrases such as "anxious scrutiny", "strict scrutiny" etc merely lead to confusion and leave open the option of applying a diluted version of an irrationality test that is no longer adequate, either in the neighbouring jurisdiction or in this one.

It has been argued that the House of Lords definitively stated a preference for a proportionality test when reviewing administrative decisions affecting human rights in *R v. Secretary of State for the Home Department, ex parte Daly*.[99] That case involved a Home Office policy requiring all prisoners to be absent from their cells during searches, which could include searches of legal correspondence. In the leading judgment of the House, Lord Bingham ruled that this constituted an interference with the prisoners' common law right to legal professional privilege. The policy had a legitimate aim – the searches themselves were necessary to ensure security, and in the case of disruptive prisoners their absence may have been necessary. However, while the policy of searching cells was justified, the blanket ban on prisoners being present while this went on was excessive and unwarranted. The House of Lords' approach has been hailed as a clear example of the application of a Strasbourg-style test to a government policy, without the test being undermined by any concept of reasonableness.[100] At the same time, however, "the executive's discretion is thus

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[98] Michael Fordham and Thomas de la Mare, "Anxious Scrutiny, the Principle of Legality and the Human Rights Act" [2000] 5 (1) *JR* 40, at 49.

[99] [2001] UKHL 26 [2001] 2 WLR 1389.

[100] Mark Elliott, "Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] 6(3) *JR* 166, at 171-172. Elliott explains that this judgment does not mean that the courts have made the leap to merits review; the same approach is applied by the Court of Human Rights without this being the case. *See* also Nicholas Blake QC, who argues that the case involved the application of a proportionality test in preference to the "blunt instrument" of *Wednesbury* review: Nicholas Blake QC, "Importing Proportionality: Clarification or Confusion" [2002] EHRLR 19, in particular 23ff. NB *Daly* involved a right at common law, but the House of Lords were adamant that the same approach should apply to Convention rights also.

narrowed, but not displaced."[101] Nevertheless, it is far from certain that even the application of the *Daly* test will allow the UK to avoid future findings by the Court of Human Rights that judicial review proceedings do not amount to an effective remedy.[102]

In support of the argument that the *Smith* test and its descendants do not go far enough to ensure respect for human rights, one need only look at the next chapter in that particular story. In *Smith and Grady v. United Kingdom*,[103] the Court of Human Rights ruled that the British ban on homosexuals serving in the armed forces was disproportionate to the aims pursued (which, according to the UK, was the "effectiveness" of the armed forces). This is authority for the proposition that even the heightened standard of review applied by in *Smith et al* was insufficient to safeguard human rights; a point that was actually recognised by Lord Steyn in the *Daly* case.[104]

The above-mentioned cases clearly illustrate that, even pre-incorporation, the English courts were willing to recognise that respect for fundamental human rights required a more interventionist approach from the courts when assessing the reasonableness of administrative actions. The process was one of evolution rather than revolution: as Norris notes, the test in *Bugdaycay* was "relatively timid", while that in *Brind* was more robust and accepted the possibility of overturning an administrative decision on substantive grounds.[105] Even before the enactment of the Human Rights Act, there were calls for "more intensive substantive review" of decisions; to that end, the *Wednesbury* test was criticised as inadequate and weak; and since *Smith* is merely a "diluted form of irrationality", it was questioned whether even the anxious scrutiny test as applied by the English courts went far enough.[106] Post- the Human Rights Act,

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[101] Mark Elliott, "Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] 6(3) *JR* 166, at 176.

[102] Tim Owen QC, "Fair Trial Rights, Due Deference and the Wider Impact of the Human Rights Act in Administrative Law" from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 55, at 76.

[103] (1999) 29 EHRR 493.

[104] *R v. Secretary of State for the Home Department, ex parte Daly* [2001] 2 WLR 1622, at 1634 (paragraph 27). *See* also Paul Craig, "The Courts, The Human Rights Act and Judicial Review" (2001) 117 *LQR* 589.

[105] Norris (n85), at 595.

[106] Norris (n85), at 599. Norris argues that there is a choice between two ways of developing a more stringent test for judicial review of human rights cases: either accept the *Smith* approach, which allows the retention of a broad spectrum of standards of review, from super-*Wednesbury* to traditional *Wednesbury* to sub-*Wednesbury*, or recognise "that the crude bludgeon of irrationality has outlived its

a doctrinal debate still rages amongst English academics as to the appropriate degree of curial deference to administrative decision-makers – if any.[107] The consensus appears to be that the HRA requires the courts to apply "an intensive standard of review",[108] which may indeed involve the application of the proportionality principle so beloved of the Court of Human Rights.[109] There are also calls for a "principled approach" to curial deference in the area of human rights,[110] in order to promote consistency and eliminate doubt; however, the precise nature of such an approach is still very much up for debate, whether it be a doctrine of "due deference",[111] or the simple requirement that decision-makers explain their decisions properly in order to render them amenable to proper examination by the courts.[112]

While academics in the UK bemoan the failure of their courts to come to terms with the need for a distinct and functional standard of review in human rights matters,[113] those in this jurisdiction are even less happy. There was no such correlative evolution in the reasoning of the Irish courts during the 1990s. Indeed, if anything, the Irish courts became less inclined to grant judicial review of administrative action, which would only be interfered with on "extremely limited" grounds.[114] In *O'Keeffe v. An Bord Pleanála*,[115] the test set down by Finlay CJ in the Supreme Court was that, "in

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usefulness" and adopt a more principled approach to substantive review (at 599-600). On the shortcomings of *Wednesbury* review, *see* also Jowell and Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law" [1987] PL 368; and Walker, "What's Wrong with Irrationality" [1995] PL 556.

[107] Some commentators have gone so far as to argue that judicial deference is entirely inappropriate in cases involving "unqualified" rights (such as the Article 3 right to freedom from torture, and the Article 14 right to freedom from discrimination): *see* Ian Leigh, "Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg" [2002] PL 265. However, this hypothesis is by no means universally accepted: *see* Simon Artill, "Keeping the Executive in the Picture: A Reply to Professor Leigh" [2003] PL 41.

[108] *See*, *inter alia*, Richard Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention Under the Human Rights Act 1998" [2004] PL 33, at 33.

[109] Paul Craig, "The Courts, The Human Rights Act and Judicial Review" (2001) 117 *LQR* 589. Craig argues that the judgment of Lord Steyn in the House of Lords in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] 2 WLR 1622 is authority for this proposition.

[110] Richard A Edwards, "Judicial Deference under the Human Rights Act" (2002) 65(6) *MLR* 859 particularly 871ff.

[111] As proposed by Murray Hunt, "Judicial Review after the Human Rights Act" [1999] 2 *QMWLJ* 14, at 15-16.

[112] Sandra Fredman, "From Deference to Democracy: The Role of Equality Under the Human Rights Act 1998" (2006) 122 *LQR* 53, at 62.

[113] Richard A Edwards, "Judicial Deference under the Human Rights Act" (2002) 65(6) *MLR* 859, at 882.

[114] Eileen Barrington BL, "Asylum Applications and Judicial Review", paper at a conference entitled "Judicial Review: All the Recent Developments in Irish Law and Practice", 29 March 2003, at 11.

[115] [1993] 1 IR 39.

order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally…so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."[116] This test has been described as a "no evidence rule" which means that the decision will stand so long as there was some material justifying it; the weight of that evidence will be irrelevant.[117] For that reason, the *O'Keeffe* test has been described as "super *Wednesbury*".[118]

Finlay CJ reiterated that "the circumstances in which the court can intervene on the basis of irrationality are limited and rare"[119] – a statement Delany says "has on the whole tended to reflect current practice".[120] In spite of the fact that *O'Keeffe* concerned the decision of An Bord Pleanála – a body with undoubted expertise in the area of planning – and did not involve any pressing issue of fundamental rights, the *O'Keeffe dicta* were routinely applied to all sorts of administrative decisions throughout the 1990s. Significantly, many of these decisions did involve a potential impact on the human rights of applicants: *see*, e.g. *Camara v. Minister for Justice*,[121] in which the High Court applied the *O'Keeffe* test to the Minister's decision to deport the applicant on the basis that his claim to need asylum was not credible (and this in the face of the fact that the applicant had appalling scarring which was consistent with his claims of torture in his country of origin).[122]

Indeed, Delany argues that the majority of Irish decisions indicate that "the balance appears to have shifted in favour of administrative authorities".[123] Even the most recent cases appear to favour the traditional *O'Keeffe/Keegan* grounds to the exclusion

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[116] [1993] 1 IR 39, at p72.
[117] Higgins (n87), at 123.
[118] Higgins (n87), at 127.
[119] [1993] 1IR 39, at 71.
[120] Delany (n82), at 88. Delany relies for support on the irrationality-based decisions of *P & F Sharpe v. Dublin City and County Manager* [1989] IR 701 and *Stroker v. Doherty* [1991] 1 IR 23.
[121] [1999] 4 IR 31.
[122] Admittedly, the applicant did not argue that the *O'Keeffe* test was incorrect in the context of asylum decisions; when he did raise that argument on appeal to the Supreme Court, the matter was settled (*see* Higgins (n87), at 123). This may indicate that the State itself was unsure that *O'Keeffe* would survive a Supreme Court challenge, at least as regards administrative decisions affecting human rights.
[123] Hilary Delany, "Judicial Review in Cases of Asylum Seekers – The Role of Curial Deference and the Question of Whether the Standard to Review Should Vary" (2002) 9(1) *DULJ* 1 at 7.

of the anxious scrutiny standard.[124] That certainly appeared to be the view of the majority in *AO and DL v. Minister for Justice*.[125] The view of the minority was admittedly, more nuanced: McGuinness J applied a straightforward proportionality test, based on that set out by Costello J in *Heaney*, and concluded that the Minister had failed it in that his orders did not infringe the applicants' rights as little as possible.[126] Fennelly J referred to the case law of the ECtHR,[127] and stated that the *O'Keeffe* test seemed to be inadequate: "It seems to me that, where as in this case, constitutional rights are at stake, such a standard of judicial scrutiny must necessarily fall well short of what is likely to be required for their protection."[128]

The majority of cases in which applicants have sought to argue that a different, more pro-applicant standard should apply in respect of human rights have been attempted reviews of asylum decisions. In *Z v. Minister for Justice*,[129] the applicant was a Russian national whose application for asylum had been deemed "manifestly unfounded".[130] His appeal had also been rejected, and Finnegan J rejected his application for judicial review. On appeal to the Supreme Court, he argued, *inter alia*, that the trial judge had erred in applying the standards set out in the *Keegan* and *O'Keeffe* decisions. Instead, the appropriate standard of review of decisions with a fundamental impact on fundamental rights was the "anxious scrutiny" standard applied by Lord Bridge in *Bugdaycay* and endorsed in *R v. Secretary of State ex parte*

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[124] Delany (n123) at 7-9. *See* also Hilary Delany, "Curial Deference – Should the Standard of Review Vary?" paper at a conference entitled "Judicial Review: All the Recent Developments in Irish Law and Practice", 29 March 2003, at 5 of the paper.

[125] [2003] 1 IR 1.

[126] [2003] 1 IR 1, at 124-127.

[127] Including *Boultif v. Switzerland* (2001) 33 EHRR 50, *Gul v. Switzerland* (1996) 22 EHRR 93, and *Abdulaziz v. United Kingdom* (1985) 7 EHRR 471.

[128] [2003] 1 IR 1, at 203. The learned judge noted that other members of the Supreme Court did seem to think that *O'Keeffe* applied to cases involving deportation orders, on the basis of Denham J's judgment in *Laurentiu v. Minister for Justice* [1999] 4 IR 26 (with which Hamilton CJ agreed). However, Fennelly J thought that Denham J's comments in that case could be regarded as *obiter dicta* (at [2003] 1 IR 1, 203).

[129] [2002] 2 ILRM 215.

[130] Section 12(4) of the Refugee Act 1996 defines "manifestly unfounded" claims as those that are clearly fraudulent or abusive; claims in relation to which the applicant had given details or evidence; claims where the applicant has without reasonable cause or in bad faith destroyed identity documents or deliberately obstructed the investigation of his/her application. This subsection is somewhat controversial, as it is more pro-State than the UNHCR's definition of manifestly unfounded claims (which are either clearly fraudulent or abusive); *see* Siobhan Mullally, "Accelerated Asylum Determination Procedures: Fair and Efficient?" (2001) 8(1) *DULJ* 55 at 56ff. NB section 12(4) has since been replaced by a new procedure which provides for an accelerated appeal in six instances.

Canbolat[131] and *R v. Ministry of Defence, ex parte Smith*.[132] McGuinness J, giving the judgment of the Supreme Court, was uncomfortable with the English formula:

> "I have a certain difficulty in the interpretation of the phrases used by the English courts in the cases to which we have been referred – 'anxious scrutiny', 'heightened scrutiny' and similar phrases. From a humane point of view it is clear that any court will most carefully consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, 'scrutiny', 'careful scrutiny', 'heightened scrutiny', or 'anxious scrutiny'? Can it mean that in a case where the decision-making process is subject to 'anxious scrutiny' the standard of unreasonableness/irrationality is to be lowered? Surely not."[133]

She concluded that the matter would require further consideration and fuller argument in a future case, but held that, in the instant case, the High Court had been correct to apply the *O'Keeffe* standard.[134]

The *Z* judgment was relied upon in later cases in order to exclude the application of an "anxious scrutiny" standard of review. In *Mohsen v. Minister for Justice*,[135] the applicant failed to convince Smyth J in the High Court that the "anxious scrutiny" standard should apply. After quoting the famous passage of Lord Bridge in *Bugdaycay* (reproduced *supra*), the learned judge stated that he did not think that a different standard of review applied in cases dealing with refugee/asylum/immigration, and that the dictum was merely "cautionary guidance that in dealing with these matters extra care and attention is devoted to them."[136] Whatever the expression used to describe

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[131] [1998] 1 All ER 161.
[132] [1996] 1 All ER 257.
[133] [2002] 2 ILRM 215, at 236. This view is shared by Siobhan Stack, who argues that "the phrase 'anxious scrutiny' does not involve any reduction of the principles in *O'Keeffe v. An Bord Pleanala*, but rather a description of the manner in which those principles are applied in the context of judicial review of a decision which actually or potentially affects human rights" (Siobhan Stack BL, "Some Recent Developments in Asylum and Immigration Law" Trinity College Dublin Conference on Recent Developments in Judicial Review, 25 June 2005, at 13 of the paper). *See* also Siobhan Stack and Bill Shipsey, "Judicial Review and the Asylum Process" in *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (Institute of Public Administration, Dublin, 2003).
[134] Keane CJ, Murphy and Murray JJ concurred with the judgment of McGuinness J. Denham J also agreed, but gave a brief judgment in which she referred to the question of the appropriate standard of review, concluding "I too await a fuller argument on this issue in a future case" [2002] 2 ILRM 215, at 218.
[135] Unreported, High Court, Smyth J, 12 March 2002.
[136] *Ibid*, at 14 of the judgment.

this, it was, in Smyth J's view, within the *Wednesbury* test for reasonableness.[137] In *Memishi v. The Refugee Appeals Tribunal and Ors*,[138] the applicant, an Albanian Kosovan Muslim, sought an order of certiorari of the respondents' refusal to grant him refugee status. Like Messrs Z and Mohsen, he argued that the *O'Keeffe* test was inadequate in relation to refugee applications, and a more stringent test should apply. Once again, the applicant relied on *Bugdaycay*. Peart J refused the relief sought, on the basis that he agreed with the earlier decisions in point. He was also careful to say that the standard of proof to be applied by the Tribunal in finding that there was not a well-founded fear of persecution was the balance of probabilities, not the criminal standard.[139]

In *MK v. Minister for Justice, Equality and Law Reform*,[140] an abortive attempt was made to argue that the rules governing judicial review of deportation decisions, as embodied in *O'Keeffe v. An Bord Pleanala*,[141] were incompatible with the European Convention on Human Rights.[142] The applicant was an Angolan national who was a member of an organisation seeking independence for the Angolan enclave of Cabinda; he argued that his activities in this regard left him open to persecution if returned to that country. He raised a number of Convention arguments, *inter alia* that his application for leave was not heard within a reasonable time and was in breach of Article 6(1) ECHR, and that the respondent had had no regard for his family circumstances. He also alleged that the decision breached his rights to a private and home life, his right to earn a livelihood and be treated without discrimination, and that it contained errors of fact and law and did not give reasons for the decision. Unfortunately, while the applicant listed a number of grounds for relief, he failed to plead them adequately or at all. Frustratingly, Murphy J noted that the applicant had not given any reasons for his allegation that the *O'Keeffe* standard breached the ECHR, nor did he make any legal submissions on that point. In the event, the High

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[137] *Ibid*, at14 of the judgment.
[138] Unreported, High Court, Peart J, 25 June 2003.
[139] Unreported, High Court, Peart J, 25 June 2003, at 20 of the judgment.
[140] Unreported, High Court, Murphy J, 15 July 2005.
[141] [1993] 1 IR 39.
[142] The applicant also sought damages under section 3 of the ECHR Act, along with an order of certiorari quashing the decision to deport him and a declaration that the Immigration Act 1999 (Deportation) Regulations 2002 were made ultra vires the Act.

Court rejected his application for leave on the basis that it was not properly grounded and was out of time.[143]

Some judgments of the High Court have been more receptive to the idea that the traditional standard of judicial review is not appropriate in human rights cases – or, at least, more open to the idea that the traditional test leaves something to be desired in cases involving fundamental rights. One such case is *Gritto and Ors v. Minister for Justice*,[144] in which the High Court rejected an application for leave to apply for judicial review. The applicants sought an order of certiorari of the respondent's decision to deport the applicant and to refuse their application for residency because of their parentage of an Irish born child. The Court held that the applicants had not passed the necessary threshold for such applications: they had not shown that there were substantial grounds for saying that the orders were invalid. However, the judge noted that the standard of review applied in the leading case in point, *AO and DL v. Minister for Justice*,[145] was based on the traditional *O'Keeffe* principles. Controversially, and after referring to Fennelly J's dissent in the earlier case, the judge went on to say:

> "I believe that the application of the normal standard of review makes the decisions of the respondent virtually immune from review. Moreover, it leaves one with the sense that the careful and comprehensive analysis conducted by the respondent's officials in most cases is a meaningless exercise."

However, as the standard of review was already being appealed to the Supreme Court in another case,[146] the judge did not think it appropriate to grant leave on that "stand alone" ground in and of itself. Laffoy J subsequently refused leave to appeal her decision.[147]

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[143] Murphy J refused to extend time. He also noted that the applicant had not appealed the decision to deport him to the Refugee Appeals Tribunal, nor had he sought any extension of time to do so. The Court appears to take the view, with some justification, that the applicant was guilty of sleeping on his rights.

[144] Unreported, High Court, Laffoy J, 27 May 2004.

[145] [2003] 1 IR 1.

[146] The case in question was *Meadows v. Minister for Justice*, in which Gilligan J had dismissed the leave application: Unreported, High Court, 4 November 2004. However, since the judgment in *Gritto* was handed down, *Meadows* appears to have disappeared from the lists. It may have been settled, or withdrawn. In that case, the applicant had sought to argue that she risked female genital mutilation if forced to return to Nigeria.

[147] *Gritto and Ors v. Minister for Justice*, Unreported, High Court, Laffoy J, 16 March 2005.

MacMenamin J expressed concerns with the *O'Keeffe* test in another application for leave. In *Okedairo v. Refugee Appeals Tribunal*,[148] the applicant was a Nigerian woman who sought to challenge the respondent's decision not to grant her refugee status. She was ultimately unsuccessful: the High Court was not convinced that the decision was unreasonable, even on the application of the anxious scrutiny test.[149] However, MacMenamin J did adopt Fennelly J's statement in *AO and DL v. Minister for Justice*.[150] Clarke J has also expressed concerns with the effectiveness of the *O'Keeffe* test on a number of occasions, including *Gashi v. Minister for Justice*[151] and *VI v. Minister for Justice*.[152] In both cases, the learned judge accepted that it was arguable that such cases required the application of a higher standard of review than that set out in *O'Keeffe*.

The most recent decisions in point illustrate a continuing uneasiness with the use of the traditional standard of review in relation to decisions which affect human rights. In *Ogunyemi v. Refugee Appeals Tribunal*,[153] the applicant sought to challenge the decision to refuse him refugee status. He alleged that he was likely to suffer religious persecution in Nigeria, and that he had been kidnapped in that country while working in the oil industry. It would appear that the respondents simply did not believe the applicant; there were a number of inconsistencies between his answers during his interview and those on the questionnaire he had filled in. Furthermore, there was evidence to suggest that while foreigners working in the oil industry were sometimes kidnapped, Nigerians were not. McGovern J refused leave; however, he indicated that he agreed with Clarke J's suggestion that the "anxious scrutiny" test ought to apply to judicial review of asylum matters.[154] Nevertheless, the judge considered that Mr Ogunyemi would not even succeed under the more favourable test.

The question remains as to what the anxious scrutiny test actually means. Ryan J has expressed the view that it involves a

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[148] Unreported, High Court, MacMenamin J, 28 July 2005.
[149] The Court held that the Tribunal had taken the applicant's evidence at its height; the Tribunal member had thus simply failed to prove his case.
[150] [2003] 1 IR 1.
[151] Unreported, High Court, Clarke J, 3 December 2004.
[152] Unreported, High Court, Clarke J, 10 May 2005.
[153] Unreported, High Court, McGovern J, 30 June 2006.
[154] *Ibid*, at 7 of the judgment.

> "...[S]liding scale of review so that the more serious the interference with rights that is being considered the more carefully the court examines the exercise of the power for propriety. In other words, if the discretion or power being exercised has a small impact on a person's rights or rights generally, a wider margin of appreciation will be permitted than would be the case if a more severe interference with entitlements were under examination."[155]

However, the learned judge did not express any opinion as to the correctness or otherwise of the anxious scrutiny test, and eventually decided the case in favour of the applicants on the basis of irrationality.[156]

It is possible to discern a variety of judicial attitudes to the question of the appropriate standard of review in relation to administrative decisions with an impact on human rights. Some recent judgments show a tendency to either grant leave/judicial review on the basis that the decision was so unreasonable as to fail the traditional test (and thus, necessarily, also the more pro-applicant anxious scrutiny test), or to refuse relief on the basis that the decision was so reasonable that it could not be impugned even under anxious scrutiny.

Some recent rulings of Herbert J illustrate this tendency perfectly: *see* e.g., *Agwu v. The Refugee Applications Commissioner and Ors.*[157] In that case, the High Court refused the application for leave to apply for judicial review of the respondent's decision that his application for refugee status was manifestly unfounded. After reviewing the evidence, the judge noted that there were problems with the applicant's evidence which went to his credibility. In the circumstances, it was open to the respondent to find as he did. The learned judge held that on the basis of the material

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[155] *Fitzpatrick v. Minister for Justice* Unreported, High Court, Ryan J, 26 January 2005 at 11 of the judgment.

[156] The first named applicant was an Irish citizen. The second named applicant came from Romania. On arrival in Ireland she applied for asylum under the name of her first husband. She did not attend for interview and her application was refused. She met the first named applicant in 2001 and they married a year later. They then applied for leave for the her to remain in Ireland on the basis of their marriage; when asked for her previous name, the second named applicant gave her maiden name. Mrs Fitzpatrick was arrested on an unrelated matter, and identified as a person against whom there was a deportation order. She was deported in 2003, and the applicants sought to challenge this order. Interestingly, Ryan J held that the Minister's requirement that the parties live together as a family unit for an appreciable period of time since the applicant's deportation was irrational and not logically connected to the objective of his decision; this radical approach was, however, disapproved by the Supreme Court in *Cirpaci v. Minister for Justice* [2005] 2 ILRM 547.

[157] Unreported, High Court, Herbert J, 5 March 2004.

available to him, the respondent's decision could not be said to be unreasonable, even on the test of anxious or heightened scrutiny.[158] The learned judge reached an identical conclusion in *DH v. Refugee Applications Commissioner and Ors*,[159] where he again refused leave to apply for judicial review. Herbert J declared himself satisfied that, even on the "anxious scrutiny" standard approved in the United Kingdom, it could not be said that the Refugee Appeals Tribunal's finding was "irrational, unreasonable or arbitrary".[160] In a more recent case, Herbert J applied the traditional test. *Bemis v. Minister for Arts, Heritage, Gaeltacht and the Islands*[161] concerned judicial review of the Minister's decision to refuse the applicant a licence to dive and explore the wreck of the RMS Lusitania, of which the applicant was the sole owner. The Minister apparently refused to consider the application because it was not made on the correct form; the judge held that this failure was "unjust, irrational and unreasonable" in all the circumstances; it was not therefore necessary for the High Court to consider whether the anxious scrutiny test was appropriate, even thought the matter concerned the circumscription of the applicant's right to property.

A similar approach has been employed by Peart J. In *Zabolotnaya v. Minister for Justice and Ors*,[162] the applicants, a husband and wife, had claimed asylum on the basis that they were being persecuted by Neo-Nazi groups in Latvia due to the husband's former membership of the KGB. Their applications were refused due to a lack of evidence and false statements given by the husband, which combined to undermine their credibility. Their appeal was rejected by the RAT. In their application for leave to apply for judicial review, the applicants argued that the case involved a breach of their fundamental rights and necessitated the application of the anxious scrutiny test: "This I take to mean that the Court must be more careful than would otherwise be required before deciding to reject the applicants' attempt to challenge the

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[158] In so finding, Herbert J added, at 18 of the judgment, "in this respect I fully acknowledge what has been held by the Supreme Court in *Z v. The Minister for Justice, Equality and Law Reform & Ors*". It is thus clear that the judge was not deciding that he had the right to apply the anxious scrutiny test in the first place.

[159] Unreported, High Court, Herbert J, 27 May 2004.

[160] At 23 of the judgment. The RAT had concluded that there was no evidence that the applicant for refugee status had actually suffered persecution due to her country's economy and health care system, and that her application was exclusively based on economic considerations, making her an economic mirgrant rather than a refugee.

[161] Unreported, High Court, Herbert J, 17 June 2005.

[162] Unreported, High Court, Peart J, 24 November 2004.

decision impugned, where human rights are involved."[163] The judge took the view that this would lower the onus of establishing substantial grounds as compared with that in other applications challenging a decision of that nature.[164] However, the High Court refused leave, holding that, even on the application of an anxious scrutiny test, the decision maker was entitled to decide that the applicants lacked credibility. It is submitted that the learned judge is slightly in error in saying that the anxious scrutiny test necessarily lowered the onus of establishing substantial grounds; it is arguable that the anxious scrutiny test simply means that, once an applicant has established that a real and significant threat to their fundamental rights is a result of the administrative decision, the court ought to examine that justification carefully and assess whether the balance applied by the administrative body was reasonable. Alleging a breach of fundamental rights does not lower the substantial grounds requirement; it provides the substantial grounds.

The applicants in *Spartariu v. Minister for Justice*[165] were more fortunate: Peart J granted leave to apply for judicial review following the Minister's decision to return them to Germany under the Dublin Convention. The applicants were Romanian nationals, who argued that the deportation order against them breached their rights to reside in the State as a family unit under both Constitution and the ECHR. Peart J held that they had established substantial grounds for challenging the order, in spite of the fact that there was Strasbourg case law to support the proposition that Article 8 ECHR did not guarantee any right to enter or reside in a particular country. (However, removal of a person from a country in which close family lived could amount to an interference with Article 8(1) if the restriction did not fall within one of the exceptions in Article 8(2) and was not proportionate to the aim pursued).[166]

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[163] At 16 of the judgment. The particular test relied upon by the applicant was the statement of the court in *R v. Ministry for Defence, ex parte Smith* [1996] QB 517: "[I]n judging whether the decision maker has exceeded the margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense applying here" (*per* Lord Bingham MR, at 554). This was the argument advanced by David Pannick QC on behalf of the applicant, and was adopted by Lord Bingham MR.

[164] At 16 of the judgment.

[165] Unreported, High Court, Peart J, 7 April 2005.

[166] The applicant relied upon, *inter alia*, *Boultif v. Switzerland* (2003) 33 EHRR 1179. In that case, the applicant was an Algerian national with a Swiss wife. Switzerland refused to renew his residency permit, and he argued that this breached his right to enjoy family life with his wife. He argued that it was not reasonable to expect her to move to Algeria, as she did not speak Arabic and would not be able to work there. The Court of Human Rights agreed, in spite of Switzerland's assertion that the

In *Ngangtchang v. Refugee Appeals Tribunal*,[167] the High Court refused leave to apply for judicial review in circumstances where the applicant had been refused refugee status. The applicant alleged that her life and bodily integrity would be in danger if she were returned to Cameroon. However, O'Leary J concluded that the respondent's assessment of her credibility was rational, before somewhat tersely adding that "The Court rejects the submission that this is a case where the application of the *O'Keeffe* test is not appropriate. Further, this is not a case where the substitution of any other test would be likely to change the outcome of the case."[168]

Even the Supreme Court has adopted the practice of disposing of cases on the basis that they also fail the anxious scrutiny test, all the while refusing to reconsider the appropriateness of the traditional reasonableness standard. In *Cirpaci v. Minister for Justice*,[169] the Minister had refused to revoke a deportation order even though the applicants had subsequently married (the first named applicant was an Irish citizen). In so doing, he raised the well-worn ground that the parties had not resided together as a family unit for any appreciable period since their marriage. The High Court (Quirke J) had refused to quash the application, and the Supreme Court dismissed the appeal on the basis that section 3(11) of the Immigration Act 1999 conferred a broad discretion on the Minister in when revoking deportation orders; he was therefore entitled to take into account the length of their cohabitation post-marriage.[170] It is clear from the judgment of the Supreme Court that the Court applied the traditional test; however, as a parting comment, Fennelly J states that he considered that the decision would survive the higher standard of scrutiny.

It is worth noting that the courts appear to be more flexible where the judicial review does not relate to an asylum/immigration matter. In *O'Callaghan v. Judge Mahon and Ors*,[171] the applicant sought to challenge the refusal of the planning tribunal to give

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applicant's removal was necessary in order to maintain public order – the applicant had been convicted of unlawful possession of weapons. (The ECtHR concluded that, although this offence was serious, the applicant had not been in any further trouble since that date, and had obtained work.)

[167] Unreported, High Court, O'Leary J, 21 December 2005.

[168] At 12 of the judgment.

[169] [2005] 2 ILRM 547. The facts of this case are discussed in more detail in Chapter 6.

[170] Fennelly J; Hardiman, McCracken, Geoghegan and Kearns JJ concurring.

[171] Unreported, High Court, O'Neill J, 7 July 2004.

him access to certain documents relied upon by the tribunal and another party being investigated by it (the notice party).[172] At the substantive hearing, O'Neill J held that the refusal of access to these documents prevented the applicant from cross-examining the notice party in relation to certain inconsistencies in his evidence. The judge added that this "may very well" be a case in which the anxious scrutiny test ought to be applied. He favoured the formulation of that test set down by Lord Woolf MR in *R v. Lord Saville, ex parte A*:[173]

> "What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations ... The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Bingham MR in *ex parte Smith* which is not in issue."[174]

O'Neill J was strenuously opposed to the application of the reasonableness test (as embodied in either *Keegan* or *O'Keeffe*) to a decision which has breached a constitutional right. The occurrence of such a breach ought to be assessed on the balance of probability, and then the justification for the encroachment had to be assessed "with the kind of caution or circumspection, which may aptly be described as 'anxious scrutiny'".[175]

On a final point, it is necessary to ask whether the courts in this jurisdiction are prohibited from applying a proportionality test to certain acts of the executive and legislature. Is such an approach constitutionally permissible, or does the separation of powers and the respect each organ of government owes the other preclude such an approach? In the UK, there has been a struggle between the traditional view that the democratic principle requires the courts to show a certain degree of deference to the decisions of the elected bodies,[176] and the more modern view that the courts must

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[172] This other party was Tom Gilmartin, who was a notice party to the judicial review.
[173] [1999] 4 All ER 860.
[174] At 872 (paragraph 37).
[175] Unreported, High Court, O'Neill J, 7 July 2004, at 21 of the judgment.
[176] The democratic principle implies that judges have neither the democratic legitimacy nor, often, the expertise of either the executive or legislature – "relative institutional incompetence". However, the latter point has lately been disputed: Lord Justice Dyson argues that, "Given enough time, and the

sometimes protect our rights from those very bodies. Indeed, even the House of Lords has expressed discomfort with the very use of the term "deference" in cases involving human rights: *see R (Pro-Life Alliance) v. BBC*,[177] in which Lord Hoffmann stated that the term has inappropriate "overtones of servility".[178] Richard Clayton argues that "the constitutional status of executive decision-making can be overstated"; and notes that the simple fact that the executive has a special expertise which helps it to decide certain matters of fact does not mean that the court should concur with the executive's assessment of how certain rights should be limited.[179] In any event, such decisions are often really made by government officials with no more democratic legitimacy than the courts; "it is difficult to understand why the judicial assessment of a breach of a Convention right or proportionality is inherently less valid or legitimate than that initially made by a civil servant."[180] Nor does the fact that a court assesses the lawfulness of administrative decisions mean that the court is examining the correctness of the underlying policy;[181] they are simply assessing whether the extent to which that policy infringes fundamental rights is necessary and proportionate.

Clayton also argues that there is no need for the English courts to be overly deferential to the other powers of government, as the separation of powers in that jurisdiction is relatively supple.[182] This raises the question as to the nature of the Irish system, and whether it permits of the same degree of fluidity. Beth notes that "Irish government is a distinctive blend, consisting of three main ingredients: those inherited from Great

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production of sufficient material, the court *could* make many decisions of the kind on which it will defer to the executive ... Clearly, it is not impossible for the court to do so, especially if it is provided with all the material that was available to the decision-makers. But it is not the normal function of courts to make such judgments, and they are less well-equipped than health authorities to make them." (Lord Justice Dyson, "Some Thoughts on Judicial Deference" [2006] 11(2) *JR* 103, at 106.

[177] [2003] UKHL 23 [2004] 1 AC 185,

[178] [2003] UKHL 23 [2004] 1 AC 185, at 240 (paragraph 75). Lord Walker agreed that deference might not be the appropriate term (*see* paragraphs 143-144). Indeed, Anthony Lester QC, who had used the term himself, later felt that it was inappropriate and replaced it with the phrase "the discretionary area of judgment in a national court" in the book he co-authored with David Pannick QC, *Human Rights Law and Practice* (2nd Edition, LexisNexis, 2004). *See* also Anthony Lester QC, "The Human Rights Act 1998 – Five Years On" [2004] EHRLR 258, at 265.

[179] Richard Clayton QC, "Principles for Judicial Deference" [2006] 11(2) *JR* 109, at 115. Francesca Klug argues that, in an English context, judicial deference towards the *executive* ought to be uncontroversial: the courts need simply apply the ECHR test of legality, necessity and proportionality: Francesca Klug, "Judicial Deference Under the Human Rights Act 1998" [2003] 2 EHRLR 125, at 125. Klug feels that the review of legislative action is more controversial; however, it is important to remember that her comments are confined to the UK legal/governmental system.

[180] Clayton (n179) at 115.

[181] *Ibid.*

[182] Particularly when compared with that of the United States. Clayton (n179), at 115.

Britain, those borrowed from the United States, and those indigenous to Ireland or invented by its founding fathers"; a mixture which, he argues, reflects an ambivalence as to whether to choose limited government à la the American model, or parliamentary supremacy.[183] It is worth noting that Ireland has a written constitution which recognises the importance of the separation of powers.[184] However, in many ways, the Irish system resembles that of our neighbour across the Irish Sea more closely than it does that of our neighbour on the other side of the Atlantic. The United States system of government is predicated upon a strict separation of powers, in which the executive and legislative powers are completely separate and distinct, often leading to a President and legislature of different political colours. By contrast, there is no prohibition on a member of the Irish or UK executives retaining his/her seat in Parliament. If anything, the separation of powers as recognised in Bunreacht na hÉireann ought to bolster the position of the Irish courts relative to the other powers. In this jurisdiction, the principle of parliamentary sovereignty does not apply, and the courts have on numerous occasions emphasised their role as guardian of the Constitution and of fundamental rights.[185]

Furthermore, the courts appear to operate on the assumption that their refusal to intervene in the areas they deem to be the preserve of the executive or legislature is evidence of their desire to remain aloof from political matters. However, proponents of judicial self-restraint fail to recognise that "self-restraint is just as political as activism", and can often amount to "judicial sanctification of the political solution".[186]

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[183] Loren P Beth, *The Development of Judicial Review in Ireland 1937-1966* (Institute of Public Administration, 1967), at 1.

[184] In contrasting the Irish and British systems, it was formerly argued that "if [the British parliament] passed a law decreeing that all blue-eyed babies should be killed at birth, no court in Britain could hold that law to be invalid" due to the entrenched doctrine of parliamentary sovereignty; such a law would not survive in Ireland, where the courts owe no such duty to the legislature: Brian Walsh, "The Constitution and Constitutional Rights" from Frank Litton (ed) *The Constitution of Ireland 1937-1987* (Institute of Public Administration, 1988), 86, at 91. This probably overstated the weakness of the British courts, even prior to the enactment of the Human Rights Act; nevertheless, it does highlight one of the principal distinctions between the two systems of government.

[185] There are numerous examples of the courts acting in this way in a diverse range of circumstances: *see* e.g., *White v. Ireland* [2004] 1 IR 571, in which the absolute limitation period for initiating judicial review proceedings of planning decisions contained in section 82(3B)(a) of the Local Government (Planning and Development) Act 1963 was struck down as an interference with the plaintiffs' right of access to the courts. In *Dreher v. Irish Land Commission* [1984] IRLM 94 the system for deciding the rateable valuation of land was held to be an unconstitutional interference with property rights, while in *Daly v. Revenue Commissioners* [1995] 3 IR 1, the property rights provisions of the constitution rendered section 18 of the Finance Act 1987 was unconstitutional.

[186] Beth (n183), at 11.

It is certainly arguable that, rather than amounting to an officious interference in the legislative and governmental sphere, judicial review "can play a part in the promotion of the core values of good governance."[187] Is it activist for judges to apply an anxious scrutiny test in cases of the type outlined above? Doyle argues that, "in order to fully substantiate a claim of judicial activism, one must show (a) that the judiciary is more interventionist and (b) that such interventionism is illegitimate."[188]

In spite of the lack of any objective justification for this approach, the Irish courts have been (justly) accused of applying a "spatial" approach to certain questions; i.e. of holding that certain areas are matters for the legislature or executive without properly explaining why this should be so.[189] As Foley notes, "This...is a theory which is eminently reasonable in the context of a parliamentary supremacy, but is wholly and utterly incompatible with even a minimalist conception of judicially enforceable rights."[190] Nevertheless, Foley argues, the Irish courts have developed a deferential approach without underpinning it with any real judicial reasoning,[191] when there ought to be better reasons for such an approach than a rote reassertion of the respective roles of legislature and judiciary.[192]

Would the existence of a proportionality test have a radical effect on the likelihood of success of challenges to deportation orders by illegal immigrants and failed asylum seekers? Some practitioners argue not: Stack, for example, states that the application

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[187] Harvey (n68) at 223.

[188] Oran Doyle, *Constitutional Equality Law* (Thomson Round Hall, 2004), at 26. The principle, in more detail, may be set out as follows (also at 26):

> First, there is an understanding that judicial activism involves an interventionist judiciary that sees itself as having a decision-making role in a large number of areas ... That is, the activist judiciary is a judiciary that sees itself as having a decision-making role in more areas than those in which other judiciaries, in a different time and place, see themselves as having a role. Secondly, there is an understanding that judicial activism is an illegitimate exercise of judicial power: it involves a judiciary that intervenes in areas which should be left to another area of government and makes choices that are not governed by law.

The subject of judicial activism is discussed in great detail by David Gwynn Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork University Press, 2001).

[189] Brian Foley, "Diceyan Ghosts: Deference, Rights, Policy and Spatial Distinctions" (2006) 28 *DULJ* 77, at 78.

[190] Foley (n187), at 79.

[191] Foley (n187), at 89ff. Foley notes that there are some exceptions to this rule, and that a few recent decisions do contain some explanation as to why the judges therein adopted a deferential approach; *see, inter alia*, *Horgan v. Ireland* [2002] 2 IR 468, at 498 (judgment of Kearns J); *King v. Minister for the Environment* [2004] 3 IR 345, at 375 (Kearns J); and *Colgan v. Independent Radio and Television Commission* [2000] 2 IR 490, at 512 (O'Sullivan J).

[192] Foley (n189), at 139. NB Foley does not argue that deference in itself is illegitimate.

of the proportionality principle to such decisions does not mean that they are any more likely to fail: "Provided that the decision is done in pursuit of a legitimate purpose, that the means of achieving that purpose are rationally connected to it, and provided no less restrictive measure is available, then the decision is proportional."[193]

One final question remains: does the current test applied by the Irish courts supply an effective remedy for parties alleging a breach of fundamental rights? Article 13 of the ECHR requires that persons residing in Contracting States have an effective remedy at domestic level for violations of those rights. The Convention does not provide any definition of what constitutes an effective remedy, but it is clear from the Article 13 case law that "an effective remedy may involve a hearing before an administrative or a judicial body provided the national authority has the power to deal with the substance of the appropriate Convention complaint and grant appropriate relief."[194] It does not appear to be necessary that the body purporting to provide the effective domestic remedy is not a judicial authority; however, where the domestic courts themselves are not involved the ECtHR will examine whether the body deciding the matter has the power to deal with the matter effectively: *Klass v. Federal Republic of Germany.*[195]

Earlier cases taken against the UK indicated that the existence of recourse to judicial review of a decision adversely affecting Convention rights did satisfy Article 13: *see, inter alia, Soering v. United Kingdom,*[196] and *Vilvarajah v. United Kingdom.*[197] However, it is interesting to note that even in these early cases, the European Commission on Human Rights took the view, *contra* the position of the Court, that the UK standard of review was inadequate to provide an effective domestic remedy in

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[193] Siobhan Stack BL, "Some Recent Developments in Asylum and Immigration Law" Trinity College Dublin Conference on Recent Developments in Judicial Review, 25 June 2005, at10 of the paper.
[194] Susan Nash and Mark Furse, *Essential Human Rights Cases* (2nd Edition, Jordans, 2002), at 26. They note that there does not appear to be any requirement for the deciding body to be a court or judicial tribunal per se, provided it can deal with Convention-based complaints and can provide an effective remedy.
[195] (1978) 2 EHRR 214. In that case, the applicants argued that domestic legislation permitting the agents of the State to intercept and examine mail and telephone conversations infringed a number of their Convention rights, including their Article 8 right to private life and their Article 6 right to a fair trial. Their main ground of complaint was that there was no obligation on the State to inform persons affected after the surveillance was over. In the circumstances, however, the Court of Human Rights ruled that the legislation contained sufficient in-built safeguards and did not exceed the proportionality requirements of the Convention.
[196] (1989) 11 EHRR 439.
[197] (1991) 14 EHRR 248.

cases where fundamental rights were at stake.[198] The facts of *Soering* are well known. The applicant was a German national who was wanted for the Virginia murder of his girlfriend's parents.[199] The United States sought the applicant's extradition; however, he successfully argued before the Court of Human Rights that the Home Secretary's decision to deport him would, if implemented, breach his rights under Article 3 ECHR.[200] He was not so fortunate in relation to his assertion that his Article 13 right to an effective remedy had also been breached. While both the applicant and the European Commission on Human Rights took the view that the scope of judicial review proceedings in the UK was too narrow to afford and effective remedy, the Court disagreed. In the view of the Court, there was nothing to prevent the applicant bringing an application for judicial review on the *Wednesbury* grounds[201] and adducing material on the "death row phenomenon" he argued would render his extradition contrary to Article 13.[202]

Thus, *Soering* might be seen as the Court of Human Rights' acceptance that the *Wednesbury* standard of review was capable of affording an effective remedy. However, it is worth noting that the Court of Human Rights believed that, had the applicant made the above argument in the course of his judicial review proceedings, the English courts would have afforded his claims "the most anxious scrutiny" given the fact that his fundamental human rights were at stake.[203] The effectiveness of the so-called anxious scrutiny test has already been called into question in this chapter,

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[198] In both cases, the Commission ruled that there had been a breach of Article 13 ECHR; however, this finding was reversed by the Court.

[199] The facts of the murder were somewhat gruesome. It was alleged that the applicant and his girlfriend had plotted to kill her parents because of the parents' opposition to their relationship. The deceased couple had died from multiple stab wounds, and a US police investigator who questioned the applicant stated that the applicant had confessed to the murders during an interview. For details of the facts of the case, *see* (1989) 11 EHRR 439, paragraphs 11-26.

[200] At paragraph 111 of its judgment, the Court of Human Rights ruled that "[H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3." (There was some evidence that the applicant, who was 18 years old at the time of the offence, was suffering from a degree of "'folie à deux', in which the most disturbed partner was [the applicant's girlfriend]" (at paragraph 21).

[201] Discussed earlier in this chapter.

[202] The Court emphasised that "The effectiveness of the remedy, for the purposes of Article 13, does not depend on the certainty of a favourable outcome for [the applicant]..." (paragraph 122).

[203] Paragraph 122.

and it is certainly arguable that subsequent developments[204] revealed the Court's views in *Soering* to be overly optimistic as far as the effectiveness of the standard applied in judicial review was concerned. The Court's error was, however, understandable given that Mr Soering had not made the Convention arguments in the form suggested by the Court in his judicial review proceedings, so the ECtHR had no way of testing their hypothesis.[205]

The facts of *Vilvarajah*[206] were somewhat different. That case involved five people of Tamil origin who had failed in their application for asylum in the UK in spite of their claims that they had been mistreated in Sri Lanka. Following unsuccessful judicial review proceedings, they were returned to Sri Lanka where they alleged that they continued to live in fear and, in some cases, were actually subjected to ill-treatment. Following an appeal, the immigration adjudicator allowed them to return to the UK where they were granted exceptional leave to stay until March of 1992. They alleged that their initial removal to Sri Lanka had been in violation of their Article 3 rights and that there was no effective domestic remedy for a violation of those rights. The ECtHR found in favour of the UK on both counts: the applicants had not established substantial grounds for believing that they would suffer inhuman or degrading treatment on their return to Sri Lanka.[207] On the Article 13 point, the Court did not see any material difference between the instant case and that of *Soering*,[208] and remained impressed by the respondent's assurance that the domestic courts subjected administrative decisions to "the most anxious scrutiny where an applicant's life or liberty may be at risk."[209]

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[204] The development of the tests applied in judicial review proceedings both in the UK and in this jurisdiction have been discussed earlier in this Chapter.

[205] The applicant had simply argued that the United States' that the applicant's rights would not be violated was worthless (paragraph 122).

[206] (1991) 14 EHRR 248.

[207] Paragraph 115. It is interesting to note the Court's view that "A mere possibility of ill-treatment…in such circumstances, is not in itself sufficient to give rise to a breach of Article 3" (paragraph 111). The circumstances in question included the fact that the applicants' personal position "was not any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country" (paragraph 111).

[208] Paragraph 124.

[209] Paragraph 125. The ECtHR had earlier referred to the dicta of Lord Bridge in *R v. Secretary of State for the Home Department, ex parte Bugdaycay* [1987] All ER 940, where he said, at 952: "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

However, the Court revised its position somewhat in the case of *Smith and Grady v. United Kingdom*.[210] The facts of that case have been discussed *supra*; briefly, it involved the applicants' discharge from the UK armed forces on the ground of their homosexuality. Domestic judicial review proceedings had been of no avail. The Court, applying its earlier jurisprudence,[211] took the view that their expulsion amounted to a violation of Article 8. Interestingly, the Court also held that, in this case, judicial review did not amount to an effective remedy because, "[E]ven assuming that the essential complaints of the applicants...were before and considered by the domestic courts, the threshold at which [those courts] could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued...".[212] In spite of this apparent indictment of the "irrationality" standard of UK judicial review, the ECtHR did not resile from its earlier case law, but chose instead to distinguish *Soering* and *Vilvarajah* on the basis that in those cases the test applied by the domestic courts coincided with that of the Court of Human Rights itself.[213] It is submitted that the ECtHR was arguably overly generous to the UK courts in those earlier cases, and was viewing the domestic proceedings therein with the benefit of hindsight in both cases.[214] Nevertheless, *Smith* is certainly good authority for the assertion that the irrationality test no longer automatically satisfies Strasbourg's stringent demands in relation to an effective remedy.[215]

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[210] (1999) 29 EHRR 493.
[211] Including, *inter alia*, *Dudgeon v. United Kingdom* (1981) 4 EHRR 149.
[212] Paragraph 138.
[213] Paragraph 138.
[214] As has been discussed, the ECtHR felt that *Soering*'s judicial review could well have constituted an effective remedy had his arguments been framed differently (a theory which belies the fact that the British courts were not at that time permitted to rely on Convention arguments for anything more than persuasive authority); while in the *Vilvarajah* case the Court was arguably influenced by the fact that it, like the British authorities, felt that the applicants had not had a well-founded fear of persecution on their return to Sri Lanka.
[215] The standard of the remedy aside, problems remain as to the effectiveness of judicial review under Article 13, given the type of remedies commonly resulting from successful judicial review proceedings. The Court of Human Rights has lately made this point in Application No 18273/04 *Barry v. Ireland*, Judgment of 15 December 2005, discussed in detail in Chapter 1, in which the Court held that judicial review proceedings could not provide the applicant appropriate redress in circumstances when he wished to expedite criminal proceedings against him; the only order the Irish court could make in this regard was an order of prohibition staying the proceedings on the ground of undue delay (*see* paragraph 52ff).

It is thus arguable that the Irish courts are failing to accord adequate protection to human rights in the context of judicial review via the consistent failure to adopt a more rigorous standard of review of administrative acts adversely affecting such rights. As noted above, it is arguable that the now-accepted English standard of "anxious scrutiny" is itself insufficient to ensure a meaningful standard of protection. As it is, in spite of numerous indications that many Irish judges are unhappy with the application of the demanding *O'Keeffe* test, particularly in the context of asylum, that test remains in force. In applying such a test, one may legitimately question whether asylum seekers (and anyone else seeking to vindicate a human right to whom this test is applied) have an adequate remedy.[216] It is certainly arguable that, in failing to provide for a robust standard of review, Ireland may well be in breach of her obligations under Article 13 of the ECHR.

[216] Mary Rogan remarks that "the apparent reluctance of the Irish courts to embrace an 'anxious scrutiny' approach in reviewing asylum procedures reinforces the argument that the opportunities for asylum seekers to have decisions affecting them subjected to rigorous examination and searching appraisal are somewhat limited. Surely this analysis at least raises the question of whether judicial review is in fact 'not an adequate remedy' in the context of serious human rights considerations." Mary Rogan, "Faster, Higher, Stronger? Sections 5 and 10 of the Illegal Immigrants (Trafficking) Act, 2000" (2002) 10 *ISLR* 3.

Chapter IV

Methods of Incorporation of the Convention

The question of how best to give domestic effect to the Convention has plagued commentators.[1] Not all parties concerned thought that an incorporating act was necessary: in *E v. E*,[2] O'Hanlon J referred to the possibility of referring a case to Strasbourg for determination. The idea that Ireland might have set up a preliminary reference procedure analogous to that available under Article 234 of the EC Treaty was an interesting idea. It would have had the same advantages as a more direct form of incorporation from the point of view of the complaining party, in that the Irish court could have referred the question of law to Strasbourg and acted in accordance with its answer without the need for domestic remedies to be exhausted and a separate action begun. However, the idea raised important questions of judicial sovereignty: the proposal effectively meant that the national courts would have had to cede jurisdiction to yet another foreign judicial panel, this time in the field of fundamental rights – an area which is, by its very nature, deeply personal to each individual state.[3] It is hard to argue with Jaconelli's view that "[s]uch uniformity is most important to a regime of economic law, but not so for a human rights code," there being no reason why the latter "should *not* yield differing applications in diverse jurisdictions."[4]

Furthermore, that solution could have sparked conflict between Ireland's obligations as a member of the European Union, whose laws she is constitutionally bound to obey, and those under the Convention. Such a conflict is all the more likely in light of the fact that the EU has, itself, begun to make some forays into the area of human rights

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[1] For a discussion of the appropriate method of incorporation in the English context, see Ben Emmerson, "Opinion: This Year's Model – The Options for Incorporation" (1997) *European Human Rights Law Review*, p313.

[2] [1982] ILRM 497.

[3] *See*, e.g., JHH Weiler, "Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space" from JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Oxford University Press, 1999), 102.

[4] Joseph Jaconelli, "The European Convention on Human Rights as Irish Municipal Law" (1987) *Irish Jurist* 13, at 14, at 19.

protection. More fundamentally, the Convention does not and never has admitted of a preliminary reference procedure, and such a system would arguably be ill advised from the ECtHR's point of view, as the already overburdened Court could be asked to adjudicate on even more questions of a frivolous or repetitious nature.[5] The inconveniences of the preliminary reference system were recognised by Strasbourg's own agents in a report of 2001.[6]

In any event, the other Contracting Parties have, for better or worse, chosen various different models in order to give effect to the Convention in domestic law. The aim of this chapter is to discover the impact that the model of incorporation chosen by Ireland will have on the Convention's status and usefulness as a source of domestic law, and to assess whether that impact could have been increased or reduced had another method been chosen.

"Everyone else is doing it, why shouldn't we?" - Models of Incorporation Used Throughout the Council of Europe

It is not proposed to undertake a study of the form of incorporation used in each and every Member State of the Council of Europe;[7] rather, we will seek to examine both those countries in which the Convention has attained the greatest influence post-incorporation and those in which incorporation has made the least difference to the domestic application of the ECHR. Despite Polakiewicz's logical assertion that effective compliance may only be assured where the Convention has priority over domestic legislation,[8] the Convention evidently does not possess such priority in all Contracting States. In this context it is important to reiterate the point, already made

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[5] Jaconelli (n4) at 19.

[6] *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG (2001) 1, 27 September 2001, at 47.

[7] This has already been dealt with in a number of specialised comparative law works, including Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), Andrew Z Drzemczewski, *European Human Rights Convention in Domestic Law* (Clarendon Press, Oxford, 1983), and Mireille Delmas-Marty and C Chodiewitz (ed) *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Dordrecht: Nijhoff, 1992).

[8] Jorg Polakiewicz, "The Status of the Convention in National Law" from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001) 31 at 34.

above, that the method of incorporation is important only insofar as it determines the (nominal) legal weight assigned to the ECHR in the domestic legal system.

It should be noted that the monist/dualist paradigm does not appear to be of help in the context of determining the influence of the incorporated Convention. The general rule is that a ratified treaty is immediately applicable in a monist state, while some act of transformation or adoption is necessary where the dualist system prevails. However, as Polakiewicz notes, even in monist states a parliamentary act is often deemed necessary to give the treaty full domestic effect.[9] In any case, the status of the incorporated Convention varies as much between one monist state and another as it does between one dualist state and another: in the monist Netherlands, for example, the ECHR has a higher status and level of influence over the domestic legal system than it does in Lithuania, another state whose Constitution favours the monist approach. Meanwhile, in monist Luxembourg, both the legislature and the judiciary frequently draw on Convention principles, and the domestic case law relating to the Convention is "extensive."[10] Because of the extent of the variation that exists, it is not proposed to retain the monist/dualist form of classification as a way of examining methods of incorporation in this chapter, as to do so would merely be confusing, artificial, and ultimately unhelpful. Nevertheless, none of the above is to say that the method of incorporation chosen by the individual Contracting State does not affect the ECHR's impact on the domestic legal sphere.

In the course of this study the reader should bear in mind the method of incorporation chosen by the Irish government: the "interpretation Act." To this end, it will be useful to have regard to the English experience since the entry into force of the Human Rights Act, 1998, which closely resembles the Irish European Convention on Human Rights Act 2003, and to contrast this approach with that of other European states whose legal culture may more closely resemble that of Ireland.

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[9] Polakiewicz (n8), at 32.
[10] Dean Spielmann, "Luxembourg" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 331 at 557.

Incorporation at Constitutional Level

For the purposes of this section, incorporation at constitutional level means that the Convention is accorded the highest possible importance within the state, in formal legal terms at least. Forms of incorporation which accord the Convention this very high legal status are relatively rare: most states choose not to place an international treaty on a par with the highest source of law in the land, for reasons ranging from a desire to retain national sovereignty to simple expediency. It has, however, been used in the Netherlands and in Austria.[11]

Nevertheless, a version of this model was considered in the Irish context. In its 1996 report, the Constitution Review Group considered the possibility of incorporation of the ECHR at constitutional level. Incorporation at constitutional level had many powerful supporters, including the Law Society and the Human Rights Commission,[12] who were strongly opposed to the indirect method of incorporation chosen.[13] The Review Group concluded that while wholesale incorporation was neither necessary nor desirable in the Irish context, "in the present context it is much better to build upon and improve the existing fundamental rights provisions of the Constitution (including, where necessary, liberally drawing on some of the ECHR text for this purpose) rather than opting for direct incorporation of the ECHR."[14] The Group felt that such a move would improve Ireland's record before the European Court of Human Rights still further.

The precise form of the selective incorporation favoured by the Review Group focused primarily of Article 40.3.1° of the Constitution, which states that:

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[11] The status of the Convention in Cyprus is less clear, in that it has constitutional force to the extent to which it has been incorporated into the Constitution; even provisions which have not been so incorporated, however, have priority over municipal law. *See* Andreas Nicolas Loizou, "Cyprus" from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 217.

[12] For evidence of this, *see* e.g. James MacGuill, "Implications for Criminal Law", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 52, at 52. The Bar Council also supported a more robust form of incorporation – *see*, e.g. Ursula Kilkelly, "Introduction" from Ursula Kilkelly (ed) *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), at lvii.

[13] *See*, e.g. William Binchy, "The Bill, the Advantages and Disadvantages of the Approach Taken, and Possible Alternatives", Speech to the Law Society Conference, 19 October 2002.

[14] *Report of the Constitution Review Group* ("the CRG"), at 218.

"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

Article 40.3.2° provides that the State will, "in particular", protect the life, person, good name and property rights of citizens. As is well known, since the famous case of *Ryan v. Attorney General*[15] the Irish courts have used the phrase "in particular" to enable them to "discover" a whole host of unenumerated personal rights, including the right not to be tortured or ill-treated,[16] the right to marital privacy,[17] the right to justice and fair procedures,[18] and the right to earn a livelihood.[19] This practice has been the subject of heavy criticism,[20] not least because it inhibits legal certainty and because it allows a judge devoid of all democratic legitimacy to effectively legislate for those rights of which he approves. The Review Group's proposed solution was to amend Article 40.3.1° to include a comprehensive list of all those rights identified by the courts to date, along with those set out in the ECHR and the ICCPR[21], as well as any other rights which might be considered appropriate in the Irish context.[22] It is likely that such an amendment would have made the Article unduly lengthy and cumbersome; in any case, this recommendation was never adopted.

The monist **Netherlands**' approach to incorporation of the Convention is quite unique among the nations of Europe, and was the result of what might be termed judicial activism. Alone of all the Contracting Parties, the Dutch courts have accorded the ECHR supra-constitutional status. It was not always thus: the ECHR's legal status in that country has improved dramatically over the last two decades, from a position where basing an argument upon a human rights treaty was seen as an indication of that argument's inherent weakness,[23] to one where the provisions of such treaties take precedence not only over national regulations, but over the provisions of the

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[15] [1965] IR 294.
[16] *The State (C) v. Frawley* [1976] IR 365.
[17] *McGee v. Attorney General* [1974] IR 284.
[18] *In re Haughey* [1971] IR 217 and *Garvey v. Ireland* [1980] IR 75.
[19] *Murphy v. Stewart* [1973] IR 97.
[20] See, for example, Desmond M Clarke's criticism of the use of natural law to "discover" new rights in his article, "The Role of Natural Law in Irish Constitutional Law" (1982) 17 *Irish Jurist* 187.
[21] The International Covenant on Civil and Political Rights.
[22] CRG Report (n14), at 259.
[23] This attitude is mirrored, to some extent, by that of the Irish courts pre-incorporation – see the case law discussed in Chapter 1.

Constitution itself.[24] This change in judicial attitudes began in 1980: between 1980 and 1986 the *Hoge Raad* (the Dutch Supreme Court) found 35 breaches of the ECHR, as well as two breaches of the International Covenant on Civil and Political Rights.[25] The Dutch courts also consider the provisions of the Convention to be self-executing and therefore directly applicable by them, with the exception of Article 6 (insofar as access to the courts is concerned) and Article 13.[26] This is in spite of the fact that until the 1980s the courts had made no specific references to the Convention, much less relied on it in any determinative way.[27]

Leo Zwaak attributes the change in attitude vis-à-vis the Convention to increased familiarity with the Convention and its case law among the judiciary, and a new emphasis on the ECHR in legal training.[28] However, Zwaak is adamant that the real reason for the significant impact the Convention has made in the Netherlands is "the status given to the Convention in the hierarchy of domestic laws."[29] It remains to be seen whether his assertion that the Convention has known similar success in other countries where it is considered to have direct effect (in the sense that its terms can be directly applied by the domestic courts),[30] is accurate or overly optimistic. It is also worth noting that, even in some states that have, in legal terms, incorporated the Convention, there remains the question as to whether or not all of the Convention's provisions are sufficiently clear as to be self-executing.

The Convention also occupies an elevated position in the Austrian hierarchy of norms. However, it is important to note that the Convention does not have precisely the same status in **Austria**[31] as it does in the Netherlands: in the former the ECHR has, over

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[24] Leo F Zwaak, "The Netherlands" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000*, (Oxford University Press, 2001), 595 at 595-599.

[25] Henk Lubbendink, "Some Observations on the Role of Constitutional Norms, International Norms and Legal Principles in the Netherlands Legal System with Respect to the Inviolability of Statute Law" (1992) *Human Rights Law Journal* Vol.13 93, at 96.

[26] Zwaak (n24) at 598. These limited exceptions are as a result of the attitude of the Dutch Supreme Court.

[27] Jorg Polakiewicz and Valérie Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is given to the Convention (Part 2)" (1991) *Human Rights Law Journal* Vol.12 125 at 129.

[28] At 622-623.

[29] At 623.

[30] *Supra.* The term "direct effect" is used by Zwaak (n24)

[31] NB It was not until the Amendment to the Federal Constitution of 4 March 1964 that the ECHR was accorded the status of a constitutional law with retroactive effect. However, it should be noted that the

time, attained the status of constitutional law; in the latter, the Convention has been granted status superior even to the Constitution. Nevertheless, that an international human rights convention has been recognised as being the normative equal of that most fundamental of domestic sources of law was, and remains, a highly significant development. As Hannes Tretter notes, "Austria was the first state which fully incorporated the Convention into its constitutional legal order," by giving it the same legal status as the domestic bill of rights and a constitutional law.[32] Furthermore, while all laws have to observe and give effect to the Convention rights, the courts and administrative authorities must also interpret the law in a manner consistent with the ECHR where possible. The courts also adopt the common-sense approach of enforcing whichever source of law gives the higher level of protection – so the applicant can rely on either the domestic bill of rights or the incorporated Convention, depending on which demands the higher standard of rights protection under the circumstances.[33]

However, it was only over time that the Austrian courts developed what Tretter terms this "more graduated view",[34] a development which, in his opinion, is undermined by the Constitutional Court's reactive as opposed to pro-active stance: this organ, he claims, prefers to react to adverse decisions by the Strasbourg Court, rather than taking the initiative. Tellingly, like so many other domestic judicial authorities, the Austrian Constitutional Court often blindly assumes that the Convention does not provide stronger protection than the national right, without justifying this hypothesis.[35] As against this, the Austrian case law regarding the Convention is "comprehensive": the domestic courts have examined in depth "nearly every right or freedom enshrined in the Convention."[36] Furthermore, it is possible for the Austrian Supreme Court to reopen criminal cases where Strasbourg has held that a violation occurred;[37] an innovative and practical development which would undoubtedly increase the domestic

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judges of the Austrian Supreme Court have not been so receptive to the Convention as their colleagues in the Constitutional Court: *see* Jorg Polakiewicz and Valérie Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is given to the Convention (Part 1)" (1991) *Human Rights Law Journal* Vol 12, 65 at 67 and 70.

[32] Hannes Tretter, "Austria" from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 103 at 105.

[33] Tretter (n32), at 105-106.

[34] *Ibid.* This resembles the solution envisaged by the Constitution Review Group, *supra.*

[35] Tretter (n32), at 106. Tretter also accuses the government and legislature of doing the bare minimum to fulfil *their* obligations (164).

[36] Tretter (n32), 117.

[37] Tretter (n32), 162. See Article 3a of the amended Code of Criminal Procedure.

effectiveness of the ECHR in other Contracting States, should they choose to follow the Austrian example in this regard.[38]

The decisions of the Court and Commission are not binding on the Austrian courts. This is the position in most, if not all of the Contracting States,[39] and is perhaps based on fears that, if the position were otherwise, the European Court of Human Rights would be placed in a hierarchically superior position to the national constitutional courts, as a sort of competitor to the European Court of Justice. Nevertheless the idea that the national courts may (indeed must, post-incorporation) interpret and apply the ECHR creates two inescapable consequences: either there is a risk of the national and international judicial bodies arriving at a different conclusion on the same facts,[40] or the national constitutional court must consider themselves bound by the rulings of the international court. The latter option has caused consternation in some quarters: as one writer has asked, "would that not be tantamount to submitting the ultimate expression of [the state's] national sovereignty to the judgment of a 'foreign power'?"[41] While this assertion is not strictly correct from the point of view of public international law, it represents a typical concern of those who are unwilling to cede greater power to international bodies – forgetting, perhaps, that the state itself generally *chooses* if and when to circumscribe its sovereignty. Only rarely are such decisions made by other countries or international bodies on our behalf, and even then, we have generally agreed to the initial first step which brought this situation about; an example would be accession to the European Union. Economic and other pressures aside, if persons and bodies other than our own executive now have some influence over certain areas of our domestic and international affairs, it is usually because we agreed to this in broad terms in the first place.

On the other hand, it is true that at least one aspect of the ECtHR's jurisprudence presents problems for the national judge seeking to follow it: many of the cases

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[38] It is also possible to reopen a criminal case in France following a finding by the ECtHR that the conviction breached the Convention. This is thanks to the Law of 15 June 2000: Jacques Borricaud and Anne-Marie Simon, *Droit Pénal Procedure Pénal* (3rd Edition, Collection Aide-Memoire), at 412.
[39] For example, the Cypriot courts are not bound by the decisions of the Strasbourg organs; neither are the courts in Malta.
[40] Jacques Robert, "Constitutional and International Protection of Human Rights: Competing or Complimentary Systems? (General Report to the IXth Conference of European Constitutional Courts)" (1994) *Human Rights Law Journal* Vol.15, 1 at 3.
[41] Robert (n40), at 3.

decided by the Strasbourg Court involve the margin of appreciation theory, by which the Court accords some latitude to the state involved where it is likely that the national authorities will, through a closer understanding of the situation and of the factors to be taken into account, have a firmer grasp of the extent to which a Convention right should be restricted in the interests of the common good.[42] On the one hand, this means that some rulings by the Strasbourg Court will be of limited assistance to the national judge, since the conditions which formed the basis of the judgment may not apply to the domestic situation; for example, in *Otto Preminger Institut v. Austria*[43] the confiscation of a film in part of the Tyrol was held to be a valid restriction of the right to freedom of speech, since the area was predominantly Catholic and the content of the film would be regarded as blasphemous by many of the local population. This is not to say that banning the same film would be a proportionate restriction in another country, or even another part of Austria, where the population did not share those religious convictions. The domestic judge would therefore have to make his own assessment of the factors which may justify a restriction on a right. Secondly, it is arguable that national courts should not allow any margin of appreciation to the state in domestic cases involving the ECHR, since they, as the domestic judicial body, do not owe the state the same level of deference as is commonly accorded by an international tribunal.[44]

In any case, since the European Court of Human Rights does not consider itself to be bound by its own earlier decisions, it would appear illogical for the national courts to slavishly follow every decision of Strasbourg. This argument is all the more forceful when we consider that many countries that have incorporated the Convention do not recognise the principle of *stare decisis* themselves.[45] The best solution would appear

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[42] Naturally, the margin of appreciation doctrine only operates in relation to rights which may legitimately be restricted in circumstances defined by the Convention (i.e. that the restriction must be in accordance with the law, necessary in a democratic society and proportionate to the legitimate aim pursued). States are never allowed to restrict the right to freedom from torture or inhuman or degrading treatment protected by Article 3 ECHR.

[43] (1995) 19 EHRR 34.

[44] This point is made in the UK context by Stephen Grosz, Jack Beatson QC and Peter Duffy QC, *Human Rights: The 1998 Act and the European Convention* (London: Sweet and Maxwell, 2000), at p114.

[45] In Hungary, for example, court decisions have only persuasive authority. See Hanna Bokor-Szego and Monika Weller, "Hungary" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 384 at 387.

to be a situation where the domestic courts give due weight to relevant decisions of the Court of Human Rights, and attempt to achieve similar results insofar as it possible.

To return to our examination of incorporation in Austria, it is worth noting, in conclusion, one effect of the generally high standard of knowledge of the ECHR in that jurisdiction. Tretter suggests that the high-level incorporation of the Convention has increased awareness of the instrument throughout Austria, and by extension the number of applications to Strasbourg.[46] This side-effect is rarely mentioned by those Irish proponents of incorporation who speak of making the Convention more accessible to the average litigant and avoiding adverse decisions against the State. Logic dictates that as awareness of the Convention mechanism increases, so too does the number of applications to Strasbourg; and as the number of applications increases, so will the number of politically embarrassing adverse decisions. Nevertheless, it is clear that the desire to avoid incurring Strasbourg's displeasure has been the naïve ideal of more than one incorporating nation.[47]

Conclusion on Incorporation at Constitutional Level

It is submitted that incorporation at constitutional level clearly provides the highest possible level of protection of Convention rights, and should have been considered more thoroughly in Ireland's case. The Constitution Review Group's suggestion that the Constitution be revised so as to incorporate those articles of the ECHR affording a higher level of protection than the equivalent constitutional article (or where no corresponding right is protected by the Constitution, or where its wording is unclear)[48] would have ensured the maximum level of protection for the individual. Careful

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[46] Tretter (n32), at 163.

[47] In Sweden, for example, a government-commissioned report in the early 90s postulated that incorporation would not only better realise the rights involved, but would decrease the number of applications to Strasbourg and thus the number of judgments against Sweden. However, applications against Sweden are, in fact, increasing: 619 applications were registered against that country for the 30 month period between 1/11/98 to 31/7/01, and a huge 357 during 2002 (1 January 2002-31 December 2002). It is thus probably fair to say that the only appreciable difference incorporation has made to Sweden has been to *increase* the number of applications registered. (Statistics for 1998-2001 from the *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* EG(2001) 1 27 September 2001; 2002 statistics from the website of the European Court of Human Rights – www.echr.coe.int.) Sweden incorporated the ECHR by law 1994:1219 of 5 May 1994, which came into force on 1 January 1995; *see* Iain Cameron, "Sweden" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001) 833, at 838).

[48] Report of the Constitution Review Group, 1996, page 219.

analysis of the Constitution and the relevant case law of both the Irish courts and Strasbourg would have revealed which provision, Irish or international, gave greater clarity or protection, and none of the advantages secured by those constitutional articles giving higher protection would be lost.

Incorporation at Supra-Legislative Level

Many states have chosen to incorporate the Convention in a way that guarantees it a legal status superior to that of all ordinary (prior) legislation but lower than that of the national Constitution.[49] Examples of countries where this practice occurs include the **Czech Republic**,[50] **Estonia**,[51] **France**,[52] **Greece**,[53] **Bulgaria**,[54] **Portugal**,[55] and **Malta**. Typically, where the Convention has been accorded this supra-legislative status, ordinary laws, the terms of which are inconsistent with the ECHR, are invalid or can be treated as such by the judiciary. In Malta, this position has been confirmed by the terms of the incorporating legislation, Act XIV of 1987, which states, in summary, "where an ordinary law is inconsistent with the Convention's protective

[49] The question as to whether the ECHR can expect priority over all *subsequent* legislation is discussed *infra*, under the heading "The *lex posterior* Conundrum".

[50] Article 10 of the monist Czech Constitution states that ratified and promulgated treaties on human rights and fundamental freedoms automatically become binding and have precedence over domestic law, without the need for any other legal act to give them domestic force. See Dalibor Jilek and Mahulena Hoffmann, "Czech Republic" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 241 at 249. It is worth noting that some controversy exists as to the precise status of the ECHR in the Czech hierarchy of norms: most legal opinion agrees that treaties occupy a position between constitutional laws and ordinary laws; however Jilek and Hoffmann think that this is incorrect, and assert that the correct textual interpretation does not support the view that constitutional laws are superior to human rights treaties.

[51] *See* Rait Maruste, "Estonia" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 277 at 281: "in the hierarchy of Estonian legal norms the Convention lies between the Constitution and ordinary legislation."

[52] *See* Catherine Dupré, "France" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 312 at 315, where the author explains the effect of Article 55 of the French Constitution.

[53] *See* Krateros Ioannou, "Greece" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 355 at 358. Article 28 paragraph 1 of the Constitution of 11 June 1975 states that the generally accepted rules of international law and international treaties "from their approval at law or and from their entering into force according to each one's own terms, shall constitute an integral part of Greek law and shall prevail over any contrary provision of law."

[54] The Convention has supra-legislative status in Bulgaria thanks to Article 5(4) of the Constitution, the interpretation of which was confirmed by a Constitutional Court decision of 2 July 1992.

[55] Joao Madureira, "Portugal" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 681 at 682.

provisions the Convention shall prevail, and such law shall, to the extent of such inconsistency, be void."[56]

In most, if not all, of those states which accord the Convention this special status, the relationship between the ECHR and the *national Constitution* has never been tested. This is probably partly due to the fact that most national courts naturally assume that the Constitution retains its legal supremacy; indeed, in cases where the question as to priority between the two has been asked, the answer has invariably asserted the primacy of the domestic charter. Such was the case in Malta, where at the time of incorporation the government was at pains to emphasise that, in case of conflict between the two instruments, the Constitution would prevail, and not the Convention.[57] However, it is arguable that too much is made of the potential for conflict between Constitution and Convention: there is invariably a high degree of correlation between the fundamental rights protected by domestic bills of rights and those enumerated in the ECHR. Where variations do exist, the domestic instrument often gives a higher level of protection. However, individual states should not be too complacent: for many years national authorities all over Europe have, somewhat self-indulgently, assumed that their own Constitutions easily went as far as (if not further than) the Convention's guarantees, without much in the way of proof to support this pervasive idea. Yet if such were the case, there would not have been so many adverse decisions by the European Court and Commission against member states whose legal and administrative authorities were ostensibly acting in accordance with their own bills of rights.

The limitations of granting the Convention supra-legislative status are highlighted by the example of the **Russian Federation**, where the ECHR appears at first sight to have priority over ordinary laws insofar as it does not contradict the Constitution. Article 15(4) of the Russian Constitution states that:

> "The commonly recognised principles and norms of international law and treaties of the Russian Federation shall be a component part of its legal system.

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[56] Joseph Said Pullicino, "Malta" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 559 at 562.
[57] Pullicino, at p566.

If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply."

Nevertheless, a leading expert feels that the true status of the ECHR in the Russian hierarchy of norms is "ambiguous."[58] Despite the fact that both the Constitutional and Supreme Courts have referred to the Convention to support their decisions, it remains far from certain that the ECHR plays an active role in protecting fundamental human rights throughout the Russian Federation; certainly, residents of Chechnya and Georgia might have contested this point during their troubled recent history.

A worrying aspect of human rights protection in Russia is that the domestic Constitutional Court, the supposed policeman of such guarantees, appears to have no mechanism at its disposal for the enforcement of its judgments.[59] This lacuna appears all the more aberrant when we consider that the vast array of remedies dispensed by the courts in other jurisdictions (ranging from declaratory orders to mandatory orders[60] to injunctions to damages) can be backed up by the threat of almost draconian enforcement mechanisms to ensure compliance: in Ireland, for example, those found to be in persistent contempt of a court order can be the subject of an order of attachment and committal in extreme circumstances, and be forced to purge their contempt in prison (although, admittedly, it has never yet been necessary to imprison a member of the government for breaching a constitutional right).

Furthermore, the Russian Public Prosecutor currently has powers of a judicial nature in relation to pre-trial detention of suspects.[61] In other civil law jurisdictions, such as France, such powers are exercised by an impartial member of the judiciary, who will

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[58] Maxim Ferschtman, "Russia" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 731 at 736.

[59] Ferschtman, at p753.

[60] Despite some debate on this issue, it would appear that the Irish courts may, in very limited circumstances, issue a mandatory order against the state where there is a continuing breach of a constitutional right, but the prevalent view appears to be that a declaratory order is usually sufficient to prompt the state to remedy the irregularity: see the discussion of this point by the High and Supreme Courts in *TD v. Minister for Education* [2001] 4 IR 259.

[61] Ferschtman, at p753-754. This power was granted to the State by Articles 89-93 of the RSFSR Code of Criminal Procedure of 1960, which was in force until 1 July 2002. Ferschtman believed that this situation will be ameliorated by the adoption of a new Code of Criminal Procedure, but the new Russian Federation Code of Criminal Procedure of 2001 allows similar forms of preventive restraint of persons who are the subject of an inquiry.

not be permitted to deal with the substantive trial of the charges against the accused.[62] Russia's pro-State approach to criminal procedure has already got the Federation into trouble with Strasbourg. In *Federov and Federovna v. Russia*,[63] the State initiated criminal proceedings for fraud against the applicants in 1996, but these were not concluded for many years, during which time the first applicant was not allowed to leave his residence without permission, and was eventually suspended from his employment. His wife, the second named applicant, was placed under house arrest; their applications to have their house arrest suspended were not considered by the Russian authorities. By the time the affair came before the Court of Human Rights, criminal proceedings against the first applicant had been in existence for over 8 and a half years; in the case of the second applicant, they had been going on for 6 years and 11 months. Disappointingly, the case did not involve a challenge to the State's power to order preventive detention; Russia was, however, found to be in breach of the applicants' rights to a speedy trial under Article 6(1) ECHR. The charges against the applicants involved the simple forgery of accounts; they were not of sufficient complexity to justify such long delays.[64]

Indeed, Russia has already been held to be in breach of the Convention on a number of occasions.[65] *Mayzit v. Russia*[66] saw Russia censured for conditions in its prisons. The applicant successfully argued that the circumstances of his 9 month long pre-trial detention were inhuman and thus a breach of his Article 3 rights: the cells were badly-lit and overcrowded, with just one square metre per prisoner[67] such that they had to take turns to sleep; the premises were infested with lice; and they could wash only every 10 days. Such conditions were not consistent with the applicant's human dignity.[68]

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[62] On French criminal procedure, *see*, generally, Borricaud and Simon, (n38).

[63] Application 31008/02 *Federov and Federovna v. Russia*, Judgment of the Court of Human Rights, 13 October 2005.

[64] The Court of Human Rights noted that "the length of proceedings must be assessed in the light of the circumstances of the case … particularly the complexity of the case and the conduct of the applicant and of the relevant authorities"; paragraph 28.

[65] In the course of 2004, 15 applications against Russia were heard by the Court of Human Rights; Russia held the Federation to be in breach on 13 of those occasions.

[66] Application No 63378/00 *Mayzit v. Russia*, Judgment of the Court of Human Rights, 6 July 2005.

[67] The Court of Human Rights noted that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment recommends 7 square metres per prisoner in detention cells (paragraph 39 of the judgment).

[68] A similar result was reached in Application No 66460/01 *Novoselov v. Russia*, Judgment of 2 June 2005. The applicant had been held in overcrowded and unsanitary cells in which he was exposed to

Many of Russia's Convention violations concerned Article 6(1); specifically, the requirement that both civil and criminal trials take place within a reasonable time, and the failure by the State to execute judgments of the domestic courts either within a reasonable time or at all.[69] There appear to be substantial problems with certain aspects of Russian legal procedure, as illustrated by cases such as *Butsev v. Russia*.[70] Mr Butsev had been an emergency worker at the site of the Chernobyl Disaster and had been exposed to radioactivity, with the consequence that his health had suffered. He alleged that his compensation had been wrongly calculated and had successfully sued the local authority on this point, receiving judgment in 1999. However, the local authority later applied to have the case re-opened on the basis of new evidence. The Town Court failed to give Butsev proper notice of the new proceedings or of the subsequent decision against him, and he was able to have this second decision overturned in the domestic courts. However, Butsev argued that the government never fully complied with the judgment,[71] with the result that execution of the last judgment was delayed by three years. The Court of Human Rights agreed that the applicant's Article 6(1) rights had been interfered with, along with his rights under Article 1 of the First Protocol (which guarantees the right to property).[72] Other Russian applicants to Strasbourg successfully relied on Article 6(1) where the State had refused to enforce

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inmates infected with tuberculosis; he contracted scabies and became emaciated. The Court of Human Rights held that, taken cumulatively, these conditions amounted to a breach of his Article 3 rights.

[69] Cases in which Russia was held to be in violation of Article 6 (1) for failure to execute judgments of the domestic courts include Application 24669/02 *Gerasimova v. Russia*, Judgment of 13 October 2005, in which the applicant had been awarded damages against her employer for non-payment of wages, but was effectively denied redress because the State failed to take any measures to comply with the ruling of the Commercial Court. Cases with a similar theme include Application No. 3734/02 *Sokolov v. Russia*, Judgment of 22 September 2005; Application No 9647/02 *Shilyayev v. Russia*, Judgment of 6 October 2005; Application No 23405/03 *Reynbakh v. Russia*, Judgment of 29 September 2005. In some cases, the problem lay in the unfair advantages granted to the State in having awards against the State quashed: *see*, e.g. *Vasilyev v. Russia*, 13 October 2005.

[70] Application 1719/02 *Butsev v. Russia*, Judgment of 22 September 2005.

[71] E.g. there was a failure to index the compensation in line with inflation as required by the appeal court.

[72] A similar case is Application No 40642/02 *Denisenkov v. Russia*, Judgment of the Court of Human Rights of 22 September 2005. Denisenkov had also been awarded compensation by the domestic authorities for injuries sustained while an emergency worker at Chernobyl; the delay in execution of his judgment was two years and seven months, a period which was considered unreasonable by the Court of Human Rights, particularly as the applicant had had recourse to the domestic courts twice in order to obtain the compensation that was his due. *See* also Application No 41302/02 *Malinovskiy v. Russia*, Judgment of the Court of Human Rights of 7 July 2005.

judgments against motorcycle dealers,[73] negligent medical professionals,[74] and in respect of ownership of housing.[75]

The Court of Human Rights has also criticised some of the more Byzantine and apparently unfair elements of Russian civil procedure: so in *Roseltrans v. Russia*[76] a judgment in favour of the applicant company was subsequently quashed during supervisory review proceedings that took place in the absence of the applicant company. The Strasbourg Court noted, with disapproval, that the president of regional courts had jurisdiction, unlimited by time, to set aside the final and binding judgment of another court as part of the supervisory review procedure. In the circumstances, there had been a breach of Article 6(1).

As noted, most of the judgments against Russia thus far concern breaches of Article 6(1) (sometimes in conjunction with Article 1, Protocol 1, where the case concerned non-enforcement of a judgment involving compensation or ownership of property), and Article 3 (the cases on prison conditions). There has been only one Article 10-based judgment thus far, in the *Grinberg* case.[77] In that case, the newspaper *Guberiya* published a piece by the applicant which accused General Shamanov, who had just been elected Governor of the Ulyanovsk Region, of "waging a war against the independent press".[78] This statement was based on the fact that the General had taken legal action against an editor who had criticised him, with the result that she was sentenced to one year of correctional labour; *Guberiya* argued that the General's heavy-handed response showed "no shame and no scruples". General Shamanov brought a successful defamation action against the applicant, who appealed unsuccessfully and was refused further supervisory review. The applicant complained of a breach of his right to freedom of expression.

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[73] Application No 75475/01 *Vasyagin v. Russia*, Judgment of 22 September 2005 – delay of 2 years, 10 months and 4 days in the execution of judgment against the dealer of a faulty motorcycle bought under warranty.

[74] Application No 34687/02 *Yavorivskaya v. Russia*, Judgment of 21 July 2005.

[75] Application No 24077/02 *Natalya Gerasimova v. Russia*, Judgment of the Court of Human Rights of 21 July 2005.

[76] Application No 60974/00 *Roseltrans v. Russia*, Judgment of the Court of Human Rights of 21 July 2005.

[77] Application No 23472/03 *Grinberg v. Russia*, Judgment of the Court of Human Rights of 21 July 2005.

[78] The content of the offending newspaper article is reproduced at paragraph 9 of the judgment of the Court of Human Rights.

In assessing the claim, the ECtHR reiterated its usual approach: that the duty of the press is to impart information and ideas on all matters of pubic interest, and that any restrictions on that right that purported to fall within the qualifying clause in Article 10(2) must be construed strictly.[79] The most significant element in the case was that its subject matter concerned the actions and views of a politician:

> "[T]here is little scope for restrictions on political speech or debates on questions of public interest ... Moreover, the limit of acceptable criticism is wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. A politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of the open discussion of political issues."[80]

Russian law also ignored the fundamental distinction to be made between value judgments and statements of fact,[81] i.e. that the existence of facts can be demonstrated, but value judgments by their very nature are not susceptible of proof.[82] In the view of the court, "the contested statement was a quintessential example of a value judgment that represented the applicant's subjective appraisal of the moral dimension of Mr Shamanov's behaviour".[83] The nature of Russian law meant that, in order to escape liability, the applicant would have had to prove, as a matter of fact, that Shamanov had "no shame and no scruples" – an impossible burden of proof that amounted to a breach of his Article 10 rights.[84]

On the other hand, the supra-legislative status of the Convention appears to have been rather better assured by the Constitution of **Spain**. Spain is a relative newcomer to the Convention system, at least among the nations of Western Europe: it did not ratify the ECHR until 1979. Article 93 of the national Constitution states that "validly endorsed treaties, once they have been officially published in Spain, form part of the internal

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[79] Paragraph 24.
[80] Paragraph 25.
[81] Paragraph 29.
[82] Paragraph 30.
[83] Paragraph 31.
[84] Paragraph 31.

regulations" without the need for any further transforming act on the part of the legislature or executive. The Article also stipulates that the provisions of such treaties can only be altered in accordance with the treaties' own terms or in accordance with international law, thus precluding any interference by the national authorities with their international obligations.

According to Polakiewicz and Jacob-Foltzer, "For most [Spanish] legal writers, the primacy of treaties is fundamental, in line with the Spanish legal position of according treaties a supra-legal position in the hierarchy of norms."[85] While the two admit that the majority of legal pronouncements supporting this principle were *obiter dicta* only,[86] this assertion is a widely accepted principle of public international law which, as we have already seen, does not permit domestic laws to contravene treaty obligations. Furthermore, their article was written fifteen years ago, and current opinion indicates that both the Convention and the case law of the ECtHR exercises a strong influence over the decisions of the Spanish courts: the Constitutional Court decision 199/1996 is an example of such a trend.[87] In that case, which involved the right to an adequate environment, the Spanish Constitutional Court appeared to regard the ECtHR's judgment in *Lopex-Ostra v. Spain*[88] as binding authority. Furthermore, it is clear that the Spanish courts continue to refer to the Convention provisions and case law on an ongoing basis.[89]

It would seem the majority of Spanish legal thinking is opposed to any attempt by the domestic courts to use the Convention to *identify* the content of constitutional rights, on the basis that the Convention sets a lower standard than that commonly applied at national level.[90] The ECHR is not, however, without a role in this area, since Article

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[85] Jorg Polakiewicz and Valerie Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is given to the Convention (Part 2)" (1991) *Human Rights Law Journal* Vol12 125 at 133.
[86] Polakiewicz and Jacob-Foltzer, 133.
[87] *See*, for further examples, Guillermo Escobar Roca, "Spain" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 809 at 830.
[88] (1995) 20 EHRR 173.
[89] For a summary of more recent cases in which the Spanish Constitutional Court and Supreme Court have relied upon the ECHR, *see* Council of Europe, *The European Convention on Human Rights and National Case Law* (Supplement to Human Rights Information Bulletin no 68), at 82ff. The dossier also contains details of recent cases featuring the Convention from the domestic courts of other Contracting Parties.
[90] Roca, at 830.

10(2) of the Spanish Constitution requires that constitutional rights be interpreted *in accordance with* the Universal Declaration on Human Rights and other human rights treaties to which Spain is a party.[91] These two positions do not necessarily conflict: the constitutional requirement may simply mean that the courts may not hold that any of the rights contained in the Constitution is of lesser scope than the rights upheld by the treaties ratified by Spain. Since the majority of Spanish judges consider that the Constitution goes further than these the international instruments to protect human rights anyway problems are unlikely to arise. In spite of widespread support in Spain for any legislative reform which would facilitate the enforcement of Strasbourg's judgments, including proposals to ensure the implementation of the judgments of the ECtHR at domestic level and the review domestic proceedings in light of Strasbourg's decisions,[92] it would appear that such reform has yet to take place.[93] The usefulness of such measures would appear to be self-evident, both as a method of guaranteeing more efficient compliance with the State's treaty obligations and as a way of avoiding the embarrassment of repeated applications to Strasbourg on similar or even identical points, particularly in relation to the Article 6 right to a fair trial (other breaches may be beyond the domestic courts' power to remedy, and may necessitate a revision of state law or practice).[94]

The situation in Spain may be contrasted with that of **France**. The French legal system is in many ways similar to that of Spain, and yet the Convention has received nowhere near as warm a reception among Gallic judges. Both countries ratified the Convention

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[91] Jorg Polakiewicz, "The Application of the European Convention on Human Rights in Domestic Law" (1996) *Human Rights Law Journal* 405 at 409.

[92] Roca, at 831.

[93] The most recent works on Spanish law reveal that there have as yet been no developments of the kind foreseen by Roca (n87): *see* Elena Merino-Blanco, *Spanish Law and Legal System* (2nd Edition, Thomson Sweet & Maxwell, 2006). However, Merino-Blanco argues that fundamental rights are for the most part adequately protected by a procedure known as the *recurso de amparo*, by which a person whose constitutional rights have been violated may seize the Constitutional Court to seek the vindication of those rights. Given the Constitutional Court's continued fondness for the ECHR when interpreting constitutional rights, it is arguable that this procedure indirectly strengthens the domestic protection of Convention rights at the same time as providing direct protection for those enumerated in the national Constitution. For a summary of recent cases in which the Constitutional and Supreme Courts have relied upon the Convention and its case law, *see* Council of Europe, *The European Convention on Human Rights and National Case Law* (Supplement to Human Rights Information Bulletin no 68), at 82ff.

[94] The idea of so-called "Strasbourg proofing", where a body examines proposed new laws for compatibility with the Convention, has long been considered a vital means of ensuring the compatibility of domestic law with the Convention. It was even been suggested that it could have been an alternative to an incorporating act: David Kinley, *The European Convention on Human Rights: Compliance Without Incorporation* (Dartmouth Publishing Company, 1993).

popularity and is becoming "a normal and natural part of everyday legal procedures throughout the French legal system."[108]

While one could hardly describe France as a despotic nation whose citizens are routinely oppressed, the country has incurred Strasbourg's displeasure on several occasions,[109] and the average French litigant could only benefit from a more receptive judicial attitude to arguments involving the ECHR. The apparent judicial hostility to the use of international norms in domestic proceedings may be linked to the post-Revolution resistance to any development perceived to lead to a *dictature des juges*, in which the role of the legislative assembly could be circumscribed by an unelected judiciary.[110] It is arguable that the French historical experience and the consequent all-pervasive distrust of judicial review is at least partly to blame for the Convention's lack of penetration into the domestic legal system.[111] Whatever the reasons behind it, is difficult to argue with the assessment that "considering that the ECHR has had binding force since 1974, one could be forgiven for thinking that it has taken French judges a very long time to become aware of its legal importance."[112]

Germany: A Case Apart

Before moving on to examine the last of the main models of incorporation, incorporation at legislative level, it is appropriate to look briefly at one of the more successful examples of incorporation; the German example. Because of its federal nature, there is a further option open to **Germany**: Article 59 of the *Grundgesetz* (Basic Law, or Constitution) states that, once approved by the Federal *Diet*, treaties

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[108] John Bell, at 61. He points to the fact that while the *Conseil d'Etat* only referred to the ECHR in 24 cases between 1981 and 1983, it mentioned it 851 times in 1996 alone. It is submitted that these statistics do not sustain Bell's hypothesis that the Convention is a part of everyday French procedures: the judgments of the French courts are very different from those of their common law counterparts, and it is often impossible to ascertain how much reliance was placed on a particular legal provision simply because it was mentioned.

[109] According to the Council of Europe, *European Court of Human Rights Survey of Activities 2005*, France was found to be in violation of at least one provision of the ECHR during 2005: at 31.

[110] Under the *Ancien Régime* judges had an unacceptably high level of influence within France. Any attempt to politicise the judicial function is therefore strongly resisted. On the continental European fear of constitutional review generally, *see* Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, 2005), at 9ff. This point has already been canvassed (in more detail) in Chapter 3.

[111] The role played by judicial review in allowing the ECHR a foothold in the domestic legal systems of its Contracting States has been discussed in Chapter 3.

[112] Dupré, at pp332-333.

have the same status as ordinary federal laws.[113] They are thus superior to all legislation passed by the Lander, but do not take precedence over other federal laws.[114]

Over the years, the status of the ECHR has evolved beyond that of other international treaties: German judges have come to recognise that some of the Convention's provisions have matured into customary international law, and thus take precedence over the laws of both the Lander *and* the Federation. Furthermore, a landmark 1987 decision of the Federal Constitutional Court held that the Convention must be borne in mind when interpreting the rights provisions of the Basic Law.[115] It thus exercises influence over subsequent as well as prior laws.[116] Almost all of the Convention's provisions are considered to be self-executing; when they are not, it is generally because they involve a right that cannot be enforced by the judicial power, such as the right to free and secret elections under Article 3 of the First Additional Protocol.[117]

Perhaps the most overwhelming example of the high regard in which the German courts hold the ECHR is their willingness to absorb it into their rights-based jurisprudence. Obviously, a litigant can rely on those Convention Articles considered to be self-executing before a court of law. However, while the Federal Constitutional Court has consistently held that it will not entertain alleged violations of personal rights when these are based *solely* upon the ECHR,[118] the Court will hear claims in

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[113] For an explanation of the German hierarchy of norms, *see* Roman Herzog, "The Hierarchy of Constitutional Norms and its Function in the Protection of Basic Rights" (1992) Vol.13 *Human Rights Law Journal* p90, at p92.

[114] Jochen Abr. Frowein, "The Federal Republic of Germany" in Mireille Delmas-Marty and C Chodiewitz (ed) *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Dordrecht: Nijhoff, 1992) p121 at p121.

[115] The Basic Law itself contains an impressive catalogue of fundamental rights in Articles 1-19 and 101, 103, and 104. For the sources of German law, *see*, *inter alia*, Dr Anke Freckman and Dr Thomas Wegerich, *The German Legal System* (Sweet & Maxwell, 1999), at 180ff, and, generally, Raymond Youngs, *Sourcebook on German Law* (2nd Edition, Cavendish Publishing Limited, 2002).

[116] Andreas Zimmermann, "Germany" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 335 at 338-339. The content of this decision has been repeated in other judgments, including that of the Constitutional Court of the State of Saxony of 14 May 1996, and it almost certainly reflects an established and continuing position.

[117] Zimmermann, at p340.

[118] Generally, the Federal Constitutional Court hears adjudicates upon complaints relating to alleged breaches of the fundamental rights and freedoms found in the German Basic Law; *see* Alfred Rinken, "The Federal Constitutional Court and the German Political System" from Ralph Rogowski and Thomas Gawron (eds) *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court* (Berghahn Books, 2002), 55.

relation to violations of the general rules of public international law *as enshrined in the Convention*.[119]

Other positive aspects of the German approach include the fact that old criminal cases may be reopened as a result of an adverse finding by the ECtHR. While the authorities are not under a legal obligation to do so, Paragraph 359.6 of the German Code of Criminal Procedure now states that the successful applicant to Strasbourg can request that his/her case be reopened.[120] The legislature regularly takes into account adverse decisions of the Strasbourg Court, even when these are against states other than Germany.[121] Finally, even though the overwhelming majority of judicial opinion takes the view that the national courts are not bound by the jurisprudence of the ECtHR,[122] there is a modern trend towards taking this jurisprudence into account. As Zimmermann remarks, "the number of Court decisions referring to the Convention almost doubled in the eighties compared with previous decades."[123]

The example of the Federal Republic of Germany provides proof, if proof were needed, that the attitudes of the legislature, and more particularly the judiciary, are the two most determinative factors in influencing the Convention's weight post-incorporation. This trend appears to have been set by the receptive attitude of the German Constitutional Court. Indeed, Polakiewicz has noted that, despite the fact that their own Constitutions contain detailed catalogues of rights, both the German and Spanish Constitutional Courts refer to the Convention frequently.[124] Like Ireland, Germany ratified the ECHR in the early 1950s, but in the intervening years the Convention's influence has grown steadily in Germany, whereas it has remained fairly static here. Germany compares favourably with most, if not all, of the other European states which *have* incorporated the Convention;[125] however, even in Germany it

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[119] Zimmermann, at p342.
[120] Zimmermann, at p343.
[121] Zimmermann, at 353. After the ruling against Germany in the *Luedicke, Belkacem and Koc Case* (A/29) 2 EHRR 149, new laws were put in place to provide free access to interpreters in criminal cases pursuant to Article 6(3) of the ECHR.
[122] Zimmermann, at 353.
[123] At 354.
[124] Polakiewicz (n91), at 408.
[125] During the course of 2005, Germany was found to be in breach of the Convention in 10 cases: Council of Europe, *European Court of Human Rights Survey of Activities 2005*, at 31

appears that the domestic courts are not always capable of applying Convention principles correctly: *see Von Hannover v. Germany.*[126]

The Convention as an Ordinary Law

Ireland could have enacted a law authorising a minister to make the necessary regulations; or an Act which imports the language of the Convention without acknowledging its parentage.[127] It has been argued that incorporation by way of an ordinary Act giving the Convention the force of law in the State would have been a fair compromise between incorporation at the highest (i.e. constitutional) level, and the relatively weak, interpretative model used.[128] However, the problem with ordinary legislation is that the principle *lex posterior derogat legi priori* would apply, leaving the Oireachtas free to amend and ignore its obligations under the earlier regime, and it is submitted that even if the incorporating legislation were to include a requirement of Strasbourg proofing of future laws,[129] this would be no guarantee of the Convention's success in domestic law.

In some states, the Convention has same status as any other ordinary law. In **Italy**, for example, the Constitutional Court has held that the Convention, which became part of domestic law on 26 October 1955, has the status of a lowly ordinary law. The Court also took this opportunity to emphasise that national and international law have equal weight, but that these two systems remain separate and independent.[130] It is worth noting that the influence of the ECHR in the Italian courts is further weakened by the controversy as to whether it is directly applicable, with some judgments ruling that its provisions are too broad to be directly enforced by the domestic courts (an argument made on many occasions in England by the late Lord Denning[131]), with others arguing that Article 1 of the Convention obliges Contracting Parties to uphold the Convention

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[126] Application No. 59320/00, Judgment of 24 June 2004, discussed in greater detail in Chapter 7.
[127] Jaconelli (n4) at 20.
[128] Donncha O'Connell, "The ECHR Act 2003: A Critical Perspective" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 1, at 6.
[129] This suggestion has been made by O'Connell (n128), (among others). *See* (n128), 6.
[130] For an analysis of this decision, see Enzo Meriggiola, "Italy" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 475 at 479.
[131] The late Master of the Rolls argued that the Convention Articles "give rise to much uncertainty," and that Article 8 ECHR in particular was "so wide as to be incapable of practical application." See *R v. Chief Immigration Officer, ex parte Salamit Bibi* [1976] 3 All ER 843, at 847.

rights by applying them.[132] It is probably fair to say that the majority of the Italian courts do not regard either the Convention or its case law with much more than idle curiosity.[133] Certainly, the fact that Italy has been held to be in breach of the Convention by the ECtHR for virtually identical infractions on several occasions (generally to do with trial in due course of law, in particular the accused's right to trial with reasonable expedition[134]) is hardly convincing evidence that either the judiciary or the legislature has taken Strasbourg's displeasure particularly seriously.

The Convention also has the status of an ordinary law in **Sweden**, apparently because of a desire to avoid potential conflict between "two parallel catalogues of rights with constitutional status."[135] It would appear that the possibility of placing the ECHR in a position above the ordinary law but below the Constitution was not considered. The Swedish courts may, however, refuse to apply a statute because it "manifestly" contradicts the Convention, but the "great reluctance of the Swedish courts to engage in constitutional review" means that the evidence for this contradiction will need to be overwhelming.[136] Furthermore, there have been only two cases in which the argument that a law is manifestly in conflict with the ECHR has been raised, an indication of the difficulty in developing this argument to the satisfaction of the domestic courts. Nevertheless it should be noted that the Scandinavian countries, which were late to implement incorporation, were nevertheless not so hostile to the idea of considering legal argument based on the Convention *prior* to incorporation as, say, their Irish counterparts.[137] For example, in a decision handed down on 22 March 1989, the Swedish Supreme Court held that the Convention, "even though…not part of Swedish

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[132] Merrigiola (n130), at 481. Article 1 states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[133] Drzemczewski uses an example of a case involving EC law to support an assertion that the Italian courts will sometimes give treaties priority over statute law (n7), at 153). However, it is submitted that the use of this example is misleading, since the Italian courts are bound by EC law in most cases involving EC law, whereas they do not regard the law of the ECHR as having the same effect.

[134] Between 1 November 1998 and 31 January 2001, over 10% of the total number of admissible applications to Strasbourg concerned Italy, and of these around half (1,085) related to the length of judicial proceedings. (Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG (2001)1 27 September 2001).

[135] Cameron, (n47), at 838.

[136] Cameron (n47), at 840.

[137] A possible exception to this observation is Denmark, whose courts have traditionally been "very reluctant" to apply the Convention: *see* CA Norgaard, "Danish Perspectives of Incorporation of the Convention" in JP Gardner (ed) *Aspects of the Incorporation of the European Convention of Human Rights into Domestic Law* (London: The British Institute of International and Comparative Law and the British Institute of Human Rights, 1993) 41 at 45.

law" had a role to play in the interpretation of the constitutional rights,[138] and Polakiewicz has noted the willingness of Nordic countries to adopt legislative reforms following Strasbourg decisions involving not just themselves, but other States.[139]

From our examination of incorporation in Italy and Sweden, it is clear that, even where the same model of incorporation is used, the resulting internal impact of the Convention can differ widely depending on the attitude of the domestic courts. Given the hitherto broadly hostile attitude of the Irish courts to the idea of taking cognisance of international law in their judgments,[140] an ordinary law would hardly be the best method of ensuring compliance with our commitments under the Convention in the absence of an extensive programme of judicial re-training.[141]

The *Lex Posterior* Conundrum[142]

The general rule of statutory construction *lex posterior derogat priori* (the later law abrogates the earlier) is a challenge the ECHR must defeat for it to have continuing influence in the domestic legal system of any incorporating state, otherwise the legislature may easily ignore international obligations by enacting contrary legislation. Polakiewicz discerns three main ways of avoiding the operation of this rule, which could potentially operate to defeat the ECHR in all states where it has less than constitutional status. Firstly, the ECHR and national constitution can be applied in parallel, so that legislation is contrary to the Convention can be declared unconstitutional and without effect. This method has been successfully employed in **Iceland** to ensure the continuing relevance of the Convention.[143] It has also been adopted in **Bulgaria**, where the Constitutional Court has taken the "bold" approach of using the ECHR when interpreting the Constitution, applying both standards where the

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[138] *Hogsta Domstolen* 22.3.1989, NJA 1989, 131 = Nordisk Doms Samling 1990, 155.

[139] Jorg Polakiewicz, "The Application of the European Convention on Human Rights in Domestic Law" (1996) *Human Rights Law Journal* Vol.17 405 at 406. Examples of such reform occurred in Denmark, for example, following *James v. United Kingdom* (1986) 8 EHRR 123.

[140] *See* Chapter 1 for a discussion of the Irish case law on this point.

[141] It is certainly arguable that the ECHR Act, while it has the same normative status of an ordinary law, is different from what one might expect from such a norm, in that it affects all prior and subsequent legislation.

[142] Gudrun Gauksdottir, "Iceland" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 398 at 410.

[143] Gauksdottir (n142) at 410. The majority of Icelandic decisions seem to agree that the ECHR has supra-legislative status in Icelandic law.

two converge.[144] However, it is submitted that it is not when Convention and national standards *converge* that problems occur, but when they *diverge*. Arabadjiev has admitted that even in Bulgaria, where the Constitutional Court seems open to taking the ECHR into consideration in its deliberations, there exist a number of laws on the statute book that would almost certainly fall foul of Strasbourg.[145]

Secondly, the courts can refuse to allow later legislation to override the Convention on the basis that the legislature must be presumed to have wanted to abide by its international law obligations. This presumption has been used by courts in many countries to achieve this result, including those in **Norway**.[146] However, it is questionable if the national courts could so disregard the separation of powers in a situation where the statutory provision leaves no doubt that it intends to override the Convention obligations.[147]

Thirdly, by virtue of the fact that it is a specialised instrument ensuring the protection of human rights, the ECHR can be regarded as *lex specialis*, and thus overrides later general legislation.[148] Again, however, it would appear that this principle would only operate so long as the subsequent legislation did not specifically state an intention to override the treaty.

It is clear that the domestic courts will not always employ the three "escape routes" from the *lex posterior* rule set out above, whether because of their own nationalistic approach to the law, or because of the legal culture in which they operate. However, the prevailing view among legal writers appears to be that the *lex posterior* rule should

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[144] Alexander Arabadjiev, "Bulgaria" in Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 191 at 202.
[145] Arabadjiev (n144) at 214.
[146] Judge Rolv Ryssdal, "Norwegian Perspectives of Compliance with the Convention and Norwegian Perspectives of Incorporation of the Convention" in JP Gardner (ed) *Aspects of the Incorporation of the European Convention of Human Rights into Domestic Law* (London: The British Institute of International and Comparative Law and the British Institute of Human Rights, 1993) 31 at 31-32.
[147] This idea is discussed in the context of Norway, where statute law has a particularly high status, by Erling Sandene, "A Survey of Norwegian Law Concerning the Hierarchy of Constitutional Norms and its Function in the Protection of Fundamental Rights" (1992) Vol.13 *Human Rights Law Journal* 98 at 99.
[148] Jorg Polakiewicz, "The Application of the European Convention on Human Rights in Domestic Law" (1996) *Human Rights Law Journal* Vol.17 405 at 410.

not be considered an insurmountable obstacle to the continuing legal force of the Convention within an incorporating state.[149]

The United Kingdom and the Human Rights Act

For the purposes of this thesis, one of the most interesting examples of a method of incorporation where the Convention has been given special status is that employed by the **United Kingdom** in the Human Rights Act, 1998 (hereafter referred to as the HRA). The incorporation of the ECHR into English law occasioned much comment and a flurry of writing[150] – unlike the response in this jurisdiction, which was rather more subdued. The UK's method of incorporating the ECHR is interesting because, despite the fact that the UK has no written constitution or modern bill of rights, it is the model the Irish government has chosen to facilitate the State's incorporation of the ECHR into domestic law.[151] For that reason, the United Kingdom has been accorded a separate and more lengthy section of this chapter than other incorporating States. Incorporation under the Human Rights Act takes place via an ordinary Act of Parliament[152] by means of which all public authorities are bound to respect the Convention and all legislation is potentially subject to review for compatibility with the ECHR. The HRA has been described as "at one level, a conservative Bill of

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[149] For example, Jorg Polakiewicz has examined situations where the Convention has the status of statutory law and concludes that, while the *lex posterior* rule would apply in principle in such places, allowing subsequent legislation to override the Convention provisions, "[t]his theoretical position does not appear to have much practical importance": "The Status of the Convention in National Law" from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), 31, at 43. He goes on to argue that the rule can be avoided entirely by simply regarding the Convention as an aid to interpreting the scope of constitutional rights, which themselves take precedence over all legislation and which are not therefore subject to the *lex posterior* rule.

[150] For an annotated version of the Human Rights Act 1998, *see* Dr Alastair N Brown, *Human Rights Act 1998* (Thomson W Green, 2003). For a brief guide to both Convention and Act, *see* Les Allamby, *Rights in Progress* (2nd Edition Law Centre (NI), 2003), and David Hoffman and John Rowe QC, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (Pearson Longman, 2003).

[151] Via the European Convention on Human Rights Act, 2003.

[152] Admittedly, there is some question as to whether the HRA is merely an ordinary statute or a "super statute"; *see* Jeffrey Jowell QC and Jonathan Cooper, "Introduction", from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 1, at 2. Jowell and Cooper note that a number of judges have "confidently asserted that it does possess constitutional status" (*ibid*), including Lord Bingham in *Brown v. Stott* [2001] 1 WLR 817, at 835, and Lord Woolf in *R v. Offen* [2001] 1 WLR 254, at 275.

Rights", in that it makes no attempt to abrogate the principle of parliamentary sovereignty, which is "the foundation of the UK constitutional arrangement."[153]

When discussing incorporation in the UK context it is important to be aware of two things. Firstly, the Convention attained domestic force at different times in different parts of the British Isles: thanks to the Good Friday Agreement, special provision having already been made for Northern Ireland, and Scotland, with its newly devolved Parliament, was, in fact, the first area of the UK to incorporate the Convention.[154] (This examination of incorporation in the UK is with reference to the HRA 1998 unless otherwise stated.) Secondly, and most importantly, in the UK context, the word "incorporation" is itself something of a misnomer. The HRA does *not* amount to full-scale incorporation in any real sense. In the course of parliamentary debate on the new legislation, Lord Irvine himself went so far as to say, "I have to make this point absolutely plain. The European Convention on Human Rights under this Bill is not made part of our law."[155] Legal writers agree that the HRA "does not amount to full incorporation but is, in many ways, a half-way house."[156] This is due to the unique status of the Convention under the HRA: as already explained, the Act demands that all legislation be read, insofar as possible, in a way compatible with the ECHR unless a contrary intention is expressly stated by the draftsman. Furthermore, the courts have been empowered to apply both the Convention and its jurisprudence (the latter retaining the persuasive authority it supposedly had at common law), and all administrative and state bodies are required to act in accordance with the Convention.

Experts are adamant that the HRA does not amount to full incorporation because it allows deviation from the ECHR in certain circumstances. For example, although laws

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[153] Justice, *Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance* (Justice, 2001), at 10. Justice remark that "The Human Rights Act 1998 (HRA) achieves a delicate balance between the creation of enforceable human rights standards, and the preservation of Parliament as the highest source of law" (at 16).

[154] The Scotland Act injuncts the Scottish Executive and Parliament from acting in a manner that is incompatible with Convention rights; indeed, the Scottish Parliament, unlike that in London, is incapable of passing legislation that is contrary to the Convention (section 29(2)(d) of the Scotland Act): *see* Stephen Tierney, "Devolution Issues and s.2(1) of the Human Rights Act 1998" [2000] EHRLR 380. For an examination of the position in Scotland pre- and post- devolution, *see* Keith Dale Ewing and Ken Dale-Risk, *Human Rights in Scotland: Text, Cases and Materials* (W Green & Son Ltd, 2004), Chapters 1 and 2.

[155] *See* Parosha Chandran, *A Guide to the Human Rights Act, 1998* (Butterworths, 1999), at 10, for a discussion of the English Lord Chancellor's comments.

[156] Jason Coppel, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Chichester, John Wiley and Sons, 1999), at 4.

will benefit from a strong presumption of compatibility with the Convention, their meaning may not be distorted to achieve this result: "If it is not possible to give it a consistent interpretation, the will of Parliament prevails over the Convention."[157] In such a situation, the court may issue a declaration of incompatibility, but the law will not cease to apply in the way that a law declared unconstitutional by the Irish courts would; its repeal depends on Parliament. In the period leading up to the enactment of the HRA, the Lord Chancellor was at pains to point out that the government's intention in introducing the HRA did not include granting the courts the right to strike down, and therefore impliedly "repeal" Acts of Parliament.[158]

A number of provisions of the HRA resemble the Irish legislation. Section 2 of both Acts contains a requirement that the domestic courts have regard to the Strasbourg jurisprudence. Section 2 of the Irish Act requires the courts to "take judicial notice" of that case law (a somewhat unusual phrase that is discussed in greater detail in Chapter 5); section 2(1) of the English Act states that the courts "must take into account" such material should any Convention issue arise. When the Human Rights Bill was going through Parliament an attempt was made to amend this provision to replace that requirement with the words "shall be bound by", on the basis that "if our judges only take account of the jurisprudence of the European Court of Human Rights, we cast them adrift from their intellectual moorings."[159] This suggestion was rejected on the basis that making the Strasbourg jurisprudence binding would make the Bill internally inconsistent, and also went further than required by the Convention itself.[160] Lord Browne-Wilkinson also objected to the proposed amendment, arguing that "I see no reason that we should fetter ourselves in that way in dealing with a jurisprudence that is by definition a shifting one."[161]

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[157] Grosz, Beatson and Duffy (n44), at 7.

[158] See Grosz, Beatson and Duffy (n44) at 31 for a discussion of the relevant parliamentary debates.

[159] Lord Kingsland, at the House of Lords Committee Stage, from Jonathan Cooper and Adrian Marshall-Williams (eds) *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Hart Publishing, 2000) at 36. For the official report, *see* Official Report, House of Lords, 18 November 1997, vol 583, col 511.

[160] Lord Irvine of Lairg, at the House of Lords Committee Stage, from Jonathan Cooper and Adrian Marshall-Williams (eds) *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Hart Publishing, 2000) at 37. For the official report, *see* Official Report, House of Lords, 18 November 1997, vol 583, col 511. Lord Irvine made similar remarks at the Report Stage; *see* Cooper and Marshall-Williams at 39, or Official Report, House of Lords, 19 January 1998, vol 584, col 1268.

[161] Lord Browne-Wilkinson, House of Lords Report Stage, Cooper and Marshall-Williams at 38-39; Official Report, House of Lords, 19 January 1998, vol 584, col 1268. Lord Browne-Wilkinson also seemed to feel that British judges were better equipped to uphold human rights than many of their

A party to any case[162] involving the application of a law or act of a public authority may raise the issue of compatibility, so long as he or she is able to show sufficient interest. The Act allows for such a challenge to be made either in a free standing action where compatibility is the point at issue (under Section 7(1)(a)[163]), or as part of any legal proceedings to which a public authority is a party (Section 7(1)(b)). If the legislation cannot be read in a way that achieves harmony with the provisions of the Convention, then the judge has the power to make a "declaration of incompatibility". It is interesting to note, however, that this does not mean that the law is invalid: Section 4(6)(a) states that the making of a declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given", neither is the declaration even "binding on the parties to the proceedings in which it is made".[164] Given the UK's long tradition of parliamentary sovereignty (which has, admittedly, been somewhat undermined by EC law), it should come as no surprise that the Act does not go so far as to allow the judiciary to overturn the will of the Parliament and invalidate a law or administrative act. However, doubts were justifiably raised about the appropriateness of this method of ensuring compliance with the Convention in the Irish context, and even English commentators have described it as a "booby prize",[165] and questioned whether it amounts to an effective remedy.[166] However, the UK Act has at least this advantage over the ECHR Act: section 10 of the HRA provides for a fast-track "remedial order" to change the law where the UK courts have granted a declaration of incompatibility (or, indeed, where the Court of Human Rights has held that some provision of UK law breaches the Convention).[167] There is no such provision in the Irish Act.

[Eastern] European neighbours: "although until now the jurisprudence of Strasbourg has been powerful, with the expansion of the European Union there are now a number of judges from jurisdictions which in the past at least have not been famous for their defence of human rights. To find that we were bound by a decision of such a court would be unfortunate." (*Ibid.*)

[162] Two exceptions which may not be challenged are acts of a public authority done pursuant to a statutory requirement, and failure to legislate.

[163] These actions are subject to a one-year time limit.

[164] Section 4(6)(b) of the Human Rights Act, 1998.

[165] Geoffrey Marshall, "Two Kinds of Compatibility: More About Section 3 of the Human Rights Act 1998" [1999] *PL* Autumn 377, at 382.

[166] Richard Clayton, "Remedies for Breach of Human Rights: Does the Human Rights Act Guarantee Effective Remedies?" from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 147, at 156ff.

[167] For a discussion of section 10 HRA, *see* Anthony Lester QC, "Parliamentary Scrutiny of Legislation Under the Human Rights Act 1998" [2002] EHRLR 432, at 448ff.

It is now six years after incorporation, and despite appearing to gather some momentum[168] the English courts have made very few declarations of incompatibility to date, some of which were reversed on appeal.[169] The British courts have, in general, been slow to grant declarations of incompatibility. Furthermore, when ruling on such applications, the courts are entitled to take into account the policy objectives of the impugned law – a task which could be accomplished by examining ministerial statements at the time of the Bill's passage through Parliament.[170] However, in at least one instance a judge has used the declaration as a means of chastising the government for its failure to fulfil earlier undertakings made to Strasbourg: in *R (M) v. Secretary of State for Health*,[171] Maurice Kay J in the Court of Queen's Bench granted the application for a declaration of incompatibility under section 4 of the HRA in circumstances where the British government had previously undertaken to the Court of Human Rights that the offending legislation would be amended – thus ensuring that Strasbourg accepted a friendly settlement.[172] The sections in question were sections 26 and 29 of the Mental Health Act, 1983, which provided that persons detained under

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[168] By the end of the HRA's first two years in force, there had been nine declarations of incompatibility in England and Wales; however, all but two were quickly appealed. One of those that remained was *R (H) v. Mental Health Review Tribunal (North and East London)* [2002] QB 1, which led to the making of the Mental Health Act (Remedial) Order 2001 in order to change the onus of proof in mental health review tribunal discharges. The other remaining declaration was made in *International Transport Roth GmbH v. Secretary of State for the Home Department* [2002] EWCA Civ 158; *The Times*, 26 February 2002, the judge of first instance held that certain provisions of Part II of the Asylum Act 1999 were incompatible with Article 6 and Article 1 of Protocol 1; they were intended to curb the problem of illegal immigrants being brought into the UK on lorries and other vehicles, and allowed the respondent to impose a fine of £2,000stg per immigrant on the person responsible for the vehicle, and to detain the vehicle itself until the fine was paid. Additional provisions were included in the Immigration, Asylum and Nationality Act to rectify the incompatibility. For a discussion of these cases, *see* Keir Starmer QC, "Two Years of the Human Rights Act" [2003] EHRLR 14, at 18ff.

[169] E.g. *R (Alconbury Developments Ltd) v. Secretary of State for the Environment* [2001] UKHL 23, [2001] 2 All ER 929. The Divisional Court made a declaration of incompatibility in respect the law governing planning decisions procedures on the basis that it breached Article 6 ECHR; the law was ultimately upheld by the House of Lords on the ground that the existence of judicial review as a means of challenging such decisions remedied any defects which might otherwise have existed. Also overturned was the declaration granted by the High Court in *Matthews v. Minister of Defence* [2002] 3 All ER 513 against the Crown's immunity from civil suit in negligence (breach of Article 6(1)), and the declaration granted by the Special Immigration Appeal Commission that the provision for the detention of foreign nationals in the Anti-Terrorism Crime and Security Act was incompatible with Article 14 in conjunction with Article 5 (on the basis that it discriminated against the applicants by reason of their nationality: *A v. Secretary of State for the Home Department* July 30, 2002.

[170] *Wilson v. First County Trust (No 2)* [2004] 1 AC 816 (HL).

[171] [2003] 1 MHLR 348 (QBD, Maurice Kay J, Judgment of 16 April 2003, *Times Law Report* of 25 April 2003.)

[172] The case in which the ECtHR accepted this friendly settlement was Application No 26494/95 *JT v. United Kingdom* (2000) 30 EHRR 121.

section 3 of that Act could not apply to court to have the "nearest relative" replaced;[173] a feature that was incompatible with the patient's right to respect for family and private life under Article 8 ECHR.

Section 4 of the HRA is closely linked to section 3, which requires the courts to read legislation in a manner that is compatible with the Convention insofar as it is possible to do so. Like the analogous Irish provision, section 3 applies to laws enacted prior to and after the coming into force of the HRA; it is thus "difficult to overestimate the importance of section 3".[174] It has been argued that section 3 has been used in two main ways: the first method involves "reading into" legislation in order to imply provisions that safeguard fundamental rights and therefore allow the law to be construed as compatible with the Convention.[175] This approach was used in the case of *R v. A (No 2)*,[176] which concerned a challenge to the "rape shield" whereby the defendant in a rape trial is not permitted to question the complainant about her prior sexual history. The House of Lords upheld the compatibility of section 41 of the Youth Justice and Criminal Evidence Act 1999, on the basis that it was possible to admit such evidence in certain circumstances.[177] The second way in which section 3 compatibility may be achieved is by "reading down", i.e. by restricting the scope of the language of the statute in order to ensure that it will be applied in a manner that does not offend Convention rights.[178] The difficulty with this approach is that this may involve giving the words used by the legislature a narrower meaning than the ordinary meaning would suggest.[179]

In earlier cases, it appeared that the British courts were content to strain Parliament's language in order to find an interpretation of statute that would not fall foul of the

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[173] The "nearest relative" had a role in consenting to the committal of a person to mental hospital; it therefore seems only fair that the patient should be able to select this person themselves.
[174] *Per* Lord Woolf in *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2001] EWCA Civ 595; [2002] QBD 48, paragraph 75. Similar sentiments were expressed by Lord Steyn in *R v. A (No 2)* [2001] UKHL; [2002] 1 AC 45, at paragraph 44.
[175] Dinah Rose and Clare Weir, "Interpretation and Incompatibility: Striking the Balance" from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 37, at 48ff.
[176] [2001] UKHL; [2002] 1 AC 45.
[177] [2001] UKHL; [2002] 1 AC 45, at paragraph 44. NB This decision has been criticised, *inter alia*, by Lord Philips of Worth Maltravers in his Keating Lecture on "The Interpretation of Contracts and Statutes", 10 October 2001.
[178] Rose and Weir, *ibid.*
[179] This was recognised, *obiter*, by Lord Hope of Craighead in *R v. Lambert* [2001] UKHL 37; [2002] 2 AC 545.

Convention.[180] However, Starmer argues that a recent case reveals a new trend, in which "[t]he search is not for linguistic possibilities, or even for the original intention of Parliament, it is for the underlying thrust of the legislation in question."[181] The case he relies on is *Ghaidan v. Godin-Mendoza*,[182] in which a majority of the House of Lords[183] felt that it was possible to read the Rent Act, 1977, in a manner consistent with Article 14 of the ECHR; this meant that, in spite of previous decisions to the contrary,[184] the legislation could be interpreted as giving the same-sex partner of a protected tenant the same rights as his/her spouse would have to succeed as statutory tenant on the tenant's death. Importantly, this reading granted rights in a private law situation; there was no question of the obligations of a public authority being engaged. Starmer argues that such cases therefore actually involve the enforcement of international law rights.[185]

The Act also introduces a special standing requirement for those seeking to challenge the compatibility with the Convention of a law or act of a public authority:[186]

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[180] *R (Sim) v. Secretary of State for the Home Department*, QBD, Elias J, Judgment of 11 February 2003, *Times Law Report* of 21 February 2003 is an example of a case where a section challenged under the HRA was upheld. The applicant argued that section 44A of the Criminal Justice Act 1991 required the Parole Board to be satisfied that the confinement of the offender was no longer necessary for the protection of the public. He argued that this infringed his right to liberty under Article 5(4) ECHR. However, Silber J held that the section was not incompatible with the Convention, as it was possible to read it as requiring the Board to direct the release of the prisoner unless positively satisfied that the public interest made it necessary to confine him. This interpretation was upheld by the Court of Appeal.

[181] Keir Starmer, "The Human Rights Act: Review of the Year 2004-2005" [2006] EHRLR 1, at 1.

[182] [2004] 2 AC 557; [2004] 3 WLR 113 (House of Lords, Lords Nicholls of Birkenhead, Steyn, Millett, Rodger of Earlsferry, and Baroness Hale of Richmond, Speeches 21 June 2004, *Times Law Report* of 24 June 2004).

[183] Lord Millett dissented on the ground that it was not possible to read the legislation in that way, due to the legislature's intention to enact gender-specific provisions in that case.

[184] *Fitzpatrick v. Sterling Housing Association* [2001] AC 27. Indeed, the Court of Appeal in *Mendoza* felt that the discrimination embodied in the statute was not only unlawful, but could not be reconciled with the State's section 3 obligations: [2003] Ch 380.

[185] Keir Starmer, "The Human Rights Act: Review of the Year 2004-2005" [2006] EHRLR 1, at 2. The Court of Appeal has also accepted that the rights referred to in section 3 HRA are the UK's international obligations rather than those created by the HRA: *see Commissioner of Police v. Hurst* [2005] HRLR 31.

[186] Public authorities are defined in section 6 of the HRA. It is worth noting that the HRA's definition is broader than that of the ECHR Act 2003, in that the former includes the courts as a public authority. For a detailed discussion of the section 6 case law, *see* Kate Markus, "What is Public Power: The Courts' Approach to the Public Authority Definition Under the Human Rights Act" from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 77. During the debates on the Human Rights Bill, the then Secretary of State argued that there were three main types of organisation for the purposes of section 6: "obvious" public authorities, such as government departments, the police etc; organisations with a mix of public and private functions (which would fall within the scope of section 6 when exercising the former type of duty); and organisations with no public functions (which would be outside the scope of section 6); *see* Simon

according to Section 7(1), a person can raise the question of incompatibility "only if he is (or would be) a victim of the unlawful act."[187] This test is similar to the "victim" test applied by Strasbourg, but has proved controversial,[188] since it is narrower than the "sufficient interest" test used in normal judicial review cases and thus "has the undesirable effect of creating two separate tests of standing in judicial review proceedings, depending upon whether Convention rights are raised as a ground for judicial review or not..."[189] One (desired?) side effect of this may be to bar non-governmental organisations, which have often been able to pass the sufficient interest test in the past, from taking cases based on Convention rights.[190] Others have taken the understandable view that while it *may* be legitimate to limit the *locus standi* of those pursuing a private law claim, there is less justification for doing so in public law.[191] This argument rings all the more true when we consider that the rights at stake are of a fundamental nature, and that those whose rights are directly violated may not be in a position to take legal action on their own behalf.

If it transpires that a public authority has acted in contravention of a person's ECHR rights, then that person may claim compensation under section 8. There have been few such awards to date, and arguably the leading case in the area is *R (Bernard) v. Enfield LBC.*[192] In that case, the House of Lords awarded Mr and Mrs Bernard £10,000stg in damages under the Human Rights Act for the breach of their Article 8 rights. Mrs Bernard was severely disabled, had limited mobility, and suffered from incontinence and diabetes. The housing provided for her by the London Borough Council in which she lived was wholly inadequate for her needs – a point brought to the Council's attention by social services. Although the House of Lords concluded that the living conditions fell short of the threshold necessary to constitute a breach of Article 3, their

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Whitbourn, *Education and the Human Rights Act 1998* (National Foundation for Educational Research, 2003), at 19, for a summary of the "public authority" debate.

[187] For the meaning of the phrase "unlawful act", see Section 6(1): "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

[188] It appears that the test was imposed in order to avoid a "floodgates" scenario; however, such fears do not appear to have been justified: *see* Nathalie Lieven and Charlotte Kilroy, "Access to the Court Under the Human Rights Act: Standing, Third Party Intervenors and Legal Assistance" from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 115.

[189] Chandran (n152), at 6.

[190] Chandran (n155), at 6.

[191] Grosz, Beatson and Duffy (n44), at 84-85.

[192] [2003] HRLR 111. The rationale for granting damages under the HRA is also discussed in Chapter 5, when it is compared with the procedures under the European Convention on Human Rights Act 2003.

Lordships did insist that the defendants were under an obligation to take positive steps to ensure that Mrs Bernard and her family could maintain as normal a family life as possible. In spite of this, they did nothing to remedy the situation until the Bernards instituted judicial review proceedings. Indeed, the Council had earlier refused to re-house Mr Bernard on the basis that he had made himself intentionally homeless through non-payment of rent – Mr Bernard contended that he could not pay as he had to defray additional expenses due to the unsuitability of the family home for his wife's needs.

In a judgment which will doubtless be hailed by claimants under the HRA, it has been recognised that damages for human rights violations under the HRA should be no lower than those for a tort of comparable seriousness, and should thus reflect the general levels of damages awarded by English courts, in order that successful claimants obtain the just satisfaction necessitated by Section 8(3) of the HRA and Article 41 ECHR.[193] In another decision of the Queen's Bench Division, Silber J held that courts determining an action under the HRA were not bound by the common law. He also held that omissions or inactivity by the State could amount to a breach of an asylum seeker's Convention rights under Articles 3 and 8. N, the asylum seeker, was eventually granted refugee status, but only after considerable delays and mismanagement of his application, which meant that he had been deprived of income support and related benefits and caused him significant mental distress. While the facts were not such as to amount to a breach of Article 3, the Home Office's behaviour, including the unreasonable delay, had caused sufficient damage to his mental stability as to constitute a breach of his Article 8 rights.[194]

The cases in which HRA-based arguments have succeeded are many and varied; there is not the space here to do them justice.[195] What follows is merely a random sample of

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[193] *R (KB) v. Mental Health Review Tribunal and Another* [2004] QB 936.

[194] *R (N) v. Secretary of State for the Home Department*, QBD, Silber J, Judgment of 14 February 2003, *Times Law Report* of 7 March 2003. Appeals to the Court of Appeal were dismissed; NB at that stage, the case was heard along with *Anufrijeva v. Southwark LBC* [2004] QB 1124.

[195] For succinct details of Human Rights Act Cases, *see* Elena Martin Salgado and Claire O'Brien, "Table of Cases under the Human Rights Act" [2001] EHRLR 376ff; [2002] EHRLR 80ff; [2002] EHRLR 245ff. *See* also Janet Arkinstall and Claire O'Brien, "Table of Cases Under the Human Rights Act: Commentary" [2002] EHRLR 239; Janet Arkinstall and Claire O'Brien, "Table of Cases Under the Human Rights Act: Commentary" [2002] EHRLR 493; and Claire O'Brien, "Table of Cases Under the Human Rights Act: Commentary" [2002] EHRLR 357.

some of the cases taken under the UK's Human Rights legislation. In a case taken under the equivalent Scottish legislation, Lord Bonomy sitting in the Court of Session held that keeping prisoners in overcrowded cells with no toilets or running water amounted to a breach, by Scotland, of Articles 3 and 8.[196] Articles 3 and 8 can be a powerful combination, at least when the facts of the case are sufficiently serious – in the case involving Barlinnie Prison in Glasgow, the petitioner was forced to spend at least 20 hours a day in a badly-ventilated and poorly-lit one-man cell with another prisoner. He also had to use a bottle and chamber pot for his human waste, which he could only dispose of by emptying them into frequently-blocked sluices, could only exercise sporadically, and was not guaranteed regular visits. In the circumstances, Lord Bonomy had little difficulty in concluding that the cumulative effect of these prison conditions were such as to diminish the prisoner's dignity and induce feelings of humiliation, and were sufficient to entitle him to damages of £2,000.

Another obvious weakness of the Human Rights Act as a method of "incorporating" the ECHR into domestic law lies in the fact that all Convention Articles are not included. Notably, Articles 1 and 13 are omitted from the Act. Furthermore, the UK has derogated from Article 5 of the Convention,[197] which protects the right to liberty. periods of pre-trial detention, and in *Brogan and Ors v. United Kingdom*[198] the ECtHR held that the detention of persons for more than four days amounted to a breach of Article 5(3).[199] That Article states that "Everyone arrested or detained in accordance

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[196] *Napier v. The Scottish Ministers* 2004 SLT 555 (Court of Session, Outer House, Lord Bonomy, Judgment of 26 April 2004, *Times Law Report* of 13 May, 2004). *See* also Anna Lawson and Amrita Mukherjee, "Slopping Out in Scotland: The Limits of Degradation and Respect" [2004] EHRLR 645.

[197] Under Article 15 ECHR, a State can derogate from its Convention obligations in times of war or other public emergency threatening the life of the nation. The United Kingdom has entered a similar derogation in respect of the ICCPR's provisions.

[198] (1988) 11 EHRR 117.

[199] The applicants in that case were detained pursuant to the Prevention of Terrorism (Temporary Provisions) Act 1984, which permitted the Secretary of State to authorise the detention of persons suspected of involvement in terrorism concerning Northern Ireland for up to seven days. The Terrorism Act 2000 retained the seven day maximum but took the decision away from the Home Secretary and gave it to the courts – a "significant change" according to Richard Stone, *Civil Liberties and Human Rights* (4th Edition, Oxford University Press, 2002), at 97. Part IV of the Anti Terrorism, Crime and Security Act 2001 controversially authorised the indefinite detention without trial of persons suspected of international terrorism, along with a power to deport them in appropriate circumstances. Part IV of that Act is considered "by far the most controversial" of the post-9/11 measures adopted in the UK at that time: Keith Dale Ewing and Ken Dale-Risk, *Human Rights in Scotland: Text, Cases and Materials* (W Green & Son Ltd, 2004), at 556.

with the provisions of paragraph 1c[200] of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." In order to preserve its anti-terrorism provisions from attack in Strasbourg, the British government entered a derogation in respect of Article 5 ECHR,[201] and the HRA took effect subject to that derogation.[202]

The perceived distinction between the public and private spheres in this area of law also affects the operation of the HRA. In Ireland, one citizen may sue another for breach of constitutional rights; this breach is a tort which is actionable against whoever may be responsible. The material point is that a fundamental right has been unjustly infringed, and that there ought to be recompense. However, most, if not all, of the writings in the UK on the HRA proceed on the basis that there is a distinction between the horizontal and the vertical – between relationships between the State and the citizen, on the one hand, and relations between citizens, on the other.[203] It is at least arguable that the position under the UK legislation is flawed: if the interpretative obligation under the Act applies to the common law governing "vertical" relationships, surely it ought to apply equally to "horizontal" relationships too?[204] It is certainly clear that the Act applies to a number of relationships that would hitherto have been considered to belong to the realm of private law.[205] The law of the State

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[200] Article 3(1)(c) of the ECHR permits "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

[201] An attempt to challenge the validity of that derogation was made in *Brannigan and McBride v. United Kingdom* (1993) 17 EHRR 539, but was rejected by the Court of Human Rights.

[202] Section 1(2) of the HRA 1998. *See* Keir Starmer, "Chapter One: The European Convention on Human Rights: An Overview" from Keir Starmer, Michelle Strange and Quincy Whitaker (eds), *Criminal Justice, Police Powers and Human Rights* (Blackstone Press, 2001), 1, at 3-4.

[203] Murray Hunt, "Human Rights Review and the Public-Private Distinction" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002, 73, at 83.

[204] Murray Hunt, "Human Rights Review and the Public-Private Distinction" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002, 73, at 84.

[205] E.g. Strasbourg's recognition of the *de facto* family may lead to new rights (and obligations) in that area; employees' most basic rights are consolidated (Article 11 ECHR protects the right to freedom of association and the right to form and join trade unions). On the impact of the Convention on private practice generally, *see* Wendy Outhwaite and Marina Wheeler, *The Civil Practitioner's Guide to the Human Rights Act 1998* (Old Bailey Press, 1999). It has been suggested that Articles 4, 6, 8, 9, 10, 11, 14, and Article 1 of the First Protocol are all relevant to employment law: Robin Allen QC and Rachel Crasnow *Employment Law and Human Rights* (Oxford University Press, 2002), at 18. They suggest that Article 6 could apply to disputes over clear contractual rights, disputes regarding pecuniary rights and

must respect Convention rights; if it does not do so, it is immaterial that the perceived aggressor may appear to be a private law entity or individual – if the national law is permitting or facilitating the breach, then the State is responsible. Sometimes, this has the potential to lead to unfairness and inconsistency: since NHS trusts are public authorities, it is arguable that an NHS patient has rights that a private patient does not.[206]

In addition, the executive may specifically deviate from the Convention merely by saying so in a Bill put before the Houses of Parliament.[207] To achieve this, section 19 of the HRA requires that a minister provide a statement at the Second Reading of the Bill to each House. In general this statement will attest that the Bill is, in the government's view, compatible with the ECHR; however, it is open to the minister to state that, although he cannot certify that the Bill is compatible with the Convention, the government nevertheless wishes it to go ahead. Grosz, Beatson and Duffy point to the fact that the number of cases in which the HRA will actually result in a declaration of incompatibility will therefore be extremely limited:

> "...[T]he only cases in which there is a significant danger that a court will be unable to hold that a provision is compatible with the Convention rights are where: (a) there is a clear and irreconcilable textual inconsistency with the Convention rights on the face of the particular statute or (b) where the government has indicated that it wishes to proceed with a Bill although it

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pension entitlements (but probably not to those regarding policy issues and recruitment; 60); it might also have implications for unfair dismissals cases, in that employment tribunals must abide by the requirements of Article 6 and be independent, impartial, and render public judgments (at 73ff). Article 8 rights may be engaged by the modern practice of increasing surveillance of employees while at work. Many employers now monitor internet and telephone usage, and Allen and Crasnow suggest that this may breach Article 8, at least where personal calls and e-mails are concerned. The ECtHR has held that such behaviour may breach Article 8, in the somewhat exceptional case of *Halford v. United Kingdom* (1997) 24 EHRR 523. The applicant was an employee of Merseyside Police and was taking a sexual discrimination case against her employer, who had told her she could use her work telephone to discuss her case; the tapping of the phone was, therefore, a breach of her right to privacy (*see* Allen and Crasnow at 108 for a discussion of the case).

[206] This suggestion has been made by Wendy Outhwaite and Marina Wheeler, *The Civil Practitioner's Guide to the Human Rights Act 1998* (Old Bailey Press, 1999), at 26.

[207] This has led leading human rights lawyers such as Gareth Pierse to observe that in passing the HRA the government successfully reserved the right to take away more with one hand than it gave with the other, as draconian new anti-terrorism legislation could easily be allowed to deviate from the Convention's terms, an ironic development since it is those suspected of serious crimes whose rights are most at risk from state action. Michael Mansfield QC, too, has pointed out that "Human rights are not going to mean anything if at the first moment there's a real test we just abandon or alter them." (See Jon Robins, "Rights and Wrongs of Terrorism Legislation" in *The Times* Law Section of Tuesday 2 October 2001, "The Human Rights Act One Year On", 5.) These dire predictions have been proven to have some truth, in that the current anti-terror provisions in the UK are draconian in the extreme.

cannot make a statement of compatibility, because it takes the view that the Bill either is or may be inconsistent with the Convention rights."[208]

However, not all observers are quite so optimistic about section 19's potential to reduce the likelihood that legislation is incompatible: the civil liberties group Justice argues that a simple statement that a Bill is compatible with the Convention is insufficient, and that a "reasoned statement" as to why the proposed legislation is compatible with human rights ought to be included in the explanatory memorandum to each Bill.[209] They point to the fact that it is notoriously difficult to influence the content of a Bill after it has been laid, even in circumstances raising human rights concerns; to that extent, section 19 merely "highlights generic and long-standing problems with legislative scrutiny."[210] It would appear that the category (b) legislation, if passed, would be immune from any declaration of incompatibility by the domestic courts, although an aggrieved party will still have the (expensive and time consuming) option of making an application to Strasbourg.[211] Chandran argues that this loophole is linked to the decision to omit Article 13 of the Convention,[212] as the loophole itself is arguably in breach of the right to an effective remedy. Furthermore, it has been argued that the necessity of a statement as to whether legislation complies with the Convention or not is susceptible to being hijacked by unscrupulous politicians in order to bolster claims that derogations are necessary to protect democracy.[213]

On a more positive note, the Act is likely to lead to a genuine increase in awareness of the ECHR throughout the legal profession: while counsel have a duty to raise an argument based on the Convention where appropriate, there may also exist a

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[208] At 41.

[209] Justice, *Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance* (Justice, 2001), at 30.

[210] Justice, *Auditing for Rights: Developing Scrutiny Systems for Human Rights Compliance* (Justice, 2001), at 66-67. Justice state that the difficulty of having proposed amendments accepted is particularly difficult when a Bill is fast-tracked, as was the case with the Football Disorder Bill. Such legislation can avoid any real human rights scrutiny (*ibid*). They argues that the establishment of a Human Rights Commission is necessary to remedy the problem.

[211] Chandran (n155) at 3.

[212] Chandran (n155), at 3.

[213] Helen Fenwick argues that "the New Labour government used the Convention in debate on the Terrorism Bill 2000 and the Regulation of Investigatory Powers Bill 2000 as a means of affording an appearance of credibility to draconian legislation and thereby curbing or pre-empting a fully normative debate as to the merits of the legislation and the balance struck between state power and civil rights." Helen Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* (Longman Pearson Education, 2000) at 3. She muses that "If a democracy readily abandons its democratic ideals, including adherence to the rule of law, in the face of terrorist activity, it lays itself open to the charge that its attachment to them was always precarious and qualified" (at 60).

corresponding obligation on the presiding judge to address Convention-related issues counsel has missed.[214] This may help to break down psychological barriers to the ECHR having real internal effect by eroding the common lawyer's preference for remedies as opposed to rights.[215] Furthermore, the intended scope of the Act is very broad, with the definition of "public authority" to be given as much scope as possible.[216] The HRA may also, in time, be interpreted so as to have horizontal effect between individuals.[217]

An assessment of the HRA's impact at the end of its *first* year in force[218] indicated that its effects had been neither so devastating nor so dramatic as the number of legal articles published on the subject of incorporation in the UK would have led the casual reader to believe.[219] Keir Starmer criticised the courts' failure to "develop clear principles to demarcate between Section 3 compatibility and Section 4 incompatibility,"[220] while John Wadham, the director of human rights group Liberty, pointed out that cases had been few and judgments cautious.[221] Leading public lawyer Michael Beloff QC refuted early warnings that the Act would prove to be a "crackpots' charter", pointing out that the judges had been reserved in their approach, with the House of Lords ruling that the HRA did not have retrospective effect.[222] He noted, however, that the areas in which the courts had used the Act most creatively "are the very ones in which the interests of civil liberties conflict most intensively with

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[214] Chandran (n155), at 21.

[215] See JP Gardner's comment that "Common lawyers are interested in remedies, not rights." He makes this point in his article, "Procedural Incorporation: The Right to Remedies" in JP Gardner (ed) *Aspects of the Incorporation of the European Convention of Human Rights into Domestic Law* (London: The British Institute of International and Comparative Law and the British Institute of Human Rights) 87 at 87. It would indeed appear that the bare assertion by a court that one's rights have been infringed, unaccompanied by compensation or other form of redress, is hardly an incentive to litigate, particularly in the case of an impecunious plaintiff.

[216] Grosz, Beatson and Duffy (n44), at 60-61.

[217] Coppel (n156), at 27. For an in-depth discussion of the potential horizontal effect of the HRA, see Murray Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] *PL* 423.

[218] For an early assessment of the operation of the Human Rights Act, *see* Ian Leigh, "The UK's Human Rights Act 1998: An Early Assessment" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002), 323. NB the HRA has now been in force for six years.

[219] For some reason, many writers on English law thought it more appropriate to have regard to the example of the New Zealand Bill of Rights than that of their neighbours in the rest of Europe – one example of this preoccupation is Michael Taggart's article, "Tugging on Superman's Cape: Lessons from Experience with the New Zealand Bill of Rights Act 1990" [1998] *PL* 266.

[220] Keir Starmer, "How Judges Have Grappled with Human Rights" in *The Times* Law Section of Tuesday 2 October 2001, "The Human Rights Act One Year On", 7.

[221] John Wadham, "Cases Few, Judgments Cautious" in *The Times* Law Section of Tuesday 2 October 2001, "The Human Rights Act One Year On", 8-9.

[222] *See In re McKerr* [2004] 1 WLR 807.

those of national security," namely the rights to privacy, to free expression, to communication. Another high-profile ruling allowed Louis Farrakhan, leader of the Nation of Islam, to enter the country, despite anti-Muslim feeling post-September 11.[223]

Article 6, the provision dealing with the right to trial in due course of law, has provided a fertile source of HRA-based litigation. Those successfully relying on that Article have complained of a wide variety of abuses, leading to certain changes: persons subject to decisions relating to the alteration of social security awards are now entitled to an appeal before an independent tribunal pursuant to Article 6(1);[224] inordinate delays between the grant of leave to appeal against conviction and sentence and the hearing of the appeal constitute a breach of Article 6, and the appropriate form of redress could be a reduction of sentence.[225]

In spite of its many successes, usefulness of the HRA has undoubtedly been grossly overestimated by litigants and lawyers alike. In some of the abortive attempts to employ Convention rights, through the medium of the HRA, the result was fairly predictable: there is, for example, the case of the prisoner who tried to rely on Articles 8[226] and 12[227] to persuade the Court of Appeal that he had a right to artificially inseminate his wife;[228] and that of the prisoner who unsuccessfully objected to the

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[223] *R (Farrakhan) v. Secretary of State for the Home* Department, Unreported, High Court, Turner J, 1 October 2001. Admittedly, this decision was subsequently overturned by the Court of Appeal: [2002] 3 WLR 481. In the initial ruling, Turner J took the view that the decision to exclude Mr Farrakhan from the UK amounted to a disproportionate interference with his right to communicate, and his followers' right to receive, his religious and political guidance. The learned judge concluded that this was a violation of Article 10 ECHR. However, the Court of Appeal held that the Home Secretary had a wide margin of discretion in circumstances where there was evidence that the applicant's exclusion was in the interests of the prevention of disorder. The Court also ruled that there could be no question of the Home Secretary's decision breaching Article 16 (which prevents the imposition of discriminatory restrictions on aliens), as that Article only applied to aliens who were already within the State.

[224] *Wood v. Secretary of State for Work and Pensions* [2003] EWCA Civ 53 (Court of Appeal, Judgment of 31 January 2003, *Times Law Report* of 11 February 2003).

[225] *R v. Ashton, Lyons and Webber* [2002] EWCA Crim 2782 (Court of Appeal, Criminal Division, Mantell LJ, Treacy and Simon JJ, Judgment of 6 December 2002, *Times Law Report* of 10 December 2002).

[226] The right to private and family life.

[227] The right to marry and found a family.

[228] *R v. Secretary of State for the Home Department, Ex parte Mellor* [2002] QB 13; [2001] 3 WLR 533 (Court of Appeal, 4 April 2001, *Times Law Reports* of 1 May 2001). The Court of Appeal concluded that it was a deliberate policy that deprivation of liberty would usually also deprive the prisoner of his right to father children, and that the refusal to allow him to have recourse to artificial insemination was neither irrational nor contrary to the ECHR. Had the Strasbourg jurisprudence mandated a different result, the case could have called into question Irish law on the subject, best exemplified by *Murray v.*

distinction made between those sentenced to just under 15 years and those sentenced to over 15 years in determining their release on parole.[229] The latter had alleged violations of his Article 5 right to liberty and his Article 14 right to freedom from discrimination, since those serving the shorter sentence only had to satisfy the Parole Board, but those, like him, who had been sentenced to definite terms of 15 years or more also had to contend with the Home Secretary, who had the power to review the parole board's recommendations where the prisoner was serving 15 years or more. The court of first instance concluded that the different treatment of the two groups was proportionate to the aim pursued, namely to preserve the Home Secretary's power to control the release of those serving longer sentences.[230] This finding was upheld by the Court of Appeal; there had thus been no breach of the prisoner's Convention rights under Article 5.[231] While this decision is unsurprising in light of the long-standing British tradition of preserving the Home Secretary's powers in this area, it is questionable whether it really accords with the spirit of the ECHR. In particular, the Court of Human Rights has strongly criticised the heavy involvement of the UK executive in deciding the length of tariff to be served by minors detained indefinitely "at her Majesty's pleasure";[232] it is difficult to see how the continued direct and immediate influence of the executive over criminal sentencing can be justified in light of Article 6, given the lack of judicial control.

In another case concerning the criminal justice system, it was, uncontroversially, held that the Parole Board could recommend that a prisoner who had been released on licence be recalled to prison without infringing his right to liberty (Article 5), or his right to a fair trial (Article 6(1)).[233] In the view of the House of Lords, the requirements of fairness did not require the parole board to hold an oral hearing in every case in which a prisoner who had been released on licence resisted his recall to prison; it was enough that the board's review of the decision to recall him/her satisfied the requirements of procedural fairness. There was also no breach of Article 6 ECHR

Ireland [1991] ILRM 465 where a similar request was refused – the only salient difference being that both Mr and Mrs Murray were serving life sentences, whereas Mrs Mellor's wife was a former prison officer who had met him in the course of her duties.

[229] *R (Clift) v. Secretary of State for the Home Department* [2004] 1 WLR 2223.

[230] QBD, Hooper J, Judgment of 13 June 2003, *Times Law Reports* of 25 June 2003.

[231] [2004] 1 WLR 2223.

[232] *T and V v. United Kingdom* (2000) 30 EHRR 121.

[233] *R (Smith) v. The Parole Board* [2005] 1 WLR 350; [2005] HRLR 8.

as the revocation of the licence did not involve the hearing of a criminal charge; so long as the prisoner had access to domestic courts to assert his right to liberty his Article 5 rights also remained intact. This judgment seems logical in view of the fact that a prisoner so recalled has already lost his right to liberty on the imposition of his sentence by the court of trial, and the right does not revive until the expiry of the term imposed; however, basic fairness would appear to make an oral hearing desirable.

A further attempt to challenge the length of the period between reviews of the position of mandatory life prisoners also failed: *Murray v. Parole Board.*[234] The Home Secretary had already been obliged to reduce the two-year review period to 15 months, and although the Court of Human Rights appeared to feel that periods of more than one year had to be justified, the Court of Appeal did not consider the 15-month interval to be so long as to amount to a breach of Article 5(4), particularly given the limited resources of the Parole Board.[235]

Article 6 has provided a fertile source of misconceived challenges under the HRA. In one such, the applicant unsuccessfully sought to challenge the fairness of a jury trial on the ground that Section 1 of the Juries Act, 1974, failed to provide for multi-racial juries.[236] In another, the role of the clerk court in Scotland was challenged, on the ground that his role in advising lay justices on law, practice and procedure was incompatible with the right to trial by an independent and impartial tribunal.[237]

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[234] [2003] EWCA 1561 (Court of Appeal, Judgment of 6 November 2003, *Times Law Report* of 12 November 2003).

[235] *Murray v. Parole Board and Another* [2003] EWCA 1561 (Court of Appeal, Judgment of 6 November 2003, *Times Law Report* of 12 November 2003).

[236] *R v. Smith (Lance Percival)* [2003] 1 WLR 2229 (Court of Appeal, Judgment of 19 February 2003, *Times Law Reports* of 3 March 2003). The man convicted of grievous bodily harm was black, but his victim, the witnesses and all the jurors at his trial happened to be white The Court of Appeal noted that there were no Strasbourg judgments relating to the composition of juries, but that fairness in jury selection was achieved by the random selection of jurors, and that since a defendant was entitled to a fair hearing by an independent and impartial tribunal established by law, the test to be passed was whether there was a real possibility of bias in the tribunal. This result is wholly unsurprising: any other would have been tantamount to admitting that unless a jury is racially balanced, there is a real risk of bias against an accused person – a conclusion which would lead to an impossible situation, since the principle of random selection would be undermined by racial profiling.

[237] *Clark v. Kelly* [2004] 1 AC 681 (Privy Council, Judgment of 11 February 2003, *Times Law Report* of 12 February 2003). The Privy Council upheld the role of the clerk, but clarified that, in the interests of fairness, the clerk should repeat any advice proffered to the justice in open court so that both sides would have the chance to respond to it.

Other HRA cases have proved controversial and have attracted a flurry of media attention: *see Shabina Begum v. Denbigh High School*,[238] in which the House of Lords upheld a school's right to enforce its policy in relation to the uniform to be worn. The plaintiff had argued that that policy infringed her right to education and to demonstrate her (Muslim) religious beliefs by wearing the jilbab (a flowing robe and headscarf which covers the wearer from head to toe).[239] The school was 79% Muslim and did allow Muslim pupils to wear the shalwar kameez (trousers and a tunic).

Sometimes, the use of Convention rights has been somewhat tangential to the relief sought. For example, one litigant attempted to rely on the Article 3, Protocol 1 right to vote in order to prevent the sale of the full electoral register to credit reference agencies – presumably because this practice discouraged one from registering to vote in the first place. The Queen's Bench Division responded that the practice was only a very limited interference with the right, and pursued the legitimate aim of disseminating information, which was of public record and was only given to a small group under certain conditions and for a specific purpose – i.e. the facilitation of credit and the prevention of fraud.[240]

There have been cases where the British courts have arguably "let the authorities off on a technicality": in one such case, it was held that members of a Gypsy family who had been obliged to give up their traditional nomadic lifestyle were no longer "Gypsies" for the purposes of planning law, and were thus no longer entitled to set up caravan sites on open ground; they could therefore be subject to enforcement notices asking them to leave.[241] Lord Justice Auld pointed out that, although planning policies could affect the Article 8 family rights of Gypsies,[242] the relevant Convention case

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[238] [2005] HRLR 16.

[239] The plaintiff had initially lost the case in the High Court: *Shabina Begum v. Denbigh High School*, High Court, 15 June 2004, *see* also John Austen and Jan Colley, "Court Rejects Muslim Schoolgirl's Dress Claim", PA News 15 June 2004; and Neville Harris, "Education: Hard or Soft Lessons in Human Rights" from Colin Harvey (ed) *Human Rights in the Community: Rights as Agents for Change* (Hart Publishing, 2005), 81, at 103. She had more success in the Court of Appeal, but that judgment was subsequently overturned by the House of Lords.

[240] *R (Robertson) v. First Secretary of State* [2003] EWCA Civ First instance: QBD, Maurice Kay J, Judgment of 21 July 2001, *Times Law Reports* of 11 August 2003.

[241] *Wrexham County Borough Council v. National Assembly of Wales and Others*, Court of Appeal, Judgment of 19 June 2003, *Times Law Reports* of 4 July 2003.

[242] This was established in *Chapman v. United Kingdom* (2001) 33 EHRR 18.

law[243] could be distinguished in this case, since whether a person fulfilled the statutory definition of "Gypsy" was a question of fact to be decided on the date of the planning decision.

In yet another case involving Article 6, it was held that that Article was not breached by the link between the medical member of a mental health tribunal and the NHS trust detaining the patient being assessed: *R (PD) v. West Midlands and North West Mental Health Review Tribunal*.[244] PD was a mental patient being detained by the respondent health trust under Section 3 of the Mental Health Act, 1983; the consultant who was the medical member of the tribunal that ruled that he should not be discharged was the employee of the trust – a nexus that the Court of Queen's Bench ruled did not of itself amount to a breach of Article 6, the real question being whether an informed observer would have thought there to be "a real possibility of subconscious bias on the part of that medical member of the tribunal" (in the Court's opinion, they would not).

In the UK, there have been instances where the executive has refused to abide by the HRA-based rulings of domestic courts, including David Blunkett's decision to continue imposing licence conditions on violent criminals and sex offenders on their release from prison.[245] This was in spite of a Court of Appeal decision that those convicted prior to the passage of the Criminal Justice Act of 1991, which allowed the imposition of such conditions, could not be subject to licence conditions as to do so would breach Article 7 ECHR (which states that offenders may not be subject to any penalty heavier than that applicable at the time of the commission of the offence).[246] Prior to the 1991 Act, an offender in Uttley's position was entitled to be released without licence after serving two thirds of his/her sentence; thanks to sections 33 and 37 of the 1991 Act, he/she could still be released after serving two thirds of the sentence, but was on licence until three quarters of the sentence had been served. Uttley had argued that this amounted to the imposition of an additional penalty on him during the course of his imprisonment. However, the Home Secretary's refusal to abide by the Court of Appeal's ruling was to become moot: the House of Lords

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[243] I.e. *Chapman*, *ibid.*
[244] QBD, Silber J, Judgment of 24 October 2003, *Times Law Report* of 31 October 2003.
[245] Richard Ford, "Appeal court rules release conditions of serial sex offender breach human rights", *The Times*, 31 July 2003.
[246] *R (Uttley) v. Secretary of State for the Home Department* [2003] 1 WLR 2590 (CA).

overturned the judgment of the lower court, on the basis that there had been no breach of Article 7(1) ECHR: the maximum sentence that could be imposed in respect of the offence of rape both before and after the new law was life imprisonment.[247] It is to be hoped that the executive in this jurisdiction does not adopt such a position; however, it is submitted that, as a general rule, Ministers in Ireland do comply with their obligations as set down by the courts.

While Cherie Booth QC admits to feeling like "a proud mother" at what she perceives to be the success of the HRA,[248] others are more sparing in their praise: Murray Hunt points out that it took some time in the early stages for judges to come to terms with the new standard of review applicable in judicial review under the Act,[249] while Conor Gearty notes that judicial pronouncements post-September 11 have been much more deferential towards draconian government measures taken to calm a worried public.[250] As to the future role of the ECHR in the English courts, there is very likely much to be learned from the experience of the Scottish courts, where, after a period of radicalism following incorporation, experts have discerned a return to a more conservative position.[251] The current global political climate is likely to provide the greatest test of the HRA's effectiveness in protecting human rights, however, for it is clear that judges are far from immune to the political climate in which they work.[252] Whatever the future may hold, it is clear that the HRA has not yet had the far-reaching ramifications predicted by Lord Irvine.[253]

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[247] *R (Uttley) v. Secretary of State for the Home Department* [2004] 1 WLR 2278 (HL).
[248] "England and the Human Rights Act – Some Lessons", speech by Cherie Booth QC to a UCD Conference on the European Convention on Human Rights, 18 October 2002.
[249] Murrary Hunt's speech to the above conference was entitled "The Impact of the Human Rights Act on Judicial Review".
[250] Professor Gearty expressed his concerns at the above UCD conference in a paper entitled "The Impact of the Human Rights Act on Civil Liberties."
[251] Aidan O'Neill QC, "Notes from a Small Country – Scotland's Constitution and the European Convention", paper to UCD Conference on the European Convention, 18 October 2002.
[252] This point will be discussed in a more general way in Part II.
[253] See Lord Irvine of Lairg, "The Development of Human Rights in Britain under an Incorporated Convention on Human Rights" [1998] *Public Law* p221.

Conclusion

> "The main responsibility for ensuring the observance of the Convention in domestic law lies with the legislature and the judiciary."[254]

While it is generally the legislature (invariably at the instigation of the executive) which decides what normative status the ECHR will have in domestic law post-incorporation, the Convention's position in the hierarchy of norms is only one of a range of factors that affect its real influence in any country's legal system. Drzemczewski has stressed that "the position [the ECHR's] provisions have secured for themselves in the domestic hierarchy does not necessarily in itself reflect the real standard of legal protection that a given state affords to individuals."[255] It is possible to go even further than this, and argue, against the contention of Polakiewicz and Jacob-Foltzer to the contrary,[256] that the place of the incorporated Convention in the hierarchy of norms is not even the *most important* factor affecting its impact.

What can we, in Ireland, learn from the way in which our neighbours have approached the question of incorporation? The first lesson would appear to be that the ECHR must be allowed to have real legal relevance within the state; otherwise we will merely be paying lip service to the idea of incorporation. For this to be assured, we must look beyond the question of the Convention's nominal legal status, to the way in which it is actually referred to and applied by the domestic courts. It has been suggested that

> "All common lawyers know that the best way to get judges to do something new is to show them that it is so close to what they have been doing all along that they could claim that it was what they have been doing all along."[257]

It may not be easy to convince Irish judges that what they have been doing all this time amounts to the domestic application of the ECHR and the judgments of its Court, but it would appear of fundamental importance that they be persuaded to give teeth to their obligation under the 2003 Act to take "judicial notice" of the Strasbourg jurisprudence.[258]

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[254] Jorg Polakiewicz, supra, at 407.
[255] Drzemczewski (n7), at 191.
[256] (1991) 12 *HRLJ*, at 141.
[257] Martin Shapiro and Alec Stone Sweet, "Judicial Law Making and Precedent" from their book, *On Law, Politics and Judicialization* (Oxford University Press, 2002) 90, at 93.
[258] Section 4 of the European Convention on Human Rights Act 2003.

It is not disputed that both the very fact of incorporation and the position occupied by the incorporated Convention in the hierarchy of norms in any given legal system are both important in determining its influence. However, perhaps the real lesson to be learned from an examination of the method chosen to incorporate the Convention into domestic law is that it tells us more about the national government's view of the ECHR (or their desire to be seen as a guardian of human rights) than it necessarily does about the legal importance attached to the incorporated document.

Chapter V

The ECHR Act 2003

After considerable delay,[1] the European Convention on Human Rights Act came into force on 31 December 2003; finally, Ireland would no longer be the only High Contracting Party to the Convention not to have accorded it domestic legal status. As yet, there have been relatively few judgments in which the new legislation plays a central role, and, to a certain extent, this thesis will involve the "crystal ball gazing" referred to by the Minister for Justice.[2] There has been considerable argument about the Convention's potential as a catalyst for the reform of Irish domestic law, with many experts suggesting that, given the high standard of rights protection embodied in the Irish Constitution, the Convention has little to add. It might well be argued that the Irish Constitution affords a higher standard of protection to fundamental rights than the European Convention on Human Rights and Fundamental Freedoms, and that incorporation is consequently a futile exercise. Certainly, the Irish courts have developed an extensive fundamental rights jurisprudence. There are even certain areas in which Irish law clearly provides greater protection than does Strasbourg: Fennelly notes that one such area is the area of pre-trial detention;[3] in contrast to many other European legal systems, Ireland has a constitutional right to bail – a right that, even after the restrictions introduced by the Bail Act, is quite extensive. It must also be recognised that not all of the Convention rights are given domestic status under the 2003 Act; [4] however, in incorporating the Article 13 right to an effective remedy, the ECHR Act has at least one advantage over the HRA.

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[1] The European Convention on Human Rights Bill was introduced in 2001, but was not passed into law until 24 June, 2003. The delay apparently cannot be attributed to the repeated reform of the text, since the government appears to have ignored most of the revisions suggested: *see* Donncha O'Connell, "The ECHR Act 2003: A Critical Perspective" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 1.

[2] Michael McDowell, TD, Minister for Justice, Equality and Law Reform, "The European Convention on Human Rights Act, 2003: What the Act will Mean", Speech to the Law Society and Human Rights Commission Conference on New Human Rights Legislation, 18 October 2003, at 1 of the paper.

[3] Mr Justice Nial Fennelly, "Introduction to the European Convention on Human Rights Act 2003" Speech to the Law Society Conference on the European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, at 7.

[4] Section 1 of the Act states that Articles 2-14 of the ECHR and Protocols 1, 4, 6 and 7 were to be incorporated into Irish law.

In enacting the European Convention on Human Rights Act, Ireland has, for better or worse, chosen to mimic the UK model (or "Delia Smith" model, in the sense that it had been prepared earlier[5]). Ireland's version of the incorporating legislation, like that of the UK, is an interpretation Act. Section 2 of the Act obliges judges, when "interpreting and applying any statutory provision or rule of law" to do so in a manner consistent with the State's obligations under the Convention provisions "*in so far as is possible*" [emphasis added]. Commentators agree that the section applies to both statute and common law.[6] Like their colleagues in the UK, Irish judges may not twist the words of a law beyond their natural meaning – where it is *not* possible to interpret Irish law in a manner consonant with the ECHR, the remedy lies in a declaration of incompatibility (discussed *infra*). The aim of this chapter is to examine and assess the substantive provisions of the European Convention on Human Rights Act, and to discuss the manner in which they have been interpreted by the courts thus far.

The Interpretative Obligation and the Judicial Notice Requirement: Section 2[7]

On the words of the legislation, the interpretative obligation in section 2 is not limited to cases in which Convention rights are a central issue, but looks like a general duty. The extent of the courts' willingness to examine laws for their compatibility with the Convention's provisions and case law remains to be seen, however. Before the enactment of the ECHR Act our judges repeatedly refused to apply Convention principles when interpreting Irish law unless they were completely satisfied that there was no conflict between the two – a somewhat pointless and self-congratulatory exercise at best. It may not bode well that a man who was, until recently, the leading judge in the State feels that section 2 is not at all innovative.[8] However, there should be little doubt that, if the Irish courts choose to seize the opportunity, this section could have far-reaching implications for Irish law and practice.

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[5] O'Connell (n1), at 2. It could just as easily have been called the "Blue Peter" model, for precisely the same reason.
[6] *See* e.g. Michael McDowell, TD, Minister for Justice (n2) at 3; and Fennelly (n3) at 3.
[7] For the full text of section 2, *see* Appendix, 51.
[8] Ronan Keane CJ, "Issues for the Judiciary in the Application of the ECHR Act, 2003", Speech to the Law Society and Human Rights Commission Conference on New Human Rights Legislation, 18 October 2003, at 6, where he says: "…while it might be going too far to say that s. 2(1) is no more than declaratory of the existing law, it is not as innovative in its effect as a first reading might suggest."

Section 2 may be closely linked with the provisions of section 4, which states that "Judicial notice" shall be taken of the Convention provisions and jurisprudence and of any declarations and decisions of the Committee of Ministers and of the now defunct Commission.[9] The term "judicial notice" is new to Irish law and is not defined in the Act. It has since made an appearance in the Interpretation Act 2005, again without a statutory definition being offered. To date, there have been no judicial pronouncements on the nature and extent of this duty. However, the use of this wording arguably means that Irish judges are not bound by the decisions of these bodies (if they were to be bound, the section could just say so) – unsurprisingly, since the reverse would be a serious circumscription of the judicial independence of our courts. While the importance of the judicial notice requirement should not be underestimated, in practice the domestic impact of the decisions of the Court of Human Rights will depend almost exclusively on the weight attached to such judgments by the Irish Courts. As Chapter 6 demonstrates, this varies very much between one judge and the next.

If our courts embrace their new duty to take cognisance of the rulings of their brethren in Strasbourg, the results could be dramatic. The case law of the Strasbourg Court indicates that there are a number of areas in which the Convention jurisprudence differs from our own, particularly in the area of Article 8 rights (most obviously, with regard to the right to private and family life). This difference is partly due to the fact that the Court of Human Rights does not operate on a system of binding precedent, so it can revisit and revise its position relatively easily. A concrete example of a possible conflict about to come before the High Court is the case of *Foy v. An t-Ard Cláraitheoir*,[10] in which a male to female transsexual is challenging the State's refusal to amend the birth records to reflect her acquired gender. Although this aspect of Ireland's birth registration system has not yet been challenged in the ECtHR, the British equivalent has. Initially, Strasbourg accepted that there were reasons for the State's refusal to amend its birth registration records: *see Rees v. United Kingdom*,[11]

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[9] The text of section 4 is reproduced at 52 of the Appendix.
[10] The first High Court hearing in the matter was before McKechnie J in 2002 ([2002] IEHC 116). The Supreme Court's subsequent ruling on the appeal was not reported; nor is the unreported version available.
[11] (1987) 9 EHRR 56.

Sheffield and Horsham v. United Kingdom,[12] and *Cossey v. United Kingdom*,[13] all of which confirmed the Court's position that the UK's refusal to re-register or amend the birth certificates of post-operative transsexuals did not amount to a breach of their Article 8 rights, particularly since the State made other efforts to facilitate the applicants' new identities in other ways (including providing gender reassignment operations on the National Health Service).

However, the ECtHR later reversed its position, and in *Goodwin v. United Kingdom*[14] it noted that, as a mechanism for human rights protection, it had an obligation to take into account changing conditions in the UK and in other Contracting States, and "to maintain a dynamic and evolutive approach".[15] Noting that birth certificates may be altered in the cases of adoption and legitimisation, the Court felt that making a further exception in favour of transsexuals (of whom it estimated that there were only 2,000-5,000 in the UK), would not seriously undermine the system.[16] Significantly, the Court also held that the refusal of the right to marry constituted a breach of the applicant's Article 12 rights.[17] Dr Foy lost her initial application to the High Court,[18] but the Supreme Court referred the matter back to the High Court following the coming into force of the European Convention on Human Rights Act and the highly relevant *Goodwin* judgment. This case could provide an important insight into the High Court's view of the extent of the duty to take judicial notice of Strasbourg decisions. It will be interesting to see if the High Court echoes the view of the House of Lords that "The duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."[19]

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[12] Application Nos 22985/93; 23390/94 *Shefflield and Horsham v. United Kingdom* Judgment of the Court of Human Rights of 30 July 1998.
[13] (1991) 13 EHRR 622.
[14] *Goodwin v. United Kingdom* (2002) 35 EHRR 18. For a discussion of the *Goodwin* case, *see*, *inter alia*, Fergus Ryan, "Marriage at the Boundaries of Gender: The 'Transsexual Dilemma' Resolved?" [2004] *Irish Journal of Family Law* 1.
[15] Paragraph 74.
[16] Paragraph 87.
[17] The case law relating to the Court of Human Rights' attitude to committed relationships has been discussed by this author in "Committed Relationships and the Law: The Impact of the European Convention on Human Rights", in Oran Doyle and William Binchy (eds) *Committed Relationships and the Law* (Four Courts Press, Forthcoming). *See* also Judy Walsh and Fergus Ryan in *The Rights of* De Facto *Couples* (Irish Human Rights Commission, March 2006).
[18] [2002] IEHC 116.
[19] *Per* Lord Bingham, *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323, at para 20.

Proponents of the Act argue that section 2 has the potential to effect "very real change in our law", given its broad application to every court and every law in the land[20] (excepting the Constitution, to which it is expressly subject). Fennelly notes that it was open to the legislature to impose a less radical interpretative obligation on the courts: they could have chosen the obligation to apply only "so far as is practicable" rather than "so far as is possible". It has been argued, however, that the obligation to interpret legislation in a manner compatible with the Convention insofar as is possible opens up the risk that the court will interpret legislation in a manner radically different from that intended by the legislature.[21] The obligation that the Convention-friendly interpretation chosen be "possible" is effectively the same as that applying to constitutional interpretation:[22] the courts cannot (in theory at least) twist the meaning of statute so much that it bears no relation to the wording.

Fennelly accepts that there are problems with the wording of the section: the obligation is also subject to the existing rules on interpretation, an "intriguing qualification" which seems open to circular reasoning – the obligation to interpret the rules of law in line with the Convention is itself subject to the usual rules of interpretation, which themselves are subject to the Convention.[23] It has been suggested that this reference to the existing rules governing the interpretation of statute may operate to limit the interpretative obligation: the UK courts have been "fairly robust" in the carrying out of their interpretative duty under the HRA – but the HRA's equivalent to Section 2(1)[24] does not contain any reference to other competing rules of interpretation,[25] and British judges have gone so far as to interpret apparently unambiguous statutes in a manner which was arguably inconsistent with Parliament's intention in order to achieve a reading that was consistent with the Convention.[26]

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[20] Fennelly (n3), at 4.

[21] Clayton argues that such is the effect of the section 3 HRA obligation to interpret legislation in a manner compatible with Convention rights "[s]o far as possible to do so". *See*, generally, Richard Clayton, QC, "The Limits of What's 'Possible': Statutory Construction under the Human Rights Act" [2002] EHRLR 559.

[22] Fennelly (n3), at 4.

[23] Fennelly (n3), at 5.

[24] I.e. Section 3(1) of the Human Rights Act, 1998.

[25] Michael Farrell, "Judicial Review", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 89, at 92.

[26] *See* Farrell, at 92-93. He points to the case of *R v. Lambert* [2002] 2 AC 545, in which the House of Lords interpreted the Misuse of Drugs Act to include a defence of lack of knowledge where a person was found in possession of controlled drugs but had been unaware of their presence.

Should Irish judges adopt the same approach, very few declarations of incompatibility will be made,[27] but the legislature's intention could be frequently subverted – an ironic development since the indirect form of incorporation was selected with a view to preserving the autonomy of the Oireachtas in law-making matters.

Arguably, one way to minimise the risk of declarations of incompatibility being made, or the probable alternative of the courts twisting the language of offending provisions, is to have a robust system of Strasbourg proofing to ensure that new legislation is compatible with the standards established by the ECHR and its case law.[28] In the UK context, David Kinley suggested that, rather than actually incorporating the ECHR into domestic law, better compliance with the provisions of that instrument might be ensured by setting up a specialist committee to perform the "preventive" role of scrutinising all proposed legislation in an attempt to eliminate any inconsistency with the Convention.[29] While this suggestion is of no more than passing academic interest in view of the enactment of the 1998 UK Human Rights Act, it is probably fair to say that Lord Hailsham's criticisms of the proposal were well-founded: he was of the opinion that what would not be discovered by Parliament in the course of debate would not be likely to be discovered by a committee either, since it would be impossible to foresee every possible outcome of every section enacted.[30]

Strasbourg proofing *was* introduced in the UK by the HRA, with the significant opt-out clause, discussed elsewhere, that the relevant Minister can ask Parliament to pass his Bill notwithstanding that it directly conflicts with the ECHR.[31] It is not suggested that Ireland retain this capacity to avoid its Convention obligations in the British

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[27] It is worth noting that the UK courts appear to have developed a number of rules in relation to the interpretative obligation; the court must identify (1) which provision which is said to be incompatible; (2) whether there is any breach of Convention rights; (3) what the possible meanings of the legislation are. Furthermore, it is not possible to interpret legislation as being compatible where this conflicts with the express words used: *R (Anderson) v. Secretary of State for the Home Department* [2003] 1 AC 837, nor is it possible to do so where that would conflict with the necessary implications of the statute: *Re S (Care Order: Implementation of Care Plan)* (2001) 2 FLR 582. For a summary of these principles, *see* Richard Clayton QC, Alex Ruck Keene, and Rory Dunlop, "Key Human Rights Cases in the Last 12 Months" [2004] EHRLR 614, at 615-616.

[28] O'Connell, (n1) at 5.

[29] See David Kinley, *The European Convention on Human Rights: Compliance Without Incorporation* (Dartmouth Publishing Company, 1993).

[30] Lord Hailsham expounded this view in an article in the *Observer* in 1970. His views are discussed by David Kinley at p19 of his book. It is interesting to note that the House of Lords Select Committee were entirely of Lord Hailsham's view on this matter.

[31] Seciton 19 of the HRA, discussed in more detail in Chapter 4.

manner, as to do so takes away with one hand the obeisance offered by the other, but examining legislation for compatibility at this early stage does appear to have the potential to limit the number of potential applications under the Act. However, it must be remembered that Strasbourg proofing is a speculative and theoretical exercise only, and will by no means eliminate the possibility of the Irish courts, or the ECtHR, finding that even "proofed" positions of Irish law are incompatible with the Convention.

How much regard should our courts have to the judgments of the Court of Human Rights? As noted in Chapter 4, to give those decisions the status of binding precedent is impractical and, in Ireland, arguably also an unconstitutional cession of national sovereignty in the absence of a referendum. Even if this were not the case, it must be remembered that the ECtHR, unlike the European Court of Justice, does not represent the pinnacle of an autonomous, separate legal order involving the surrender of a large measure of sovereignty, to which the peoples of its members have consented.[32] Furthermore, the Strasbourg Court allows itself a margin of appreciation in many cases as a result of the varying traditions, cultures, and circumstances of its Contracting States.[33] As a result, a restriction on a right which the Court has held to be proportionate in one country may not necessarily be proportionate in another; it would therefore be illogical to follow the value judgments of the ECtHR too strictly. Finally, one can question the reasonableness of slavishly following the judgments of a Court which does not, itself, operate on a system of binding precedent; although it is perhaps

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[32] Some surrender of sovereignty is invariably involved when a state accedes to the compulsory jurisdiction of an international body such as the ECtHR – see the US's recent refusal to submit to the jurisdiction of the International Criminal Court for proof that some states do not like their actions to be scrutinised by foreign judicial authorities.

[33] There is an ever-present danger that the domestic courts may latch on to the margin of appreciation and confuse it with the doctrines of proportionality (or the administrative law concept of deference). In fact, the two are totally distinct and separate; the margin of appreciation is the doctrine applied by the ECtHR in certain cases where it considers that the national authorities have a greater understanding of the "local" situation than the Strasbourg Court. Proportionality is the test applied in order to discern whether state action has gone too far in restricting rights in pursuance of the common good. There is a danger that the courts may begin to justify deferential decision-making on the basis of a sort of margin of appreciation – which is inappropriate in a domestic court. On the distinction, and the dangers of confusing the two, *see* Philip Plowden and Kevin Kerrigan, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (Cavendish Publishing Ltd), chapter 3.

the ECtHR's flexibility in this regard that allows it to take a dynamic approach to the interpretation of the Convention.[34]

Nevertheless, the extensive and varied case law of the Strasbourg Court is too rich a seam to be left unmined, and it is to be hoped that Irish judges will display a more open-minded attitude towards this body of information and ideas in the future. Grosz, Beatson and Duffy have suggested that the UK is only bound to abide by ECHR decisions against that state.[35] It is submitted that this approach is shortsighted, and that both the Irish legislature and judiciary would do better to take note of *all* Strasbourg's decisions in order to avoid Ireland needlessly falling foul of the Court for violations similar to those of our neighbours in the future. In any case, the Irish courts have clearly been willing to consider arguments based on cases against any Contracting Party.[36]

Early cases reveal two main trends: some judges appear to be at ease with and open to arguments based on the Convention.[37] Others are tending to retain their earlier stance, applying Irish case law and constitutional jurisprudence rather than the Convention. Admittedly, this difference may be due in part to the type of challenges based on the ECHR Act that have thus far reached the courts and the extent to which the Convention was actually relied upon.[38] Furthermore, the State appears to have settled some of the more meritorious cases based on the Act rather than await a judgment.[39]

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[34] Jorg Polakiewicz and Valerie Jacob-Foltzer, "The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is given to the Convention (Part1)" (1991) Vol.12 *Human Rights Law Journal* p65 at p65.

[35] At 21.

[36] E.g. in *Kozhukarov v. Minister for Justice*, Unreported, High Court, Clarke J, 14 December 2005, the court referred to *Berrehab v. The Netherlands* (1988) 11 EHRR 322 and *Ciliz v. The Netherlands* (2000) 2 FLR 469.

[37] E.g. the judgments of Clarke J reveal a keen understanding of Convention based arguments: *see*, e.g., his judgment in *Kozhukarov v. Minister for Justice*, Unreported, High Court, Clarke J, 14 December 2005 (leave application).

[38] There are too many judgments of this second type to list here; for details, *see* Chapter 6.

[39] *See*, e.g., *Lonergan v. Minister for Defence*. That case was settled just before the substantive hearing and there does not appear to be any written judgment in relation to the leave application. The matter concerned a challenge, by way of judicial review, to the compatibility of the Irish court martial system with Article 6 ECHR. (Details obtained from the solicitor on behalf of the applicant).

The Burden on the State: Section 3 and the Duty to Act in Conformity with the Convention

Section 3[40] obliges every organ of the State to perform its functions in a manner compatible with the ECHR; where State organs fail in this duty with the result that loss is incurred, the injured party may institute an action in damages – the "teeth" of the section.[41] However, this section is not nearly as far reaching as it initially appears: first, the obligation on State organs is a qualified one, "subject to any statutory provision…or rule of law". So if another statute specifically requires an organ to act in a way that is incompatible with the Convention, presumably that contrary intention would prevail. Secondly, the definition of an "organ of the State" is narrower than that under the UK legislation, in that it specifically excludes the courts themselves (a somewhat irrational state of affairs, since other tribunals are included): section 1(1) states that "'organ of the State' includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses *or a court*) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised" [emphasis added].[42] It has been suggested that the reason for the deliberate omission of the courts from the section was the Minister for Justice's fear that it would make them "too pro-active" and lead them to raise Convention arguments of their own initiative.[43]

The statutory definition of the term "organ of the State" is not an exhaustive one, and it has been suggested that the courts could interpret the section more broadly, so as to include bodies not specifically covered by the section.[44] As yet, there is no evidence of them showing any intention of doing so, but it is fair to say that the question of to whom the section will apply is an interesting one, although the answer may be informed by the current solutions to the sometimes difficult question of which bodies may be judicially reviewed. However, the scope for expansion of the list of bodies constituting "organs of the State" may, in reality, be severely limited by the explicit

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[40] Appendix, 51.
[41] Fennelly (n3), at 12.
[42] The UK Human Rights Act also excludes both Houses of Parliament from the scope of the Act – another nod to the principle of parliamentary supremacy.
[43] MacGuill, at 77.
[44] Fennelly (n3), at 11.

exclusion of many institutions from the definition, including some semi-state bodies such as private hospitals and schools. In the UK context, it has been suggested that there could even be situations where "because of the nature of the function during the exercise of which it is claimed Convention rights are infringed, even an 'obvious' public authority [such as a government department or the police] may not be considered as a public authority for the purposes of the 1998 Act."[45] If this approach is adopted in this jurisdiction also, it could limit the scope of section 3 still further.

Worryingly, section 3 has already been misinterpreted by the High Court. An attempt to rely on Article 8 ECHR was made by a disgruntled tenant seeking to resist eviction from her home in a Ballymun Tower in *Dublin City Council v. Laura McGrath*.[46] The defendant, Ms McGrath was refusing to leave in defiance of a notice to quit from the plaintiff, who wanted to re-house the defendant and her son elsewhere in Ballymun so that they could proceed with the demolition of the tower. The plaintiff sought an interlocutory injunction restraining the trespass, which the Court granted on the basis that the balance on convenience clearly favoured the plaintiff, and that the defendant could be compensated in damages if it transpired that the injunction should not have been given.[47] The defendant had asked that the Court have regard to Article 8 of the ECHR, but the Court found that the question of whether the Council had exercised its functions in a manner compatible with the Convention would be tried at the hearing of the main action. Given the outcome of the interlocutory hearing, it remains to be seen whether the main action will ever go on for hearing, so once again the case is of limited use to students of the 2003 Act. It is submitted that, where a party makes a convincing argument that injunctive relief could adversely impact on a Convention right, the courts should be slow to grant that relief, particularly where an injunction would effectively decide the issue. Admittedly, this was probably not such a case; the

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[45] Simon Whitbourn, *Education and the Human Rights Act 1998* (National Foundation for Educational Research, 2003), at 20. For a discussion of what constitutes an "obvious" public authority for the purposes of the Human Rights Act 1998, *see* 19. Other commentators on the UK situation take the view that the Act is likely to have at least some horizontal application: Max du Plessis and Jolyon Ford, "Developing the Common Law Progressively – Horizontality, the Human Rights Act and the South African Experience" [2004] EHRLR 286. Some even go so far as to argue that the horizontal application of the HRA could cause the disintegration of the traditional public/private divide: Dawn Oliver, "The Human Rights Act and Public Law/Private Law Divides" [2000] EHRLR 343.

[46] Unreported, High Court, Carroll J, 12 March 2004.

[47] The learned judge also seemed greatly influenced by the fact that the defendant "[did] not wish to remain and says so. What she wants is a tenancy in the area of her choice."

defendant was trying to hold the Council to ransom in order to get a home of her choosing.

Importantly, the learned judge made an unfortunate error when describing the High Court as an "organ of the State" within the meaning of the ECHR Act: as we have seen, the courts were emphatically excluded from that definition. Furthermore, the Court appeared to accept that the defendant had a right to rely on Article 8 ECHR pursuant to section 3 of the Act, on the basis that the Court had to perform its functions in a manner that does not offend the Convention; since the Court is not one of those organs, this section does not apply to it. If section 3 had any relevance to the proceedings, it was in the argument that the Council, an organ of the State, had breached its duties under the Act – an allegation the High Court would have to judge.

Another factor limiting the section 3 right of action is that no other remedy in damages be available; section 3 damages are only applicable "if no other remedy in damages is available".[48] On one view, where a person could institute proceedings in tort, or for breach of constitutional rights, he/she will be excluded from the ambit of the section. In that regard, the former Chief Justice, speaking extra-judicially, expressed the view that the areas of free speech and free primary education aside, there will be very few cases in which a person could obtain an award under this section where he/she could not do so under the existing constitutional tort.[49]

In terms of the compensation available, quantum will be limited by the rules covering the jurisdiction of the High and Circuit Courts in tort, depending on where the claimant had chosen to institute proceedings.[50] It would appear that there is no obligation to use Strasbourg awards as a guide; this is one of the more salutary aspects of the legislation, in that our courts are generally much more generous in assessing compensation for torts than the Court of Human Rights is in awarding its "just satisfaction".[51] In cases where the applicant could not show pecuniary loss, not only

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[48] Section 3(2) ECHR Act 2003. This is very similar to the analogous provision of the Human Rights Act, section 8(3) (Appendix, 96).
[49] Ronan Keane CJ, at 9.
[50] Section 3(3).
[51] *See* Chapter 1. After a cautious beginning (given the absence of guidelines in the HRA), it appears that English judges now apply the same rules as to quantum as they would in tort: Philip Havers QC

have awards tended to be very low,[52] but the case law of the ECtHR in arriving at these figures has been uniformly criticised for a lack of coherence and the absence of clear guiding principles in determining damages; quantum may well have been decided by "sticking a finger in the air or tossing a coin."[53] No matter how egregious the breach, the only remedy available under section 3 is a civil one, as the section specifically excludes the creation of any criminal offence;[54] but this is not particularly controversial, since neither is there any offence of breach of constitutional rights by the State.

The most trying question to arise from section 3 in the future (aside from possible difficulties in defining "organs of the State") is likely to be the assessment of quantum in cases of non-pecuniary damage. (This assertion is based on the assumption that pecuniary damage, based on actual loss, will be easier to assess.) Of course, there is no reason why this should be a difficult question, provided the courts adhere to the policies they have formulated in cases involving breaches of constitutional rights. This is more or less what the English courts have done: to date, they have rejected the idea that they should base quantum on comparisons with awards of the Court of Human Rights in favour of domestic comparitors.[55] This refusal to rely on the Strasbourg jurisprudence is partly due to the recognition among domestic jurists that that jurisprudence offers little guidance: *Anufrijeva v. Southwark LBC*.[56] The lack of guidance from Europe may be because the Court of Human Rights regards the whole question of damages to be a mere matter of procedure, secondary and ancillary to the main issue of liability.[57] It may be that the Irish courts will look across the Irish Sea

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and Rosalind English, "Human Rights: A Review of the Year" [2003] EHRLR 587, at 592. They refer to the case of *R (Bernard) v. Enfield LBC* [2003] HRLR 111, discussed in chapter 4.

[52] For an enlightening list of the Court's awards for both pecuniary and non-pecuniary loss, *see* Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (2nd Edition, Thomson Sweet & Maxwell, 2004), at 548ff. The amounts awarded by way of non-pecuniary loss for death attributable to the state cover a wide range from nothing (e.g. *McCann v. United Kingdom* (1996) 21 EHRR 97, in which IRA suspects were killed on a bombing mission), to Euro 20,000 (in Application Nos 43577/98 and 43579/98 *Nachova v. Bulgaria*, Judgment of 6 July 2005, which also concerned excessive use of force on arrest), to Euro 133,000 (in *Oneryildiz v. Turkey* (2005) 41 EHRR 325, in where the cause of death was the failure to enforce health and building regulations in relation to a rubbish tip, where methane gas caused an explosion).

[53] Stephen Grosz, Jack Beatson QC and Peter Duffy QC, *Human Rights: The 1998 Act and the European Convention* (London: Sweet and Maxwell, 2000), at paras 6-21.

[54] Section 3(4).

[55] John Hartshorne, "The Human Rights Act 1998 and Damages for Non-Pecuniary Loss" [2004] EHRLR 660, at 665.

[56] [2003] EWCA Civ 1406; [2004] 2 WLR 603.

[57] Hartshorne, at 668.

for assistance when the time comes to award damages under the 2003 Act; however, it is submitted that this would be regrettable for two reasons: first, there is no need to do so; as noted above, the Irish courts could simply have regard to their own awards for breaches of constitutional rights; secondly, there are simply not that many HRA decisions on non-pecuniary damage.[58]

More worryingly, the time limit under section 3 is extremely short: less than one year from the contravention of Convention rights by the State organ can have passed by the institution of proceedings.[59] This narrow window of opportunity for taking an action alleging a violation of the Convention is open to criticism, not least because time runs from the date of the breach, not from the date on which the consequences of the breach became obvious to the applicant. Fortunately, the time limit may be extended if the court considers it to be in the interests of justice to do so.[60] As yet, there is no case law indicating the circumstances in which the courts will extend time under this provision. It is possible that this one-year time limit reflects a broader trend towards the shortening of limitation periods generally (the most obvious example being the Civil Liability Act of 2004 which has shortened the time limit in respect of personal injuries claims from three years to two years.) It is arguable that the section 3 plaintiff should at least benefit from the same two year limitation period as the victim of a personal injury, not least because the party responsible is the State, and the breach involved will be a breach of fundamental human rights.

The narrow time limit in section 3 is merely one of a number of aspects to the Act which make one wonder if the legislature really intends anyone to have recourse to its provisions at all – indeed, they seem intent on limiting the field of potential applicants as much as possible without quite making the Act wholly redundant. Another problematic feature of the section is that it provides for only one type of remedy: there is no jurisdiction in the courts to grant another type of order, even though it is not difficult to envisage situations where it may be more appropriate to grant an injunction to restrain a persistent and ongoing breach of Convention rights. O'Connell has called

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[58] Hartshorne, at 671. This may be because under section 8 of the HRA, which is the equivalent to section 3 of the ECHR Act, damages are a remedy of last resort. As Hartshorne notes, this fact should be borne in mind by those who fear that the HRA will contribute to "compensation culture" (671).
[59] Section 3(5)(a). This is the same time limit as applies under the UK Human Rights Act 1998.
[60] Section 3(5)(b).

for the "radical expansion" of the possible remedies under the Act, arguing convincingly that the exclusion of alternative remedies coupled with the short limitation period will marginalize the ECHR as a tool of human rights litigation.[61] He also says that the current dearth of remedies under the Act may amount to a breach of the Article 13 right to an effective remedy.[62] Hogan, too, has suggested that the courts should be able to make appropriate declaratory orders, on the basis that "any system of judicial review of legislation cannot fly on one wing".[63]

On the other hand, the Minister for Justice has argued that it was not necessary to provide for alternative remedies in the section, since anyone seeking an injunction against a State organ could take ordinary judicial review proceedings.[64] This is unconvincing: the courts' jurisdiction to injunct the State is hardly limitless, and in the absence of an express power to restrain State action for a breach of Convention obligations the courts may feel constrained from doing so by the separation of powers. Nevertheless, it has been suggested that the courts may develop their own injunctive jurisdiction in this area, based on the Supreme Court ruling that they have jurisdiction to restrain State bodies from infringing directly applicable EU law.[65] However, in spite of the incorporation of the ECHR, there remain significant differences between the Convention's domestic status and that of EU law, not least because of the latter's special constitutional status, not to mention the fact that breaches of EU law by the Irish authorities can lead directly to enforcement actions by the European Commission, with political and financial consequences. At the time of writing, section 3 relief has been sought in a number of cases, but has yet to be ordered.

The Declaration of Incompatibility: A Controversial Remedy: Section 5[66]

Controversially, Ireland has chosen to follow the UK in allowing judges to make a "declaration of incompatibility" when no other remedy is appropriate and where they

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[61] O'Connell (n1), at 8.
[62] Donncha O'Connell is also sceptical as to whether the declaration of incompatibility can ever be viewed as an effective domestic remedy, as required by Article 13 ECHR; *see* (n1) at 5.
[63] Gerard Hogan, "Incorporation of the ECHR: Some Issues of Methodology and Process" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 13, at 33.
[64] McDowell (n2), at 4.
[65] Fennelly (n3), at 13.
[66] Appendix, 52-53.

are unable to read the statutory provision or rule of law as being compatible with the State's obligations under the Convention.[67] This requirement that no other remedy must be adequate or available for a declaration to be granted is problematic and, it is submitted, unreasonable. Unlike a finding of unconstitutionality, the declaration of incompatibility does not result in the offending provision being struck down; rather, its validity and continued operation are entirely unaffected.[68] It is up to the government to propose that the provision or rule of law be repealed, an unsatisfactory situation which could potentially lead to the same piece of legislation being declared to be incompatible several times as the result of several different legal actions. The apparent rationale behind the choice of this "minimalist remedy"[69] is the desire that the ECHR should not interfere with the law making power of the Oireachtas, a reason that has been heavily criticised as being an unnecessary protection of the legislature in circumstances where the Irish courts already have wide-ranging powers to strike down laws for unconstitutionality.[70]

The only practical consequence of a declaration of incompatibility is that the Taoiseach is obliged to lay a copy of the court order before both Houses within 21 days on which each House has sat.[71] Because it does not affect the validity or continued operation of an offending provision, the declaration of incompatibility has come to be seen as a "booby prize" by practitioners in the UK: in spite of a number of such declarations being made in the UK, that legislature has not been overly quick to respond, with the notable exception of the Mental Health Act.[72] Irish commentators have described the consequences of obtaining a declaration as "dilute in the extreme,"[73] while the Human Rights Commission has been highly critical of the absence of any practical effect of a declaration for a successful litigant, who is

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[67] Section 5(1).
[68] Section 5(2)(a) of the Bill.
[69] O'Connell (n1), at 3.
[70] Or at any rate, this was the intention attributed to the then Attorney General, Michael McDowell, according to a speech delivered by Suzanne Egan to a UCD Conference on the European Convention on Human Rights, 18 October 2002.
[71] Section 5(3).
[72] Michael Farrell, "Judicial Review", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 89, at 93.
[73] MacGuill, at 78.

ultimately left without an effective remedy.[74] Furthermore, only the High and Supreme Courts can grant declarations of incompatibility; however, it is submitted that this jurisdictional limitation is the least controversial aspect of the section. After all, only the High and Supreme Courts are empowered to rule of the constitutionality of measures, and to grant lower courts the power to declare domestic law incompatible with the Convention would produce a troublesome anomaly – and one which could even lead to the lower courts attempting to subvert the policy of the higher.

One objectionable aspect of the Act's operation is that applicants seeking a declaration of incompatibility are not entitled to legal aid, no matter what their income. The traditional floodgates argument may help to explain this, as well as the fear (perhaps transmitted from the UK along with the form of the Act) that it might become the "crackpots' charter" predicted in many quarters.[75] No doubt simple economics also came into the decision. Regardless of the reason, it seems unfair that a significant proportion of the population should be excluded from exercising their rights under the ECHR Act for purely financial reasons. Surely, in the field of human rights if nowhere else, the principle of equality before the law enshrined in both our Constitution[76] and in the Convention itself[77] should preclude such discrimination. The fear of unfounded and frivolous claims hardly seems justified: rich people are at least as likely to take such cases as the poor, and therefore just as likely to clog up the courts, with the attendant drain on the State's resources (although admittedly, the State will at least be saved the expense of paying the rich man's own legal fees – at least where he is unsuccessful[78]). Certainly, it is not necessarily likely that the courts will be inundated with claims for damages under the Act, given that the long-standing recognition of the tort of breach of constitutional rights has spawned relatively few actions. Furthermore,

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[74] Human Rights Commission, "Submission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights", at 4.

[75] The precise origin of the phrase "crackpots' charter" is unclear; however, it was commonly used by the media to refer to the Human Rights Act 1998 and became the term used by opponents of the Act. On the use of the phrase, *see*, for example, www.tssa.org.uk/workemp09pdf, viewed on 13 May 2007; *see* also David Feldman, "A Keynote Address for the Conference on European Influences on Public Law: 5 Years of the Human Rights Act 1998 in English Law and Recent French Developments", at paragraph 16, viewed at www.law.cam.ac.uk/docs/viewshpdoc=2681 on 13 May 2007.

[76] Article 40.1.

[77] Article 14 ECHR.

[78] The author is assuming that the usual rule that "costs follow the event" will apply in such cases. On the application of that rule, the State can be ordered to pay the successful plaintiff's costs, but can also apply to the Court for an order that the unsuccessful applicant defray the costs incurred by the State. It is likely that such applications will be granted should vexatious or frivolous attempts to rely on the ECHR Act be made.

by precluding those in need of civil legal aid from taking a case under the Act in the domestic courts, we run the risk of forcing them to either abandon their Convention rights or to risk the even greater expense of petitioning Strasbourg – one of the expensive, time-consuming and politically embarrassing (in the case of a positive result for the applicant) eventualities the Act was supposed to prevent.

It is also important to realise that the actions for damages for a breach of Convention rights and seeking a declaration of incompatibility are distinct and separate procedures. As we have seen, Section 3 actions for damages can be brought in either the Circuit Court or the High Court; applications for declarations of incompatibility can only be made in the High Court (and reviewed by the Supreme Court on appeal). This raises the question of whether a plaintiff who has successfully sued for damages within the Circuit Court's jurisdiction must take a separate High Court action if he/she requires a declaration of incompatibility[79] – not a far-fetched scenario given that the State organ may pay the compensation due but continue to apply the offending legislative provision. Realistically, one supposes that it would be wiser to simply bring all proceedings in the High Court if both remedies are sought.

A further distinction is that, while the action for damages is a stand-alone set of proceedings, an application for a declaration of incompatibility can be considered by the Superior Courts in any proceedings; indeed, it is not necessary that an application be moved by a party to the litigation – the High Court may, of its own motion, make a declaration of incompatibility. Where the High Court decides that a declaration of incompatibility is the most appropriate course, the person whose Convention rights have been infringed can apply to the Attorney General for compensation for any injury, loss or damage suffered;[80] however, it is at the government's *discretion* to decide whether any *ex gratia* payment will be made.[81] As the name implies, there is no obligation on the government to make such a payment, and no opportunity to appeal quantum where one is made. There is no entitlement to financial recompense, no matter what the nature of the loss sustained as a result of the breach – not even where the breach amounts to quantifiable financial loss resulting from a breach of the

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[79] Fennelly (n3), at 15.
[80] Section 5(4)(b).
[81] Section 5(4)(c).

property rights guarantee of Article 1 of the First Protocol, as it the Court of Human Rights found in *Pine Valley* (*supra*). Furthermore, as many commentators have emphasised, the legislation makes specific reference to the awards made by the ECtHR pursuant to Article 41 – awards which are, as we have seen, typically very low.[82]

One does not need a crystal ball to foretell that any compensation granted as a result of an *ex gratia* payment will be paltry, particularly if the government hides behind awards made by the Court of Human Rights under the heading of "just satisfaction"[83] – assuming that the government will ever choose to exercise this discretion at all. It is submitted that the absence of any power in the courts to grant compensation as well as a declaration of incompatibility is another justification, if one were needed, for the introduction of legal aid in this area. Those taking incompatibility actions under the Act will patently not be acting out of a desire for personal enrichment, but rather to obtain a moral victory where the State has violated their Convention rights. For that reason, it appears entirely appropriate to classify the declaration of incompatibility as "a remedy of last resort"[84].

Low awards and the dubious pleasure of a moral victory have always been features of the Convention system at Strasbourg level, and to that extent the Act's stance on compensation may be justifiable. However, the awards available for breach of constitutional rights are not limited by the government's pleasure. While the terms of the Act clearly indicate that Ireland does not view Convention rights with the same degree of favour as constitutional rights, this obvious difference in terms of compensation once again calls into question our commitment to safeguarding people's rights under the ECHR. Furthermore, the right to an effective remedy, which must be ensured at domestic level,[85] conceivably requires a more robust form of redress for the person whose Convention rights have been infringed than a mere declaration that this

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[82] *See* Chapter 1. Ursula Kilkelly, "Introduction" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), at lvii.

[83] Fennelly notes that awards made by the Court of Human Rights are "extremely modest when compared with the levels of damages awarded in our courts for a wide range of civil wrongs"; (n3) at 16.

[84] Ursula Kilkelly, "Introduction" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), at lvii.

[85] Article 13 ECHR.

was so and the theoretical possibility of a government handout – particularly where the breach was egregious and longstanding.[86]

Section 6 ECHR Act: Procedural Requirements[87]

The enactment of the ECHR Act necessitated the updating of the rules relating to court practice and procedure, a task which has been accomplished (in part, at least, by SI no. 211 of 2004, Rules of the Superior Courts *(Right of the Attorney General and Human Rights Commission to Notice of Proceedings Involving Declaration of Incompatibility Issue Rules) 2004*. This Statutory Instrument has inserted a new order, Order 60A, into the Rules of the Superior Courts, and requires the party with carriage of the proceedings to serve notice on the Attorney General and Human Rights Commission in cases where a declaration of incompatibility (under Section 1(1) of the ECHR Act) becomes an issue, stating the nature of the proceedings and the contentions of both sides. An earlier practice direction by the President of the High Court remains in force insofar as it concerned claims for damages under Section 3 of the ECHR Act.[88] This practice direction merely sets out how the plenary summons in a damages application must be headed ("*In the matter of the* European Convention on Human Rights Act 2003, section 3(1)"), and states that a copy of the notice should be filed at the Central Office of the High Court. The drafting of the new provisions has been criticised, firstly because the SI does not include the practice direction's instructions in relation to Section 3 claims, and also because of the omission of the fact that Section 3 envisages remedies other than damages, including injunctive and declaratory relief.[89] This legislative foot-dragging is inexcusable, particularly since the addition of these additional elements would have simplified matters for lawyers and saved time for the legislature later on, when it will inevitably be forced to revisit the issue and remedy the draftsman's unwarranted laziness – yet another reminder, perhaps, of how lightly the State is taking the threat of actions under the Act.

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[86] Donncha O'Connell, speaking at the Brian Walsh Memorial Lecture in the Distillery Building, Dublin, on 26 November 2002.
[87] Appendix, 53.
[88] Practice Direction HC 32, signed by Finnegan P on 25 March 2004. Also set out in *Law Society Gazette*, May 2004, 5. That part of the practice direction that concerned declarations of incompatibility has been superseded by the new SI.
[89] Alma Clissman, "One to Watch: New Legislation", *Law Society Gazette*, June 2004, 2 at 2.

Section 6 has not been the subject of long debate in the post-incorporation case law, and it is not clear if failure to notify either the Attorney General or the Human Rights Commission amounts to a procedural bar to continuing. Murphy J briefly considered the section in *Superwood Holdings plc v. Ireland*,[90] and appeared to consider that failure to comply with section 6 was indeed "a substantial or procedural bar", in that he considered that he could not decide to make a declaration of incompatibility because the applicants had refused to notify the Human Rights Commission.[91] The case arose out of circumstances where the company sought to sue their insurers, Sun Alliance. The Supreme Court had granted Sun Alliance security for costs in the amount to Euro 1,592,102.56 pursuant to section 390 of the Companies Acts. Superwood's case against the State appeared to be that this ruling was a breach of its rights under Articles 6 and 14 of the Convention, and Article 1 of the First Protocol. In any case, the applicant company's Convention arguments were weak at best, and the Court had little difficulty in holding that the company's case did not disclose any basis for holding that that the section was incompatible.

The Operation of the ECHR Act: When Does the Act Apply?

Shortly before the ECHR Act came into force, the Minister for Justice suggested that the Act would apply both prospectively and retrospectively without any apparent temporal limitation[92] – a feature that would conflict with the general rule *lex posterior derogat priori*. This prediction has turned out to be entirely erroneous.

The question of "when" the 2003 Act applies is of more practical significance than at first it might appear: the temporal application of the Act is a matter of primary importance, particularly given the 2003 Act's potential for challenging acts of state organs on a host of new grounds. Nor is the question of the Act's force in time so obvious as it might first seem. Naturally, the Act came into force on 31 December 2003; prior to that date, it was not possible to rely on the Convention in an Irish court other than as persuasive international law authority, nor was it possible to seek any of the remedies provided for by the Act, such as compensation for a breach of

[90] Unreported, High Court, Murphy J, 5 July 2005.
[91] At 28-29 of the judgment.
[92] *See* McDowell, *supra*, who takes the view that the interpretative duty will apply "to all courts, at all times and in every circumstance"; at 3 of the paper [emphasis appears in the original text].

Convention rights under section 3, or the section 5 declaration of incompatibility. That much should be fairly obvious even on the most shallow reading of the Act. However, the situation is slightly more nuanced; section 5 applies both to laws that were "in force immediately before the passing of this Act or any such provision coming into force thereafter".[93] As to the Act in general, it appears that the section 2 obligation to interpret Irish law in line with the Convention insofar as is possible applies to all cases heard after the date of its coming into force. Section 3, on the other hand, only applies to acts committed by organs of the State after 31 December.

The first significant case in which the matter of the Act's application was considered was *Lelimo v. Minister for Justice*[94] - albeit in the *obiter* part of the judgment. In that case, the applicant, who sought to challenge the decision to deport her, asked for leave to amend her submissions on the basis that the 2003 Act had come into force since she had obtained leave to apply for judicial review. The applicant now wished to include pleadings to the effect that her deportation would infringe her rights under Articles 2[95] and 3[96] ECHR. The applicant had sought to rely on the Convention in her original leave application, but O'Sullivan J had refused leave on that ground on the basis that the ECHR did not at that time have force of law in the State.[97]

Laffoy J refused leave to amend on the basis that a High Court judge did not have jurisdiction to overrule an earlier order of the same court.[98] However, the learned judge went on to make a number of important points in relation to the application of section 3 of the 2003 Act. In doing so, she made extensive reference to a decision of the House of Lords in relation to the Human Rights Act. *In Re McKerr*[99] had its genesis in the RUC murder of Gervaise McKerr in 1982. In *McKerr v. United Kingdom*,[100] the Court of Human Rights held that the UK's failure to conduct an effective investigation into the murder of the deceased amounted to a breach of Article

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[93] Section 2(2) of the ECHR Act.
[94] [2004] 2 IR 178.
[95] Article 2 protects the right to life. (Appendix, at 4).
[96] Article 3 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[97] High Court, Unreported, O'Sullivan J, 12 November 2003 (original leave application).
[98] This principle had been reiterated in a similar application before McKechnie J in *LR v. Minister for Justice* [2002] 1 IR 260, at 267.
[99] [2004] 1 WLR 807.
[100] (2002) 34 EHRR 20.

2. Mr McKerr's son continued his legal battle at home, taking judicial review proceedings on the basis that the Secretary of State for Northern Ireland had been in breach of section 6 of the HRA (the UK equivalent to section 3 of the Irish Act) and Article 2 ECHR in failing to carry out an appropriate investigation into his father's death. Mr McKerr also sought an order of *mandamus* to compel such an investigation.

The House of Lords ruled that the application was based on a fundamental misunderstanding of the law. Both the applicant and the Northern Ireland Court of Appeal (which found in his favour) had failed to properly distinguish the UK's international obligations from its domestic law duties.[101] The Convention was *not* a part of domestic law, either before or after the 1998 Human Rights Act:

> "Although people sometimes speak of the Convention being incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the statute, not the Convention. But they are domestic rights, not international rights. Their source is statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for the domestic courts, not the court in Strasbourg."[102]

On that basis, the human rights provisions contained in the HRA could not have been breached prior to 2 October 2000, because the HRA would not have been in force.[103]

Laffoy J adopted Lord Hoffmann's reasoning in considering section 3(1) of the ECHR Act.[104] The ECHR Act had not altered Ireland's international law obligations in any way,[105] and insofar as the applicant sought to amend her pleadings to include breaches of Articles 2 and 3 of the Convention, she was asking the High Court to overrule an earlier decision of the same court – which was not possible.[106] The applicant had conceded the non-retrospectivity of the 2003 Act (properly, in Laffoy J's opinion), so the deportation order could not be impugned on that ground. The only available

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[101] [2004] 1 WLR 807, *per* Lord Hoffmann at 826 (paragraph 62).
[102] *Per* Lord Hoffmann, at 827 (paragraph 66).
[103] The non-retrospectivity of the HRA had already been discussed in other cases: *see*, e.g., *R (Khan) v. Secretary of State for Health* [2003] EWHC 1760 (Court of Appeal, Judgment of 10 October 2003, *Times Law Reports* of 15 October 2003).
[104] [2004] 2 IR 178 at 188.
[105] *Ibid.*
[106] [2004] 2 IR 178, at 189.

avenue for attack left open to the argument was to argue that the *enforcement* of the order would be a breach of section 3(1) of the Act. In the High Court's view, this was not the case: the power to deport derived solely from the deportation order, and if the order, which predated the 2003 Act, could not be challenged on the basis of that Act, then nor could the execution of the order.[107]

Other attempts to rely on the ECHR Act where the facts in issue took place prior to 31 December 2003 have generally been equally unsuccessful. In *Rooney v. Minister for Agriculture, Food and Forestry*,[108] another abortive attempt was made to rely on the Convention when the events complained of took place ten years before incorporation. The plaintiff farmer alleged that the destruction of his cattle in order to prevent the spread of bovine tuberculosis infringed his property rights under the Convention.[109] As in *Lelimo*, the plaintiff conceded that the 2003 Act was not retrospective; he therefore could not rely on the Act, but only on the Convention itself. Since the Convention was not part of Irish law in 1993, he could not maintain an action for the breach of his Convention rights at that time in an Irish court.

In *Gashi v. Minister for Justice, Equality and Law Reform*,[110] the applicants sought to challenge the Minister's refusal to revoke a deportation order. The application to revoke had been refused on 3 November 2003, prior to the coming into force of the ECHR Act; the applicants appealed, but this appeal was once again rejected on 3 February 2004, after the Act came into force. At the hearing of the leave application, Clarke J noted that, pursuant to the judgment in *Lelimo*, the Act was not retrospective – "at least insofar as substantive rights are concerned". However, he generously took the view that it was "at least arguable" that the provisions of the 2003 Act applied to the case, given that the appeal took place after it came into force.[111] It is submitted that

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[107] *Ibid*, at 190. This would appear to concord with the views of the Court of Human Rights; *see Bouchelkia v. France* (1997) 25 EHRR 686, in which the Court of Human Rights confirmed that France had been correct in asserting that the material time for assessing the validity of a deportation order was at the time that order was made. This decision is controversial insofar as it seems to suggest that the execution of a deportation order cannot be severed from the making of the order. This approach appears to be inconsistent with the entitlement of an applicant for asylum to seek revocation of a deportation order on the basis of a material change of circumstances, which would render execution of the order unlawful; *see*, e.g., *Agbonlahor v. Minister for Justice*, Unreported, High Court, Herbert J, 2005.

[108] Unreported, High Court, Laffoy J, 13 July 2004.

[109] The relevant provision of the Convention is Article 1 of Protocol 1.

[110] Unreported, High Court, Clarke J, 3 December 2004; discussed in greater detail *infra*.

[111] At 4-5 of the unreported judgment.

the learned judge was perhaps unduly generous in his interpretation of the applicants' rights. Given that the original deportation order and refusal to revoke occurred before the 2003 Act came into force, allowing the applicants to argue that the Act should apply to a rejection of an appeal based on pre-ECHR Act decisions could arguably amount to giving the Act retrospective effect. The fact that this was only a leave application, however, somewhat mitigates the potential effects of the ruling.

More controversial was the judgment in *Carmody v. Minister for Justice*,[112] described by Hogan as the only really important case to date under the Act (aside from *Fennell*, discussed below).[113] In *Carmody*, Laffoy J considered section 5 of the ECHR Act. The plaintiff was a Kerry farmer who was charged with numerous offences under the Diseases of Animals Act 1996 (and the regulations made thereunder); most of the summonses alleged that he had kept infected animals with healthy ones.[114] The plaintiff sought a declaration of incompatibility in relation to section 2 of the Criminal Justice (Legal Aid) Act 1962, on the basis that the section only provided for representation by a solicitor alone in the District Court. This, he alleged, amounted to a breach of Articles 5,[115] 6,[116] and 14[117] of the Convention, because a solicitor alone could not guarantee effective representation; furthermore, since the prosecution would employ counsel, the principle of equality of arms would have been breached. The plaintiff also alleged that this situation breached his rights under various Articles of the Constitution.[118]

In the course of her judgment, Laffoy J made a number of significant points in relation to the operation of the ECHR Act. The State argued that the plaintiff was precluded from relying on the ECHR Act, and relied on the UK authority of *In Re McKerr*,[119] which had found favour with the same judge in the *Lelimo* case. The State argued that Mr Carmody could not rely on the Act because the prosecutions were commenced

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[112] [2005] 2 ILRM 1.
[113] Gerard Hogan, "The Value of Declarations of Incompatibility and the Rule of Avoidance" (2006) 28 *DULJ* 408, at 417.
[114] The criminal proceedings against him were stayed pending the outcome of the judicial review.
[115] The right to liberty.
[116] The right of access to the courts and to a fair trial.
[117] The right to be able to exercise one's Convention rights without being discriminated against on the grounds of sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
[118] Specifically, he alleged breaches of Articles 38.1, 40.1, 40.3.1°, 40.3.2° and 40.4.1°.
[119] [2004] 1 WLR 807; discussed *supra*.

before it came into force. Laffoy J noted that *McKerr*-type arguments were very relevant in relation to applications under section 3 (i.e. allegations that an organ of the State had breached its duties under the 2003 Act). It is submitted that the judge was correct on this point: it is logical that State organs cannot be held to have breached obligations under the ECHR Act up to and including 30 December 2003, because until 31 December 2003 those obligations simply did not exist at domestic level. It would be repugnant if a person were to be convicted on foot of a law enacted today for an offence committed last week; such a construction of the law would simply not be allowed to stand.

However, Mr Carmody was not alleging that the actions of State organs in prosecuting him were contrary to section 3; if he had, that argument would have failed due to the fact that the section is not retrospective, rather, he was asserting that section 2 of the Criminal Justice (Legal Aid) Act 1962 was incompatible with the Convention. Such a challenge was possible under section 5(1) of the ECHR Act, and did not involve any element of retrospectivity. Section 5(1) was clearly intended to provide a means of assessing the compatibility of all Irish legislation with the Convention; to say that it only applied to laws enacted after 31 December 2003 would not only be contrary to the words of the section, but would deprive the section of all force. In *Carmody*, the State effectively tried to rely on the fallacious argument that the source of the plaintiff's grievance was his pre-2003 prosecution rather than section 2 of the 1962 Act; that this argument failed is a salutary lesson that the High Court will not tolerate this type of approach.

Having decided that the plaintiff could, indeed rely on section 5 of the 2003 Act, the learned judge accepted the traditional view that the constitutional issue should be determined last, in keeping with the presumption of constitutionality. While this solution may be logical, it is submitted that it could lead to a situation where a litigant obtained the weaker and less attractive remedy of the declaration of incompatibility in circumstances where the section in question is indeed unconstitutional – or would be so found, if only the court had considered the question. This could discourage applicants from electing to plead the ECHR Act at all – particularly given the fact that, should the court grant a declaration of incompatibility, it is not permitted to award damages. Furthermore, as Hogan notes, Laffoy J's approach simply flies in the face of

the wording of section 5(1), which clearly states that the High Court may only make a declaration of incompatibility "where no other legal remedy is adequate and available". A declaration that the impugned provision was unconstitutional was clearly an available alternative remedy (the court considered that question after dismissing the suggestion that the section was incompatible with the Convention).[120] In the event, neither the Constitution nor the Convention were deemed to have been breached in Carmody's case; unsurprisingly, the High Court concluded that there was no reason why a solicitor acting alone, could not provide him with effective representation.[121]

The Supreme Court considered the question of the ECHR Act's operation in a meaningful way for the first time in *Dublin City Council v. Jeanette Fennell and Ors.*[122] In that case, the Supreme Court rejected any suggestion that the Act could operate retrospectively in relation to complaints about the behaviour of a State organ before 31 December 2003. The appellant, Ms Fennell, had been a tenant of the City Council until the Council was granted possession of her home by the District Court on 12 December 2003, following service of a notice to quit dated 26 June 2003. The notice to quit did not include any reason for the termination of the tenancy, nor was the Council required to give any reason by the procedure set down by section 62 of the Housing Act, 1962, which facilitates the repossession of local authority housing by way of application to the District Court. However, it was common cause between the parties that the reason for the eviction was alleged misbehaviour at Ms Fennell's address. The basis for the defendant's complaint was the Council's failure to give reasons.

Ms Fennell appealed the District Court decision to the Circuit Court, and Judge Linnane stated a case to the Supreme Court in the following terms:

1. Did the 2003 Act apply to the City Council's ejectment proceedings, which were commenced before the Act came into force?
2. Did the 2003 Act apply to the appeal before the Circuit Court?

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[120] Hogan, at 417ff.
[121] This case is currently under appeal but has yet to be heard.
[122] [2005] 2 ILRM 288. Hogan describes this as "the Supreme Court's only substantial engagement to date with the 2003 Act"(at 412).

3. Did section 2 of the 2003 Act impose an obligation to interpret section 62 of the Housing Act, 1966 (as amended),[123] in a manner consistent with the State's obligations under the ECHR in the context of an appeal against proceedings that were initially issued prior to the ECHR Act's coming into force?
4. If the answer to 3 was yet, was the effect of section 2 of the ECHR Act that the local authority had to adduce evidence in support of its decision to terminate a tenancy under section 62 of the 1962 Act?

The Supreme Court answered all of these questions in the negative. Kearns J, giving the judgment of the Court,[124] noted that the summary procedure for repossession provided for by the Housing Act made the position of the City Council's tenants much more precarious than those of private lessees. Had the ejectment proceedings begun after 31 December 2003, the defendant might have had more success - the Court accepted that the summary procedure might arguably infringe several Convention Articles, including Article 6 (fair trial) and Article 1 of the First Protocol (the right to property).[125]

The Attorney General accepted that, on its very face, section 2(2) of the ECHR Act clearly applied to any law in force before the Act as well as after. However, both the Attorney General and Dublin City Council argued that the appellant had in no way

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[123] Interestingly, the constitutionality of this section had already been challenged, and upheld, in *The State (O'Rourke) v. Kelly* [1983] IR 58. The challenge was on the basis that the District Court was deprived of any real discretion in issuing a warrant on the application of a local authority once a tenancy had been ended. The Supreme Court rejected this argument, as the warrant could only be issued once section 62(1) had been complied with (i.e. once there was no longer any valid tenancy in relation to the premises). Hogan argues that the existence of the *O'Rourke* decision did not preclude a constitutional challenge to the validity of the section on fundamental rights grounds; it had never been challenged on such grounds before, only on separation of powers arguments. Hogan points to *Laurentiu v. Minister for Justice* [1999] 4 IR 26, in which the Supreme Court struck down part of section 5 of the Aliens Act, even though its constitutionality had previously been upheld following a challenge on different grounds (Hogan, at 415).

[124] Denham, McGuinness, Fennelly, and McCracken JJ concurring.

[125] It has been suggested that, in the future, local authorities may find themselves exposed to a host of applications based on the ECHR Act, not just because of provisions like section 62, but also because even some time after the coming into force of the 2003 Act local authorities still appear to ignore the Convention and its ample case law on the duties of local authorities while formulating policy: Dr Padraic Kenna, "Local Authorities, the European Convention on Human Rights Act and Judicial Review Litigation", Trinity College Dublin Conference on Recent Developments in Judicial Review, 25 June 2005, at 36 of the paper. Dr Kenna refers to a number of judgments of the Court of Human Rights, including *Connors v. United Kingdom* (2005) 40 EHRR 9, in which the Court of Human Rights declared that the type of summary proceedings used to regain possession by local authorities was incompatible with Article 6 ECHR because the applicant had been unable to challenge the authority's evidence of nuisance either by giving evidence or calling witnesses. There was a fundamental inequality of arms between the parties.

challenged the compatibility of any provision of the Housing Act with the Convention. There was no challenge under section 5 of the ECHR Act, only an assertion that the City Council should have interpreted section 62 of the Housing Act in a manner that would give effect to the applicant's Convention rights – at the time they issued the notice to quit. It is to be regretted that Ms Fennell did not apply for a declaration of incompatibility; although the constitutionality of section 62 has already been upheld by the Supreme Court,[126] the Court of Human Rights has condemned similar summary possession procedures: *see Connors v. United Kingdom*.[127] In *Connors*, the ECtHR held that the applicant was at "a substantial disadvantage" and that there was "no equality of arms in the procedure".[128] The applicant's eviction naturally also adversely impacted on his Article 8 rights, without there being any justification for this or any indication that the means used were proportionate to a legitimate aim.[129] However, as Hogan points out, if Ms Fennell would have been entitled to a declaration of incompatibility on the basis that section 62 violated her rights under the Convention, why would she not also have equally good grounds for asserting that the section was unconstitutional?[130]

In reaching his decision, Kearns J had regard to the judgment of Laffoy J in *Lelimo*. He also made extensive reference to the provisions of the UK Human Rights Act in interpreting whether the Irish Act could be retrospective or not – an exercise which is on the one hand logical, given that the Irish Act was largely based on the HRA, but arguably flawed, there being no reason why the Irish Supreme Court should be incapable of interpreting an Act of the Oireachtas according to its terms. Once again, the Court had regard to decisions of the House of Lords in relation to the Human Rights Act as an aid to interpreting the Irish legislation, citing both *McKerr*[131] and

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[126] *Lord Mayor, Aldermen and Burgesses of the City of Dublin v. Amanda Hamilton* [1999] 2 IR 486; [1998] 2 ILRM 542.
[127] *Connors v. United Kingdom* (2005) 40 EHRR 9.
[128] At paragraph 102.
[129] Paragraph 95. This judgment is discussed by Dr Padraic Kenna, "Will the European Convention on Human Rights Act 2003 affect Local Government in Ireland?" (2004) 11(2) *IJEL*, 382, at 396-397.
[130] Hogan, at 415. Hogan approaches the question from the perspective of arguments based on family life (Article 8 ECHR and Articles 40.5 and 41 of the Constitution), and property (Article 1 of the First Protocol to the Convention and Articles 40.3.2° and 41 of the Constitution). It is submitted that these are also strong grounds for attack. Anyone seeking to challenge section 62 in the future would be well advised to mount a two-pronged (constitutional and Convention-based) attack grounded in the rights to fair procedures, respect for private and family life, and the right to property.
[131] Cited by the Supreme Court at [2005] 2 ILRM 288, 316.

Wilson v. First County Trust Ltd (No. 2).[132] The *Wilson* case concerned section 3 of the HRA, the English equivalent of section 2 of the ECHR Act. Lord Nicholls noted that the section was intended to apply to Acts in force at the time the HRA came into force. However, to allow the post-HRA interpretation of legislation to extend to pre-HRA events could have an arbitrary and capricious impact on vested rights, to the detriment of one party and the benefit of another.[133] The State relied on this dictum in *Fennell*, and argued that, had the Oireachtas intended section 2 to apply to pre-ECHR Act *transactions and events*, they ought to have said so clearly: "The greater the unfairness that might follow from applying the relevant statutory provision to past events and transactions, the more it is to be expected that the legislature will make it clear if that is intended."[134]

Kearns J examined the wording of sections 2, 3 and 4 of the ECHR Act, and noted that the very consequences envisaged by section 3 in particular (that an organ of the State may have to pay damages as a result of breaching a person's Convention rights) "strongly suggest" that the Act should be prospective only.[135] Even though Ms Fennell's appeal to the Circuit Court was to be heard post-ECHR Act, the same set of rules should apply to both the original proceedings and the appeal, because the rights and obligations of the parties had to be determined at the time "the "wheel was set in motion" – i.e. the time of the service of the notice to quit.[136] In the view of the Supreme Court, it would be a bizarre outcome if the first hearing was conducted by one set of legal rules and the appeal by another;[137] accepting the appellant's arguments

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[132] [2003] 3 WLR 568, cited by the Supreme Court at [2005] 2 ILRM 288, 314-315.

[133] [2003] 3 WLR 568, at 575-576 (paragraphs 17-18):

> "On its face section 3 is of general application. So far as possible legislation must be read and given effect to in a way compatible with the Convention rights, section 3 is retrospective in the sense that, expressly, it applies to legislation whenever enacted…
>
> "Considerable difficulties, however, might arise if the new interpretation of legislation, consequent on an application of section 3, were always to apply to pre-Act events. It would mean that the parties' rights under existing legislation in respect of a transaction completed before the Act came into forece could be changed overnight, to the benefit of one party and the prejudice of the other. This change, moreover, would operate capriciously, with the outcome depending on whether the parties' rights were determined by a court before or after 20 October 2000."

[134] At 305.

[135] The Court also cited its own earlier decision in *In Re Article 26 and In Re the Health (Amendment) (No. 2) Bill, 2004* [2005] 1 ILRM 401, at 437. The Bill, which sought to render unlawful a person's previous failure to pay health charges, was found to be contrary to Article 15 of the Constitution.

[136] At 319.

[137] At 320.

could place some evicted tenants in a privileged position compared with others simply because their appeal happened to be heard after the ECHR Act had come into force.[138] It would, in the Court's eyes, amount to altering the past to the benefit of some tenants, something which was not possible: "This alone is denied to God: the power to undo the past."[139]

The *Fennell* case raised important questions about the way the ECHR Act should be applied, going beyond the limited perameters of the questions posed by the Circuit Court. Clearly, section 2 of the ECHR Act imposed an obligation on the courts to interpret pre-2003 statutes in accordance with the State's Convention obligations. However, Ms Fennell was trying to extend this interpretative obligation further still: she wanted it to apply to the City Council's interpretation of the Housing Act in pre-ECHR Act proceedings. It could, one supposes, be argued that *Fennell* also raises questions as to the correctness of Laffoy J's judgment in *Carmody*; the Supreme Court may well decide that the Minister was correct in his view that, because the genesis of Mr Carmody's application for a declaration of incompatibility lay in a prosecution that commenced before the ECHR Act came into force, that application amounts to an attempt to give the Act retrospective effect. It is submitted, however, that this is unlikely to happen.

However, it is arguable that there is a difference between *Carmody* and *Fennell.* In *Carmody*, the State had effectively tried to argue that a section 5 application actually was a section 3 application that could not succeed because the acts complained of occurred prior to 31 December 2003; in *Fennell*, the defendant effectively tried to hide behind the section 2 interpretative obligation to challenge an act of an organ of the State prior to that date. Interestingly, *Fennell* only contained explicit references to sections 2, 3 and 4: section 5 was not mentioned. In both cases, the arguments were held to be ill-founded and an attempt to twist the meaning of the ECHR Act, for the reasons outlined above. But the *Fennell* case differed from *Carmody* in that Ms Fennell did not submit that any element of the Housing Act was incompatible with the Convention. It might be inferred from this that, if she had, the result might have been different; arguably, the time at which the courts should assess the question of

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[138] At 320.
[139] Artistotle, quoted by Kearns J at 318.

incompatibility of a law is at the time the application is made to them, and if the application is made after the coming into force of the ECHR Act, then they have jurisdiction to examine the question. On the other hand, it is likely that she would have lacked *locus standi* to make this argument, since the time at which she suffered the adverse effects of the Act was before the ECHR Act came into force. The argument that any attempt to raise the ECHR Act with reference to any events which occurred before it came into force is certainly attractive in its simplicity, and is likely to find favour with the Supreme Court.

Almost one month after judgment was handed down in *Fennell*, another plaintiff succeeded in obtaining leave to amend his statement of claim to include reliefs based on the Convention. The application to amend was based on the argument that, since the original proceedings had been commenced, the ECHR Act had come into force and accorded the plaintiff certain new, actionable rights. *Clifford v. Minister for Education and Science and Ors*[140] involved an action in negligence on behalf of a profoundly autistic young man on the basis that the defendants had failed to properly assess and respond to the plaintiff's special needs. It was alleged that this failure amounted to a breach of Articles 2, 3, 5, 8, 13, 17 and 18 of the ECHR, as well as Article 2 of the First Protocol thereto.[141] Interestingly, the Convention had been referred to in the original statement of claim, but had not been specifically pleaded against the third named defendant (Ireland), as the ECHR Act had not been in force at the time.[142]

The application to amend the pleadings was strongly opposed by the State parties on the ground that the ECHR Act had no retrospective effect, and that any amendment would date the new cause of action from the date of the original plenary summons. Budd J concluded that the State parties could raise this argument in their amended defence, and it could be disposed of at the hearing of the full action. The learned judge's position is perhaps at least partly explicable in terms of the discretion given to the High Court by Order 28 rule 1 of the Rules of the Superior Courts in respect of

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[140] Unreported, High Court, Budd J, 10 June 2006.

[141] *See* Appendix for full details of these Articles.

[142] If the Irish courts fully accept the approach of the House of Lords in *In re McKerr*, the practice of alleging that "Ireland" has breached Convention rights is incorrect; in Lord Phillips' view, that practice relates to the State's international obligations, which cannot be enforced by the domestic courts.

amendment of pleadings. It is also possible that cases such as *Clifford* are slightly different, in that the argument might be made that the case concerned ongoing breaches of the plaintiff's Convention rights, and that those breaches complained of occurred after both the original plenary summons and the ECHR Act. In such circumstances it would be a more efficient use of court time to allow all the issues to be determined at the same hearing; however, it might fly in the face of the Supreme Court's position in *Fennell.*

Other case law indicates that the judgment in *Fennell* will be interpreted to mean that cases commenced before 31 December 2003 will not be able to raise ECHR Act arguments, or, on the stricter view, arguments in any way based upon the Convention. In *Morris v. Farrell*,[143] the applicants sought a number of reliefs, including an order that the inquest into their son's death was invalid having regard to Article 2 of the European Convention on Human Rights (the right to life). Their son, John Morris, had been shot dead by Gardaí while taking part in an armed robbery. The applicants were concerned about rumours that he had been wounded and was shot in the head while lying on the ground. They sought to compel the respondent (the coroner) to provide copies of all witness statements and other documents in his possession relating to the shooting. On the morning of the inquest, the applicants' representatives were permitted to flick through large bound volumes of statements for a few minutes. They then withdrew from the proceedings on the basis that they could not properly participate when the State had access to a vast quantity of information and they did not. Ultimately, this withdrawal did not impress the High Court: Ó Caoimh J held that it was premature, and prevented the plaintiffs from showing that they were prejudiced by the respondent's actions. There was thus no justification for quashing the verdict of the inquest jury.

As for the Convention argument, the respondent argued that the Convention had not been part of Irish law at the date of the impugned decision of the coroner (which dated back to 2001). The judge noted that "at no time relevant to these proceedings did it form part of the domestic law of the State".[144] However, he was nevertheless "satisfied that I can have regard to the jurisprudence of the European Court of Human Rights

[143] Unreported, High Court, Ó Caoimh J, 12 March 2004.
[144] At 62-63 of the judgment.

insofar as it may assist this court in examining the issues before this court in the context of Irish law, in particular, the Consitution".[145] The learned judge had regard to a number of ECtHR decisions on the State's duty to initiate an official investigation where a person had been killed by agents of the State;[146] he eventually concluded that Article 2 provided "no greater protection" to the right to life than the Constitution, but was satisfied that the case law of the Court of Human Rights in point was "representative of the state of law in this jurisdiction".[147] On that basis, he concluded that the applicants had not shown that they were deprived of information necessary to enable them to examine the facts – a conclusion that is, it is submitted, rather at odds with the background to the case. It is submitted that the High Court's primary concern was to safeguard the special status of the inquest, which, as the learned judge repeatedly remarked, is not a *lis inter partes*, and to which different rules have traditionally applied. Whether such rules should continue to apply post-ECHR Act is certainly debatable.

As disappointing as the result of *Morris* must have been for the applicants, at least Ó Caoimh J was willing to hear their Convention points. The High Court adopted a more stringent approach in *Magee v. Farrell and Ors*,[148] over a year later. The plaintiff's son had died after falling unconscious in a police cell. The young man had been arrested for public order offences and had been displaying symptoms of paranoid delusions. A Garda performed CPR and the man was taken to hospital, but was pronounced dead shortly after he arrived. The conclusions of the pathologist, Dr Marie Cassidy, were that the death was consistent with cocaine related collapse. The plaintiff's view was that there were questions over the deceased's treatment while in custody. She sought a number of reliefs pursuant to Articles 38, 40.1 and 40.3 of the Constitution, and Articles 2 and 13 of the Convention (the right to life and the right to an effective remedy, respectively), namely an order directing that she be provided with

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[145] At 63 of the judgment.

[146] At 29-33 of the judgment. The cases relied upon included a number involving deaths involving the Royal Ulster Constabulary, notably *McKerr v. United Kingdom* (2002) 34 EHRR 20 (decided at the same time were *Jordan v. United Kingdom* and *Shanaghan v. United Kingdom*); Application No 30054/96 *Kelly v. United Kingdom*, Judgment of 4 April 2000; and *McCann v. United Kingdom* (1996) 21 EHRR 97. Other cases included *Edwards v. United Kingdom* (1993) 15 EHRR 497, in which the applicant's brother had died whilst detained in prison in Northern Ireland, and several cases in which the Turkish authorities were implicated: *Kaya v. Turkey* (1999) 28 EHRR 1; *Ilhan v. Turkey* (2002) 34 EHRR 36; and *Ogur v. Turkey* (2001) 31 EHRR 40.

[147] At 63 of the judgment.

[148] Unreported, High Court, Gilligan J, 26 October 2005.

legal representation at her son's inquest, and damages under section 3 of the ECHR Act.[149] She also sought a declaration that the right to life, as protected by Article 2 ECHR and Articles 40.1 and 40.3 of the Constitution required the defendants to "take appropriate steps to safeguard the lives of those within the jurisdiction", including the proper investigation of the cause of death of persons in State custody. However, although the case was heard after the coming into force of the Act, the death had occurred on 26 December 2002, and the Court held that, under *Fennell* and *Lelimo*, the Act could have no retrospective effect on proceedings that had already been commenced before the Act came into operation. Therefore, the plaintiff's claim under the Act failed.[150]

Does the 2003 Act Guarantee Effective Domestic Remedies for Breach of Convention Rights?

The current Minister for Justice (and former Attorney General) Michael McDowell, has defended what many perceive as the "tame" method of incorporation selected. In his view, the ECHR Act represents a "full-blooded, thoroughgoing and workable" solution, and one which represents incorporation "to the fullest extent permissible under the Constitution".[151] Mr McDowell argues that it was not constitutionally permissible to give the Convention full force of law in the State, and that the parliamentary sovereignty argument that justified the weak half-way house approach epitomised by the UK Human Rights Act applies equally to Ireland given our adherence to the principle of popular sovereignty and the vesting of legislative power in the Oireachtas alone.

With respect, it is submitted that such arguments are unconvincing: those who argued for true incorporation at constitutional level had in mind the amendment of the Constitution – therefore it is disingenuous to argue that the current wording of the Constitution precludes the ECHR from having the force of law in the State when what was proposed was an alteration of that wording. Arguably, the open-ended amendment

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[149] The plaintiff also sought damages for breach of constitutional rights.
[150] Fortunately for the plaintiff, the High Court concluded that fair procedures under the Constitution required that she be provided with legal aid to enable her to be adequately represented at the inquest into her son's death.
[151] McDowell (n2), at 2 of the paper.

used to facilitate Ireland's membership of the EU is much more far-reaching than an amendment requiring the Irish courts to have regard to Convention rights and standards.

Neither does the popular sovereignty argument hold water: although the Oireachtas may be vested with the sole law-making power in the State, this has no bearing on the right of the people to amend the Constitution by way of amendment. Granted, if the ECHR were incorporated at constitutional level, the Oireachtas' power to legislate would be curtailed, in the same way that the existence of the current personal rights guarantees of the Constitution curtail the legislative power. But what of it? Ireland long ago acceded to the Convention and its principles; a constitutional amendment requiring our courts to apply those principles to concrete cases would not undermine the legislature – unless the legislature wishes, like that of the UK, to retain the power to ignore its Convention obligations and to violate the Convention rights of Irish citizens by retaining the power to enact legislation they believe to be contrary to the Convention. In this regard, it is interesting to note that the section 3 requirement to act in accordance with the Convention does not apply to the Oireachtas.

The Minister has also asserted that the giving the Convention domestic force of law would render it a "shadow constitution", a status the Council of Europe never intended it to have.[152] There are many problems with that argument: first, there is no reason why real, effective, full incorporation of the Convention into domestic law should have the effect of undermining the existing Constitution. That has not been the effect of incorporation in other Contracting States which have incorporated it – not even where the ECHR was given very high status.[153] Indeed, it is difficult to see how bolstering the protection of fundamental rights could ever adversely impact on a liberal and democratic society, unless one is to indulge in doomsday fantasies that the only people benefiting from such rights are supposed terrorists and law breakers of the worst kind. There is simply no reason why the Irish courts could not have been directed to have regard to the Convention's wording and jurisprudence as well as to their own constitutional jurisprudence in relevant cases, and to apply whichever gave the higher standard of protection. Our judges are well versed in the interpretation of

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[152] *Ibid.*
[153] *See* Chapter 4.

statute and case law, and it seems surprising that the Minister for Justice should consider them unequal to this task. Of course, there is the risk that Irish judges would have simply decided that both documents are equivalent and that the old constitutional standard would continue to apply, but this risk still exists under the current model. There are, however, many areas of Irish law where it is far from certain that the pre-incorporation standard of rights protection is the equal of that in Strasbourg.

As it is, the method of incorporation chosen involves the courts applying two standards of review to legislation – the only difference is that one of those standards is expressly subordinate to the other,[154] rendering their task more confusing than ever. The Act itself requires the Irish courts to act in a manner that is arguably constitutionally suspect: they must apply not only the terms of the Constitution, but also the terms of the Convention; they must apply their own jurisprudence, but must also take judicial notice of the case law of a foreign curial body, even though there is no constitutional support for these new duties.

The problem with the interpretative form of legislative incorporation is this: it is not so much inherently bad as it is entirely unsuited to our legal system. Condemning the "cumbersome" procedure of making declarations of incompatibility, Gerard Hogan remarks:

> "...one suspects that this would have a distorting effect on the substantive law, i.e., that the Supreme Court, aware of these potential difficulties, would simply cut through the Gordian knot and simply find the Act in question to be unconstitutional. The UK model is not really designed to be superimposed on the existing structure of judicial review of legislation which exists in this State."[155]

It is difficult to argue with this proposition; indeed, on reading the European Convention on Human Rights Act one wonders how this major inconsistency between the method of incorporation chosen and the domestic legal system went unnoticed by those responsible for the legislation. Hogan argues that, when compared with the declaration of unconstitutionality, which renders the offending provision void *ab initio*

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[154] As the long title to the ECHR Act makes clear, as if the ordinary rules of constitutional interpretation were not sufficient to do so, the terms of the Act are subject to the Constitution.
[155] Gerard Hogan SC, "The Incorporation of the ECHR into Irish Domestic Law", Law Society Conference Paper, 14 October 2000, at p8.

and *erga omnes*, the weak, ineffectual declaration of incompatibility simply "cannot compete" in terms of its attractiveness.[156] Given the problems associated with declarations of incompatibility, it would, perhaps, not be an entirely negative development if the courts *were* to declare offending legislation to be unconstitutional in the manner Hogan describes, although this would be an artificial and unsatisfactory method of circumventing what is really a problem within the Act itself.

Even more disturbing is the argument that the declaration of incompatibility is probably an even less effective remedy than a judgment in favour of an applicant by the Court of Human Rights. Strasbourg has held that States found to be in breach of the Convention must not only pay any sum awarded by way of just satisfaction, but also take any general or individual measures necessary to put an end to the violation; however, the measures taken are to a large extent a matter for the State in question.[157] Thus, a finding of a violation by Strasbourg appears to involve an implicit obligation to change the law with prospective effect if future violations are to be avoided (although not necessarily to order a retrial for the individual in question).[158] But even the arguably minimalist benefits of success in Strasbourg appear to have greater merit for the applicant than a declaration of incompatibility, which does not oblige the Oireachtas to change the law.[159]

As Hogan points out, our adoption of the UK model of incorporation raises other important questions that have apparently been ignored by a legislature all too eager to slavishly follow Britain's example. For instance, is it legitimate for our courts to invalidate one Act with reference to another? Would it be possible to declare incompatible an Act which had successfully negotiated the hurdle of the Article 26

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[156] Gerard Hogan, "Incorporation of the ECHR: Some Issues of Methodology and Process" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 13, at 26.

[157] *Lyons v. United Kingdom* (2003) 37 EHRR CD 183, at 189; (2003) 6 EHRLR, 658. The applicants had been compelled to answer questions regarding an allegedly illegal takeover bid pursuant to section 434 of the Companies Act, 1985. A police investigation ensued and the applicants were eventually convicted of criminal offences. The House of Lords upheld the applicants' convictions as safe notwithstanding a finding by the Court of Human Rights that the UK breached had Article 6 in forcing the applicants to incriminate themselves. While the Strasbourg Court could not itself order the British authorities to hold a re-trial, the Court stressed "the importance of ensuring that domestic procedures are in place which allow a case to be re-visited in the light of a finding that Art. 6 of the Convention has been violated"; at 660.

[158] Gerard Hogan, "Incorporation of the ECHR: Some Issues of Methodology and Process" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 13, at 27.

[159] Gerard Hogan, "Incorporation of the ECHR: Some Issues of Methodology and Process" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 13, at 27.

reference? What if the Constitution protected two competing rights but the Convention only one of them?[160] The Act appears to require a novel application of the "double construction rule,"[161] but may, in fact, lead to the courts straining the language of the impugned rule of law or statutory provision in an attempt to avoid having to declare it incompatible.[162] There have already been some indications from Britain that judges would be willing almost to twist a provision out of shape so as to read it in a way which is compatible with the ECHR rather than to make a declaration.[163]

As Jaconelli notes, the interpretation model is suited to Britain because of that jurisdiction's preoccupation with the doctrine of parliamentary sovereignty.[164] One might add to that the observation that it has no written constitution or bill of rights, unlike the overwhelming majority of other Council of Europe members. Jaconelli adds, "The device is all very well when the terms of a statute may reasonably be read in either of two ways, one of which will lead to the furtherance of human rights protection. When, however, the desired result cannot be achieved, even by the most imaginative statutory exegesis, the force of the Interpretation Act is spent. The offending provision must stand according to its own terms."[165] Suzanne Egan has gone so far as to suggest that such a limited form of providing redress to a litigant whose Convention rights have been infringed may not go far enough to constitute satisfaction of Ireland's international obligations,[166] in that Article 13 requires States to provide their people with effective remedies in the vindication of their Convention rights.

Finally, what impact will the ECHR Act have on our individual right of petition to Strasbourg? Will it be necessary to exhaust all possible avenues under the new legislation? It is clear from the Act that applications for a declaration of incompatibility need not take the form of separate actions, but rather can be made

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[160] Hogan, *supra*, at 8-9.
[161] If two interpretations of a provision are *reasonably* open to the court, and one is constitutional and one is not, the court will apply the provision in the manner which is compatible with the Constitution.
[162] Hogan, *ibid*, at 22.
[163] Grosz, Beatson and Duffy remark, at p36 of their book on incorporation in the UK that under the HRA statutes must be read in accordance with the Convention unless it is "*clearly impossible to do so*" [my italics], and note that the English courts have gone to great lengths to ensure that national measures do not conflict with EC law. They also note that an attempt to table an amendment including a requirement that the interpretation must be reasonable was unsuccessful.
[164] Joseph Jaconelli, at 21. He adds that, in fact, an Interpretation Act should not apply to the common law.
[165] Jaconelli, 21-22.
[166] *Supra.*

during any proceedings in an appropriate court. It would thus seem logical that litigants be able to rely on ECHR Act grounds in the alternative to the traditional grounds, i.e. that they be able to argue the commission of a tort (constitutional or otherwise) in the alternative to a breach of the State's Convention duties.[167] Furthermore, since the action for damages for breach of one's Convention rights by an organ of the State is dependent upon there being no other, pre-existing remedy, it would be highly unfair to prevent people from arguing alternative grounds of relief – indeed, to do so could arguably amount to a breach of the right to access to the courts – a right protected under Article 6(1) ECHR! To date, the Convention appears to have been most frequently argued as an alternative to the more traditional remedies sought. It is submitted that this is the only logical approach, since these must be exhausted in order to obtain either damages or a declaration of incompatibility under the Act.

In the UK, it has been said of the Human Rights Act that "it enables the courts to breathe new life into fossilized old statutes by applying the dynamic values and standards prescribed by the HRA."[168] Will the European Convention on Human Rights Act do the same for Irish law, or does the Constitution reign supreme even after the enactment of the 2003 legislation? For an attempt to answer this, it is necessary to look at some of the cases in which the 2003 Act has been relied upon, and to assess whether the result would have been any different pre-ECHR Act.

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[167] Ursula Kilkelly, "Introduction" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), at lviii.
[168] Anthony Lester QC, "The Human Rights Act 1998 – Five Years On" [2004] EHRLR 258, at 260.

Chapter VI

The European Convention on Human Rights Act 2003: The Judicial Response to Incorporation: Post-Enactment Decisions on Substantive Convention Issues

In an ideal world, it would be possible to examine each and every case taken since the European Convention on Human Rights Act came into force on 31 December 2003 with a view to asking whether Convention arguments could have been raised. As it is, it is impossible to say definitively whether the Act has been pleaded in all appropriate cases; all that any study of this area can do is to look at the cases where such points were considered by the court, and examine whether the Irish assessment of Convention rights so far accords with the apparent view of the European Court of Human Rights. It will be also be noted that Convention arguments were raised in a number of cases where they either should not have been, or where they do not appear to have been taken any further once the case reached the hearing. Finally, it must be noted that there were very few cases where Convention points appear to have been determinative.[1]

The following study will loosely group cases in terms of subject matter, with the greatest focus on Article 6 ECHR and Article 8 ECHR. It is submitted that the trend towards reliance on these two provisions is unsurprising: historically, they have been the source of most of the judgments against Ireland in the European Court of Human Rights. Whether incorporation will make these rights more secure at domestic level remains to be seen; but there are strong indications that, in the case of Article 6 at least, the Irish courts do not appear to see any major difference between their own jurisprudence and the right to a fair trial as set down in the Convention and its case law.

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[1] The Law Society has recently released a report on the ECHR Act 2003, containing a list of decisions on the subject and a brief summary of the issues raised: Donncha O'Connell, Siobhan Cummiskey and Emer Meeneghan, with Paul O'Connell, *ECHR Act 2003: A Preliminary Assessment of Impact* (Law Society, launched 23 October 2006).

Article 6 ECHR in the Irish Courts

Most recent successful challenges to Irish law and practice in the Strasbourg Court have relied upon Article 6 ECHR, in particular Article 6(1).[2] The popularity of Article 6 among Irish applicants to the ECtHR is unsurprising: traditionally, it has been the most commonly cited provision of the Convention overall in applications to the Court.[3] However, it must be noted that the Court of Human Rights assiduously applies the "fourth instance" doctrine, under which it upholds the position that the Court is *not* a court of third or fourth instance, and is not allowed to re-open procedures that took place before the domestic courts.[4] The sole concern of the ECtHR is to ask whether Article 6 has been breached during the domestic procedures and, if so, whether the trial as a whole was unfair. An applicant to the Court of Human Rights is therefore at a significant disadvantage compared with an appellant before a domestic court: the domestic court of appeal may overturn a criminal conviction on the ground that it was unsafe; the ECtHR may not – nor is the ECtHR really concerned with the safety of the conviction *per se*, but rather with whether there has been a breach of Article 6.[5] For this reason, it has been said that, "In practice…the European Court of Human Rights – which tends to be very conscious of the differences between common and civil law systems, and of the need to defer to national courts' assessment of the facts of cases – often impacts only marginally on the actual criminal justice process in Member States."[6] It is thus arguable that, in jurisdictions where there is a possibility of relying on Article 6 and its Strasbourg case law at domestic level, the applicant has the best of both worlds, since the domestic courts may be minded to apply the provisions of Article 6 in a more radical manner than the ECtHR.

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[2] For details, *see* Appendix, at 6. For an examination of the cases taken against Ireland to the Court of Human Rights, *see* Chapter 1.

[3] This point has been made by, *inter alia*, Claire Ovey and Robin White, *Jacobs and White, The European Convention on Human Rights* (3rd Edition, Oxford University Press, 2002) at 139. They note that out of 10,486 applications registered in 2000, 7,264 included a complaint based on Article 6. *See* also Noel Whitty, Thérèse Murphy, and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (Butterworths, 2001), at 173.

[4] Claire Ovey and Robin White, at 140.

[5] Ovey and White, at 140.

[6] Whitty, Murphy and Livingstone, at 174.

The Right to a Fair Trial in Criminal Cases

Article 6 ECHR is frequently described, in a sort of legal shorthand, as "the fair trial provision" of the Convention. It includes (and implies) a large number of rights associated with the fair administration of justice, including the right to be informed of the charges against one, the right to legal representation etc. It has also been relied upon on occasion to argue that the right to institute judicial review proceedings does not amount to an effective remedy. As for what constitutes criminal proceedings, the Court of Human Rights is less concerned with the label attributed to the matter by the domestic authorities than with the reality of the situation, and will examine the nature of the impugned conduct and the severity of the penalty which my be imposed in order to determine whether the case is civil or criminal in nature. This is similar to the Irish approach as set down in *Melling v. Ó Mathghamhna*.[7]

The cases in which Ireland has been found to be in breach of Article 6 are discussed in detail in Chapter 1; however, it is worth setting out a brief summary of the main problem areas to date. The earliest case was, of course, *Airey v. Ireland*,[8] which established that the absence of civil legal aid for people applying for a judicial separation was a breach of the Article 6(1) right of access to the courts.[9] Later cases concerned the violation of the privilege against self-incrimination contained in section 52 of the Offences Against the State Act: *Heaney and McGuinness v. Ireland*[10] and *Quinn v. Ireland*.[11] Most recently, the aspect of the Irish legal system that is consistently under fire is the right to speedy determination of legal proceedings, both

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[7] [1962] IR 1. This point is discussed by Bríd Moriarty and Dr Anne-Marie Mooney Cotter (general editors), *Law Society of Ireland: Human Rights Law* (Oxford University Press, 2004), at 122.
[8] *Airey v. Ireland* (1979) 2 EHRR 305.
[9] Because of the implications this had for the applicant's family life, there was also a breach of Article 8 in that case.
[10] (2001) 2 EHRR 12.
[11] Application No 36887/97 *Quinn v. Ireland* Judgment of 21 December 2000. The right to silence in fact comprises a number of different rights, privileges and immunities, including a general immunity from being compelled on pain of punishment to answer questions, a general immunity from being compelled to answer questions on pain of punishment when the answers may be incriminating, and specific immunities possessed by those accused of criminal trials not to have to answer questions during police interviews or to give evidence in the dock during their trial: *see* the judgment of Lord Mustill in *R v. Director of Serious Fraud Office, ex parte Smith* [1992] 3 WLR 66.

civil and criminal, which arose in *Barry v. Ireland*,[12] *Doran v. Ireland*,[13] *O'Reilly and Ors v. Ireland*,[14] and *McMullen v. Ireland*.[15]

What is striking about all of the above cases is not that they revealed a gaping lacuna in the domestic protection of fundamental rights in Ireland (they did not), but that they emphasised how it was possible to apply broadly similar principles in two jurisdictions and reach different conclusions. Admittedly, none of those cases was initiated after the coming into force of the ECHR Act; however, the Irish Constitution applies a number of principles which are very similar to those set out in Article 6 and in the Convention case law – and yet the state of the law in Ireland clearly did not provide adequate protection for the rights involved. It has long been accepted that there is, in Ireland, a right of access to the courts; however, this did (and does) not mean that the State had to pay for this right of access in all circumstances, and was of little benefit to Mrs Airey. The courts had long recognised the right to silence and attendant privilege against self-incrimination; but when the High and Supreme Courts were asked to balance this right against the general interest in the prevention of terrorism, they held that the common good should prevail over the individual right.[16] In this context, it is worth noting that the general approach of the Court of Human Rights has been that, while it may not be a violation of the Convention *per se* to compel a person to answer questions, the subsequent use of those answers against that person in a criminal trial will violate the right to silence: *see*, e.g., the leading case of *Saunders v. United Kingdom*.[17] However, the ECtHR will not necessarily preclude the drawing of inferences from the silence of an accused[18] – which validates the approach used in

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[12] Application No 18273/04 *Barry v. Ireland*, Judgment of 15 December 2005.
[13] *Doran v. Ireland* (2006) 42 EHRR 13.
[14] *O'Reilly and Others v. Ireland* (2005) 40 EHRR 40.
[15] Application No 42297/98 *McMullen v. Ireland* Judgment of 29 October 2004.
[16] *See Heaney v. Ireland* [1994] 3 IR 593; [1994] 2 IRLM 420 (HC) and [1996] 1 IR; [1997] 1 ILRM 117 (SC), in which Costello P in the High Court applied a proportionality test to the privilege and concluded that it was legitimate to circumscribe it in the manner suggested by the Offences Against the State Act. His conclusions were upheld on appeal.
[17] (1997) 23 EHRR 313. The applicant had answered the questions of government investigators about an illegal share support scheme on pain of imprisonment. Transcripts of these interviews were used at his subsequent trial.
[18] E.g. in *Murray v. United Kingdom* (1996) 22 EHRR 29, it was consistent with Article 6(1) for a trial judge to draw an inference of guilt in circumstances where an accused remained silent both under police questioning and at trial. The judge was sitting alone as the trial was heard by a non-jury "Diplock" court; and the accused had been given the modern UK caution that although he did not have to say anything his failure to mention any fact subsequently relied upon in court may lead to inferences being drawn against him (the source of which caution is Article 3 of the Criminal Evidence (Northern Ireland) Order 1988). It is submitted that much turned on the particular facts of that case; the other evidence

certain statutes in this jurisdiction, including the Criminal Justice (Drug Trafficking) Act 1996.[19] On a not unrelated matter, it appears that the procedures applied to applications for the seizure of property considered to be the proceeds of crime by the Criminal Assets Bureau are not inconsistent with the Convention, as broadly similar British provisions have been upheld by the Court of Human Rights.[20] There is also a constitutional right to trial with due expedition, but this does not preclude delays of the type seen in *Barry* and other cases.

Indeed, Article 38.1 of the Constitution in many ways resembles Article 6 of the Convention, in that it upholds a plethora of what may broadly be termed "fair trial rights". To an extent, Article 38.1, like Article 40.3 (on which the doctrine of unenumerated rights relies) is greater than the sum of its written parts,[21] in that it has been interpreted in a manner likely to protect a range of rights. Statute and common law also have a role to play in this area: for a long time, the Irish courts upheld the doctrine of *autrefois acquit* under which a person who had already been acquitted could not be tried again for substantially the same offence.[22] As is well known, the Supreme Court made significant inroads into that principle in the case of *The People (DPP) v. O'Shea*;[23] however, it was subsequently reinstated by the legislature in the

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against the applicant was strong, and the ECtHR reached the opposite conclusion in *Condron v. United Kingdom* (2001) 31 EHRR 1 where the trial judge had failed to direct the jury that it should only draw an adverse inference from the applicants' silence if convinced that it was due to his having no reasonable answer to make. The applicants were in heroin withdrawal at the time they were questioned, and their solicitor had advised them not to say anything (although a police doctor thought them fit to be questioned).

[19] Under that Act, inferences may be drawn from a failure to explain, when questioned, the presence of controlled drugs in the possession of the accused; *see* section 7 of the Act.

[20] *See* Application No 41087/98, *Philips v. United Kingdom*, Judgment of 5 September 2001. The applicant had been convicted of drug trafficking, and, under the provisions of the Drug Trafficking Act 1994, the court was required to assume that any property held by him at the time of his conviction or for the previous six years was the proceeds of crime – unless the applicant could show (on the balance of probabilities) that there was a serious risk of injustice should the Act be applied. The applicant had been unable to substantiate his account of how he had obtained the property, nor had he been employed during the relevant time.

[21] Although its "written parts" are not to be underestimated: Article 38.2 states that minor offences may be tried by courts of summary jurisdiction; 38.3 allowed the Oireachtas to establish the Special Criminal Court, a judge-only jurisdiction which tries offences of special sensitivity where there could be a danger of jury tampering, such as those related to terrorism and the criminal underworld; 38.4 covers military tribunals; 38.5 upholds the provision of jury trial for all non-minor offences (other than those subject to trial by a military tribunal or the Special Criminal Court).

[22] This principle, also known as the rule against "double jeopardy", also applies to situations where the person has been *convicted* of an offence: he/she cannot subsequently be retried for the same offence either.

[23] [1982] IR 384 The Supreme Court's ruling was based on a rather literal reading of Article 34 of the Constitution, which states that the Supreme Court has a right to hear an appeal on any matter from the High Court. Mr O'Shea had been acquitted by direction of the trial judge of drugs charges in the Central

Courts and Court Officers Act 1995.[24] The principle of *autrefois acquit* does not seem to be explicitly recognised by the Convention; certainly, it has recently been limited in a neighbouring jurisdiction which has incorporated the Convention.[25] Those accused of criminal offences are also protected against prejudicial pre-trial publicity; however, the applicant must establish a real or serious risk of an unfair trial: *see*, e.g., *DPP v. O'Dea*.[26]

Criminal Court (i.e. the High Court sitting in its criminal guise). The State argued that the wording of Article 34 gave them a right of appeal to the Supreme Court; a majority of that Court agreed (O'Higgins CJ, Walsh P and Henderman JJ). However, the minority (Finlay P and Henchy J) argued that a literal approach to the Constitution was not appropriate in this context, as each provision of the Constitution had to be read in the light of the Constitution as a whole. The question of whether the Supreme Court could order a retrial arose in *People (DPP) v. Quilligan (No 2)* [1989] IR 46, in which the defendant had once again been acquitted by direction of the trial judge, who had ruled that the accused had been held in illegal custody and that a number of statements made by him during that time were therefore inadmissible. In *People (DPP) v. Quilligan (No 1)* [1986] IR 495; [1987] ILRM 606, the prosecution had shown that the trial judge had erred on this point. The Supreme Court in *No 2* was divided, with two judges arguing that the Court did indeed have jurisdiction to order a retrial in the circumstances, two dissenting vociferously with that conclusion, and one who reserved judgement on that point, but did not think that a retrial was necessary in that case.

[24] Section 44 states that "An appeal shall not lie to the Supreme Court from a decision of the Central Criminal Court to acquit a person, other than an appeal under section 34 of the Criminal Procedure Act, 1967". Section 34 of the Criminal Procedure Act 1967 allows the Attorney General to refer a question of law to the Supreme Court where an accused is acquitted by the direction of the trial judge on a question of law. This reference is without prejudice to the verdict in favour of the accused (section 34(1)).

[25] In the England and Wales, Part 10 of the Criminal Justice Act 2003 allows for the quashing of an acquittal and the ordering of a retrial provided that (1) there was new and compelling evidence against the person in relation to the offence in question and (2) it must be in the interests of justice for the court to make such an order. This procedure was applied for the first time in *R v. Dunlop* Court of Appeal (Lord Philips of Worth Maltravers LCJ, Sir Igor Judge, President, Silber, Rafferty and Openshaw JJ), 16 June 2006, *The Times*, 14 September 2006. In that case, the Court of Appeal ruled that it was in the interests of justice to quash the Dunlop's acquittal for murder and order his retrial in circumstances where he had later confessed to the crime on a number of occasions. Lord Philips, giving the judgment of the Court, held that it did not matter that the accused may not have appreciated that the admissions could lead to his retrial. It is worth noting that, like Messrs O'Shea and Quilligan, Dunlop had not been acquitted by a jury verdict but by order of the court following two abortive trials in which the juries could not reach a verdict and were discharged. Interestingly, following his admissions that he had indeed murdered Julie Hogg, Dunlop had been convicted of perjury for the evidence he had given in both murder trials. He was sentenced to six years. The Court of Appeal held that this did not invoke the doctrine of *autrefois convict*, as he was convicted of a separate offence; however, the time served should be taken into account in the event of his being convicted of the murder on his retrial.

[26] [1994] 2 IR 465. The applicant stood trial for indecent assault (the old term for what is now termed "sexual assault"), and on both occasions the jury had been discharged and his retrial ordered. On the second occasion, the jury was discharged as a result of prejudicial newspaper reporting of the proceedings. Shortly afterwards, *The Sunday Tribune* (a national newspaper) published an interview with the complainant. Although the article did not name either the complainant nor the accused, it gave a detailed account of the legal proceedings to date. The applicant obtained an order of prohibition in the High Court, but this was overturned on appeal by a majority of the Supreme Court (Finlay CJ and Egan J dissenting), who held that, while it was possible that one or more of the jurors would read the article and associate it with the applicant (and feel sympathy for the complainant), the applicant had not shown that there was a real or serious risk that the jury would disregard their oath to give a verdict on the evidence before them or that they would ignore the charge of the trial judge not to rely on extraneous material. The real risk test was followed in *Z v. DPP* [1994] 2 IR 476, in which the applicant was unsuccessful; and in *Magee v. O'Dea* [1994] 1 IR 500, in which the applicant successfully obtained his

Delay

The right to a fair trial within a reasonable time – or to trial "with due expedition" - is one which is recognised by both the Irish courts and the Court of Human Rights. The applicant in *Barry v. Ireland* complained that his right to an expeditious trial under Article 6 had been breached in circumstances where the first complaints had been made some ten years prior to the judgment of the Court of Human Rights. The right to an expeditious trial was already recognised in Irish law, where it had particular relevance in relation to criminal proceedings. Under the Petty Sessions Act, 1851, the summons in relation to a summary offence must generally issue within six months of the alleged incident;[27] a factor which has the effect of curtailing the length of proceedings. While there is no statute of limitations in relation to criminal matters, the courts can preclude proceedings on the basis of undue delay. It would appear, however, that while delay in and of itself can be sufficient to prevent a criminal trial from going ahead, there must generally be some element of prejudice to the accused;[28] the extent to which the prosecution has been culpable for the delay can also be taken into account (although if the accused can show sufficient prejudice this may be enough on its own).

There also appears to be a distinction between cases where the commission of the offence was known to the authorities almost from the very time of its commission (e.g. a murder where the body is found three weeks later) and cases where the very existence of the crime was not known until many years after (e.g. a murder which was not discovered for 20 years, or, as was increasingly common from the 1990s on, a case of sexual abuse dating from decades before the initial complaint). In the first case, prosecutorial delays (once a suspect has been identified) are arguably more

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release in the face of an application by the British authorities that he be extradited to the UK. The applicant's photograph had been displayed on the front of English newspapers with taglines such as "This is the face of the suspected cold-blooded murderer of Soldier Michael Newman."

[27] The Supreme Court has held that the six month time limit does not mean that the entire summary trial or even the accused's first appearance in court must be within that time; only that the application to the District Court for a summons must be made within that time: *DPP v. Byrne* [1994] 2 IR 236; [1995] ILRM 279.

[28] *See*, e.g. *DPP v. Byrne* [1994] 2 IR 236; [1995] ILRM 279, in particular the judgment of Blayney J. Furthermore, the onus is on the person alleging that there has been undue delay (i.e. the accused) to show that this is indeed the case.

inexcusable than in the second.[29] It appears that the Irish courts, like their colleagues in Strasbourg, will apply a global approach and look at the case as a whole, including factors such as the complexity or otherwise of the case which may excuse (or negate) the need for delay.[30] The issues to be examined include the length of the delay, the reasons for it, the accused's conduct, the actual prejudice suffered, and the community's right to have offences prosecuted; the test, in effect, is whether there is a "real risk" of an unfair trial.[31] Context is often all-important: for example, in a number of sexual abuse cases, long delays were held to be excusable having regard to the fact that the authorities were not aware of the offences at the time of commission, and the alleged victims had been unable to make complaints earlier due to psychological factors.[32] In the area of undue delay, the power to apply to the domestic courts for judicial review of the decision to prosecute in reliance on the constitutional right to a fair trial with due expedition is attractive in that it can lead to an order of prohibition being imposed on the prosecution. However, based on the *Barry* judgment it appears that the Court of Human Rights takes the view that judicial review is not an adequate remedy for such delays.[33]

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[29] Nevertheless, it is open to the accused in either scenario to argue that the delay in and of itself makes it impossible for him/her to obtain a fair trial, having regard to the impact the sheer passage of time may have on the memory and that of any potential witnesses.

[30] E.g. in *Cahalane v. Murphy* [1994] 2 IR 262, the applicant vet was accused of converting alcohol to be used in his practice into alcohol for human consumption – a charge which he categorically denied. The rumours initially began to circulate around 1987; a file was sent to the DPP in 1989; the applicant was charged in 1991; the book of evidence was served in 1992; and the prosecution was finally ready to begin proceedings in 1993. The alleged offence identifiably took place in 1987, and there had thus been a delay of approximately six years in bringing the matter to trial. In the High Court, Carney J held that, while there were complexities in the case, they did not excuse a delay of this nature; the problem was further compounded by the death of an expert witness in the interim. The lack of any adequate explanation for the delay was also averted to by the Supreme Court on appeal.

[31] These factors were referred to by the Supreme Court in *B v. DPP* [1997] 2 ILRM 118, *per* Denham J. She also indicated that the court could take into account the duration of pre-trial incarceration, the length of time for which the accused had been subject to pre-trial anxiety, any impairment to the defence, and any special circumstances of the case.

[32] I.e. in such cases, the complainants are often alleged to be under the "dominion" of the perpetrator, who is frequently a family member or a person in authority. In *DO'R v. DPP* [1997] 2 IR 273, the accused (a former swimming coach) had been charged with around 90 counts of unlawful carnal knowledge, indecent assault and sexual assault dating back to the 1960s. The allegations came to light in 1992-1993, and he was charged in 1995. Kelly J held that in assessing the length of the delay, the court could have regard to all the circumstances of the case and allowed the case to proceed. The learned judge rejected the applicant's contention that the delay effectively precluded him from adducing certain alibi and documentary evidence to rebut the charges; in the Court's view, such evidence was less important in this type of case, which turned more on the credibility of the witnesses versus that of the accused. It is certainly true that, in cases involving the persistent sexual abuse of minors, it is often difficult to elicit specific dates and times from the alleged victims, and that this necessarily impacts on the probative value of alibi evidence in any case.

[33] As the ECtHR pragmatically noted in that case, even a successful application for judicial review could not erase the delays that had already taken place; in addition, lengthy delays are often a central

Article 6(1) guarantees the right to "a fair and public hearing within a reasonable time", and applies to both civil and criminal proceedings. Additional burdens are placed on the state when the accused is detained on remand pending the hearing of criminal charges by Article 5(3), which requires that persons accused of criminal offences be tried within a reasonable time, and that this must be done with "special diligence" where they are in detention. A common feature of the Irish and Convention jurisprudence is that the delays will not be excused on the basis that the courts have an excessive workload:[34] the Court of Human Rights has held many times that procedural delays due to an overloaded judicial system will not excuse a Contracting Party,[35] and has condemned Italy for the frequency with which applications based on undue delay in that jurisdiction come before the Court.[36] From an examination of recent judgments against Ireland, it appears that this country is currently running the risk of a similar finding;[37] a problem which is all the more significant when one considers that it does not impact on Ireland alone, but on the whole European regime of rights protection: Ovey and White argue that, in tying up the resources of the Court of Human Rights with repeated applications based on the same problem, some countries are depleting the ECtHR's resources and thus contributing to the backlog of cases before the Strasbourg Court.[38]

An attempt to rely on Article 6 was made in *Ward v. Governor of Portlaoise*.[39] The applicant was charged with robbery, causing serious harm and possession of firearms,

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feature of the judicial review system itself (Application No 18273/04 *Barry v. Ireland*, Judgment of 15 December 2005, at paragraphs 52-53).

[34] The Supreme Court would not excuse delay based on a backlog of cases in *The State (O'Connell) v. Fawsitt* [1986] IR 362, in which Finlay CJ, giving the judgment of the Court, remarked, "A person charged with an indictable offence whose chances of a fair trial have been prejudiced by excessive delay should not be put to the risk of being arraigned and pleading before the jury" (at 379).

[35] The ECtHR has, on many cases, held that the Contracting Parties have an obligation to arrange their legal systems so as to minimise such delays; *see*, e.g., the attitude of the Court in Application No 42297/98 *McMullen v. Ireland* Judgment of 29 October 2004.

[36] Application No 34884/97, *Bottazzi v. Italy*, Judgment of 28 July 1999. Nor is Italy the only offender: the majority of applications from Poland are also connected to the length of the judicial process: *see*, generally, Marie-Bénédicte Dembour and Magda Kryzanowska-Mierzewska, "Ten Years On: The Voluminous and Interesting Polish Case Law" [2004] EHRLR 517.

[37] *See* Chapter 1. An obvious way to solve the problem would be to appoint more judges so that more cases could be heard simultaneously. Naturally this would also depend on the availability of a sufficient number of courtrooms, and any solution would require the commitment of substantial resources by the state.

[38] Ovey and White, at 168.

[39] Unreported, Supreme Court, 30 June 2006 (Denham J; McCracken and Macken JJ concurring).

and was remanded in custody. His attempt to procure his release was unsuccessful in the High Court,[40] and he sought to appeal the High Court ruling on a number of grounds, *inter alia* that he had not been afforded a fair hearing and had not been tried within a reasonable time, in breach of Article 6 ECHR. He also alleged that he had been denied an effective remedy, pursuant to Article 13 ECHR. Unfortunately for Mr Ward, the Supreme Court ruled that, as he had not actually raised any of the Convention grounds in the High Court, the Supreme Court had no jurisdiction to decide those arguments, and remitted them to the High Court.[41] It is a pity that the Supreme Court did not have jurisdiction to hear the Convention arguments, as the period of delay in the case was not inconsiderable. Significantly, the applicant had been in pre-trial detention since 6 October 2003, and his trial was set for 12 October 2006. At the time the Supreme Court ruled upon his application, the accused had already been in detention for the best part of three years – a fact which surely indicates that he ought to have relied upon Article 5 ECHR as well.[42]

The issue of delay in criminal proceedings has come before the post- ECHR Act High Court on a number of occasions, with varying degrees of attention being paid to the Convention, but without it ever determining the issue. In *Sweetman v. The Director of Public Prosecutions*,[43] the applicant relied upon Articles 6 and 8 of the Convention in an attempt to restrain his prosecution. The prosecution in question was for murder, possession of firearms with intent, and false imprisonment.[44] The alleged offences took place in February of 1996, and the applicant relied exclusively on the argument that there had been undue delay in relation to his retrial (the jury at his first trial was discharged due to adverse publicity in the press at the time, and he succeeded in overturning his conviction by a second jury during an appeal in October 2000). Sweetman relied upon his right to a prompt trial, as protected by the Constitution and Article 6, and alleged that his right to respect for private and family life had been

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[40] High Court, ex tempore judgment of Lavan J, 8 May 2006.

[41] As for the High Court's refusal to grant habeas corpus, Denham J was satisfied that the High Court had not erred in refusing the remedy.

[42] Article 5 ECHR protects the right to liberty. Mr Ward did not rely upon this Article (not that it would have availed him given that he had not made any Convention arguments at first instance), and it is possible to doubt the wisdom of his decision to represent himself in the proceedings.

[43] *Ivor Sweetman v. The Director of Public Prosecutions*, High Court, Unreported Judgment of Murphy J of 1 April 2004.

[44] The facts of the case were somewhat sensational: a group of three men had broken into a family home, tied the husband to a chair in the kitchen and tied the mother and daughter up in another room. The father was then shot dead.

infringed due to the prolonged uncertainty as to the outcome of the charges against him. In the event, the judge concluded that the applicant was not entitled to the relief sought: some of the delays had been an inevitable,[45] while the others could not be seen as prosecutorial delays, as the applicant had contributed to them. The judge noted that, although the delays may have increased the applicant's anxiety, he was never actually left in a state of uncertainty as to the state of the proceedings against him. The constitutional and Convention arguments were thus not discussed. It is submitted that proper regard to the Convention case law (including *Barry*) would preclude the courts from excusing a lot of delay. Certainly there will be "inevitable" delays caused by the gathering of evidence and the procedural steps every trial must go through; however, delays caused by the heavy workload of the courts are factors which relate to the State's failure to provide a speedy trial, and are less excusable.

The applicant in *LO'N v. The Director of Public Prosecutions*[46] had more success – largely, it is submitted, thanks to the circumstances of his case. The applicant sought to quash an order for his return for trial for multiple counts of sexual assault. His two main arguments were that Gardaí had told him that the prosecution would not be proceeding, and delay: the final decision to prosecute was made 17 years after the original complaints, and four years after the date on which the complaints were renewed. The applicant alleged that his prosecution would infringe Articles 5(3), 6(1) and 13 of the Convention, and sought damages pursuant to section 3(2) of the ECHR Act. Having regard to the facts of the case, MacMenamin J held that there was no real excuse for the delay. One reason advanced by the State was that the investigating Garda was sick for an extended period of time; unsurprisingly, the judge was unimpressed by this argument, and described the delay as "unacceptable" and culpable on the part of the prosecution. The Court also held that fair procedures demanded that the applicant be allowed to make submissions in relation to the reversal of the decision not to prosecute. He was therefore entitled to an order of certiorari quashing his return for trial on both counts. No order was made in respect of the section 3 claim for compensation, nor did the judgment in any way refer to the case law of the Court of

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[45] At 4 of the unreported judgment, the judge remarked, in relation to a hearing moved back due to the unavailability of a judge, that "such delays occur from time to time both in civil as well as criminal cases", and later referred to "the resources [or presumably the absence of resources] of the Central Criminal Court" at 5.

[46] Unreported, High Court, MacMenamin J, 1 March 2006.

Human Rights, although he did make extensive reference to Irish and even US case law. Given that the case was heard over three years after the incorporation of the Convention, it is rather disappointing that the High Court did not feel it necessary to make even the most cursory reference to the ECtHR's substantial jurisprudence on the question of delay in criminal trials. The Court's approach appears to lend credence to the suggestion that, when faced with Convention problems, the Irish courts will fall back on the tried and tested constitutional jurisprudence where possible.[47]

Admissibility of Evidence

Some cases in which the Convention was relied upon concerned the admissibility and/or availability of evidence. There is a wealth of constitutional case law on this area to the effect that evidence that has been obtained in breach of constitutional rights will be excluded unless there are extraordinary excusing circumstances.[48] For an example of circumstances which might justify interference with constitutional rights, *see The People (DPP) v. Shaw*,[49] where the Supreme Court accepted that it had been reasonable in the circumstances to infringe the defendant's right to liberty in the interests of protecting the life of another.[50] It is probable that the Irish rule against

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[47] On this point, *see*, generally, Gerard Hogan, SC, "The Incorporation of the ECHR into Irish Domestic Law", Law Society of Ireland Conference Paper, October 14, 2000.

[48] The rule against unconstitutionally obtained evidence is linked to the Article 40.5 right to inviolability of the dwelling, which generally means that Gardaí may only enter a home if they are in possession of a valid warrant. However, it appears that an oversight in relation to the warrant may not be fatal: in *The People (AG) v. O'Brien* [1965] IR 142, a majority of the Supreme Court (Kingsmill Moore J, Lavery and Budd JJ concurring; O Dalaigh CJ and Walsh J dissenting) allowed evidence to be adduced even though it was obtained on foot of a warrant containing the wrong address (the defendants lived at 118 Captain's Road; the warrant related to 118 Cashel Road). NB in that case there was no evidence of "deliberate treachery, imposition, deceit or illegality". Furthermore, the Supreme Court has since rejected any suggestion of a US-style "good faith" rule: *see*, e.g., *The People v. Kenny* [1992] IR 110, in which the Supreme Court held that, if evidence is obtained unconstitutionally, it will be excluded whether Gardaí realised they were in violation of the Constitution or not.

[49] [1982] IR 1.

[50] The Gardaí believed Shaw to be involved in the murder of two women. In a written statement, he admitted to having killed one of them, but suggested that the other might still be alive and offered to go with police to look for her in various places around Connemara. As a result, he was detained for longer than the limit of 24 hours before being charged. It transpired that she was already dead. He was convicted by a jury in the Central Criminal Court, and sought to appeal his conviction on the basis that his written statement and admissions made by him during the journey should not have been admitted into evidence, as they were obtained during an unlawful period of detention. His appeal was disallowed by both the Court of Criminal Appeal and, on a further appeal, by the Supreme Court. A majority of the Court (Henchy, Griffin, Kenny and Parke JJ) held that the entire period of his detention was lawful, and ruled that in choosing to attempt to save the woman's life by temporarily ignoring the appellant's right to liberty, the Gardaí had simply tried to protect the more important of two conflicting constitutional rights.

unconstitutionally obtained evidence goes further than the position of the Court of Human Rights, which does not exclude unlawfully obtained evidence *per se* but simply takes the fact that such evidence was admitted as one of many elements to be taken into account in deciding whether the trial was fair.[51] As far as the Convention is concerned, the admissibility of evidence and the assessment of the weight it should be accorded is primarily a matter for the domestic courts; the ECtHR will only exercise "limited supervision" of these points, on the basis of the fourth instance rule and due to practical considerations (i.e. that the domestic courts have first-hand knowledge of the matter).[52] This supervision is generally restricted to asking whether the manner in which evidence was presented is in accordance with the Article 6(1) requirement of fairness, and whether it breached the presumption of innocence.[53] Now that Article 6 is justiciable by the domestic courts, it may bolster the existing constitutional provisions. However, because of the level of deference shown to the assessment of the domestic courts by the ECtHR in this area, and because of that Court's global approach to the issue of fairness, it is submitted that the jurisprudence of the Court of Human Rights will have less to add in this area than it may do in others.

In most cases where the Convention has arisen in relation to the admissibility of evidence, the courts have, at best, used the ECHR simply to bolster the constitutional point. Such was the approach in *Lynch v. His Honour Judge Moran and the DPP*,[54] where the question of estoppel in criminal proceedings arose. The applicant was tried for manslaughter in the Circuit Court in February 2004; during that trial, the defence sought to exclude evidence of an identification parade by way of *voir dire*, but the trial judge had ruled against them. The jury was unable to reach a verdict and the case was re-listed. At the second trial, the first named respondent held that issue estoppel arose in favour of the prosecution, and that the defence were precluded from challenging the identification evidence again. The applicant sought relief by way of judicial review on a number of grounds, including the fact that the first named respondent's ruling meant that the applicant could not receive a fair trial in accordance with Article 38.1 of the Constitution and Article 6(1)(2) and 6(3)(d) of the ECHR. He also argued that the

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[51] Karen Reid, *A Practitiioner's Guide to the European Convention on Human Rights* (2nd Edition, Thomson Sweet & Maxwell, 2004), at 108.
[52] Reid, at 105.
[53] Reid, at 105.
[54] Unreported, Supreme Court, 23 May 2006 (Kearns J; Denham, Geoghegan, Fennelly, and McCracken JJ concurring).

ruling prevented him from raising all possible defences and challenges, thus breaching the principle of equality of arms embodied in Article 6(1) and 6(2),[55] and also deprived him of an effective remedy pursuant to Article 13. The High Court disagreed, but the Supreme Court allowed the applicant's appeal and set aside the order of the first named respondent.

Kearns J, giving the judgment of the Supreme Court, examined the jurisprudence on issue estoppel (where a party is prevented from raising a certain point in a subsequent trial) in the criminal courts in this[56] and other jurisdictions, including the UK,[57] Australia and Canada.[58] The learned judge's extensive reliance on the case law of these foreign jurisdictions was so marked that the judgment at first appeared to hark back to pre-ECHR Act decisions; however, Kearns J went on to look at the impact of the Convention. He stated that one major problem with issue estoppel was that the

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[55] The principle of equality of arms is considered to be a vital element of the right to a fair trial, which is embodied in Article 6(1) ECHR. The principle has been described by the court as requiring "that each party should be afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis her or her opponent": Application No 12643/02 *Moser v. Austria*, Judgment of 21 September 2006, at 86. In that case, it was held that the respondent had breached the principle of equality of arms in circumstances where the applicant's child had been taken into care. During court proceedings relating to the matter, the applicant, who had been unrepresented, had not been given access to reports relied upon by the State in seeking to deny her custody. She was thus unable to comment on or rebut the contents of those reports. The Court of Human Rights considered this to be a violation of her Article 6 rights. It was no answer that she could have discovered the existence of the reports had she inspected the case file. A similar result was reached in Application No 38184/03 *Matyjek v. Poland*, Judgment of 24 April 2007, in which the applicant was denied proper access to State files on his case. The applicant in that case had been indicted under the Lustration Act 1997, which prohibits persons who collaborated with the communist secret services from holding public office. The applicant was a member of the lower house of parliament (the *Sejm*), and denied any such collaboration. The ECtHR held that a number of factors combined to create an inequality of arms in his case. These included the confidentiality of the documents relied upon by the State, the fact that the applicant could not take away his own notes on these files on the occasions on which he was given access to them, and the fact that the State body responsible for prosecuting the offence had a number of advantages open to it (including the fact that it had unlimited access to the files, possessed a staff with clearance to access official secrets, and had the power to hear witnesses and order expert reports).

[56] The respondents had relied upon the judgment of *The People (DPP) v. O'Callaghan* [2001] 1 IR 584, in which the Court of Criminal appeal had held that "A decision on an issue in a criminal trial is capable of giving rise to a plea of estoppel in subsequent civil proceedings grounded on the same facts" (at 592). Hardiman J also stated that there was no reason "in principle" why an issue decided in a criminal trial should not give rise to an estoppel in a subsequent criminal trial (at 594). The judge based this conclusion on the earlier decisions in *Kelly v. Ireland* [1986] ILRM 318, and *Breathnach v. Ireland* [1989] IR 489. However, Kearns J preferred the approach of the Supreme Court in *Corporation of Dublin v. Flynn* [1980] IR 357, in which the question of issue estoppel was fully considered and rejected.

[57] The House of Lords rejected the idea of issue estoppel in criminal proceedings in *R v. Humphrys* [1977] AC 1.

[58] In *R v. Blair* [1985] 1 NSWLR 584 and *Rogers v. R* [1994] 181 CLR 251, the Australian and Canadian courts also appeared to reject issue estoppel in criminal proceedings.

point decided in the original trial could never be re-examined: "The court simply does not have jurisdiction to trawl through transcripts of earlier trials (even if it was minded to do so) to examine the correctness or otherwise of the original ruling to which issue estoppel applies."[59] The accused therefore lost a clear ground of appeal in relation to what was potentially a crucial issue. Not only did that infringe the right of appeal provided for in Article 34 of the Constitution, but it also infringed Article 2(1) of Protocol No 7 of the Convention.[60] In the light of the section 2 obligation to interpret and apply the law in accordance with the Convention, the Court held that that Article was "decisive in determining that issue estoppel in favour of the prosecution can have no place in Ireland's criminal justice system".[61] Ironically, the judge's final reference to the ECHR was one in which he used the Convention to bolster the rights of the prosecution: he held that, if issue estoppel could not operate against the defence in a criminal trial, then it could not operate in favour of the defence either.[62] This ruling is probably correct; nevertheless, it is arguable that the Court of Human Rights did not intend its principle of "equality of arms" to benefit States Parties to the Convention; the case law indicates that the Court tends to view that principle as ensuring the rights of the underdog.[63]

The issue of equality of arms also arose in *JF v. DPP*,[64] in which the complainant in a sexual assault case refused to allow the accused's expert to examine him, even though he had been examined by the DPP's expert on several occasions. The Supreme Court held that this was a violation of the accused's rights as set down in *Re Haughey*[65] (specifically, the right to call evidence in rebuttal of the charge). Although the case was not decided on Convention principles, the Court did accept that the situation also breached the principle of equality of arms. However, Hardiman J was adamant that the

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[59] At 33 of the judgment.
[60] Article 2(1) of Protocol 7 states: "Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law."
[61] At 34 of the judgment. Kearns J also accepted that, insofar as it prevented the accused from challenging a ruling made in a previous trial, criminal issue estoppel may also be contrary to Article 6 ECHR and Article 38 of the Constitution. However, he made no determination in this regard.
[62] At 35 of the judgment.
[63] On this point, *see Steel and Morris v. United Kingdom* (2005) 41 EHRR 22.
[64] [2005] 2 IR 174.
[65] [1971] IR 217.

ECHR did not add anything to the existing protection available under Article 38.1 of the Constitution.[66]

Another post-ECHR Act case approached the evidence issue from almost the opposite angle: in *DC v. Director of Public Prosecutions*,[67] the applicant sought leave to apply for judicial review to restrain his prosecution for rape and sexual assault on the basis that the Gardaí had not made available witness statements and had not sought out two potential witnesses.[68] The application for judicial review alleged that this failure breached his right to a fair trial in accordance with Article 38.1 of the Constitution and with Article 6 ECHR. In the event, the applicant was refused leave on the basis that he had failed to establish even an arguable case. Although the applicant ostensibly relied upon the Convention, it is submitted that the case is not of much assistance in defining the post-ECHR Act status of that document; it is unclear to what extent his arguments before the High Court were actually based upon the Convention, particularly as they are not mentioned in the course of the judgment.[69]

A similar argument also failed in substantive judicial review proceedings in *O'Hara v. The Director of Public Prosecutions and District Judge Furlong.*[70] Once again, the applicant cited the Convention as a ground of relief, but does not appear to have fully explored that ground, as it is not mentioned in the judgment.[71] The applicant sought an order of prohibition preventing his prosecution for the theft of a cigarette vending machine. He argued that the failure to seek out and preserve possible video evidence meant that he was prevented from having a fair trial in accordance with Article 38.1 of

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[66] [2005] 2 IR 174, at 182. This case is discussed by Gerard Hogan, "The Value of Declarations of Incompatibility and the Rule of Avoidance" (2006) 28 *DULJ* 408, at 411.
[67] Unreported, High Court, Ó Caoimh J, 18 May 2004.
[68] The alleged victim had been out drinking with a friend, Ms R. In her statement, Ms R said that she and the complainant had gone back to a flat with two men for part of the night. The complainant had gone into a bedroom with one of the men for a time. The two women had then left the apartment and had later had a fight, whereupon Ms R went home, while the complainant went to a pub and had a drink with the applicant. Some time later, the complainant alleged that the applicant had assaulted her in a park. The applicant alleged that the Gardaí had a duty to seek out the two men whose home the women had visited during the night, as their evidence might have a bearing on the complainant's credibility.
[69] The judgment is very much fact-dependent. It is clear that Ó Caoimh J did not think that the two alleged witnesses had anything substantive to add, as neither even encountered the applicant and they had certainly not witnessed the alleged attack. Reading between the lines, the applicant's desire to question the men seems like an attempt to pry into the complainant's past sexual history (though she denied having sex with either of the men). This tactic did not find favour with the judge.
[70] Unreported, High Court, O'Leary J, 10 December 2004.
[71] Except to list it as one of the applicant's arguments.

the Constitution and Article 6 of the Convention. This suggestion was quite audacious, given that the applicant had been found in a hotel toilet, along with the missing cigarette machine, a black plastic sack and a screwdriver. Furthermore, his conduct after his arrest did nothing to explain how he came to be in that position.[72] The applicant submitted that the Gardaí ought to have preserved any video evidence from the hotel on the day in question, on the basis that it might have shown other suspects entering the location etc. The judge eventually decided the issue as one of whether the seminal case of *Braddish v. DPP*[73] could be extended to cover the circumstances of the present case, and concluded that it could not.[74]

The issue of the admissibility of evidence reached the post- ECHR Act Supreme Court in *The People (DPP) v. Murphy*.[75] The applicant had been convicted in the Special Criminal Court of conspiracy to cause an explosion ("the Omagh bomb"). During that trial, the Court had found that some Gardaí had altered interview notes and lied about it under cross-examination; the Court excised this evidence, but admitted that of the other Gardaí, on the basis that they had not colluded in this. The Special Criminal Court also heard evidence obtained through telephone tapping, which they held was corroborative of his guilt. In the Court of Criminal Appeal, the applicant argued that the admission into evidence of his telephone records were an invasion of his right to privacy, and amounted to a breach of the decisions laid down by the Court of Human

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[72] After his arrest, the applicant refused to respond to Garda questions other than to say that he had come to the area that morning but could not remember at what time. During the interview, the Gardaí had asked the applicant if he realised that there was a video recording system in the hotel. On seeing a transcript of the interview, the applicant's solicitor asked to see this evidence, but was told that the area in which the cigarette machine had been located and the area of the toilets were not covered by the video.

[73] [2002] 1 ILRM 151. This is the leading case on the Gardaí's duty to seek out and preserve video evidence. In that case, the prosecution had lost an original video, from which a still photograph was used to identify the accused. The trial judge excluded this photograph on the basis that the video was not available. However, the applicant nevertheless succeeded in arguing that the absence of the video created a real risk of an unfair trial. Hardiman J, for the Supreme Court, held that the video had the potential to assist the defence (by showing that he had been wrongly identified as the person who committed the robbery), and restrained the further prosecution of the offence. At 157 Hardiman J stated, "It is the duty of the Gardaí, arising from their unique investigative role, to seek out and preserve all the evidence having a bearing or a potential bearing on guilt or innocence. This is so whether the prosecution proposes to rely on the evidence or not and regardless of whether it assists the case the prosecution is advancing or not."

[74] The Gardaí had no evidence tending to make the video relevant (given that it did not cover the area in question); however, the position might have been otherwise had the applicant given them any information during his interview that showed the need to investigate alternative theories.

[75] [2005] 2 IR 125.

Rights in *Malone v. United Kingdom*,[76] in which the Court considered the legality of telephone tapping. Unfortunately for the applicant, that case was probably of more assistance to the State: certainly, the Court of Criminal Appeal focused on Strasbourg's requirement that there be safeguards in place to protect the right to privacy when the State chooses to undertake that kind of surveillance. Such safeguards should primarily take the form of "legal rules concerning the scope and manner of exercise of the discretion enjoyed by the public authorities".[77] The Court of Criminal Appeal held that the Irish legislation contained "precisely such safeguards" in allowing a person who believes his phone to be tapped to have his complaint investigated, and in providing for the ongoing review of the operation of the legislation by a judge.[78] The appeal was allowed on two other, non-Convention related grounds, and a re-trial ordered.[79]

Oppression

In the context of a criminal trial, oppression may arise in a number of ways to make the proceedings unfair, e.g. in circumstances where a confession is obtained through oppression.[80] In *TH v. Director of Public Prosecutions*[81] the applicant relied upon Article 6 of the Convention in an application for an order prohibiting his prosecution under the Criminal Law (Rape) Amendment Act. The offence was such that TH could be tried either summarily or on indictment, but the DPP was not disposed to allow the

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[76] (1985) 7 EHRR 14.
[77] (1985) 7 EHRR 14, at paragraph 87.
[78] [2005] 2 IR 125, at 157. These safeguards can be found in sections 8 and 9 of the Interception of Postal Packets and Telecommunication Messages (Regulation) Act 1993.
[79] Specifically, the Court of Criminal Appeal held that the Special Criminal Court had made findings based on mere speculation and had not been sufficiently critical in its analysis of the case; it had also erred in relying on evidence of the applicant's past convictions for unrelated crimes as probative of his guilt in the instant case. Interestingly, the Court held that, where Gardaí were shown to have altered interview notes and lied under oath, the court should ask whether a reasonable jury would convict on the remaining evidence, and should carefully examine the evidence in order to discern whether there was wider complicity among the investigation team. There was no automatic right to an acquittal simply because gardaí were shown to have lied under oath.
[80] E.g. the Supreme Court quashed a conviction based on a confession obtained in oppressive circumstances in *The People (DPP) v. Lynch* [1982] IR 64. The accused had found the dead body of a woman in a house he had been asked to paint and called the police. They questioned him for many hours with little sleep and he eventually confessed to the murder. At his trial, the accused maintained that gardaí had prevented him from going home although he had told them he wanted to do so. It was also established that the woman had been alive some hours after the accused had said he had killed her. The Supreme Court held that the trial judge ought to have excluded the accused's admissions because the circumstances in which they had been procured had been oppressive.
[81] Unreported, High Court, McKechnie J, 9 March 2004.

case to be dealt with summarily unless the applicant pleaded guilty; the applicant alleged that this amounted to oppression and an attempt to force him to plead guilty. He also alleged abuse of process and undue delay. TH was unsuccessful on the first two grounds, but was successful in establishing delay, and was granted the injunction sought. Neither the ECHR nor the implementing legislation figure greatly in the judgment, but as unfortunate as this may be it is unsurprising, given that the case largely turned on its facts. The only reference of note the judge made to the ECHR Act was to say that:

> "...[P]rior to the coming into force of the European Convention on Human Rights Act 2003, the Articles of the Convention did not have the force of law in this jurisdiction though the judgments of the court, particularly in latter years have been increasingly influential in our jurisprudence. Even, however, if the convention [sic] was part of our domestic law, I don't think reliance upon it, is essential for the purpose of this case."[82]

The learned judge then went on to consider the issue of delay by relying solely on Irish case law, even though he noted that the applicant had relied extensively on the Strasbourg case law on Article 6, as well as upon several US decisions.[83] Somewhat depressingly, it would appear that the Convention remains only one of many foreign sources of law to be mentioned.

Legal Aid in Criminal Cases: The Principle of Equality of Arms

A major element of the Convention jurisprudence on Article 6 has been the principle of equality of arms. Briefly, this principle may be summarised as "the idea that each party to a proceeding should have equal opportunity to present a side of the case and that neither should enjoy any substantial advantage over his opponent."[84] Naturally, where one side is legally represented and the other is not, there is an inherent inequality of arms. In criminal matters, this inequality is somewhat mitigated by the provisions of Article 6(3) ECHR. Article 6(3)(b) explicitly recognises the right of an accused person "to defend himself in person or through legal assistance of his own

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[82] At 30 of the unreported judgment. Lest the reader be perturbed by the unusual use of punctuation and absence of appropriate capital letter, it should be noted that this version of the judgment was obtained from the website www.bailii.org, on 20 August 2004. The case has not been reported, and the wrong case has been filed in place of this one in the unreported judgments.
[83] At 30 of the judgment.
[84] Moriarty and Mooney Cotter, at 123.

choosing" or, if he has insufficient means with which to pay for such assistance, 6(3)(c) states that he must be "given it free when the interests of justice so require." This is not unlike the Irish rule in relation to free legal aid. Section 2 of the Criminal Justice (Legal Aid) Act, 1962 (as amended) states that, where it appears to the District Court that the means of a person charged before it with an offence are insufficient to enable him to obtain legal aid, and where the gravity of the offence means that it is essential in the interests of justice that the person should have legal aid in the preparation and conduct of his defence, then, on an application being made on that behalf, the District Court shall grant a legal aid certificate.[85]

Where a person is returned for a summary trial in the District Court, the legal aid certificate will only cover the cost of a solicitor, but not a barrister.[86] This remains the case post- incorporation: *Carmody v. Minister for Justice*.[87] In that case, the plaintiff sought a declaration of incompatibility pursuant to section 5 of the ECHR Act 2003 in relation to section 2 of the Criminal Justice (Legal Aid) Act 1962, on the basis that the section only provided for representation by a solicitor alone in the District Court. He argued that this state of affairs breached Articles 5,[88] 6,[89] and 14[90] of the Convention, because a solicitor alone could not guarantee effective representation. He also argued that the principle of equality of arms would be breached because the prosecution would employ counsel against him.[91] Laffoy J did not agree, and held that a solicitor was capable of providing the plaintiff with effective representation on the facts of the

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[85] NB There is no constitutional right to legal aid in criminal matters as such; however, where the provision of legal aid is essential in the interests of justice, then the court should not proceed with the matter until legal aid has been granted: *The State (Healy) v. Donoghue* [1976] IR 325. On the face of section 2, there is no obligation to inform a person of his right to legal aid; however, according to O'Higgins CJ (at 352):

> "[I]f a person who is ignorant of his right fails to apply and on that account is not given legal aid then, in my view, his constitutional right [to a fair trial] is violated. For this reason it seems to me that when a person faces a possible prison sentence and has no lawyer, and cannot provide for one, he ought to be informed of his right to legal aid. If the person charged does not know of his right, he cannot exercise it; if he cannot exercise it his right is violated."

[86] In practice, barristers do often appear in the District Court on behalf of legal aid clients; however, in these circumstances, the general practice is that the barrister and instructing solicitor split the fee to be paid by the legal aid board.

[87] [2005] 2 ILRM 1. This case is discussed in greater detail in Chapter 5, as it raises a number of points in relation to the temporal application of the ECHR Act.

[88] The right to liberty.

[89] The right of access to the courts and to a fair trial.

[90] The right to be able to exercise one's Convention rights without being discriminated against on the grounds of sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[91] The plaintiff also alleged that section 2 violated a number of constitutional provisions, including the Articles 38.1, 40.1, 40.3.1°, 40.3.2° and 40.4.1°.

case. There was thus no violation of his right to legal representation or of the doctrine of equality of arms.[92]

Courts Martial Procedure

Serious questions remain about the compatibility of the Irish military law with the ECHR. It appears likely that certain procedures in force may amount to a breach of Article 6(1), after the ECtHR held that similar UK provisions were in breach of that Article in a number of cases, including *Findlay v. United Kingdom*,[93] *Morris v. United Kingdom*,[94] and *Thompson v. United Kingdom*.[95] The issue has been raised in a leave application in *Potts v. Minister for Defence*,[96] in which the applicant argued that certain provisions of the Defence Act, 1954, and the Rules of Procedure (Defence Forces), 1954[97] were in breach of his Convention rights. Under sections 178 and 179 of the 1954 Act, certain charges under military law can be investigated and dealt with summarily by the same person, a subordinate officer. (In the alternative, this subordinate officer can refer the matter to his commanding officer, who can deal with the matter summarily himself or remand the accused for trial by court martial.) If the matter was dealt with summarily, there was an absolute ban on the accused having

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[92] In any case, it appears that the Irish system is kinder to the impecunious accused than the German version, which has nonetheless been upheld by the Court of Human Rights. Under that system, a convicted person may have to reimburse the state for fees after the trial; the ECtHR held that this system was not of itself incompatible with the Convention: *Croissant v. Germany* (1993) 16 EHRR 135. The system would only infringe the ECHR if it affected the fairness of proceedings; it did not (paragraph 36).

[93] (1997) 24 EHRR 221. The Article 6 right to trial by an impartial tribunal was breached by the respondent state in circumstances where the applicant had been judged by a court martial whose members were appointed by a convening officer; he chose people who were all inferior in rank to himself and who had served in his units; there was thus a strong link between the convening officer and the members of the tribunal. Furthermore, he had the right to ratify the court martial's decision (even though he himself was not a judicial officer) and even had the power to vary the sentence imposed. In an attempt to remedy the situation, the Armed Forces Act 1996 was passed.

[94] (2002) 34 EHRR 52. In that case, and in spite of the enactment of the Armed Forces Act 1996 which was intended to remedy the defects in the court martial system exposed in *Findlay*, the Court of Human Rights held that the general structure of the British court martial system was contrary to Article 6 (1) ECHR. The Court held that the safeguards within the system were incapable of eliminating the risk that two junior officers serving on the applicant's tribunal could be subject to undue pressure, particularly as they had no legal training and were subject to army discipline themselves. *See* Steve Foster, *Human Rights and Civil Liberties* (Pearson Longman, 2003), at 83-85.

[95] Application No 36256/97, Judgment of 15 June 2004.

[96] [2005] 2 ILRM 517.

[97] SI No 243 of 1954.

legal representation.[98] The applicant, a soldier, was before a subordinate officer on a charge of being absent without leave, a charge punishable by confinement to barracks for a week, a fine of one day's pay, or a warning. The applicant sought leave to challenge the statutory framework allowing for the summary trial of charges against members of the Defence Forces on the basis that they were a breach of the ECHR. In particular, he argued that the procedures in place did not satisfy the requirements of Article 6 that a person charged with a criminal offence have access to representation and a public hearing.

Clarke J accepted that an issue arose as to whether the charges against the applicant could be considered to be "criminal" within the meaning of the Strasbourg case law. He cited the case of *Engel v. The Netherlands*,[99] in which the Court of Human Rights had sought to set out the following test:

> "The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the state may in principle employ against him disciplinary law rather than criminal law.
>
> "However supervision by the court does not stop there. Such supervision would generally prove illusory if it did not also take into consideration that degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental."[100]

The High Court accepted that an issue arose as to whether the offence of being absent without leave was a criminal offence or a purely disciplinary one, given that the list of offences in Chapter 2 of the 1954 Act is not in any way subdivided, and is merely entitled "Offences Against Military Law". Clarke J noted that the offence with which the applicant was charged had elements that pointed both ways under the *Engels* test

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[98] Rule 69(1) of the Rules of Procedure (Defence Forces), 1954. However, the accused did have the right to cross-examine, present his own evidence, call any reasonably available witness, and demand that witnesses against him be sworn. A list of these rights appears on military charge sheets.
[99] (1976) 1 ECHR 647.
[100] (1976) 1 ECHR 647, at paragraph 82, quoted by Clarke J at [2005] 2 ILRM 517, 525.

(i.e. it might be argued that it was purely a disciplinary offence, but it might equally be argued that the punishment brought it within the spectrum in *Engels*).[101] The Court concluded that the matter would need a full and detailed hearing, and granted leave to apply for judicial review.

Unfortunately, at the time of writing the *Potts* case has yet to be heard. Another case partially based on the compatibility of the court martial system with the Convention was settled by the State prior to the hearing; an indication that there may be some substance to the Article 6 argument.[102] As it stands, the compatibility of the 1954 Act with the Convention remains undecided. It is submitted that serious questions remain as to whether the current procedures for the summary trial of military personnel take proper account of the State's Convention obligations, particularly given that the range of available punishments includes the deprivation of liberty (even confinement to barracks, while not so unpleasant as imprisonment in Mountjoy, is still an interference with the right to liberty). In the short term, it will undoubtedly be less trouble for the State to settle such claims rather than run the risk of an unfavourable decision by the courts. However, it may be that, in the long term, the only real solution will be that adopted by the UK after the ruling in *Thompson*: to introduce new procedural safeguards such as a summary appeals body.

Civil Procedure: Article 6 and the Right of Access to the Civil Courts

As stated above, Article 6 ECHR also has implications for civil hearings. A notable area in this regard is the right of access to the courts, which is also guaranteed under the Constitution. Mention has already been made of the *Airey* case, in which the Court of Human Rights' judgment effectively led to the establishment of a limited system of civil legal aid in this jurisdiction. It is clear from *Airey* that the Court of Human Rights has accepted that the absence of civil legal aid can sometimes amount to a breach of the Article 6 right of access to the courts. In certain circumstances, where it involves a huge inequality of arms and compromises an applicant's ability to present his/her case,

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[101] [2005] 2 ILRM 517, at 526.

[102] That case was *Lonergan v. Minister for Defence and Ors*. It had successfully passed the leave stage, but there does not appear to be a written report of the judgment on the leave application. Details of the case and confirmation that it has been settled were obtained from the solicitor acting on behalf of the applicant.

it can also interfere with the right to a fair trial: *Steel and Morris v. United Kingdom*.[103] However, there does not appear to be any authority to suggest that where a civil legal aid system exists, the ECtHR demands that Contracting Parties allocate more resources to the system to eliminate delays.

In a recent case, the High Court has attempted to extend the right of access to the courts to include an obligation on the State to make resources available so that a person entitled to legal aid can obtain it within a reasonable time: *O'Donoghue v. Legal Aid Board and Ors*.[104] Unfortunately, although the plaintiff relied upon the Convention, the High Court's ruling was grounded in her constitutional right of access to the courts – rightly so, given that the events complained of dated from 1999 (although this point was not mentioned by the Court). Nevertheless, the sheer novelty of the case, and the fact that it appears to extend the Irish position on legal aid beyond that required by the Court of Human Rights, make it worth a brief summary here.

The plaintiff challenged the inadequacies of the Civil Legal Aid Board, and convinced Kelly J that there was a constitutional obligation on the State to provide the Board with adequate resources. The plaintiff, who was involved in a family law action, had had to wait 25 months before receiving a legal aid certificate, thus delaying the legal proceedings. She argued that there was an obligation on the State (who was the third named defendant) to provide the Board with adequate resources to carry out its functions.[105] Traditionally, the Legal Aid Board has relied on section 5(1) of the Civil Legal Aid Act 1995 to resist such claims;[106] that section contains a resource-related "saver", which had defeated an earlier plaintiff in similar circumstances: *see Kavanagh v. Legal Aid Board and Ors*.[107]

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[103] *Steel and Morris v. United Kingdom* (2005) 41 EHRR 22.

[104] Unreported, High Court, Kelly J, 21 December 2004.

[105] She also alleged negligence and breach of duty on the part of the first named defendant, the Legal Aid Board itself, on the basis that it had failed to provide her with the certificate within a reasonable time.

[106] That subsection states:

> "The principal function of the Board shall be to provide, *within the Board's resources* and subject to the other provisions of this Act, legal aid and advice in civil cases to persons who satisfy the requirements of this Act." [Emphasis added.]

[107] Unreported, High Court, Butler J, 24 October 2001. Mrs Kavanagh, like Ms O'Donoghue, had been forced to wait for some time for her application for civil legal aid to be granted in the context of a judicial separation. In that case, Butler J remarked that "the language of section 5(1) … is plain and obvious and requires no special interpretation … The words simply mean that legal aid shall be provided within the Board's resources" (at 5 of the judgment).

Ms O'Donoghue argued that this was contrary to her constitutional rights; she also argued that the ECHR rendered the Board's lack of resources irrelevant in the face of her right to legal aid. To this end, she argued that the ECHR required the State to provide the Board with adequate resources, an argument Kelly J felt was superfluous on the basis that he had already decided that the delay in her case breached her unenumerated constitutional rights of access to the courts and fair procedures.[108] However, had the question been decided, it is submitted that the Convention jurisprudence does not support the plaintiff's contention: the Court of Human Rights has never yet gone so far as to require a Contracting Party to spend money on legal aid in order to make that process more expeditious (however desirable that might be). Nevertheless, it appears that the case is not to be appealed; indeed, the State has responded by increasing the funding to the Legal Aid Board.[109]

In *McCoppin v. Judge Kennedy and Ors*,[110] the applicant sought judicial review of the respondent's decision to abort Circuit Court proceedings in which he was a party, and to award costs against him on a "thrown away" basis, in circumstances where the applicant's behaviour had annoyed him. Specifically, the judge had remonstrated with the applicant's first witness for fiddling with a plastic bag, had ejected the applicant/plaintiff from the court when his mobile phone rang, and had finally aborted the proceedings when the applicant's counsel's phone also rang. He had therefore ordered the matter to be relisted before another judge. The applicant argued that the respondent had breached Article 6 of the ECHR, and that he was entitled to an order that the costs of the judicial review be awarded against the respondent. In that regard, he argued that the general rule that costs would only be awarded against a judge in cases where *mala fides* had been established amounted to a breach of Article 6 and the Article 13 right to an effective remedy. In the High Court, Macken J quashed the

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[108] The plaintiff also made a different ECHR-related argument which was rejected by Kelly J. This other argument was based on section 28(5) of the Civil Legal Aid Act, which requires the State to provide legal aid when an international agreement requires it to do so, and which contains the significant phrase (at least, significant in the plaintiff's eyes) "notwithstanding any other provision of this Act". The Court had little difficulty in rejecting this argument; that subsection only applied where an international agreement explicitly commanded the State to provide civil legal aid. No provision of the ECHR does so.

[109] For a discussion of the case, *see* GF Whyte, "The Future of Civil Legal Aid in Ireland" (2005) (10)4 *Bar Review*, 111, at 113.

[110] [2005] 4 IR 66.

judge's order as to the costs of the aborted Circuit Court hearing, in circumstances where none of the parties objected to the making of an order of certiorari. However, she held that it was reasonable for the respondent to terminate the proceedings when he did – "It might even be considered to be a prudent approach on his part in view of the fact that the ringing of the mobile phones had so exasperated him."[111] Since the applicant had not established any evidence of *mala fides*, the High Court refused to grant costs against the Circuit Judge. However, Macken J also concluded that the Convention arguments raised "discrete legal grounds which may have a significant effect on the existing jurisprudence of this court and of the Supreme Court, which require to be argued and considered in detail."[112] She therefore directed that those issues be remitted to an appropriate judicial review list.

The Duty to Give Reasons in Civil Cases

It would appear that the enactment of the ECHR Act has not in any way altered the position that there is no need for the courts to give reasons for their decisions at an interim stage in the proceedings. In *Gallagher v. Casey*,[113] the appellant had been added as a party to Circuit Court proceedings in circumstances where the amended civil bill in which she was named had not been properly issued. She argued that she was entitled to a written judgment setting out the court's reasons for its interim rulings under the European Convention on Human Rights. A case was stated to the High Court, where Abbott J held against the appellant, on the ground that the case law of the Court of Human Rights did not support her argument. The learned judge noted that, while Article 6(1) had been interpreted as creating an obligation on the courts to give reasons for their decisions,[114] a detailed answer on each and every argument was not required, and the extent of the obligation to give reasons varied according to the circumstances: *Van de Hurk v. Netherlands*.[115] It is submitted that the learned judge was probably correct in his assessment of the Convention case law; so long as a party

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[111] [2005] 4 IR 66, at 75.
[112] [2005] 4 IR 66, at 78.
[113] [2006] 1 ILRM 431.
[114] In this regard, the Court referred to the jurisprudence of the ECtHR: the Court considers that the giving of reasons demonstrates that the parties have been heard and also facilitates appeals: *see*, e.g., Application No 1035/61, *X v. Germany*, Decision of 17 June 1963 (1963) 6 *Yearbook* 180, at 192 (admittedly, that decision refers to a criminal case.
[115] (1994) 18 EHRR 481, referred to at [2006] 1 ILRM 431, 437.

has the chance to a meaningful appeal of interim rulings (as is the case in this jurisdiction), the fact that a judge did not hand down a written judgment of his reasons for that ruling arguably does not infringe Article 6. If it were otherwise, the practical difficulties would be immense: one can only imagine how long it would take for each court to produce written judgments of every motion to come before it, and the ultimate victims of the delays caused would be the litigants themselves.[116]

There are a number of areas which, although not falling within the scope of Article 6 of the Convention, are nevertheless intimately connected with the right to a fair trial. Two such areas are the right to bail[117] and the Article 8 right to privacy,[118] the latter of which can be infringed by, *inter alia*, criminal investigations or investigations carried out at the request of a tribunal of inquiry.

Article 6 and the Right to Substantive Due Process for Asylum Seekers

As has been noted, there is a constitutional requirement that justice be administered in courts and in public, unless there is a good reason why the hearing should not be in public. This is mirrored by Article 6(1)'s requirement that judgment be pronounced in public. However, for some time, it was impossible not only for the public to attend the hearings and or/rulings of the Refugee Appeals Tribunal, but also for anyone applying to the Tribunal to gain access to its past decisions. This situation was finally challenged (successfully) in *PPA v. Refugee Appeals Tribunal and Others*.[119] The applicants relied upon Article 6(1) ECHR, the fair trial provision of the ECHR, along with the analogous provisions of the Constitution.

In a ground-breaking decision,[120] MacMenamin J overturned the policy of the Refugee Appeals Tribunal not to make available its previous decisions. In seeking to uphold

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[116] It is worth noting that it was not terribly unjust to join the appellant as a co-defendant; Abbott J held that she was estopped from arguing that the proceedings against her were a nullity on the basis that she had originally applied to the Circuit Court to be added as a party.
[117] This point is discussed further, *infra*.
[118] This point is discussed further, *infra*.
[119] *PPA v. Refugee Appeals Tribunal (Tribunal Member, Aidan Eams). Chairman of the Refugee Appeals Tribunal and Minister for Justice Equality and Law Reform*, Unreported, High Court, McMenamin J, 7 July 2005.
[120] Patricia Brazil and Nuala Egan state that it is widely anticipated that this judgment will have a significant impact on the operation of the Refugee Appeals Tribunal and on the conduct of appeals:

this policy, the RAT argued that it was necessary to protect the confidentiality of applicants, and that the Chairman of the RAT had no discretion to make such decisions available. The nub of the applicants' argument was that they needed access to the Tribunal's previous decisions in order to ensure fair procedures. On examining the constitutional jurisprudence, MacMenamin J noted that "There is clear authority that the constitutional right to fair procedures in a decision-making process affecting a person's rights extends to a requirement that relevant information, documentation and matter of evidence [sic] should be disclosed."[121] The judge had little difficulty in holding that the applicants in the instant case were entitled to fair procedures: "Because of their significant positive and negative consequences, the hearing and procedure in these cases comes within the range of proceedings wherein the applicant is entitled to fair procedures."[122] The respondents did not dispute that the applicants were entitled to fair procedures; they simply queried the argument that the right to fair procedures required that the applicants have access to previous decisions, and contended that this question had already been answered in the negative.[123] However, MacMenamin J stated that the issue had only been touched on "briefly and peripherally" in earlier cases, which had been decided prior to the coming into force of the ECHR Act and the Immigration Act 2003.[124] A striking feature of the latter Act was that it amended the Refugee Act in order to include a specific reference to a "negative discretion" on the part of the Chairman of the RAT to refrain from publishing decisions which were not of legal importance; the Act also allowed the Chairman to provide for the protection of the parties' identities when decisions were published. The clear implication of this was that publication should be the rule and refusal to publish the exception.

Patricia Brazil BL and Nuala Egan BL, "Refugee Law", *Annual Review of Irish Law 2005* (forthcoming).

[121] At 14 of the judgment. The Court looked at a number of previous decisions on this point, including *The State (Williams) v. Army Pensions Board* [1983] IR 308; *McConnell v. Eastern Health Board*, Unreported, High Court, 1 June 1983; *Nolan v. The Irish Land Commission* [1981] IR 23; and *Kiely v. Minister for Social Welfare (1)* [1977] IR 267.

[122] At 16 of the judgment. On this point, the judge relied upon the judgment of the Supreme Court in *Gallagher v. The Revenue Commissioners* [1995] IR 55, and that of the High Court in *Flanagan v. UCD* [1988] IR 724.

[123] The respondents argued that this question had already arisen in two previous High Court decisions: *Raiu and Ors v. The Refugee Appeals Tribunal*, Unreported, Smyth J, 25 April 2002, and *Pop v. Refugee Appeals Tribunal*, Unreported, Butler J, 11 June 2004.

[124] At 18 of the judgment.

In arriving at his decision, the learned judge made reference to Irish decisions which supported the principle that hearings of a judicial nature should be in public, including *Irish Times & Ors v. Ireland and Ors*,[125] before posing the following rhetorical question:

> "Conformity and consistency in decision making are surely essential facts of fair procedures in a quasi-judicial process of this nature. How can these objectives be achieved in the absence of access to previous relevant decisions of the Tribunal...? How can fairness of process be observed when the respondent may know upon what evidence his officials may rely as to objective circumstances in a particular state [sic] and the applicant may not?"

MacMenamin J then went on to consider the relevant European authorities, in a passage which is one of the most impressive attempts to date to analyse the Convention jurisprudence in a post-ECHR Act case. He began by noting that Article 6(1) ECHR overlapped to a large extent with Article 34 of the Constitution; one difference between the two provisions is that Article 6(1) expressly requires judgments to be pronounced in public – however, this had not prevented the ECtHR from accepting that judgments can sometimes be pronounced in camera so long as the content of the decision itself is made public.[126] A second difference is that Article 6(1) also applies to administrative bodies, whereas the scope of Article 34.1 of the Constitution is confined to the courts.[127] While recognising that he was not bound by the judgments of the Court of Human Rights, the judge nevertheless made extensive reference to the case law of that court. In early judgments, the ECtHR had in fact held that a literal reading of Article 6(1) did not require the public announcement of judgments;[128] however, that interpretation had not been universally accepted even within the Court,[129] and more recent decisions appeared to emphasise that the public

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[125] [1998] 1 IR 359. MacMenamin J also referred to the case of *In re R Ltd* [1989] IR 126, in which the Supreme Court had ordered an application under section 205 of the Companies Act, 1963, to be held in public, on the basis that the public administration of justice was one of the requirements of the Constitution, unless the public nature of the proceedings would itself operate to deny justice.

[126] At this point, the judge quoted with apparent approval from GW Hogan and GF Whyte, *Kelly: The Irish Constitution* (Dublin, 2003) at 751, and refers to the case of *Campbell and Fell v. United Kingdom* (1985) 7 EHRR 165, in which the Court held that the decision of a prison board infringed Article 6(1) because the decision was not made public – and not because it was pronounced in private.

[127] At 24-25 of the judgment. This point is made by Hogan and Whyte at paragraph 6.1.257, where they rely for support on the cases of *Albert and Le Compte v. Belgium* (1983) 5 EHRR 553 and *Diennet v. France* (1996) 21 EHRR 254.

[128] *See Pretto v. Italy* (1984) 6 EHRR 182 and *Sutter v. Switzerland* (1984) 6 EHRR 272.

[129] *Sutter v. Switzerland* (1984) 6 EHRR 272, at 280, Dissenting Opinion of Cremona, Ganshof van der Meersch, Walsh and Macdonald JJ: "If the basic underlying concept of public scrutability is to be a

nature of hearings was a fundamental rule of the Convention – even where the hearing in question was that of a disciplinary tribunal rather than that of a court: *see Diennet v. France*,[130] which concerned disciplinary proceedings against a French doctor before the French Medical Association. MacMenamin J accepted that *Diennet* was authority for the proposition that the Convention requirement that justice be administered in public extended to quasi-judicial hearings "where such hearings are of serious moment to respondents".[131] It could hardly be argued that the applicants' hearing before the RAT failed this test.

In the end, MacMenamin J concluded that a constitutional reading of the relevant legislation necessitated a conclusion "that the Chairman not only has a negative discretion, i.e. not to publish decisions which are not of legal importance, but also a correlative positive discretion, which must be exercised...to actually publish decisions which *are* of legal importance."[132] The court concluded that there was a narrow duty on the Chairman to make available relevant tribunal decisions as requested or identified and as sought by the applicants; failure to do so amounted to an unlawful exercise of the Chairman's discretion, as well as being in breach of the applicants' rights to fair procedures and natural and constitutional justice pursuant to Article 40.3 of the Constitution.[133] The judgment is undoubtedly a victory for fair procedures; however, it is disappointing that, in spite of his detailed reference to the ECHR, the learned judge ultimately chose to decide the matter solely on the constitutional point.[134] Much to the State's chagrin, the High Court ruling has been upheld by the Supreme Court. However, the Supreme Court did not think it necessary to consider the Convention.[135]

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reality, a restricted access to judgments such as existed in the present case, i.e. restricted only to persons who could establish an interest to the satisfaction of a court official, falls short of what is required by the Convention. Public knowledge of court decisions cannot be secured by confining that knowledge to a limited class of persons..."

[130] (1995) 21 EHRR 554.

[131] At 27 of the judgment.

[132] At 32 of the judgment. Section 4A(b) of the Refugee Act, 1996, as amended.

[133] This was the order in respect of the second and third named applicants; the order in respect of the first named applicant was slightly different, because the first named applicant's case was heard before the Immigration Act 2003 came into force, so that the Chairman had not had the all-important discretion at that time. The order in his case was in the form of a declaration that the first and second named respondents' refusal to make available relevant decisions requested by him was in breach of his constitutional rights.

[134] At 35 of the judgment. In light of the decision he made, MacMenamin J concluded that "no issue arises under the European Convention on Human Rights Act.

[135] Unreported, Supreme Court, 26 July 2006, at 14 of the judgment.

Article 5 ECHR and the Right to Liberty Post- ECHR Act

Pre-Trial Detention and the Right to Bail

Although the Convention does not expressly mention the word "bail", the effect of Article 5(3) is to introduce a limited right to bail: arrested or detained persons are entitled "to trial within a reasonable time *or to release pending trial. Release shall be conditioned by guarantees to appear for trial.*" [Emphasis added.] The right to bail is also a constitutionally recognised guarantee, albeit one that is subject to a number of exceptions, in part thanks to the Bail Act.[136] In spite of the fact that inroads have been made into the right to bail under Irish domestic law, it is submitted that domestic law still provides, if anything, a greater level of protection against excessive or unlawful pre-trial detention than the ECHR. On the wording of Article 5(3), bail is not necessary where the accused is tried promptly; under Irish law, the grant of bail is the rule which must be justified by some important exception.

The applicant in *Maguire v. Director of Public Prosecutions*[137] was charged with the offence of membership of an unlawful organisation before the Special Criminal Court and was refused bail.[138] When his trial had still not commenced four months after the initial refusal of bail, the applicant reapplied pursuant to section 3(1) of the Bail Act 1997. That section states:

> (1) Where an application by a person for bail –
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> (a) has been refused by a court under section 2, and
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> (b) the trial of the person for the offence concerned has not commenced within 4 months from the date of such refusal,

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[136] Section 2 of the Bail Act provides that a court may refuse an application for bail if it is considered necessary to prevent the commission of a serious offence by the applicant. In exercising this discretion, the court must take into account the seriousness of the offence with which the person has been accused, the seriousness of the offence it is feared he will commit, the nature and strength of the evidence in support of the charge, any conviction previously committed while on bail, any previous convictions of the accused, any other offence with which the accused is charged and is awaiting trial.

[137] [2004] 3 IR 241; [2005] 1 ILRM 53.

[138] The respondent had argued that he represented a flight risk and also that he was likely to commit a further serious offence (the second ground being a reason to refuse bail under section 2 of the Bail Act 1997).

then, the person may renew his or her application for bail to that court on the ground of delay by the prosecutor in proceeding with his or her trial, and the court shall, if satisfied that the interests of justice so require, release the person on bail.

The High Court rejected the applicant's renewed application, ruling that in order to rely on section 3, the applicant would have to show that the delay in serving the book of evidence on him was attributable to the prosecutor. Finnegan P also stated that the only factors the court could take into account when there was an objection to bail were the factors set out in section 2(2) of the Bail Act, which lists six items to be taken into account, including the seriousness of the offence with which the accused was charged.[139]

Mr Maguire appealed to the Supreme Court, where his appeal was allowed and his bail application remitted to the High Court. Hardiman J, giving the judgment of the Supreme Court, took the view that the lower court had been incorrect in its interpretation of sections 2 and 3 of the Bail Act. The learned judge indicated that, in addition to the statutory and constitutional provisions on bail and the jurisprudence based thereon, the courts now also had to take into account Articles 5 and 6(1) of the ECHR. Article 5 guarantees the right to liberty and security of the person, with 5(1) allowing this right to be circumscribed by lawful arrest or detention when a person has committed an offence or "when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". Article 5(3) states that everyone had the right to trial "within a reasonable time or to release pending trial". In Hardiman J's view, section 2 of the Act was consistent with Article 5(1) in that both

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[139] Section 2(2) of the Bail Act states:

(2) In exercising its jurisdiction under subsection (1), a court shall take into account and may, where necessary, receive evidence or submissions concerning –

(a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,

(b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,

(c) the nature and strength of the evidence in support of the charge,

(d) any conviction of the accused person for an offence committed while he or she was on bail,

(e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,

(f) any other offence in respect of which the accused person is charged and is awaiting trial,

and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977.

recognised that detention may be permissible to prevent further offences where this is "reasonably considered necessary" by the court.[140] The learned judge also noted the Article 6(1) guarantee of "a fair and public hearing within a reasonable time"; given section 2(1) of the ECHR Act 2003, the Supreme Court was obliged to interpret the law in a way consistent with the State's Convention obligations.[141]

Hardiman J considered the possibility that section 2 of the 1997 Act created "a discrete, self-contained and exclusive jurisdiction in relation to cases where the section was invoked"; on this view, the only factors which could be taken into account for a bail application were those set out in that section, and excluded the consideration of any other factor, including the length of the bail applicant's pre-trial detention. Having considered the meaning of both Convention and constitutional rights, Hardiman J held that the exclusion of the length of time for which the applicant had been in pre-trial detention from the matters the High Court was entitled to take into account would endanger the applicant's rights under both Constitution and Convention. In conclusion, *Maguire* was a relatively Convention-friendly judgment in which regard was had to the provisions of the ECHR. However, it is unlikely that the result would have been any different even in the absence of incorporation. Furthermore, the case does not establish any absolute right to bail in circumstances where four months had passed since the original application: section 3(1) of the Bail Act requires the Court to grant it only if it is in the interests of justice to do so.[142]

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[140] [2004] 3 IR 241, at 250.
[141] [2004] 3 IR 241, at 251.
[142] This appears to be more or less consistent with the requirements of Article 5(3) ECHR, if a recent decision of the House of Lords is correct. In *R (O) v. Harrow Crown Court* Judgment of 26 July 2006 (HL), *The Times*, 10 August 2006, the House of Lords held that the two key requirements of Article 5(3) were that the prosecution must bear the overall burden of justifying a remand in custody and must advance good and sufficient reasons outweighing the presumption of innocence and the general presumption in favour of liberty; secondly, the judge must be entitled to take account of all relevant considerations pointing for and against the grant of bail in order to exercise meaningful control over a person's pre-trial detention.

The Detention of Persons Illegally Present in the State

The State has extensive powers to detain persons who are in the State illegally. This power of detention was challenged in an early application for a declaration of incompatibility in *NA v. The Governor of Cloverhill Prison*.[143] The applicant, NA, was detained pursuant to section 9(8) of the Refugee Act 1996 (as amended). He had initially been arrested on the basis that he was not in possession of a valid passport or other equivalent proof of identity.[144] He then applied for refugee status and was subsequently detained on the basis of section 9(8). That section allows an immigration officer or Garda to detain a person to whom the Act applies in certain circumstances;[145] in NA's case, the Gardaí suspected that he had not made reasonable efforts to establish his true identity, contrary to section 9(8)(c), and that he had also breached 9(8)(f), which covers a situation where the person is thought to have destroyed his identity or travel documents or been found in possession of forged travel documents.[146] Any person so detained must be brought before a District Judge as quickly as is practicable; if the judge agrees that section 9(8) applies, he/she has the option of either detaining the person for not more than 21 days, or releasing the person subject to such conditions as the judge thinks fit.[147] If the Garda or immigration officer changes his mind, and forms the opinion that none of the paragraphs of subsection (8) applies, the person may be brought before the District Judge; if the judge shares this

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[143] *NA v. The Governor of Cloverhill Prison, Judge Brady, Judge Coughlin, The Commissioner of An Garda Siochana, The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* Unreported, High Court, Ryan J, 26 January 2005.

[144] In fact, the applicant, who stated that he was an Albanian national, initially told Gardaí he was an Italian, and produced identification to that effect (including a social security card).

[145] Section 9(8) of the Refugee Act 1996 (as amended) states that:

> (8) Where an immigration officer or a member of the Garda Siochana, with reasonable cause, suspects that an applicant –
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> (a) poses a threat to national security or public order in the State,
> (b) has committed a serious non-political crime outside the state,
> (c) has not made reasonable efforts to establish his or her true identity,
> (d) intends to avoid removal from the State in the event of his or her application for asylum being transferred to a convention country pursuant to section 22 or to a safe third country (within the meaning of that section),
> (e) intends to leave the State and enter another State without lawful authority, or
> (f) without reasonable cause has destroyed his or her identity or travel documents or is in possession of forged identity documents,
>
> he or she may detail the person in a prescribed place (referred to subsequently in this Act as "a place of detention".

[146] On the facts, it did appear that NA had been in possession of forged documents.

[147] Section 9(10) of the Refugee Act 1996 as amended. If the judge decides to release the person, the conditions imposed can include the surrender of passport or travel documentation, or undertakings to reside in a particular place in the state or to report to a particular Garda station at prescribed intervals.

view, he must release the person.[148] However, where the judge decides to detain the person, that detention may be renewed/extended for further periods of 21 days; there does not appear to be any limit on the number of renewals.[149]

The applicant brought judicial review proceedings seeking declaratory relief under a number of headings, including a declaration that sections 9(8)(c) and (f) as applied by section 9(10)(b)(i)[150] of the Refugee Act 1996 were unconstitutional, and a declaration pursuant to section 5 of the ECHR Act that the sections were incompatible with the State's obligations under the Convention. The applicant argued that section 9 was unconstitutional insofar as it permitted the preventative detention of the applicant without his being charged with a criminal offence. In such circumstances, the detention could only be lawful if it continued for the shortest practicable time – a requirement that was not apparent from the section.[151] Ryan J preferred the State's argument that the Refugee Act constituted a balancing act between the rights of a person applying for refugee status and the State's interest in controlling immigration in the interests of the common good.[152] To that end, the judge noted that it was legitimate to attempt to establish the identity of an applicant, whose sole basis for remaining in the State was to allow his application for refugee status to be decided. Ryan J then pointed to the fact that the impugned section required an applicant to be

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[148] Section 9(10)(c).

[149] Section 9(10)(d). The applicant's detention was authorised by District Judge Brady on the basis of subsections (c) and (f), although in a subsequent application the same judge accepted that only the requirements of subsection (c) had been satisfied; when that 21-day period expired, the applicant was brought before Judge Coughlin, who held that both paragraphs (c) and (f) justified the applicant's continued detention. The applicant argued that it was not open to Judge Coughlin to detain him pursuant to section 9(8)(f) since that basis had been rejected in the earlier order of Judge Brady. However, the High Court disagreed, stating that "[T]he section clearly envisages a separate hearing in the District Court on each occasion when a detention order or a further detention is sought … It follows that Judge Coughlin was not wrong to interpret the section in a way which entitled him to look afresh and come to the conclusion that another paragraph of sub-s. (8) applied in addition to (c)." At 11 of the judgment.

[150] Section 9(10)(b)(i) states that, where a person is taken before a District Judge under the section, the judge may, "subject to paragraph (c), and if satisfied that one or more of the paragraphs of subsection (8) applied in relation to the person, commit the person concerned to a place of detention for a period not exceeding 21 days from the time of his or her detention." The subparagraph (c) referred to states that "If, at any time during the detention of a person pursuant to this section, an immigration officer or a member of the Garda Siochana is of opinion that none of the paragraphs of subsection (8) applies in relation to the person, the judge shall release the person."

[151] At 15 of the judgment. The applicant also argued that 9(c) was deficient in that it did not give any precise list of documents that would be acceptable to avoid a finding that the applicant had not failed to establish his identity. Ryan J rejected this argument on the basis that it was necessary for the section to be flexible given the possibility that it might be difficult to obtain and produce documents relating to the identity of an applicant for asylum.

[152] At 18 of the judgment.

brought before a District Court as soon as was practicable; that each period of detention could last no longer than 21 days; that the section allowed for his/her release if the situation changed; and that the District Court had discretion as to whether to direct the applicant's detention or his release subject to conditions.

As for the applicant's argument that his detention was contrary to Article 5 ECHR, the judge had little difficulty in finding that the section was not in breach of that Article. He relied on the exception in Article 5 which allows for "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or is a person against whom action is being taken with a view to deportation or extradition". The applicant had argued that the exception could not apply, as the Article expressly referred to detention to prevent unauthorised entry, not to a situation where a person had already effected that entry. The learned judge rejected that interpretation as "a much too technical interpretation of a document embodying principles of protection of rights. The Convention is not to be read as if it were a revenue statute or a criminal provision."[153] Ryan J also noted that in *Chahal v. United Kingdom*[154] the Court of Human Rights had upheld the proportionality of a period of six years' detention pending deportation, which he stated "gives some indication of the flexible approach that can be taken by the Court in cases of deportation", although he added that he did not think it was particularly relevant to the instant case. It is submitted that the learned judge was correct in holding that the Convention did not provide any relief for the applicant in this case; the Convention case law on pre-trial detention, as exemplified by *Chahal*, is almost breathtaking in the extent to which it allows Article 5 rights to be limited in circumstances where the affected person has committed no crime.

The Article 8 Right to Privacy in the Context of Investigations

Article 8 ECHR guarantees, *inter alia*, the right to respect for private and family life. The concept of privacy in more general terms has also been recognised as an unenumerated personal right under the Constitution: *Kennedy v. Ireland.*[155] Naturally,

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[153] At 18 of the judgment.
[154] (1996) 23 EHRR 413.
[155] [1987] IR 587; [1988] ILRM 472, at 591. The plaintiffs in that case complained that the state tapping of their telephones was a breach of their right to privacy. Hamilton P, in the High Court, had little difficulty in accepting that such a right had constitutional protection: "The right to privacy is not an

any type of State investigation into an individual's private activities will put in issue his/her right to privacy; however, this right is not absolute, and it will generally not be difficult to justify its restriction provided the State can point to sufficiently important countervailing interests in the common good. This was to be discovered by the applicant in *Caldwell v. Judge Mahon and Ors*,[156] who argued that the activities of the respondent's Tribunal of Inquiry ("the Mahon Tribunal") breached his right to privacy under Article 40.3 of the Constitution and Article 8 ECHR. The matters challenged by the applicant dated back to November 2003, and were thus outside the scope of the ECHR Act. Nevertheless, Hanna J adopted the position that he could have regard to the Convention and its jurisprudence on the basis that they had persuasive authority.[157]

The applicant's main complaint was that the tribunal's inquiry would breach his Article 8 rights through the disclosure of his confidential business affairs. However, the Court concluded that the interference with the applicant's right to privacy was in accordance with law, necessary in a democratic society, related to a pressing social need, and amounted to a proportionate interference with his rights.[158] It is submitted that this was the correct result in all the circumstances.

The case is not notable because it involved the overthrow of the existing Irish legal principles – it does not – but because of the type of analysis undertaken by the High Court. In spite of the fact that the ECHR Act did not apply to the case, Hanna J undertook an examination of the case that closely resembled the process used by the Court of Human Rights itself, as is borne out by the form of his findings (*supra*). The

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issue, the issue is the extent of that right or the extent of the right 'to be left alone'." In so doing, he adopted the formulation of that principle as set our by McCarthy J in his dissenting judgment in *Norris v. Attorney General* [1984] IR 86. McCarthy J had, in turn, borrowed the phrase "the right to be let alone from US Federal judge Brandeis J. In *Norris*, a majority of the Supreme Court had declined to recognise a general right to privacy – albeit in very different circumstances.

[156] Unreported, High Court, Hanna J, 15 February 2006.

[157] *O'Brien v. Mirror Group Newspapers* [2001] 1 IR 1, at 33, *per* Denham J. Denham J's judgment was a partial dissent; she agreed with the majority of the Supreme Court (Keane CJ, Murphy and O'Higgins JJ) that the award in the instant case had been too high; on the other hand, she also thought that there were grounds for revisiting the Supreme Court's judgment in *de Rossa v. Independent Newspapers* [1999] 4 IR 432. In that case, the Court had rejected the suggestion that juries should be given more detailed directions on the subject of damages in defamation cases. The case is discussed in more detail in Chapter 7.

[158] At 15 of the judgment.

learned judge had regard to texts on the scope of Article 8,[159] and to Article 8 judgments of the ECtHR. If there is any criticism to be made of the judgment, it is that the cases referred to were factually very different from that before the High Court.[160] However, it is interesting to see an Irish judge adopt the procedure of the Strasbourg Court, in asking whether the interference with the right is (a) prescribed by law, (b) necessary in a democratic society, and (c) proportionate. Indeed, the recent case law of the Court of Human Rights indicates that, if the domestic courts are unable to examine issues of proportionality, then access to those courts will not amount to an effective domestic remedy under Article 13 ECHR: *see Keegan v. United Kingdom*.[161] In that case, the police had forcibly entered the applicants' home in the belief that an armed robber lived there. They rammed the door and searched the premises. Upon realising their mistake, they apologised to the Keegans and had the door repaired. The applicants brought proceedings against the Chief Constable of Merseyside Police, alleging that they had been caused terror, distress and psychiatric harm, but were unsuccessful in both the County Court and the Court of Appeal, in spite of Kennedy LCJ's finding that if the police had made proper inquiries there would have been no need for the search warrant. The Court of Human Rights unanimously found that the State had breached the applicants' Article 8 right to respect for their home, and their Article 13 right to an effective remedy, as they did not have any means of obtaining redress for the violation of Article 8 in the domestic courts.[162]

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[159] Hanna J referred to Lester and Pannick, *Human Rights Law and Practice* (2nd Edition, 2004), at 261-263, and Claire Ovey and Robin White, *Jacobs and White, The European Convention on Human Rights* (3rd Edition, Oxford University Press, 2002) at 201.

[160] The main Article 8 judgment referred to is *Goodwin v. United Kingdom* (2002) 35 EHRR 447, which concerned the right of a transsexual to have the gender reassignment recorded on the official birth certificate. The Court referred briefly to *Niemitz v. Germany* (1992) 26 EHRR 97, which was slightly more to the point, in that the Court of Human Rights accepted in that case that the search of a lawyer's office could constitute a breach of his Article 8 rights. The judge also referred to *Bladet Tromso v. Norway* (2000) 29 EHRR 125, a case which did not involve Article 8, but Article 10: the applicants had been convicted of criminal libel after publishing articles on seal hunting in Norway.

[161] Application No 28867/03 *Keegan v. United Kingdom*, Judgment of 18 July 2006, *The Times*, 9 August 2006.

[162] The British courts had held that they could only award damages if there was malice on the part of the police; negligence did not qualify. It is submitted that the emphasis placed on the proportionality principle by the Court of Human Rights supports the argument made in Chapter 3 of this thesis that the standard of review of administrative action currently applied in this jurisdiction falls below that necessary to avoid incurring the wrath of the ECtHR, and that a proportionality test should apply. Admittedly, had Mr and Mrs Keegan lived in Ireland, they simply could have relied upon their constitutional right to inviolability of the dwelling save in due course of law as a ground for claiming damages against the state.

The Convention and Irish Extradition Law

The Court of Human Rights has potentially limited Ireland's discretion to make and apply extradition treaties: the Court has long accepted that Article 3 ECHR applies to extraditions, in the sense that a person may not be extradited if they are likely to be subject to torture or inhuman or degrading treatment in the State to which they are sent. Nor is the extraditing State's duty limited to satisfying itself that a breach of Article 3 will not occur: if the person whose extradition is proposed can show that he could be exposed to a breach of his Convention rights in the country seeking his extradition, he may be able to convince the court to reject the application. This potential breach could be of Article 6 (in the sense that the accused may be unlikely to receive a fair trial), or of Article 3, in that he may be subjected to a punishment that is inhuman or degrading. The most famous case in point is that of *Soering v. United Kingdom*,[163] in which the Court of Human Rights held that the extradition of a German prisoner to the Virginia, USA, would amount to a breach of his Article 3 rights in circumstances where he would have been detained on death row for several years prior to his execution. Recently, the Court of Human Rights has condemned as a breach of Article 3 unsatisfactory prison conditions: *Mayzit v. Russia*.[164] It is unclear whether the risk of imprisonment in unsanitary or overcrowded cells would be sufficient to convince an Irish court that extradition should be refused; considering conditions inside certain Irish prisons (notably Mountjoy[165]), such a result would certainly be politically embarrassing – particularly if our extradition partners began to return the favour.

An attempt to rely on the ECHR Act in resisting extradition was made in *Minister for Justice v. McArdle*.[166] The respondent was the subject of a European Arrest Warrant, being suspected by the Spanish authorities of the murder of his wife while in Malaga.

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[163] (1989) 11 EHRR 439. In fact, this was the case which established that the proposed expulsion of a person to a country where he/she would suffer a breach of Article 3 rights amounted to a breach of those rights by the expelling State. The principle was extended to persons in other contexts, including asylum seekers, in *Cruz Varas v. Sweden* (1992) 14 EHRR 1.

[164] Application No 63378/00 *Mayzit v. Russia*, Judgment of the Court of Human Rights, 6 July 2005.

[165] According to the *Fourth Annual Report of the Inspector of Prisons and Places of Detention for the Year 2004-2005* (Kinlen J, Inspector of Prisons), during one of his surprise visits to Mountjoy Prison, there were 501 prisoners in a prison with a maximum capacity of 464. There were also an average of 2.5 prisoners per cell – for which the cells were not suitable (14 of the Report).

[166] [2005] IEHC 222.

The respondent was not so audacious as to suggest that his Article 3 rights would be in jeopardy if extradited to Spain; he relied instead on a general pleading that the extradition would breach his Convention rights in general, and would thus be in breach of the 2003 Act. Finnegan P disagreed: no argument had been advanced to suggest that the respondent's trial would involve a breach of his rights under either the Convention or the Irish Constitution.

One salutary aspect of *McArdle* was the High Court's elucidation of the factors to be considered when a Convention argument was raised in the extradition context. Reflecting the current trend of referring to English authorities when judging a matter involving the new human rights legislation, the President cited the judgment of Sedley LJ in *R v. Secretary of State for the Home Department, ex parte Rachid Rimda.*[167] Mr Rimda claimed that extradition to France would expose him to a risk of an unfair trial, contrary to Article 6 ECHR. Although satisfied that such was not the case, Sedley LJ emphatically rejected the Home Secretary's assertion that, even if the French trial was unfair, the problem could be cured by an application to the Court of Human Rights. It is submitted that the Home Secretary's argument was either disingenuous in the extreme or based on a fundamental misunderstanding of the entire Convention system. Sedley LJ recognised that the point was flawed: in spite of France's monist system, the Strasbourg Court was not a court of final appeal for the French legal system, nor was there any recourse to it as of right. To this criticism might be added the fact that, although a judgment of the ECtHR may trouble the offending State, Strasbourg has no power to order either a retrial or the release of a prisoner where his/her trial was unfair. The extraditing State therefore had to be satisfied that the prisoner was not at risk of an unfair trial in the receiving State, without regard to any application he might make to the international system of Strasbourg. Finnegan P approved this approach, thus hopefully precluding the Minister for Justice from advancing any similar (and misguided) argument in this jurisdiction.

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[167] [2002] EWHC 1278 (Admin).

Article 2 versus Article 10

Restrictions on the press have long been controversial and must, in general, be justified with some very significant countervailing interest – particularly if one party to the action wishes to restrain publication before it has even taken place. However, such cases are not unheard of, particularly where the countervailing right protected is the right to life. As dramatic as this may seem, it is not impossible to imagine a situation where the publication of a newspaper article might lead (however indirectly) to an attack on the life of another. As will be seen in Chapter 7, Article 10 rights are not absolute; the right may legitimately be restricted, either on the grounds of one of the justifications set down in 10(2), or because the exercise of the right to freedom of expression will have a detrimental effect on one of the other Convention rights. Thus, in England, injunctions have been granted prohibiting the press from revealing the whereabouts, post- their release from prison, of a number of that country's more notorious criminals, including Thompson and Venables (the murderers of the toddler Jamie Bolger),[168] and Mary Bell, who, like Thompson and Venables, killed a young boy while still a child herself.[169]

To date, no such order has been granted by an Irish court, in spite of the efforts of the plaintiff in *Foley v. Sunday Newspapers Limited*.[170] The plaintiff sought an interlocutory injunction prohibiting the defendant from publishing material which the plaintiff alleged amounted to a real and serious risk to his right to life. The defendant had published articles on the plaintiff in which he was described as a major drug dealer and criminal who had been the victim of three attempts on his life. The plaintiff argued that the conventional remedy of damages in defamation was not open to him, as he had no good name to speak of anyway.[171] Kelly J concluded that there was no justification for granting an order preventing the defendant from writing about the

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[168] [2001] Fam 430.

[169] *X (A Woman Formerly Known as Mary Bell) v. O'Brien* Unreported, QB, Family Division, Butler-Sloss J, 21 May 2003. Admittedly, Mary Bell's case is slightly different. The injunctions granted in favour of Thompson, Venables and Carr were intended to preserve their right to life; in Bell's case, the primary reason for the injunction was to safeguard the right to privacy of her daughter. Given the passage of time since she had committed the murder, it may have been thought that Bell's life was simply not in real danger should her whereabouts be revealed; that did not, however, mean that her daughter would not be subject to opprobrium should her true identity be known.

[170] [2005] 1 IR 88.

[171] [2005] 1 IR 88, at 91.

defendant pending the trial of the action, provided that they did not exhort violence towards the plaintiff. On the issue of prior restraint, Kelly J stated that the Irish and English courts had always been slow to grant injunctions which would infringe the freedom of expression enjoyed by the media.[172] In that regard, the learned judge referred to Article 10 and the manner in which it has been interpreted by the English courts post-ECHR Act.[173] It is submitted that this case does not mean that the Irish courts will never grant an injunction if it is deemed necessary to protect the right to life; simply that they did not feel it appropriate on the unusual fact of the *Foley* case.[174]

The ECHR Act and Border Control

Irish immigration policy has been under fire for quite some time, particularly as regards the law in relation to asylum.[175] Naturally, the Convention can have no real impact on most aspects of immigration law, which remains a matter for the governments of the Contracting Parties. However, in spite of the fact that the right to asylum is not expressly mentioned in the Convention,[176] it has been suggested that the ECHR Act is still likely to have some impact on this area of law, particularly on the grant of deportation orders, discrimination law, access to the courts and family rights.[177] The basis for such speculation lies in the fact that the Court of Human Rights has, on occasion, found States to be in breach of certain Convention Articles in

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[172] [2005] 1 IR 88, at 102.

[173] At 103 of the judgment, Kelly J referred to the judgment of Butler-Sloss P in *Venables v. News Group Newspapers* [2001] Fam 430, at 450, in which she held that the media's freedom to publish could not be restricted unless the need for the restriction fell within the restrictions set down in Article 10(2), which had to be construed strictly, and were proportionate to the legitimate aim pursued. Similar comments were made by Munby J in *Kelly v. BBC* [2001] Fam 59, at 70.

[174] The plaintiff was a somewhat shady underworld figure, and three attempts had already been made on his life. The Court held that, in describing these attempts and in publishing the opinion of persons who said they would be surprised if he died in his bed, the newspaper was not inciting violence against the plaintiff.

[175] Eilís Ward suggests that "In relation to asylum seekers, the State's response has been to keep them out": "Ireland's Refugee Policies: A Critical Historical Overview" from Dennis Driscoll (ed) *Irish Human Rights Review 2000* (Round Hall Sweet & Maxwell, 2000), 157 at 157.

[176] The omission was due to the drafters' recognition that the right to asylum challenges the State's right to control entry to its territory, one of the core aspects of sovereignty; Suzanne Egan, "Refugee Law" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 81, at 84.

[177] Noeleen Blackwell, "Asylum and Immigration Law", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 100, at 100.

expelling a person from their territory.[178] As with the Court's decisions on extradition, it is not purporting to lend the Convention extraterritorial effect;[179] the breach occurs because there is a causal nexus between the action of the Contracting State in expelling the person, and as a result that State is held liable for the "foreseeable consequences" of deportation, extradition or expulsion.[180] To date, the Convention has proved a fertile ground for applications for judicial review of ministerial decisions to deport non-nationals.

A major element of Irish law in relation to the entry and residence of non-nationals involves asylum. The number of refugees has increased dramatically over the past decade.[181] The Court of Human Rights appears to take a dim view of States who fail to conduct substantive examinations of asylum applications, and rely on procedural shortcomings in applications to justify deportations. It has been argued that Irish law may breach this requirement, given that Section 7 of the Immigration Act, 2003, requires applicants to inform the Refugee Applications Commissioner of their address within five working days of making their application, on pain of withdrawal of the application – the consequence of which may be the refusal of the application.[182] The Convention does not always undermine national law, however: domestic prohibitions

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[178] For a relatively early suggestion that the European Convention on Human Rights could have a role to play in limiting the State's power to deport, *see* Liz Heffernan, "In Search of a Human Rights Approach to Refugees" from Anthony Whelan (ed) *Law and Liberty in Ireland* (Oak Tree Press, 1993), 184, at 194-196.

[179] The Grand Chamber of the Court of Human Rights has held that the Convention does not have extraterritorial effect: Application No 52207/99 *Bankovic v. Belgium and 16 Other Contracting States* Judgment of 12 December 2001. The applicants in that case included one person who had been injured during the NATO bombing of Belgrade and several relatives of people who had been killed. The ECtHR held that the application was inadmissible because the Convention did not apply to the extraterritorial acts of the respondent States. Kentridge argues that this principle should not be applied too strictly, and that, where a State exercises its police powers in another State it ought to afford the same protection to the people of that State; Janet Kentridge, "The Reach of the Human Rights Act 1998: Its Jurisdictional Scope" from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 5, at 35.

[180] Janet Kentridge, "The Reach of the Human Rights Act 1998: Its Jurisdictional Scope" from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 5, at 20. For an exploration of the concept of causation in this context, see pages 18-22.

[181] Conor Foley and Keir Starmer, *Signing Up for Human Rights: The United Kingdom and International Standards* (Basingstoke Press, Amnesty International United Kingdom, 1998), at 13. At the time of publication, they estimated that there were around 18 million refugees or people who were internally displaced within their own borders.

[182] Suzanne Egan, "Refugee Law" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 81, at 92.

on racial discrimination may also be bolstered by recourse to Article 14 ECHR;[183] Strasbourg has gone so far as to hold that discrimination on the basis of race may of itself amount to a breach of Article 3.[184] This may prevent the governments of Contracting States from introducing any racist immigration law favouring certain racial groups above others. However, in one area the Convention is likely to be of no benefit: it will still not be possible to have asylum or immigration cases decided on the merits by the courts – according to the ECtHR, Article 6 does not require such decisions to be taken by the judiciary, since they are a question for the public authorities.[185] Furthermore, while asylum seekers may invoke the Article 5 right to liberty,[186] the jurisprudence of the Court of Human Rights is not encouraging on that score: *see Chahal v. United Kingdom*,[187] where separate periods of captivity were held not to violate Article 5(1), even though they added up to a long period when taken together.

The Article 3 Right to Freedom from Torture and Inhuman and Degrading Treatment and the Power to Deport

Nevertheless, certain aspects of the Convention do appear to limit the State's discretion in immigration matters. The most obvious situation in which a deportation will be contrary to the ECHR is where the applicant can prove a breach of his/her Article 3 rights (Article 3 is the non-derogable prohibition on torture and inhuman and degrading treatment). The breach occurs, not because the expelling State is itself meting out treatment contrary to Article 3, but because it is likely that the applicant will suffer torture or inhuman or degrading treatment in the State receiving him.[188]

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[183] However, Mullan argues that the ECtHR's record in the area of discrimination has actually been rather disappointing up to this point; *see* Grainne Mullan, "Discrimination Law" from *ECHR and Irish Law* (Bristol: Jordan Publishing Limited, 2004), 217, at 241.

[184] *See East African Asians v. United Kingdom* (1981) 3 EHRR 76; at paragraph 196 of its decision, the European Commission on Human Rights confirmed its position that discrimination based on race could of itself constitute degrading treatment in appropriate circumstances.

[185] *See* Blackwell, at 104. The current leading case is *Maaouia v. France* (2001) 33 EHRR 42.

[186] The Irish constitutional equivalent to Article 5 ECHR is Article 40.1.4, which provides that "No one shall be deprived of his personal liberty save in accordance with law."

[187] (1997) 23 EHRR 413. The Court of Human Rights felt that the authorities had acted with due diligence and that there were sufficient guarantees against the arbitrary deprivation of Chahal's liberty while he was awaiting deportation. The Court was undoubtedly not immune to the fact that the UK cited national security grounds and Chahal's status as a suspected terrorist in arriving at its decision.

[188] The Court of Human Rights has adopted a "sliding scale" approach to alleged breaches of Article 3, which prohibits various types of behaviour, of which torture is the most serious, and inhuman or degrading treatment is less so – although still equally impermissible.

Thus, where a person can show that he is likely to be tortured if returned to his country of origin, his expulsion from the Contracting State is, under the ECHR, a breach of Article 3.[189] The test to be applied is whether there is a "real risk" that the prospective deportee's Convention rights will be infringed if they are removed from this State.[190] The nature of inhuman or degrading treatment can vary greatly; in one case, the ECtHR held that it would be a breach of Article 3 to return an AIDS sufferer to a country where his condition was poorly understood by society and where he would receive inadequate medical treatment.[191] Nor is it always necessary for the applicant to show that he/she would run a personal risk of persecution, but merely that there was a general danger.[192]

Dramatic as it is, it is unlikely that Strasbourg's Article 3 jurisprudence will form the basis of many successful judicial reviews of deportation orders. This is simply because those adjudicating on applications for asylum must, by definition, consider whether the applicant has cause to fear persecution in his/her country of origin.[193] If the adjudicator or, on appeal, the Refugee Appeals Tribunal, fails to take such considerations into account, the applicant will have a good case for judicial review – although the applicant admittedly has an uphill struggle in a situation where the Minister/RAT *had* considered the treatment the applicant would be likely to receive in his/her home country, but had made a finding of fact that the applicant's concerns were unfounded.[194] To date, there do not appear to have been any cases in which

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[189] However, there must be substantial grounds for believing that the applicant will suffer such treatment if returned to their country of origin; if the belief is not well-founded, the deportation of the individual will not amount to a breach of Article 3 ECHR: *see Cruz Varas and Ors v. Sweden* (1992) 14 EHRR 1, in which the applicants unsuccessfully argued that their return to Chile would lead to a breach of their rights under Article 3; the ECtHR held that there were insufficient grounds for this belief. The Court reached a similar conclusion in *Vilvarajah and Ors v. United Kingdom* (1991) 14 EHRR 248, holding that the applicant Tamils had not established substantial grounds for showing that they would be subject to torture or inhuman or degrading treatment if returned to Sri Lanka – in spite of the fact that they alleged they had been persecuted in that country in the past.

[190] On this point, *see* Steve Foster, *Human Rights and Civil Liberties* (Pearson Longman, 2003), at 67ff.

[191] *D v. UK* (1997) 24 EHRR 423. The ECtHR held that it would breach Article 3 to remove a late-stage AIDS sufferer to St Kitts, where he would have no medical treatment, accommodation or family support.

[192] *Ahmed v. Austria* (1997) 24 EHRR 278.

[193] For a summary of the relevant procedures and legislation, *see* Bríd Moriarty and Dr Anne-Marie Mooney Cotter (general editors), *Law Society of Ireland: Human Rights Law* (Oxford University Press, 2004), at 229-256.

[194] Such considerations will not arise in cases to which the Dublin Convention applies. This Convention is a piece of European Union law and is properly entitled "The Convention determining the State responsible for examining applications for asylum lodged in one of the Member States". Its principal goals were to establish a common formula for deciding which Member State had responsibility for

reliance on Article 3 ECHR has formed the basis of successful judicial review proceedings of decisions to deport.[195]

Article 2 ECHR and the Right to Life

The Convention's right to life guarantee is contained in Article 2 ECHR.[196] That Article was relied upon in *Makumbi v. Minister for Justice, Equality and Law Reform*,[197] in which the applicant, a Ugandan national and applicant for refugee status, sought to resist her return to the United Kingdom pursuant to Council Regulation (EC) No 343/2003[198] on the basis that she was likely to commit suicide if sent back to that country. The applicant had applied for asylum in the UK; while that application was pending, she made her way to Ireland and made a further application for asylum in that State. The fact of the applicant's earlier UK application was discovered after she was fingerprinted (she had expressly denied having applied for asylum elsewhere in the EU), and the respondent made a transfer order. It subsequently transpired that the

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deciding each particular application for asylum, and to ensure that each application should only be processed by one Member State: *see* Refugee Council Briefing, "The Dublin Convention on Asylum Applications: What it Means and How it's Supposed to Work", August 2002, at 1. The Convention has received ample attention elsewhere (*see*, e.g., Clotilde Marinho (ed), *The Dublin Convention on Asylum: Its Essence, Implementation and Prospects* (European Institute of Public Administration, 2000); but, in short, it means that asylum seekers must make their application in the first EU country they enter. Where they are found to have passed through another EU Member State on the way to the one in which they make their application, they may be returned to that first Member State. The difficuty with this is that each Member State is permitted to apply their own laws to asylum applications, which can lead to inconsistent results and, in some cases, lead to asylum seekers being returned to countries which some Member States consider "safe" but others do not. On this point, and for an argument that the Convention may create a danger of *refoulement*, *see* the Refugee Council Briefing referred to *supra* at 3ff, and the Irish Refugee Council, "Fact Sheet on the Dublin Convention" at 2ff. The UNHCR has also expressed reservations about the Convention: *see*, generally, UNHCR, "Revisiting the Dublin Convention: Some Reflections by UNHCR in Response to the Commission Staff Working Paper". For a critique of the asylum procedures applied in the EU, *see* Justice, *Asylum: Changing Policy and Practice in the UK, EU and Selected Countries* (Justice, 2002).

[195] The applicant in *Agbonlahor v. Minister for Justice*, Unreported, High Court, Herbert J, 2005 attempted to raise this point, but failed. It would appear to be an extremely difficult threshold to pass.

[196] Article 2 reads as follows:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    a. in defence of any person from unlawful violence
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.

[197] Unreported, High Court, Finlay Geoghegan J, 15 November 2005.

[198] That regulation allows third country nationals to be returned to the first EU country they entered. The first country is required to readmit them. It is subject to strict time limits.

applicant had a history of severe clinical depression, self harm and suicide attempts. She had informed her doctor that if she was sent back to the UK she would kill herself; her doctor viewed this statement as a serious threat, and felt that she would benefit from psychiatric intervention.[199]

The applicant sought a number of reliefs, including an injunction preventing the Minister from transferring her to the UK so long as she remained a suicide risk.[200] To that end, she relied upon "perhaps the most fundamental of human rights, the right to life",[201] as protected by both Article 40.3.2° of the Constitution and Article 2 of the ECHR, which applied by virtue of sections 2[202] and 3[203] of the ECHR Act 2003. The kernel of the applicant's argument was that, at the very least, these provisions imposed an obligation on the State to consider the new medical and factual evidence indicating that she was a suicide risk before implementing the order.

The respondent's "rather stark" argument was that such an obligation did not exist. The Minister submitted that he had no discretion under the procedures set down by the Directive: he had to return her to the country of her first asylum application. In the event, the High Court disposed of the application on the basis of the interpretation of the Council Directive, without conducting any examination of the constitutional or Convention arguments. Finlay Geoghegan J rejected the State's argument on that point: after examining the wording of the provisions, while the first country had an obligation to "take back" the applicant, Ireland had no obligation to return her.[204] The judge also noted that transfers had to be "carried out in accordance with the national law of the requesting State",[205] and it followed that "If the national law of Ireland prohibits the carrying out of the transfer of a particular applicant (as is contended on behalf of the applicant herein) then it does not appear to me that there is anything in

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[199] At 5.
[200] The applicant also argued that the Minister's decision to transfer her to the UK while she was a suicide risk was void and ultra vires, and sought an order of mandamus compelling the Minster to consider her application for asylum in Ireland.
[201] *Per* Finlay Geoghegan J, at 19, quoting from *In re the Illegal Immigrants Bill* [2002] 2 IR 310, at 410.
[202] Section 2 of the European Convention on Human Rights Act 2003 requires the Irish courts to interpret and apply the law in a manner compatible with the State's Convention obligations.
[203] Section 3 of the European Convention on Human Rights Act 2003 imposes a duty on organs of the State to perform their functions in a manner compatible with the Convention.
[204] At 14 of the judgment.
[205] Article 20(1)(d).

the Council Regulation which prevents the respondent determining, even at a late stage in the process, not to effect a transfer."[206]

Rather than granting the orders sought, Finlay Geoghegan J granted an injunction pending the determination by the respondent of the application that he should not implement the transfer order, along with a declaration that the respondent did indeed have discretion not to implement the transfer order and to revoke such an order, and another that the facts and constitutional justice required the determination of the applicant's request not to implement the transfer order. This ruling is more radical than it might at first sight appear; the Minister had traditionally relied on the Dublin Convention as a quick and easy way of disposing of applicants for asylum who had already made that application in another EU Member State. His reasoning had been that, when such a person applied for asylum in Ireland, that application could not be determined in this State, nor could the person be permitted to remain, whatever the circumstances, because (a) Ireland had no discretion not to implement a transfer order, and (b) Ireland had no power to revoke such an order once made. The judge had little difficulty in disabusing the State of these misconceptions. The obvious meaning of her judgment is that the State cannot implement a transfer order where to do so would be contrary to the domestic law of the State; the implication is that the Minister cannot therefore implement a transfer order where that would endanger the human rights of the person concerned in a manner that would not be tolerated under Irish law. *Makumbi* itself quite literally involved a matter of life and death; however, there is no reason why the same principle should not be applied to other cases and other rights; however, the threat to those rights would probably have to be proven to be real and substantial in order to render unreasonable any decision of the Minister to remove the applicant to the first country.[207]

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[206] At 16 of the judgment.

[207] It is worth noting that a similar argument failed to impress the High Court in *Cosma v. Minister for Justice* Unreported, High Court, 15 February 2006 and Supreme Court, 10 July 2006. However, the medical evidence in that case was weaker.

A Major Ground of Review: Article 8 ECHR and the Right to Private and Family Life

According to Strasbourg, another ground with the potential to limit the State's discretion in immigration – and, primarily, asylum – matters is Article 8 ECHR, which guarantees a number of rights including the right to privacy and family life.[208] Once the enactment of the ECHR Act made it possible to rely on Article 8 in the Irish courts it was inevitable that this ground would become an attractive way of bolstering an application to remain in the State, particularly to those whose stay would previously have been secured by the birth of an Irish born child.[209] The Court of Human Rights has long accepted that it may be possible to resist removal from a Contracting State where this would infringe the right to family life under Article 8: *see*, *inter alia*, *Beldjoudi v. France*.[210] The right to family life is, of course, protected under the Irish Constitution; however, the ability of non-nationals to rely on the Constitution appears to be somewhat circumscribed; in any case, the family which the Constitution guards

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[208] The case law of the Court of Human Rights in relation to Article 8 is breathtaking in its volume, scope and diversity: *see* e.g., *Keegan v. Ireland* (1994) 18 EHRR 263, in which the Court recognised that an unmarried father could rely on Article 8 to vindicate his right to family life with his illegitimate child; *Norris v. Ireland* (1988) 13 EHRR 186 and *Dudgeon v. United Kingdom* (1981) 4 EHRR, in which the Court condemned the criminalisation of consensual sexual acts between adult homosexual men.

[209] In *Fajujonu v. Minister for Justice* [1990] 2 IR 151, the High Court held that all Irish born children were citizens, and, as such, were entitled to enjoy constitutional rights in this State, including the right to family life which might enjoying the company of their parents in the State. The rights of the Irish born child thus became a factor to be taken into account by the Minister for Justice in deciding whether to deport other members of the Irish born child's family. This position was clarified by the Supreme Court in *AO and DL v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1, with the Court confirming that, whatever the rights to the Irish born child may be, the Minister still had the right to order the removal of their family from the State; this was in accordance with the State's right to "so order society as to restrict family life in Ireland" (*per* Denham J, at 60). For a summary of the case, *see* David P Boyle in the "ILT Digest of Legislation and Superior Court Decisions" (2003) 21 *Irish Law Times* 277. The subsequent constitutional amendment to the provisions on citizenship should, in any case, limit the number of applications which can be made on this ground. On the referendum, *see* William Binchy in "The Implications of the Referendum for Constitutional Protection and Human Rights – Part II" (2004) 22 *Irish Law Times* 166.

[210] (1992) 14 EHRR 801. In that case, the Court of Human Rights held that to eject the applicant from the territory would amount to a disproportionate violation of his Article 8 right to family life, even in circumstances where he had been convicted of a criminal offence in France. However, it appears that the Court will take into account the degree of family life established within the State, as well as the number and seriousness of any offences committed in such cases: *see Boughanemi v. France* (1996) 22 EHRR 228. In that case, the applicant failed to establish sufficiently strong family links within the State, even though he had lived with a French woman and fathered her child, and in spite of the fact that his parents and siblings also resided in France. On the facts of the case, it appeared that the applicant had very little contact with either his former partner or his child, and was not particularly close to other family members. Furthermore, the offences he had committed were of a relatively serious nature, and included burglary, assault, and living on the proceeds of prostitution (with aggravating circumstances).

so jealously is the family based on marriage;[211] a position that had been repeatedly affirmed by the Irish courts.[212] By contrast, for the Court of Human Rights the existence of family life is a question of fact and degree: *Marckx v. Belgium*;[213] *Keegan v. Ireland*;[214] *Boyle v. United Kingdom*.[215] Furthermore, the scope of Article 8 is broad enough to encompass a number of personal matters related to the right to privacy (such as, in special circumstances, the health and well-being of the applicant – see below).

Immigration lawyers were not slow to recognise Article 8's potential as a means to avoid deportation orders following unsuccessful asylum applications. Under section 3(11) of the Immigration Act 1999, the Minister has the power to revoke orders made under section 3 of that Act – including deportation orders. The argument raised in many of the following cases was that he ought to have exercised this power in order to vindicate the applicants' right to family life. Whether Article 8 is actually as ground-breaking as they might have hoped does, however, appear doubtful, in the light of post-ECHR Act decisions on the subject. Successful cases are few and therefore worth mentioning from the outset: in *Kozhukarov v. Minister for Justice*,[216] Clarke J granted leave on the sole ground of Article 8 ECHR in circumstances where the applicants' infant son had died and their deportation had been ordered.[217] In *Bosango v. Minister for Justice*,[218] the applicant obtained leave on the ground that Article 8 required the

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[211] Under Article 41.1.1° of the Constitution, "the Family" is "the natural primacy and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law." Article 41.3.1° states: "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded and to protect it against attack."

[212] *See*, e.g. *The State (Nicolaou) v. An Bord Uchtala* [1966] IR 567. The issue of how the Convention applies to the non-marital family has been discussed by the author of this thesis in "Committed Relationships and the Law: The Impact of the European Convention on Human Rights" from William Binchy and Oran Doyle (eds) *Committed Relationships and the Law* (forthcoming).

[213] (1979-80) 2 EHRR 330. The ECtHR condemned the Belgian laws on illegitimacy as an attack on the right to family life of an unmarried mother and her child.

[214] (1994) 18 EHRR 341. For details, *see* Chapter 1.

[215] (1995) 19 EHRR 179. In that case, the Court of Human Rights held that family life existed between an uncle and his nephew.

[216] Unreported, High Court, Clarke J, 14 December 2005

[217] According to counsel in the case, the case was settled and the applicants were granted leave to remain for two years. It now appears that this leave will be extended indefinitely.

[218] Unreported, High Court, O'Sullivan J, 2 November 2005. This was the leave application, but the case was subsequently settled. NB the judgment of 2 November is not yet available; the writer is grateful to counsel in the case for their notes of the judgment and details in relation to pleadings.

respondent to take into account his medical circumstances (he suffered from PTSD). The case has subsequently been settled.[219]

In *Oleg Margine v. The Minister for Justice*,[220] the applicant sought, *inter alia*, a declaration that the first respondent's deportation order infringed his rights under the Constitution and/or the Convention. The basis for this assertion was, effectively, that the applicant was the father of an Irish born child, and that deportation would interfere with his Article 8 right to the society of his son. In the event, the High Court preferred the submissions of the respondent, which focused on judgments in which the Court of Human Rights had upheld decisions to deport even though this would have implications for the right to family life.[221]

Peart J also had regard to a decision of the English Court of Appeal – a judgment which is fast becoming a firm favourite of the Irish judiciary in similar cases (*see infra*) – *R (Mahmood) v. Secretary of State for the Home Department*.[222] The *Mahmood* case was decided on the basis of the Human Rights Act, with particular emphasis on Article 8, and supported the Irish Minister's case that the Article had limited potential as a means of resisting deportation. In *Mahmood*, Laws LJ noted that "[T]he state [sic] owes no duty generally to give effect to a couple's choice of place of residence, and it will be very much up to the state to strike the balance between the requirements of immigration control and the immigrant's freedom to choose how and where he will exercise his Article 8 rights." The English court took the view that deportation did not render it impossible for Mr Mahmood to enjoy family life with his wife and children, as it was open for them to join him in Pakistan. Peart J took a similar view, holding that the Minister could take "such reasonable and proportionate

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[219] Interestingly, even though the facts of this case were strong, in that medical evidence corroborated the applicant's position, the High Court did not feel that he had passed the Article 3 barrier: his deportation would not amount to inhuman and degrading treatment.

[220] Unreported, High Court, Peart J, 14 July 2004.

[221] In *Bouchelkia v. France* (1997) 25 EHRR 686, the applicant, like Mr Margine, had fathered a child *after* a deportation order had been made against him; the Court of Human Rights confirmed that France had been correct in asserting that the material time for assessing the validity of a deportation order was at the time that order was made.

[222] [2001] 1 WLR 840. This decision has become very popular with Irish judges deciding immigration matters. However, the Court of Appeal's approach has since been criticised by certain members of the House of Lords: *see* the judgment of Lord Steyn (with whom four other judges agreed) in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] 2 WLR 1622, at paragraph 26, in which he stated that the *Mahmood* approach was unduly deferential to the administrative decision-maker and altogether too close to *Wednesbury* review. *See* also Mark Elliott, "Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] 6(3) *JR* 166, at 172.

steps to maintain...the integrity of the asylum system as he thinks fit". On this basis, it is difficult to see how any judicial review based on Article 8 can ever succeed in this context, if the applicant is expected to show that it would be impossible for the whole family to relocate to the country to which the applicant is being sent, unless conditions in that country are so dire (war, civil unrest) that it would be difficult to understand why the original asylum application failed at all.[223]

Many of the cases in which leave to remain in the State was refused involved families where the parents were married, but had not lived together in as a married couple in Ireland for any appreciable length of time. The duration of married life within the State is a factor taken into account by the Minister when deciding cases on the Article 8 ground, and its effect has frequently been to deny the family any right to remain. This policy was applied to the applicants' detriment in *SC, RC and CC v. Minister for Justice*.[224] The second named applicant, Mr RC, was an Albanian Kosovar who had an Irish born child (CC) with SC, an Irish citizen. RC had been refused asylum, and his appeal had been rejected. Attempts by the authorities to contact him had failed due to his changing address without informing them as he was required to do. He was deported to Albania some days after the birth of his daughter, but later married SC in Albania.

The applicants did not seek to challenge the validity of the deportation orders made against RC, merely the way in which the Minister had exercised his power to revoke (or decline to revoke) the orders. In particular, the applicants complained that the Minister was unduly fettering his own discretion by taking into account the fact that they had not lived together as a family unit for any appreciable time since the marriage of SC and RC. They argued that their right to reside together in Ireland was not only protected by Articles 40-42 of the Constitution, but by Articles 8 and 14[225] of the

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[223] Article 8 aside, however, it was not surprising that Mr Margine's judicial review proceedings were unsuccessful: he had failed to participate in the asylum process in any meaningful way, and had not, for example, attended his initial interview.

[224] Unreported, High Court, Quirke J, 21 December 2004.

[225] Article 14 states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is frequently used in conjunction with other Convention Articles to bolster claims that the applicant has received less favourable treatment on one of the prohibited grounds; the original

Convention, which was now part of Irish law pursuant to the ECHR Act. In their submission, RC's deportation and the Minister's refusal to revoke it amounted to an unjustified interference with the right to family life.

Quirke J disagreed, in a judgment based largely on Irish constitutional jurisprudence.[226] In a somewhat terse final paragraph, the learned judge noted that Article 8 ECHR did not necessarily require that the respondent's decision be overturned. Citing the English case of *R (Mahmood) v. Secretary of State for the Home Department*,[227] upon which the applicants had (ill-advisedly, as it turned out) relied, Quirke J noted the Court of Appeal's view that "Article 8 does not impose upon any State a general obligation to respect the right of residence of a married couple."[228] Lord Philips MR stated that there were a number of factors to take into account, not least that "Knowledge on the part of one spouse at the time of the marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8."[229] This passage implies that a person who is unaware that his/her spouse is not entitled to reside in the country is in a more favourable position than someone with better knowledge of the situation. This seems a somewhat arbitrary distinction, and one which could be difficult to establish on the facts – the State being likely to be somewhat sceptical in the face of claims that one spouse did not know the other was likely to be deported. However, the "knowledge" test arguably only amounts to a warning to anyone seeking to use marriage to a citizen as a way of subverting national immigration law.

The issue of family rights versus the Minister's discretion to deport finally reached the Supreme Court in *Cirpaci v. Minister for Justice, Equality and Law Reform*.[230] In that case, the second named applicant was a Romanian national who was deported in 2002. In 2003, he married the first named applicant, an Irish citizen, in Romania. Mr Cirpaci was unable to re-enter Ireland unless the respondent revoked the deportation order,

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Convention has no free-standing anti-discrimination provision; the Council of Europe has sought to remedy this with the Adoption of Protocol 12, which Ireland has not yet ratified.

[226] The learned judge focused on *Fajujonu v. Minister for Justice* [1990] 2 IR 151 and *DL v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1.

[227] [2001] 1 WLR 840; discussed *supra.*

[228] [2001] 1 WLR 840; at 861, *per* Lord Philips MR.

[229] *Ibid.*

[230] [2005] 2 ILRM 547.

which the respondent refused to do on the ground that the applicants had not resided together as a family for any appreciable period since the date of their marriage. This was because the first named applicant, who had Irish born children, had returned to Ireland shortly after the marriage ceremony. The applicants argued that the requirement that they live together for an appreciable time could not be lawful under either the Constitution or Article 8 ECHR. In applying this test, the respondent was following a "fixed, rigid and inflexible policy, which precluded him from taking account of the merits of the individual case".[231] Importantly, the applicants also argued that, due to the importance of the rights at stake, the court ought to apply a stricter standard of review than the traditional standard, and should instead follow the English courts in developing an "anxious scrutiny" test.[232]

Fennelly J, giving judgment for the Supreme Court,[233] rejected these arguments. Firstly, he agreed with Quirke J that there was no evidence of the Minister applying a fixed and inflexible policy; the fact that he had cited the period of cohabitation in other cases did not make it so.[234] Nor did Fennelly J think it was in any way inappropriate for the respondent to consider the duration of the marriage:

> "In the course of argument a number of hypothetical cases were explored. At one extreme an Irish citizen might contract a marriage, valid under the laws of a remote jurisdiction, while on holiday there. Could such a person, within days of the marriage, insist, to the point of demanding that the brevity of the marital relationship was irrelevant, that his or her new spouse be granted a visa admitting him or her to reside in the State? At the other extreme would be an Irish citizen, who had lived abroad for many years, perhaps for his or her entire working life. Such a person has, as a citizen, an undoubted right to return to reside in Ireland on retirement or earlier. It is not necessary to pose the constitutional question whether that person would have the right to be accompanied by his or her foreign spouse of many years. For my part, I have no doubt that such a right exists. It would not, of course, be absolute. The

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[231] At 554. The applicant also argued that the Minister's policy had no rational connection to the policy objectives being pursued and was therefore irrational within the meaning of *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39.
[232] At 555. The English judgment relied upon was *R v. Lord Saville of Newdigate, ex p A* [2000] 1WLR 1855; [1999] 4 All ER 860. For a discussion of the "anxious scrutiny" test, *see* Chapter 3.
[233] Hardiman CJ, Geoghegan, McCracken and Kearns JJ concurring.
[234] At 557.

foreign spouse might be a notorious criminal. It is enough to say that, in the most benign of such circumstances, the minister [sic] would be entitled and possibly bound…to give favourable consideration to a claim that such a person be permitted to be accompanied to his or her spouse."[235]

It is submitted that the examples thus accepted by the Supreme Court seem designed to protect the family rights of members of the diplomatic corps working abroad, while "protecting" those imprudent enough to marry as a result of a holiday romance.

The learned judge then turned to the Convention argument. Unsurprisingly, the Supreme Court quoted with approval from the judgment of *Mahmood*, in which Lord Phillips summarised the impact of Article 8 ECHR:[236]

1. A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
2. Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple.
3. Removal or exclusion of one family member from a state where the other members of the family are lawfully residence will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all of the members of the family.
4. Article 8 is likely to be violated by the expulsion of a member of the family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
5. Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter's spouse violates Article 8.
6. Whether interference with family rights is justified in the interests of controlling immigration will depend on –

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[235] At 557.
[236] At 558.

(i) the facts of the particular case and

(ii) the circumstances prevailing in the state whose action is impugned.[237]

It is submitted that the fact that the Supreme Court has elected to follow Lord Phillips' reasoning renders it all but impossible for any Irish citizen to argue that they should be allowed to enjoy family life within the State, unless their partner has some sort of legitimate expectation that they will be allowed to stay. It is not clear what circumstances would constitute an "insurmountable" obstacle to family life. However, the fact that the country of origin of one spouse is very far away, or has a very different culture and way of life will probably not be enough. It appears that the English courts do take account of the fact that length of establishment in the State may, in and of itself, make it unreasonable to expect the rest of the family to follow the expelled spouse; this appears to be consistent with the case law of the Court of Human Rights.[238] However, it appears from point 5 in Lord Phillips' analysis that knowledge on behalf of one spouse that the precarious residence rights of one spouse can be used to deflect Article 8 arguments. With respect, this point seems somewhat dubious. Firstly, it seems to imply that, where the spouse whose status is uncertain

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[237] At 861 of *Mahmood*.

[238] A recent example of the Court's case law on this point is Application No 50435/99 *Rodrigues da Silva and Hoogkamer v. The Netherlands*, Judgment of 3 July 2006. In that case, the first and second named applicants were mother and daughter. The mother was a Brazilian national who came to the Netherlands in 1994. She lived with her partner and was later joined by one of her sons (the other remained in Brazil being cared for by grandparents). Her daughter was born in 1996. When the parents split up, the second named applicant's father sought and was granted parental authority over her. The Netherlands sought to expel the first named applicant. The question before the ECtHR was whether the Netherlands authorities were under a duty to allow the first named applicant to reside in the State in order to maintain family life with her daughter. The Court accepted that the applicant must still have links with Brazil, as she had lived there until the age of 22 (paragraph 40); however, the Court rejected the argument that the applicants could easily enjoy family life together in Brazil, as the girl's father was unlikely to agree and the Dutch courts themselves had concluded that the child's welfare was best served by her remaining in the Netherlands (paragraph 41). In the circumstances, "the economic well-being of the country" could not outweigh the applicants right to enjoy family life, which could only be vindicated by allowing the first named applicant to remain in the Netherlands. In other cases, the ECtHR has required Contracting States to admit the children of parents legally residing within their territory: *see Sen v. The Netherlands* (2003) 36 EHRR 7 and Application No 60665/00 *Tuquabo Tekle v. The Netherlands*, Judgment of 1 March 2006. In the former case, two parents with the status of settled immigrants sought to be reunited with their nine year old daughter, whom they had chosen to leave with relatives in Turkey for a number of years. The Court rejected the argument that they could just as easily enjoy family life together in Turkey; they had since had two children, born in the Netherlands, who were accustomed to that cultural and linguistic environment and who had Dutch nationality. The facts of the latter case were extremely similar, save that the applicants in that case had been granted refugee status and sought entry for her fifteen-year-old daughter who was being cared for in Eritrea by her grandmother and an uncle. Notwithstanding the fact that the applicant and her husband had delayed for some time before making the application, the ECtHR once again held that the State had failed to strike a fair balance between the national interest and the applicants' right to family life in refusing the daughter the right to enter.

deceives or misleads the other spouse, they can then benefit from that lie to remain in the State. Secondly, it discriminates against those who do take the trouble to acquaint themselves with their spouse's status. It is certainly arguable that fundamental rights should not be limited to the ignorant or the gullible.

Fennelly J also cited two judgments of the Court of Human Rights to support his conclusions, quoting the passage in *Abdulaziz v. United Kingdom*[239] in which the ECtHR stated that Article 8 "cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice of married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country". Fennelly J also referred to *Gul v. Switzerland*,[240] when the ECtHR had accepted that a balance had to be achieved between the rights of the individual and those of the community. It is not disputed that these two cases were relevant to the issue of Article 8 and its impact upon the right to reside in a Contracting Party to the Convention. However, it is at least arguable that neither *Abdulaziz* nor *Gul* was very similar to the issue before the Supreme Court. Neither case concerned a similar factual background to that of *Cirpaci*.

Fennelly J also stated that "given the particular facts of the case, [the respondent's] decision fell well within the margin of appreciation allowed to the Member States by the European Convention."[241] It is submitted that this represents at the very least a misunderstanding of Convention terminology by the learned judge. The margin of appreciation is a doctrine which has been developed by the Court of Human Rights in reviewing sensitive decisions of Contracting States. The standard is applied on the basis that, in certain areas, State authorities are better placed to make decisions than an international court. When the ECtHR holds that an impugned action was within a State's margin of appreciation, it is stating that, although it may itself have decided the matter differently, it feels that the State was within this margin of appreciation. There is absolutely no correlative need for a domestic court to apply such a margin of appreciation in respect of decisions and actions of the State; if the Supreme Court is not in a position to assess the proportionality of the Minister's actions, then surely no

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[239] (1985) 7 EHRR 471.
[240] (1996) EHRR 93.
[241] At [2005] 2 ILRM 547, 560.

one is. Admittedly, this point is somewhat moot: it appears that the Supreme Court did indeed think that the Minister's decision not to revoke the deportation order was proportionate in the instant case. However, it is imperative that the Irish courts should not develop a practice of allowing the State a "margin of appreciation" in decision making in addition to the general irrationality standard applied in judicial review. Indeed, it is disappointing that the Supreme Court did not explore the possibility that the ECHR Act requires a higher standard of judicial review in cases involving fundamental rights. That question will remain to be litigated on another occasion; it is to be hoped that, in the meantime, the courts will not start applying an even less stringent standard of review under the heading of a "margin of appreciation."

The judgment of the Supreme Court in *Cirpaci* did not, however, prevent applicants from trying to rely on Article 8 ECHR for relief, even though many Article 8 based judicial reviews did not even pass the leave stage. One example is *Stamatov and Ors v. Minister for Justice*,[242] in which the first three applicants were Bulgarians and the fourth was the Irish born child of the first two applicants and brother of the third. They had applied for refugee status but withdrew this application with the apparent intention to seek residency on the basis of the birth of the Irish born child; this second application for residency was never, in fact, made. The applicants sought leave to apply for judicial review of their proposed deportation, but were refused by Peart J. The applicants had argued that the Minister's refusal to determine their right to remain in the State due to their parentage of an Irish born child was contrary to section 3 of the ECHR Act, and to the Convention itself. The timing of the application was crucial to its failure: the Minister had not yet made a decision in respect of their application to remain, so there was, effectively, nothing to review. However, in view of the *Margine* and *SC* decisions, discussed above, it is unlikely that the application would have succeeded even had the applicants been less precipitous and reached the substantive review stage.

As has been noted, the Court of Human Rights has traditionally recognised the existence of the *de facto* family as a unit attracting the protection of Article 8 ECHR, unlike the Irish constitutional jurisprudence on the family. There was thus a strong

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[242] Unreported, High Court, Peart J, 30 November 2004.

argument that the Minister's policy of examining the length of time applicants for leave to remain in the state had spent here as a married couple ran the risk of infringing that couple's Article 8 rights, provided they had established family life as a *de facto* family before (or even instead of) marriage. This point was raised by Clarke J in *Akinkoulie v. Minister for Justice and Ors.*[243] The applicants were husband and wife; the first named applicant was a Nigerian national, the second his Irish wife. The Minister refused to rescind his deportation order in respect of Mr Akinkoulie on the basis that he had been aware of the intention to deport him for 18 months before the order was actually made, nor had he informed the authorities of his change of address or his intention to marry until he was arrested with a view to his deportation. Following the earlier jurisprudence, Clarke J reiterated that "parties such as the applicants do not have an absolute right to reside in this jurisdiction as a family, notwithstanding the constitutionally recognised family rights which they hold as a married couple."[244]

On the Convention point, Clarke J referred to the ever-popular *Mahmood* interpretation of Article 8 ECHR, and to the earlier Supreme Court decision of *Cirpaci*, in which the higher court accepted that the length of the marriage was a factor that the Minister was entitled to take into account. Clarke J concluded that the meaning of these decisions was that where the Minister had made a valid deportation order, and is later asked to revoke that order because of new circumstances, then the Minister has an obligation to take into account the rights of all concerned. In some circumstances, the Minister might even be obliged to allow the parties to remain in the State.[245] However, the case law also made it clear that the Minister could take into account a number of factors, including the length of the marriage or relationship concerned, the circumstances of how it began, and the status of the non-national at that time.[246] In the circumstances,[247] the learned judge was not satisfied that the applicant

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[243] [2005] 4 IR 564.

[244] At 570. Clarke J referred to the ex tempore judgment in *Malsheva v. Minister for Justice Equality and Law Reform*, Unreported, High Court, Finlay Geoghegan J, 25 July 2003, where the Court, at the leave stage of judicial review proceedings, could not accept that there was an absolute obligation on the Minister to rescind a deportation order so that the parties could enjoy family life as a married couple within the State.

[245] At 573.

[246] At 573. There seems to be a continuing desire on the part of the State to protect vulnerable Irish citizens from being trapped, tricked or enticed into marriage by unscrupulous foreign nationals intent on obtaining the right to reside in this State.

had raised substantial grounds such as would entitle him to leave to apply for judicial review. Arguably, the most interesting facet of Clarke J's judgment is his persistent referral to marriage or "permanent relationships" – is this a small concession to the Convention requirement to take into account non-marital relationships for the purposes of Article 8?

The learned judge applied the same reasoning when he granted leave to the applicants in *Gashi v. Minister for Justice.*[248] They argued that the 2003 Act should have been taken into account in refusing to revoke their deportation order. Again, the nub of the argument was that the provisions of the ECHR Act, together with the Constitution, granted them a right to reside as a family in Ireland. Clarke J referred to the ever-popular *Mahmood* case, noting Lord Philips' view that removal of a person from the State in which other family members reside will not necessarily breach Article 8. However, this only served to convince the learned judge that the ECHR Act was applicable to the case before him.

Interestingly, Clarke J displayed a keen understanding of the implications of Article 8, noting that the only real difference between the Convention provision and Article 41 of the Constitution was the broader definition of the family under Article 8.[249] He stated that this difference was nevertheless significant in that applicants' case, because the husband and wife had lived together in Ireland before their marriage, and this period would be taken into account under the Convention but not under the Constitution. Given that the respondent's decision was solely grounded upon the fact that the first and second named applicants had not lived in Ireland as husband and wife for any appreciable time, the potential impact of the ECHR Act was important. In the circumstances, Clarke J was convinced that there were "good grounds" for granting leave. It is submitted that the judge was correct in noting the important distinction between the wider meaning of family life as set down in the Strasbourg jurisprudence

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[247] The judge noted that, as the first named applicant had been aware of the intention to deport him since 31 December 2002, his relationship with the second named applicant had at all times been "precarious", in the language of *Mahmood*: "While the status of the marriage or intended marriage was not at the extreme end of the spectrum identified by Fennelly J in *Cirpaci*, the circumstances fall far short of those at the other end of the spectrum where it might be arguable than an entitlement to revocation exists." At 573.

[248] Unreported, High Court, Clarke J, 3 December2004.

[249] Article 8 includes, for example, the non marital or *de facto* family.

and the relatively narrow (and arguably anachronistic) definition of the family "based on marriage" in the Constitution.[250] The Constitution and the Article 41 based jurisprudence are clear in their endorsement of the marital family as the only type of family worthy of constitutional protection; the ECHR Act is not capable of subverting this position. However, it is arguable that the section 2 interpretative obligation in the ECHR Act means that the Irish courts should take into account the broader Convention definition of the family,[251] at least in a manner that will not conflict with the Constitution.

Conclusion: The ECHR's Impact on Judicial Reasoning to Date

It is worth noting that, in some post-ECHR Act cases, the courts stuck very firmly to the traditional constitutional grounds for relief rather than dealing with the Convention arguments. This approach may be understandable given the years of experience our courts have in dealing with constitutional arguments and, so long as the applicants involved are successful, it does not cause injustice. However, it is disappointing for anyone who wants to see the development of remedies under the ECHR Act. Examples of such cases include *O'Brien v. The Personal Injuries Assessment Board*,[252] which concerned the famous challenge to the Board's refusal to deal with legal representatives of those seeking damages for personal injuries. The applicant argued that this was in breach of section 7 of the Personal Injuries Assessment Board

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[250] Indeed, Siobhan Stack argues that, notwithstanding her view that the enactment of the ECHR Act is unlikely to materially improve the rights of non-nationals with Irish family members, "it will be of considerable assistance to those families based on non-marital relationships. It may also strengthen the position of couples who have not been married for a long time, but who have been in a committed relationship for a significant period prior to marriage." Siobhan Stack BL, "Some Recent Developments in Asylum and Immigration Law" Trinity College Dublin Conference on Recent Developments in Judicial Review, 25 June 2005, at 10-11 of the paper.

[251] Unlike the Irish courts, which have consistently held that the "family" protected under Articles 41 and 42 of the Constitution is that based on marriage (*see*, *inter alia*, *Nicolaou v. An Bord Uchtála* [1966] IR 567), the Court of Human Rights has always adopted a much broader and more liberal definition of "family life" for the purposes of Artcle 8 ECHR. The ECtHR's approach has always depended more on the *de facto* relationship between the parties, combined with other factors such as blood ties, and is less concerned with matters of form: *see* the leading case of *Marckx v. Belgium* (1979) 2 EHRR 330, in which the Court held that Dutch laws discriminating against illegitimate children infringed the Article 8 rights of a mother and her daughter. *See* also *Keegan v. Ireland* (1994) 18 342, in which the applicant, an unmarried father, successfully argued that Irish legislation permitting his former partner to have their child adopted without his consent was a violation of Article 8 in circumstances where he could establish *de facto* family ties with the child. The Court has also held that other family relationships, such as uncle and nephew (*Boyle v. United Kingdom* (1994) 19 EHRR 179) and grandparents and grandchildren (*Bronda v. Italy* (2001) 33 EHRR 4) may fall within the definition of "family life" for the purposes of Article 8.

[252] Unreported, High Court, MacMenamin J, 25 January 2005.

Act 2003, the applicant's constitutional rights, Article 6(1) of the ECHR, and section 3 of the ECHR Act. After examining Irish and US case law, the High Court held that the respondent had breached section 7 of the Personal Injuries Assessment Board Act, and there was therefore no need to examine any of the other issues.

In *O'Reilly and Ors v. Limerick County Council*,[253] the applicants made a claim under section 3 of the European Convention on Human Rights Act as part of an overall case that the respondents had breached their duties to provide the applicants with suitable accommodation. The County Council admitted that they had no current plans underway to build new serviced halting sites in the area. In the event, the High Court divided the question into two parts: whether the respondents had failed in their statutory duty, and, if so, what the implications of that failure were under the Constitution and Convention. The Court held that the respondent had failed in its duties under the Housing Acts[254] and the Planning and Development Act 2000,[255] and that the case could be decided on that basis. Admittedly, this was probably a case where the applicants' Convention and constitutional rights were adequately protected by the legislation in place; it was not the law that breached the applicants' rights, but the respondents' failure to implement that law. So long as the courts are happy to grant a remedy in such circumstances, there is probably no need to go further and allege a breach of either of the major human rights documents in force. However, it is regrettable that local housing authorities do not appear to have taken due account of the need to re-educate their officers and inform their policies with regard to the Convention.[256]

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[253] Unreported, High Court, MacMenamin J, 29 March 2006.

[254] Section 13(1) of the Housing Act 1998 imposed obligations on housing authorities to provide for members of the Travelling Community who "traditionally pursue or have pursued a nomadic way of life". Under section 29(2), housing authorities may provide such people with caravan sites. Section 5 requires housing authorities to adopt an accommodation programme specifying the needs of Travellers. The respondent's programme did not adequately comply with its duties under that section.

[255] Section 10(2)(i) places the respondent under an express duty to include areas in its development plan for the provision of accommodation for Travellers. The Court held that this was an express and mandatory duty and that the applicants had failed to comply with it.

[256] Authorities in England seem to have realised that some awareness of the ECHR is necessary: *see* Derek O'Carroll and Sam Lister, *A Guide to the Human Rights Act 1998 for Housing Professionals* (Chartered Institute of Housing, 2000). O'Carroll and Lister (at 21-33) argue that housing authorities ought to take into account Articles 6, 8, 14 and Article 1 of the First Protocol. The Article 6 right to fair procedures should inform decision-making. As for Article 8, "Whenever a public authority makes a decision which affects a person's private or public life etc., it must demonstrate that in making its decision there has been a reasonable balancing between the rights of the individual on the one hand, and the competing interest of the wider community on the other." The Article 14 prohibition is not a stand-alone provision, but is considered in conjunction with other Convention provisions; so, for example, it

As stated earlier, there were also a number of cases in which the Convention should probably not have been pleaded at all. In *NWR FM Limited (t/a North West Radio) v. Broadcasting Commission of Ireland*,[257] the applicant company alleged that there had been a breach of its Convention rights in circumstances where the respondent awarded a broadcasting licence to another party. The applicant had held the licence, but when it came up for renewal the respondent advertised it and awarded it and the applicant company was unsuccessful. The case therefore involved a challenge to the decision-making process employed by the respondent, a public body. The applicants were dissatisfied by, *inter alia*, the manner in which the decision was reached and the fact that the handwritten note of the board's meeting was destroyed as soon as the minute of the meeting had been approved.

The High Court refused the order of certiorari sought by the applicant: there was no obligation on the respondent to keep a handwritten note of meetings at which decisions were made, and they had notified the applicant of the reasons why its bid had failed. The result was somewhat unsurprising: the applicant's reliance on the ECHR and the 2003 Act were dubious at best. First, the impugned decision had been made on 29 April 2003 – before the ECHR Act came into force – and ought to have been immune from such a challenge.[258] In any case, Peart J was not convinced that the Convention arguments were well founded. The applicant alleged that the respondents' decision amounted to an attack on their property rights under the Convention. The weak ground on which this argument was based was that the failure to renew the licence had caused the value of the applicant company to plummet from four million Euro to 129,000 Euro. It is submitted that it would be harsh to hold the respondent liable for the impact that their decisions, fairly made, had on the stock of unsuccessful

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would be a breach of Article 14 to apply discriminatory procedures to a particular ethnic group. Article 1 of the First Protocol protects the right to private property – O'Carroll and Lister suggest that the Article may apply to the right to buy enjoyed by secure tenants. In this jurisdiction, Dr Padraic Kenna has argued that "It is…incumbent on local authority Managers and indeed, local Councillors, to take account of the ECHR Act in preparing Corporate Plans": Dr Padraic Kenna, "Will the European Convention on Human Rights Act 2003 affect Local Government in Ireland?" (2004) 11(2) *IJEL*, 382, at 386. He argues that Articles 3, 6 and 8 all have implications for local government, particularly as regards housing policy.

[257] [2004] 4 IR 50.

[258] On the non-retrospectivity of the European Convention on Human Rights Act 2003, *see* Chapter 4. The respondent does appear to have raised the argument that the 2003 Act did not apply to the Commission's decision – [2004] 4 IR 50, at 88.

applicants.[259] This was particularly so as the applicant's contract clearly stated that there was no right to a renewal, and thus no legitimate expectation; as Peart J remarked, "The applicant cannot claim a breach of a property right when under the terms of the contract itself the applicant has acknowledged that it has no such right."[260]

Peart J had even less difficulty in dismissing the applicant's claim that the manner in which the Commission had made its decision were contrary to its rights to a fair hearing and to an effective remedy (protected by Articles 6 and 13 ECHR respectively). While refusing to decide whether the applicant could rely on the Convention, the Court held that the applicant did have an effective remedy: the right to apply for judicial review. The absence of a separate right to appeal on the merits did not, in that context, amount to a breach of Article 6 ECHR.[261]

In some cases, the ECHR was argued in the early stages but subsequently abandoned: *see*, e.g., *Fowley v. Conroy*.[262] In others, some references to the Convention were made without the matter being taken further.[263]

It is fair to say that practitioners and judges in the UK took time to acclimatize themselves to being able to rely on the Convention in domestic proceedings. It is likely that time will also be the true test of the effectiveness of the European Convention on Human Rights Act in this jurisdiction. The majority of judgments to date reveal no radical reform of our law on the basis of the newly-relevant

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[259] [2004] 4 IR 50, at 88-89.
[260] [2004] 4 IR 50, at 88.
[261] [2004] 4 IR 50, at 89.
[262] Unreported, Clarke J, 27 July 2005. The applicant was a member of the Gardaí and witness at the Morris Tribunal into Garda corruption and misconduct in Donegal. Her house was burgled and items relevant to the Tribunal stolen. She took proceedings in an attempt to have the incident investigated by members of the Gardaí other than those of the Donegal Division. Her application was unsuccessful: however well founded her fears might have been, the Court concluded that the investigation had in fact been properly conducted. It is difficult to see what the ECHR would have added; the Convention requires the State to respect the rights of those resident upon its soil and investigates breaches of those rights in a proper manner; it does not contain a right to choose the investigator.
[263] In the early stages of *O'Brien v. The Personal Injuries Assessment Board*, Unreported, High Court, MacMenamin J, 25 January 2005, the applicant argued that the respondent's refusal to deal with the applicant's lawyers amounted to a breach of his Convention rights as well as those under the Constitution. However, the judgment in the case relies almost solely on Irish law. *See* the unreported judgment of MacMenamin J in the High Court, 25 January 2005. In *O'Brien v. Mr Justice Moriarty* [2005] 2 ILRM 321, the applicant's lawyers made vague references to the ECHR in letters to the Tribunal, but does not appear to have taken that argument any further in before the Courts; it certainly does not arise in any of the judgments of the Supreme Court.

Convention. The question remains as to whether there are major areas where the ECHR has the potential to inform (and reform our law); in order to attempt an answer, the next chapter will examine an important right that has hitherto received relatively little attention in Irish litigation: the right to freedom of expression.

At the time of writing, the ECHR Act is still very much in its infancy. The relatively few judgments in which it has featured thus far show that the Act has far to go. On a positive note, lawyers seem to have enthusiastically embraced the opportunity to plead the European Convention as part of domestic proceedings, and to support those pleadings with reference to the extensive case law of the Court of Human Rights. However, their enthusiasm has not always been matched by a complete understanding of the standards the Convention upholds. This "lazy pleading" may partially explain why many of the judgments to date are disappointing, because although the legislation was pleaded, it was not thought to be relevant, or because the Court preferred to decide the matter on constitutional grounds. Nevertheless, other cases do show evidence of an increasing awareness of the Convention among judges and practitioners alike.[264]

Unsurprisingly, given the stakes, the largest number of Convention arguments have been raised in relation to criminal procedure – to little avail. In spite of assertions that "the ECHR jurisprudence [on due process and the right to a fair trial] is both wider

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[264] There were early indications that the Irish courts were eager to take cognisance of their obligations under Article 6: in *The People (DPP) v. Desmond* [2004] 3 IR 486, the Court of Criminal Appeal reminded their colleagues in the Central Criminal Court of the implications of the ECHR Act – even though the Act was not in force at the time of the impugned decision, and does not appear to have been raised by the applicant. The applicant had been convicted of four charges under the Firearms Acts in somewhat unusual circumstances: on the morning of his trial, before the arraignment or the empanelling of the jury, he discharged his legal advisors (who practised mainly at the Northern Ireland and Scottish Bars). He sought an adjournment from the judge in charge of the Central Criminal Court list, but was refused. That judge (who is not named in the judgment of the Court of Criminal Appeal, presumably out of delicacy) then transferred the matter for hearing to McKechnie J, with the instructions that the latter should receive a transcript of the first application (which included the first judge's repeated opinion that the applicant was "playing ducks and drakes" with the court in discharging his legal team and, indeed, in having selected a legal team from outside the jurisdiction). When the matter came on before McKechnie J, the applicant again sought an adjournment to enable him to obtain new legal representation, but this second application was refused. The Court of Criminal appeal granted leave to appeal and ordered a retrial. McCracken J, giving the judgment of the Court, took a dim view of the refusal to adjourn, particularly as the judge in charge of the list had relied on the Central Criminal Court's "no adjournment rule". In the view of McCracken J, such a rule did not and could not exist in the interests of justice, and, in relation to cases heard since 31 December 2003, would have to be assessed in light of the rights of an accused under Article 6 ECHR.

and more detailed in scope than the Irish equivalent",[265] it is submitted that the Irish constitutional guarantees and the manner in which they have been interpreted effectively leave the Convention with little to add on this point. It is true that the Court of Human Rights has arguably been more assiduous in its protection of the right to silence than the Supreme Court; however, on most other points the two jurisdictions seem to concur. The only area where Strasbourg is at a discernable advantage is in its ability to censure the State for delays caused by overloading of the courts;[266] it is submitted that, even now that the Convention has been incorporated into Irish law, the domestic courts will be relatively slow to censure the State for this problem.

Asylum has also provided a fruitful area for arguments based on the Convention to be raised; however, such arguments have frequently been unsuccessful. Only in the most clear-cut of cases have they prevailed. There is, in effect, a tension between the argument that the Convention offers "significant guarantees" to asylum seekers, and the "cautious" approach of the Court of Human Rights in this area.[267] While those attempting to remain in the country after a refusal of asylum have nothing to lose by seeking judicial review on ECHR grounds, it appears that they would be well advised not to be overly optimistic; ultimately, it seems, "one should not overestimate the importance of this instrument."[268]

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[265] Bríd Moriarty and Dr Anne-Marie Mooney Cotter (general editors), *Law Society of Ireland: Human Rights Law* (Oxford University Press, 2004), at 121.

[266] Moriarty and Mooney Cotter argue that Strasbourg also has the advantage of its own approach to legal problems, which involves a constantly evolving jurisprudence, which may be contrasted with the restrictions placed upon (or assumed by) the Irish Supreme Court as a court in the common law tradition; at 121.

[267] Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths, 2000), at 90.

[268] Harvey, at 89.

Chapter VII

Constitution and Convention: The Post-Incorporation Impact of the ECHR on Irish Free Speech Law*

The early years of the 21st Century have witnessed much speculation as to the potential impact of the incorporation[1] of the European Convention on Human Rights into Irish law, most of it unflattering from the Convention's point of view. A few commentators foresee the European Convention on Human Rights Act, 2003 (hereafter the ECHR Act), as a force for great positive change, with the potential to maximise the Convention's role in *Irish* jurisprudence[2] or as a means of providing new remedies for the legal practitioner.[3] The majority view – and one that, somewhat disappointingly, would seem to be shared by many of the judiciary – is that the Act will make no very great changes to the Irish legal landscape. This standpoint is based upon two main premises: first, that Irish law already so closely reflects Convention standards that we have little to gain from our new ability to rely on its provisions. This argument is not entirely without merit: as all lawyers are aware, like most international human rights treaties, the ECHR represents no more than a minimum standard of rights protection, and one that sometimes falls short of national fundamental rights guarantees.[4] Anyone with the temerity to point out that this rather self-satisfied and rose-tinted view of Irish law is not always entirely justified runs the risk of belonging to the "Convention good, Constitution bad" camp - a somewhat unfair summary of the

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* Much of this chapter has already been published under the title "Constitution and Convention: the Post-Incorporation Impact of the ECHR on Irish Free Speech Law" in Eoin O'Dell (ed) *Freedom of Expression* (Ashgate, Forthcoming).

[1] The word "incorporation" is used here out of expediency – the one point of congruence for all those interested by the coming into force of the European Convention on Human Rights Act, 2003, is that the legislation, like its UK equivalent, actually stops short of real incorporation and merely "gives further effect" to the Convention in domestic law. On this point, *see*, *inter alia*, former Chief Justice Ronan Keane, "Issues for the Judiciary in the Application of the ECHR Act, 2003", Speech to the Law Society and Human Rights Commission Conference on New Human Rights Legislation, 18 October 2003, at 1 of the paper.

[2] Mr Justice Nial Fennelly, "Introduction to the European Convention on Human Rights Act 2003", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, at 16.

[3] James MacGuill, "Implications for Criminal Law", Speech to the Law Society Conference on The European Convention on Human Rights Act, 2003: A Practitioner's Guide to Effective Remedies, 29 January 2003, 52, at 76.

[4] For example, even after the inroads made by the Bail Act, Ireland's constitutional right to bail is still more extensive than any the Convention would require. *See* Mr Justice Nial Fennelly, *supra*, at 7.

views of the Convention's defenders, particularly when their adversaries' views might be summed up as "Convention OK, Constitution better".

A further point advanced by the "Constitution better" camp is that the incorporation of the ECHR will effect no radical change simply because the ECHR and its jurisprudence were already regularly cited and relied upon by Irish courts.[5] With respect, this second argument is not supported by pre-incorporation Irish case law. Until the position was altered by the ECHR Act, the settled position of the Supreme Court was that Ireland's dualist approach to international law precluded any direct reliance on either the Convention or its case law: *see In re Ó Láighléis*.[6] Thus, prior to the coming into force of the ECHR Act, the Convention was "binding on the State but not within the State";[7] neither the ECHR nor the judgments of its Court were binding on Irish Courts,[8] and litigants seeking to vindicate their right to freedom of expression had a single bill of rights on which to rely: the Constitution.

It is not the purpose of this chapter to denigrate the Irish Constitution, a document whose fundamental rights guarantees have served us well for many decades; however, it must be admitted that the constitutional provision on free speech, Article 40.6.1°i, is far from perfect, particularly when compared with the Convention's Article 10. That the wording of Article 10 ECHR is infinitely superior to that of Article 40.6.1°i of the Irish Constitution is evident from a reading of both provisions.[9] The Irish guarantee is

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[5] This argument was advanced by former Chief Justice Ronan Keane; *see* Note 1, *supra*. The learned judge cited a number of judgments in which reference was made to the Convention; however, it is submitted that in none of them did Convention principles hold any real sway over the end result. *See*, e.g. *The State (Healy) v. Donoghue* [1976] IR 325, and the judgment of Henchy J in *The State (DPP) v. Walsh and Coneely* [1981] IR 412; Keane CJ cites both as proof of the Convention's domestic Irish influence, but both were, in reality, decided purely on the basis of domestic law, with the Convention used in conjunction with other foreign sources of law, such as the US Constitution, as a means of illustrating common international positions on the right to free legal aid and contempt of court respectively. Neither judgment accords the Convention any more authority than the other non-Irish sources of law to which they refer.

[6] [1960] IR 93.

[7] Andrew Z Drzemczewski, *European Human Rights Convention in Domestic Law* (Clarendon Press, Oxford, 1983), at 172.

[8] Leo Flynn, "The Significance of the European Convention on Human Rights in the Irish Legal Order" (1994) *Irish Journal of European Law* 4, at 11. It may legitimately be asserted that this position has not really been altered by the ECHR Act, since the Act falls short of giving the Convention real force of law, and the Irish courts are merely exhorted to take judicial notice of the Strasbourg jurisprudence. However, the focus of this article is not on the application of the ECHR Act, and this point will be taken no further here.

[9] Article 40.6.1°i of the Irish Constitution states:

"qualified and ambivalent",[10] containing a weak assertion of the citizens' right to express freely their convictions and opinions, hastily followed by the proviso that the organs of public opinion must not be allowed to undermine public order, morality, or the authority of the State. The Article's anachronistic and broadly-worded qualifying clause has led to calls for its replacement with a provision more in line with Article 10.[11] On its face, Article 40.6 appears to be a pro-State and paternalistic attempt to limit the operation of a necessary but dangerous right,[12] while the constitutional offences of publishing blasphemous, seditious or indecent matter are a questionable addition for a bill of rights.[13]

The poor wording of the Irish Article even led to judicial confusion as to whether it covered the right to communicate information as well as opinion. This problem famously arose in *Attorney General v. Paperlink*,[14] in which Costello J's literal reading of Article 40.6 confined its operation to the expression of convictions and

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"The state guarantees liberty for the exercise of the following rights, subject to public order and morality:

i. The rights of citizens to express freely their convictions and opinions.
The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality of the authority of the State.
The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law."

Article 10 ECHR reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
"2. The exercise of such freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[10] Marie McGonagle, "Freedom of Expression and Information" from Gerard Quinn (ed) *Irish Human Rights Yearbook 1995* (Round Hall Sweet & Maxwell, 1995) 31, at 31.

[11] This possibility was examined by the *Report of the Constitution Review Group*, May 1996, at 291ff. The present qualifying clause is regarded as out of date for, amongst other things, its failure to refer to television and the Internet.

[12] *See*, e.g., Neville Cox, "'Careful Now, Down With This Sort of Thing' Blasphemy, Indecency and Freedom of Speech", TCD Symposium on Freedom of Expression, 5-6 December 2003: "the terms of the clause itself seems to suggest a fear on the part of its drafters that if the citizens of the new independent republic had too much freedom they might choose to exercise it in an unwholesome fashion" (at 1 of the paper).

[13] Stephen Ranalow, "Bearing a Constitutional Cross: Examining Blasphemy and the Judicial Role in *Corway v. Independent Newspapers*" [2000] 3 *TCLR* 95, at 95.

[14] [1984] ILRM 373, at 381.

opinions. The learned judge of the High Court nevertheless accepted that the right to communicate facts and information must exist under the Constitution, and concluded that this right was one of those personal unspecified rights of the citizen protected by Article 40.3.1°.[15] This judgment effectively stated that the right to freedom of expression was fully protected under the Constitution, but that the source of the protection depended on the type of material being published.

It should be noted that Costello J's was not the final word on this point: in *Attorney General of England and Wales v. Brandon Book Publishers Limited*,[16] Carroll J took the view that Article 40.6 did indeed cover the right to impart information as well as ideas. Still more recently, in *Irish Times v. Murphy*,[17] two members of a Supreme Court of three adopted a similar position, albeit *obiter*, with O'Flaherty J endorsing Carroll J's reading of Article 40.6, and Barrington J noting that it would be absurd if a right to express convictions and opinions did not include a right to state facts. Absurd or not, the third member[18] reserved the question of whether the scope of Article 40.6 was restricted in the manner contended for by Costello J, and the question is still open to be argued, should the occasion arise.[19]

While the focus of the domestic provision appears to be on the justifications for restricting freedom of speech, the language of Article 10 ECHR is much more right-centred. Furthermore, it expressly covers both the communication of fact and opinion, precluding *Paperlink*-style judicial limitations of its scope. Limitations on the right must be prescribed by law; the State must be able to point to one of the legitimate

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[15] At 381. Since the case of *Ryan v. Attorney General* [1964] IR 294, the Irish courts have accepted the idea that the Constitution is capable of protecting rights other than those explicitly set down in its pages; this doctrine of unenumerated rights has led to the "discovery" of a number of rights, including the right to work and earn a livelihood, the right to litigate etc. The doctrine has proved highly controversial with positivists; *see*, for example, Gerard Hogan, "Unenumerated Personal Rights: *Ryan*'s Case Re-Evaluated" (1990-1992) 25-27 *Ir Jur* 95, and Desmond Clarke, "The Role of Natural Law in Irish Constitutional Law" (1982) 17 *Ir Jur* 187.

[16] [1986] IR 597.

[17] [1998] 2 ILRM 321.

[18] The third member of the Court was Denham J.

[19] It was not essential to the resolution of the *Murphy* case that the status of Article 40.6 be determined once and for all. The case involved an application by *The Irish Times* for an order of certiorari quashing the order of Murphy J, who had prohibited the media from reporting the evidence in a drugs trafficking case he was hearing until the conclusion of the trial. The applicant newspaper failed to convince Morris P in the High Court, but was ultimately successful in the Supreme Court, where the members focused on the right of the media to publish contemporaneous reports of proceedings; a right which could only be restricted where there is a real risk of an unfair trial, or where the damage which any improper reporting would cause could not be remedied by appropriate directions by the trial judge or otherwise.

justifications in Article 10(2), or to a competing Convention right; and, finally, the restriction on the right must go no further than is necessary in a democratic society (Strasbourg's much-vaunted "proportionality test").

As far as case law is concerned, the variety and scope of Strasbourg's free speech jurisprudence puts that of Ireland firmly in the shade. Article 40.6 has been one of the least litigated fundamental rights provisions, while the ECtHR's fundamental rights case law has justifiably been described as "the jewel in the crown of the Strasbourg court [sic]."[20] The leading Convention case, *Sunday Times v. United Kingdom*,[21] is a stirring and robust statement on the nature and extent of the right to freedom of expression, with the Court using language as emotive as that of the great US dissents of the early 20th Century[22] to uphold the right to express ideas that offend, shock or disturb. On the other hand, the ECtHR's reliance on the margin of appreciation has certainly operated to the detriment of claimants in certain types of free speech cases – notably where the State relies on the religious sensitivities of its citizens as a ground for the impugned restriction.[23] In addition, it has been argued that the domestic application of the Convention's privacy guarantee, enshrined in Article 8 ECHR, will have a negative impact on freedom of expression – at least in some circumstances.

Arguably, there has been a tendency to either grossly overstate or grossly underestimate the potential impact of the ECHR in general, and Article 10 in particular, on Irish law. There are many aspects of Irish free speech law which clearly *do* meet the Convention standard, even if they may appear controversial at first glance; these areas will be discussed in Part 1. Elsewhere, however, there is ample room for improvement, if both lawyers and judges are prepared to allow the ECHR Act to be a catalyst for change, and Part 2 will examine some aspects of the Strasbourg case law that hint that Irish law may need to evolve in order to remain consistent with the Convention, including the suggestion that Article 8 may have an impact on press freedom in this jurisdiction. Certain caveats must be entered at this point: unfortunately, the dearth of ECHR-based Irish judgments at the time of writing means

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[20] Gerard Hogan SC, Address on the Mohan Report to the UCD Conference to Consider the Report of the Legal Advisory Group on Defamation, 1 December 2003, viewed at www.justice.ie on 16 March 2004.
[21] (1979) 2 EHRR 245.
[22] E.g. Those of Holmes and Bradeis JJ in *Gitlow v. New York* 268 US 652.
[23] Cases which support this theory will be discussed later in this chapter.

that much of what follows is necessarily speculation;[24] furthermore, in so short a chapter it has been impossible to catalogue all of the restrictions on freedom of expression in this jurisdiction and their position under Convention law. This chapter therefore focuses on some of the more interesting areas to come to prominence in recent times, and asks what difference, if any, the recently published Defamation Bill 2006 will make to our law's compatibility with the ECHR in the area of free speech.

The ECHR and Irish Restrictions on Free Speech: Unproblematic Areas

For the most part, the limitations which Irish law places on freedom of expression are largely uncontroversial from Strasbourg's point of view. Anyone who imagines that the incorporation of the ECHR will completely overhaul our free speech law will be sorely disappointed; after all, Article 10(2) itself allows the right to be curtailed for a wide range of legitimate reasons, including the interests of national security, the prevention of crime and, significantly, the protection of the rights of others.[25]

Parliamentary Privilege

Parliamentary privilege is an unusual aspect of free speech law, in that the rule effectively accords a certain section of the population (TDs and Senators) a greater degree of freedom of expression than everyone else – provided they are speaking in the Oireachtas.[26] Members of the Oireachtas, in common with their counterparts in many other jurisdictions, enjoy total immunity from suit for comments made in either House of Parliament; furthermore, as in the United Kingdom, the subsequent publication of these comments also enjoys absolute privilege.[27] This situation has not been altered by the Defamation Bill 2006.[28]

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[24] The phrase "crystal ball gazing" used by the Minister for Justice is more or less apt; *see* Michael McDowell, TD, "The European Convention on Human Rights Act, 2003: What the Act will Mean", Speech to the Law Society and Human Rights Commission Conference on New Human Rights Legislation, 18 October 2003, at 1 of the paper.

[25] *See* Note 9, *supra*.

[26] In Ireland, this absolute parliamentary privilege is protected by Articles 15.12 and 15.13 of the Constitution. Article 15.13 states that "The members of each House of the Oireachtas...shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself."

[27] Article 15.12 of the Constitution.

[28] Section 15 of the Bill deals with the defence of absolute privilege. Section 15(2) sets out the circumstances in which the defence arises, and is largely declaratory of the existing law in the area.

The Court of Human Rights has upheld the absolute privilege of parliamentarians and their corresponding immunity from suit for defamatory statements uttered during parliamentary debates: *see A v. United Kingdom*.[29] In that case, a British MP speaking in the House of Commons described the applicant as a "neighbour from hell". Michael Stern, MP, read out the applicant's full name and address, and claimed that her family was responsible for "anti-social behaviour", including criminal damage and drug activity. His remarks were repeated in the press, and as a result she was subjected to such abuse that the local authority had to re-house her. In other circumstances, the applicant could (and possibly would, resources permitting) have sued for defamation; in this case, parliamentary privilege made such a course of action impossible.

In spite of the undoubted seriousness of the allegations, the applicant failed in her claim that absolute parliamentary privilege breached her right of access to the courts under Article 6(1) – a somewhat unsurprising result, given that elected representatives of the Contracting Parties, not to mention the Secretariat of the Council of Europe, enjoy similar privileges.[30] Vociferous third party interventions were made by Austria, Belgium, the Netherlands, Finland, France, Ireland, Italy and Norway, all of whom emphasised the importance of parliamentary immunity to members' ability to speak freely and carry out their duties.[31] As a statement of principle, the Court was undoubtedly correct; however, its suggestion that Ms A had adequate alternative remedies[32] open to her is questionable, given the well-established tradition that the most appropriate remedy for defamation is in damages.[33] It is clear that the Court was (justifiably) preoccupied with the social utility of the long-standing and widespread tradition of parliamentary immunity, and that cornerstone of parliamentary democracy was not to be easily dislodged.

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[29] (2003) 26 EHRR 917, also noted at [2003] 2 EHRLR 230; and 3(6) *Human Rights and UK Practice* 12.

[30] 927 (Paragraph 33) of the judgment.

[31] At 928-932 (Paragraphs 37-58).

[32] Such as having another MP petition the House to have the comments retracted, or asking Parliament to punish deliberately misleading remarks.

[33] The Irish courts have long upheld the theory that damages represent the best – indeed, the only appropriate – compensation for the tort of defamation. However, *The Report of the Legal Advisory Group on Defamation* (March 2003) suggests that alternative remedies should be made available. It remains to be seen whether these suggestions will be acted upon.

The Irish Religious Advertising Ban

As we have already noted, the Court of Human Rights is loath to interfere in areas of particular sensitivity, partly due to the belief that the national authorities are bound to have a better understanding of local feeling than a Court composed of international judges sitting far removed in Strasbourg. Thus, it flatly refused to overturn the Irish ban on religious advertising challenged in *Murphy v. Ireland*,[34] rejecting the application on substantially the same grounds as had the Irish Supreme Court.[35] The facts of *Murphy* are well known: a pastor attached to a Christian ministry sought to broadcast a radio advertisement giving details of when and where he would be presenting a video on the Resurrection. The commercially-owned station to whom he submitted the advertisement was happy to broadcast it, but was prevented from doing so by the Independent Radio and Television Commission (the IRTC), because of the ban on religious and political advertising, and advertising relating to a trade dispute contained in section 10(3) of the Radio and Television Act, 1988.[36]

Murphy's challenge to the constitutionality of the advertising ban was unsuccessful, with the Supreme Court taking the view that section 10(3) was a legitimate attempt by the legislature to avoid advertising that could cause offence or even civil unrest, given the emotive nature of the three areas it targeted and the fact that all three had proved extremely divisive in Ireland's recent past. The ECtHR accepted this reasoning almost without question, noting that

> "[A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of 'the protection of the rights of others' in relation to attacks on their religious convictions."[37]

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[34] (2004) 38 EHRR 212.
[35] [1999] 1 IR 12; [1998] 2 ILRM 161.
[36] This ban was subsequently slightly relaxed by section 65 of the Broadcasting Act, 2001, which permits the broadcasting of the fact that a religious newspaper or magazine is available for sale, or that a religious event or ceremony will be taking place. This relaxation of the rules would in no way have benefited Murphy, since his video presentation did not amount to a religious event or ceremony.
[37] At paragraph 67 of the Judgment.

Although the ECtHR accepted that there was a risk of excessive interference with the right to freedom of expression under the pretext of protecting religious sensibilities from allegedly offensive material,[38] they unanimously held that there had been no violation of Article 10; Ireland had not exceeded her margin of appreciation. In arriving at this conclusion, the Court noted that the applicant could still take part in *programmes* on religion and could advertise through other media, since the ban related only to the audio-visual media. There was no clear European consensus on religious advertising, and the Court accepted the Irish government's arguments that religion was a highly sensitive topic in Ireland. This was, therefore, a situation where a blanket ban on all audio-visual religious advertising was necessary and avoided placing agents of the State in the invidious position of having to decide which advertisements were offensive and which were not. Given the style of the ECtHR's reasoning, it would seem likely that any challenge to the ban on political advertising and advertising relating to industrial disputes would also be upheld, if taken to Strasbourg.

As a post-script to the religious advertising question, it should be noted that RTE did effectively allow religious advertising in late 2002 at the behest of the Power to Change Campaign, an ecumenical Christian campaign which showed TV advertisements encouraging people to return to religion. The wording of these advertisements was strictly agreed, and much less emotive than that used in Northern Ireland, where the ban did not apply. Nevertheless, it arguably ran a much more serious risk of offending the religious sensibilities of non-Christians than Murphy's advertisement. It is submitted that, whatever criticisms may be made of the reasoning in the *Murphy* decisions, the ban on religious and political advertising is a desirable one not merely because it avoids causing offence (which is, at best, a relatively weak argument in the context of free speech, running contrary to all of Mill's theories[39]), but also because it protects the vulnerable from exploitation and ensures a certain level of equality in the recruitment of religious devotees and political partisans alike, in that it prevents more wealthy religious groups, or even cults, from using media saturation to sell their ideas on the airwaves.

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[38] At paragraph 68 of the Judgment.
[39] *See* John Stuart Mill, *On Liberty and Other Essays* (Himmelfarb, ed) (Penguin, 1995).

It would appear that the ECtHR is remarkably reluctant to intervene at all when a State raises the defence of protecting the feelings of others. This reluctance to intervene has been known to extend, controversially, to forms of expression which "offend, shock or disturb" – a controversial position, given the *Sunday Times* principle that those types of speech are most in need of protection. Artistic speech seems to be particularly vulnerable: in *Muller v. Switzerland*,[40] for example, the applicant was an artist who had been convicted under an obscenity law after showing paintings depicting sexual acts between and men and animals in an exhibition that was open to the public. The Court of Human Rights had little difficulty in holding the restriction to be proportionate.

The margin of appreciation appears to be even broader when art offends religious sensitivities. In *Otto Preminger Institut v. Austria*,[41] the authorities seized a film from a private art-house cinema on the grounds that its satirical treatment of religious figures would offend the local Roman Catholic population. This was arguably an even more serious interference than that in *Muller* since the chances of anyone accidentally strolling into the private cinema and seeing the film without any prior knowledge of its content were probably slim. In *Wingrove v. United Kingdom*[42] the UK authorities had refused a certificate to another controversial film with a religious topic[43] on the ground that it contravened the criminal law of blasphemy. The ECtHR upheld the proportionality of this censorship measure. It has been argued, not without some justification, that the Court in *Wingrove* "implicitly upholds freedom of religion over freedom of expression".[44]

As stated above, the Irish Constitution is unusual in that it includes the offence of uttering material that is blasphemous, seditious or indecent.[45] The method of incorporation chosen in the ECHR Act means that the Constitution retains its supremacy, and that the Article 40.6 offences of blasphemous, seditious and indecent speech are thus immune from any challenge based on the Act. The original rationale

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[40] (1991) 13 EHRR 212.
[41] (1995) 19 EHRR 34.
[42] (1997) 24 EHRR 1.
[43] The film, *Visions of Ecstasy*, suggested that a saint's ecstatic visions were in fact erotic in nature.
[44] Paul Kearns, "The Uncultured God: Blasphemy Law's Reprieve and the Art Matrix" [2000] EHRLR 512, at 519.
[45] Article 40.6.1°i. On this point, *see*, *inter alia*, Stephen Ranalow, Note 13, *supra*.

behind this offence was to punish those who offended God; however, the modern reasoning of the ECtHR, in upholding anti-blasphemy laws, seems to be to censure those who, by attacking or ridiculing their beliefs, offend other men.

Even if the criminalisation of blasphemy were to have its sole source in statute or common law, the ECHR Act would probably not provide any grounds for challenging the compatibility of such a crime with the Convention. Blasphemy laws would seem to be compatible with the Convention.[46] Nor does Strasbourg require that such domestic laws protect all religions: in *R v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury*,[47] the House of Lords refused to apply blasphemy law in the context of *The Satanic Verses* because English blasphemy law only applied to attacks on Anglicanism. This position was vindicated by the ECtHR in *Choudhury v. United Kingdom*,[48] where the Court held that Article 9 ECHR did not impose a positive duty on Contracting Parties to protect all religious sensitivities in this manner – a judgment which seems to indicate that, while States may generally safely restrict free speech in order to protect the religious feelings of some of the population, there is no obligation on them to do so for all of the population.

However, given the Supreme Court's refusal to apply the blasphemy provision in *Corway v. Independent Newspapers Limited*[49] (on the slightly dubious[50] ground that no satisfactory definition of the offence existed), it appears unlikely that any future prosecution for blasphemy will be successful in this jurisdiction, so the compatibility of the offence with the Convention is largely a moot point.[51] Likewise, it would appear that the Convention does not prohibit domestic legislation regulating "hate speech" where this would amount to a threat to the rights of others. Thus, legislation

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[46] The legitimacy of blasphemy law was also upheld by the European Commission on Human Rights in *X and Y v. United Kingdom* (1983) EHRR 123.
[47] [1991] 1 All ER 306; [1990] 3 WLR 986.
[48] (1991) 12 HRLJ 172.
[49] [2000] 1 ILRM 426.
[50] On this point, *see* Neville Cox, "Constitutional Law – Constitutional Interpretation – Passive Judicial Activism – Constitutional Crime of Blasphemy" (2000) 22 (ns) *DULJ* 201.
[51] However, it has been argued, with justification, that even unenforced laws can have a chilling effect; *see* Neville Cox, Note 12, *supra*, at 23. The power exerted by the law over societal attitudes, even when the law is never put into action, was recognised by the Court of Human Rights itself in *Norris v. Ireland* (1988) 13 EHRR 146.

prohibiting incitement to racial hatred would probably not fall foul of the Strasbourg Court, provided the restriction imposed was proportionate to the end pursued.[52]

Defamation Damages – Lottery or Windfall?

Until recently, an important aspect of Irish defamation procedure remained problematic: quantum. Strasbourg's most definitive statement on damages in defamation remains the celebrated *Tolstoy Miloslavsky v. United Kingdom*,[53] in which the applicant's undoubtedly serious allegations against a British peer were the basis of the largest English award of damages in a defamation action - £1.5m sterling.[54] For the first time, Strasbourg was asked to rule that the size of an award alone amounted to a breach of Article 10, and had little difficulty in holding that the award was excessive.[55] Not only the magnitude of the award concerned the Court, but its cause: English law at the time of the original libel action displayed a complete absence of adequate safeguards against excessive awards: there was no overriding principle of proportionality, nor did the law prescribe any upper or lower limit on damages. Likewise, it was impermissible for either side or for the presiding judge to suggest figures to the jury, or to make comparisons with personal injury cases. An award could only be overturned on appeal "if it could not have been made by sensible people but must have been arrived at capriciously, unconscionably or irrationally"[56].

Even by the time the ECtHR heard the application, the English courts had taken some small steps to remedy the deficiencies in this area of the law: in *Rantzen v. Mirror Group Newspapers*,[57] the Court of Appeal had taken the opportunity to re-assess its former position, which was one of reluctance on the part of appellate courts to

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[52] Jonathan Cooper and Adrian Marshall Williams, "Hate Speech, Holocaust Denial and International Human Rights Law" [1999] 6 EHRLR 593.
[53] (1995) 20 EHRR 442.
[54] The applicant's pamphlet accused Lord Aldington of handing over Cossacks to be killed during World War II. The award was three times the size of the next highest award that had been made until that case, and was substantially higher than awards made in respect of serious physical injury (see 468 of the judgment).
[55] (1995) 20 EHRR 442, at 480.
[56] At 468 (Paragraph 38).
[57] [1994] QB 670. *The People* newspaper had published four articles suggesting that the TV presenter and ChildLine founder Esther Rantzen had wrongly failed to expose the fact that an informant, who had helped her to expose sexual abuse at a school at which he had worked, was himself an abuser. The plaintiff said that her actions had been motivated only by her desire not to impede the police investigation of the matter. She won at first instance and was awarded damages of £250,000stg; MGN then appealed.

interfere with jury awards. The old test was one of rationality on the part of the jury;[58] however, on a consideration of the authorities, it was clear to the Court of Appeal that a proper understanding of the common law now required large awards to be subjected to "a more searching scrutiny than has been customary in the past".[59] The new test to be applied was whether a reasonable jury would have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation.[60] Furthermore, in his charge to the jury, the trial judge should invite the jury to take account of the purchasing power of any award they might make, and to ensure that the amount was proportionate to the damage to the plaintiff and was necessary to re-establish his reputation.[61]

The *Rantzen* test was to be a stop-gap measure: the Court of Appeal did not seem averse to the idea that figures be mentioned to the jury, but, since those figures in existence had been made in ignorance of the proportionality requirement, they advised waiting until sufficient guidelines concerning the size of defamation awards had been laid down by the Court of Appeal pursuant to its new powers under Section 8 of the Courts and Legal Services Act, 1990 (which section gave the Court the power to substitute its own assessment of damages for that of the trial jury, rather than having to remit the matter). The Court of Appeal declined, however, to endorse the suggestion that juries be referred to personal injury awards. While accepting the validity of the criticism that defamation plaintiffs could receive much larger sums than the victims of serious physical injuries, Neill LJ noted that the courts had emphatically rejected any satisfactory link between the two types of case, and that there seemed no reason personal injury awards could provide guidance to defamation juries.[62] In the course of its judgment in *Tolstoy*, the Court of Human Rights endorsed the findings of the Court of Appeal in *Rantzen*, which confirmed the ECtHR's own suspicions that the old

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[58] In *Praed v. Graham* (1889) 24 QBD 53 (at 55), the test was whether "the damages are so excessive that no twelve men could reasonably have given them"; in *McCarey v. Associated Newspapers Ltd (No. 2)* [1965] 2 QB 86 (at 111, *per* Wilmer LJ), an award was overturned because it was "divorced from reality".

[59] [1994] QB 670, at 692.

[60] At 692.

[61] In the circumstances, the Court of Appeal found that, despite the undoubted seriousness of the allegations against Ms Rantzen, she had continued her highly successful career in television, and her work on behalf of abused children continued to earn her "wide acclaim". On the standatds of reasonableness, necessity and proportionality, the award of £250,000 had been excessive, and was reduced to £110,000.

[62] At 694-695.

system lacked the necessary judicial safeguards against disproportionate awards, both at first instance and on appeal.[63]

The evolution of the English law in relation to defamation awards continued in *John v. MGN Ltd.*[64] In spite of the apparent revolution in English civil practice that was *Rantzen*, juries had continued to make large awards in defamation cases. One such case concerned the *Sunday Mirror*'s publication of a story alleging that the musician Elton John suffered from a rare form of bulimia, whereby he chewed food but spat it out rather than swallowing it, and that he had been witnessed doing this and overheard discussing the practice at a Hollywood Christmas party. The jury found for the plaintiff and awarded a total of £350,000stg (£75,000 general damages, and £275,000 exemplary damages). Once again, the Court of Appeal was called to intervene, and once again, it held that the damages awarded were excessive.[65] Noting that the article did not attack Elton John's personal integrity or professional reputation, the Court substituted a figure of £75,000, consisting of £25,000 in general damages, and £50,000 exemplary damages. Sir Thomas Bingham MR, delivering the judgment of the Court of Appeal, agreed with the judgment of the earlier Court of Appeal in its assessment that it was too early for juries in defamation cases to be referred to awards made by other such juries, as the comparators would have been made in the absence of real guidance, but that those awards approved or made by the Court of Appeal might in future be referred to for guidance. However, it was made clear that the necessary framework of appellate awards had not yet been established, and was likely to take some time to emerge.[66]

The most radical aspect of the *John* decision, however, was the Court of Appeal's reversal of the *Rantzen* position in relation to personal injury awards. The Court noted the rationale behind the supposed distinction between damages for defamation and compensation for personal injury – that defamation awards operate as "a solatium rather than a momentary recompense for harm measurable in money"[67]. The Court

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[63] (1995) 20 EHRR 442, at 473 (Paragraph 50).
[64] [1997] QB 586.
[65] *John v. MGN Ltd* [1997] QB 586.
[66] *John v. MGN Ltd* [1997] QB 586, at 611-612.
[67] *Per* Windeyer J in *Uren v. John Fairfax & Sons Pty Ltd* 117 CLR 115, at 150. It is, of course, highly questionable whether an injury such as, e.g. the loss of a limb is really "measurable in money", but this

noted that awards in the two types of action fulfilled different purposes, but took the view that such reasoning could not stand up against the use of personal injury awards to test the reasonableness of proposed defamation awards.[68] The Master of the Rolls stated that "it is one thing to say...there can be no precise equiparation between a serious libel and (say) serious brain damage; but it is another to point out to a jury considering the award of damages for a serious libel that the maximum conventional award for pain and suffering and loss of amenity to a plaintiff suffering from very severe brain damage is about £125,000 and that this is something of which the jury may take into account".[69] On the other hand, there was, Lord Bingham continued, force in the arguments that referring to personal injury awards simply admits "yet another incommensurate" into the jury's consideration, and that personal injury awards are too low in the first place and are therefore an uncertain guide.[70] Their Lordships were not contending that personal injury figures should be used as an exact guide, but in order to allow the jury to decide if the victim of libel or slander legitimately deserves more financial recompense than, say, someone who has been left quadriplegic. Sir Thomas Bingham MR stated that:

> "It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time had in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons."[71]

The Court of Appeal rejected as unconvincing the age-old argument that mentioning actual figures to a jury would automatically turn the courtroom into an auction, noting that judges in personal injury cases were addressed in detail on quantum.[72] They also accepted, theoretically at least, the soundness of the suggestion that both judge *and* counsel might one day be allowed to address the jury on the appropriate level of any award, so long as the jury remained free to make up their own mind.[73]

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is a fiction the courts the world over engage in out of necessity and the sheer absence of any other appropriate remedy.

[68] *John v. MGN Ltd* [1997] QB 586, at 613.
[69] *John v. MGN Ltd* [1997] QB 586, at 614.
[70] At 614.
[71] At 614.
[72] At 615.
[73] At 615-616.

The English Court of Appeal's position was diametrically opposed to that of the Supreme Court, as exemplified by *de Rossa v. Independent Newspapers plc.*[74] *De Rossa* concerned an article in the *Sunday Independent* that accused the politician and his former party, the Worker's Party, of involvement in criminal activities to raise funds, and of allegiance to the Soviet Communist Party, an organisation the article's author termed "brutal" and "anti-Semitic". After two initial abortive trials, a third jury eventually awarded de Rossa damages amounting to £300,000 – an award which was subsequently upheld by a majority of the Supreme Court.[75] The Supreme Court rejected the appellant/defendant's arguments, based on the reasoning of the Court of Human Rights in *Tolstoy*, that not only were the damages awarded excessive, but that the trial judge's directions to the jury were inadequate. What the appellant called for was, effectively, a revolution in Irish law: the trial judge's charge to the jury had been in accordance with the existing guidelines; the defendant argued that the current practice of leaving the jury unguided discretion in assessing damages led to excessive and disproportionate awards and was in breach of the Constitution. More detailed guidelines from the judge and counsel were necessary. Specifically, judge and counsel should make reference to the purchasing power of the award, to what they thought would constitute an appropriate award, and to awards in previous defamation cases and personal injury cases for the purposes of comparison. Furthermore, the appellant submitted that both Constitution and common law required that awards be subject to "a more searching scrutiny" than in the past,[76] and that the old rationality test was no longer appropriate.[77]

The Supreme Court rejected these submissions, adopting the position that there was no conflict between Article 10 ECHR and the common law or the Constitution.[78] Hamilton CJ noted that the judgment of the Court of Appeal in *John v. MGN* represented a fundamental alteration to the previous practice, and concluded that neither the Constitution nor the ECHR required the steps contended for by the

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[74] [1999] 4 IR 432.
[75] Hamilton CJ, Barrington, Murphy and Barron JJ; Denham J dissented.
[76] For a summary of the appellant's arguments, *see* the judgment of Hamilton CJ at 447.
[77] Under Irish law, appellate courts had to ask whether the award made by the jury was "so disproportionately high having regard to the injury suffered" that no reasonable jury who properly applied the law could possibly have made it (*per* Hamilton CJ, at 448).
[78] *See* the judgment of Hamilton CJ at 450.

appellant.[79] The Chief Justice noted that the Court of Appeal's decision was based on developments in the English common law, rather than the Convention[80] – a view supported by Sir Thomas Bingham's statement that "We reach these conclusions independently of the Convention...and would reach them even if the Convention did not exist"[81]. Hamilton CJ chose to retain the old Irish position as to the appropriate charge to the jury, set down by Henchy J in *Barrett v. Independent Newspapers Ltd*:[82]

> "In a case...where there is no question of punitive, exemplary or aggravated damages, it is the duty of the judge to direct the jury that the damages must be confined to such sum of money as will fairly and reasonably compensate the plaintiff for his injured feelings and for any diminution in his standing among right-thinking people as a result of the words complained of ... Among the relevant considerations proper to be taken into account are the nature of the libel, the standing of the plaintiff, the extent of the publication, the conduct of the defendant at all stages of the case, and any other matter which bears on the extent of the damages."[83]

Despite the appointment of a new Chief Justice, the approach of the majority of the Supreme Court in the *O'Brien v. Mirror Group Newspapers*[84] remained largely identical to that of the earlier Court – with one happy difference from the appellant newspaper's point of view: the award of £250,000 to the businessman Denis O'Brien was held to be disproportionate by four members of the Court, and a new trial was ordered on the issue of damages alone.[85] The majority refused to depart from the guidelines set down in *de Rossa*, rejecting the argument that they had had insufficient regard to the *Tolstoy* principles in that case. While the application of the proportionality test to defamation awards is to be welcomed, it is arguable that the

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[79] At 458.
[80] At 459.
[81] *John v. MGN Ltd* [1997] QB 586, at 619.
[82] [1986] IR 13.
[83] [1986] IR 13,at 23-24.
[84] [2001] 1 IR 1. The *Irish Mirror* had alleged, *inter alia*, that O'Brien's radio station, 98FM, had been awarded its licence after disgraced former Minister Ray Burke received a donation of £30,000; furthermore, the article intimated that O'Brien would soon be investigated following suggestions of impropriety in the award of a mobile phone operators' licence to his company, Esat Digifone.
[85] Keane CJ, Murphy and O'Higgins JJ. Denham J also agreed that the award was disproportionate, but, unlike the other four judges, she took the view that there were grounds for reconsidering the reasoning of the Supreme Court in relation to guidelines in *de Rossa*. Geoghegan J, dissenting in part, felt that having regard to the circumstances in which jury awards could be set aside, the award made was not unreasonable and should not, therefore, be set aside as being unreasonably high.

Supreme Court's proportionality test was not as robust as it might have been: it appeared to involve little more than a comparison of the figure awarded with two other very large awards that had been upheld by earlier Supreme Courts. Keane CJ noted that "the damages awarded are in the highest bracket of damages appropriate in any libel case" and were "comparable to the general damages awarded in the most serious cases of paraplegic or quadriplegic injuries" and to those awarded in *de Rossa*.[86] On a comparison of *de Rossa* and *O'Brien*, the Chief Justice concluded that the allegations in the former case were "significantly more damaging and serious" than in the instant case, and the damage done to de Rossa was also greater, given his public profile – a profile O'Brien did not share since he was not so well known to the general public.[87]

However, the Court also noted that O'Brien was also more widely known to the general public than that of the plaintiff in *McDonagh v. Newsgroup Newspapers Ltd*,[88] a case in which a former Supreme Court stated that the award of £90,000 was "undoubtedly high and at the top of the permissible range."[89] McDonagh, who had been sent by the Irish government to observe an inquest into the SAS killings of three IRA members in Gibraltar, was accused by the newspaper of being a terrorist sympathiser. Although the Supreme Court quoted with approval Finlay CJ's statement that £90,000 represented the upper end of the permissible scale of libel awards, it did not appear to have any trouble in endorsing the appropriateness of an award over three times that size in *de Rossa*. The Chief Justice's observation that O'Brien was better known than McDonagh also appeared to indicate that he felt O'Brien should receive more compensation than McDonagh, although *significantly* less than de Rossa (the businessman's initial award was, at £250,000, already £50,000 less than that awarded to the politician).

One further problem with the reasoning of Keane CJ in *O'Brien* lies in his theory that the better known to the public a figure is, the more damage is done to his reputation by a libel, and the more damages he should receive.[90] It is submitted that, as a point of departure for the assessment of damages for defamation, this thesis is flawed: from an

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[86] [2001] 1 IR 1, at 20.
[87] [2001] 1 IR 1, at 21.
[88] Unreported, Supreme Court, 23 November 1993.
[89] *Per* Finlay CJ, at 17 of the judgment.
[90] *See* [2001] 1 IR 1, at 21.

ideological point of view, those who willingly enter the public arena, and particularly those who stand for public office, must surely be taken to accept the risks involved, including the risk of harsh and sometimes unreasonable criticism. Indeed, the Court of Human Rights has consistently emphasised that the limits of acceptable criticism are broader as regards a politician than they are in the case of a private individual.[91] That is not to say that public figures should be forced to endure with equanimity the unsubstantiated ravings of hostile journalists; but, given that they *will* be criticised, sometimes in an unmeasured and unreasonable manner, it seems entirely unreasonable that their public visibility should be allowed to increase damages. The current situation may be somewhat attenuated by the new defence of 'fair and reasonable publication on a matter of public importance' envisaged by section 24 of the Defamation Bill.[92]

A significant feature of both the *de Rossa* and the *O'Brien* decisions is Denham J's dissent in both cases – a dissent which was based, in large part, on the judge's conclusion that the existing system was very likely in breach of the Court of Human Rights' position in *Tolstoy*.[93] In *de Rossa*, Denham J took a more liberal view on the question of guidance to juries: "Information does not fetter discretion".[94] There is undoubtedly some logic in Denham J's point that it would not be a huge departure for trial judges to refer to actual awards in other defamation cases, especially since they are already allowed to refer to the facts in other cases (in *de Rossa*, the trial judge referred to the famous beard-pulling allegation in *Barrett v. Independent Newspapers*[95]

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[91] *See*, *inter alia*, *Lingens v. Austria* (1986) 8 EHRR 103.

[92] This defence is subject to the dual requirement that the material was published in good faith and 'in the course of, or for the purposes of, the discussion of a subject of public importance, the discussion of which was for the public benefit'. The Bill also makes provision for opinion pieces on matters of public importance: section 18 codifies the defence of honest opinion, a replacement for the defence of fair comment; under section 18(2)(c), an opinion will be considered to be honestly held for the purposes of the section if it is related to a matter of public importance.

[93] A similar conclusion has been reached by others. *See*, e.g., Patrick Leonard, BL, "Irish Libel Law: The European Convention on Human Rights" (2000) 5(8) *Bar Review* 410, especially 415.

[94] [1999] 4 IR 432, at 477.

[95] [1986] IR 13. The plaintiff was a Teachta Dála and a member of the Fianna Fáil party. The party had met to consider a resolution that Charles Haughey should be removed as party leader; that resolution was defeated, and the plaintiff and other party members left the building through an entrance hall where members of the press were waiting. The defendant newspaper published the following account: "There were savage scenes as TDs left Leinster House early today. Michael Barrett TD, a Dublin Haugheyite leaned over and pulled at my beard and said 'You thought you'd dance on his grave'." The plaintiff brought proceedings for defamation. The trial judge directed the jury that the words used were defamatory, leaving the jury to deal with the issue of damages only. On appeal to the Supreme Court by the defendant, the Court ruled that a finding by the jury that the words used were not defamatory would

as an example of a less serious libel). Indeed, it is submitted that the utility of mentioning other cases at all is highly questionable if the facts of those cases may not be linked to the award made, so that the jury hearing the account can make a comparison of the seriousness of the defamation with that before them and adjust the amount of their award accordingly. In *O'Brien*, Denham J adopted a similarly pro-Strasbourg position and attached considerably more importance to the European question than did the majority. Keane CJ, with whom Murphy and O'Higgins JJ concurred, appeared to agree with his predecessor's approach to Article 10 and *Tolstoy*, but focused more on the test to be applied in deciding whether or not to overrule an earlier Supreme Court decision.

In addition, in *de Rossa*, Denham J took the more radical view that libel juries should be allowed to hear evidence of personal injury awards:

> "Compensation is a notional remedy in both instances. The lame do not walk after an award of compensation. The defamed do not cease to have been defamed after an award of damages. An order of damages is an artificial form by which a court gives a remedy to an injured person."[96]

Certainly, the "artificial" remedy of damages serves a similar purpose in both cases. Indeed, it has even been questioned whether the award of damages, typically made quite some time after the publication of the original libel, really vindicates a person's good name at all[97] – although it is submitted that while damages may not be so effective a remedy as the courts pretend, it does appear to be the one preferred by plaintiffs.[98] Indeed, for policy reasons is arguably objectionable that anyone should receive more compensation for defamation, even for the most serious and offensive of libels, than a person who through the fault of another has lost all movement in his/her limbs and remains forever trapped in a useless body, helpless but aware. Why should a jury not know how much the quadriplegic will receive, or the brain-damaged child, or

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have been perverse; however, in the circumstances the award was excessive, so the matter was remitted for trial on the issue of damages only.

[96] [1999] 4 IR 432, at 478.

[97] Marie McGonagle, "Response to Legal Advisory Group Report on Defamation", available at www.justice.ie (site visited 16 March 2004).

[98] In that context, it is interesting to note that the Defamation Bill 2006 proposes a new remedy. According to section 26, a defamation plaintiff may apply for a 'declaratory order' that the impugned statement is false and defamatory; however, this remedy may only be obtained in isolation, as an alternative to all other remedies – notably damages. If the section comes into force, it will be interesting to see what proportion of defamation plaintiffs avail themselves of it, if any.

the artist whose hands are rendered useless? Why should a jury not be asked to consider whether defamatory allegations are so serious as to warrant more compensation than a severe personal injury, or less, or a similar amount? However, the fact remains that the Court of Human Rights has never gone so far as to require that figures of any sort must be mentioned to juries for the purposes of comparison, only that appropriate guidance be given to enable juries to make appropriate awards.

Before the 16th of June 2005, it would not have been unreasonable to conclude that Denham J's views would be vindicated on the Independent Newspaper's application to Strasbourg, following *de Rossa*. However, the Court of Human Rights has held otherwise: in *Independent News and Media v. Ireland*,[99] it ruled, by six votes to one, that the award of £300,000 was not a disproportionate breach of the applicant's right to freedom of expression. This was in spite of the fact that reform in this area has long been urged by bodies concerned with law reform: in 1991, the Law Reform Commission recommended that the issue of quantum be decided by the trial judge,[100] and in 2003 a report commissioned by the Department of Justice recommended statutory reform allowing the jury to hear submissions on the issue of damages and to receive more detailed directions from the trial judge.[101] The ECtHR also received Third Party Submissions from a number of media players,[102] all of whom took the view that the current state of Irish law ran contrary to the demands of free speech.[103]

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[99] Application No. 55120/00, Judgment of 16 June 2005.

[100] *See* The Law Reform Commission, *Consultation Paper on the Crime of Libel*, March 1991. The Commission took the view that the question of fact as to whether the plaintiff had been defamed should continue to be decided by the jury.

[101] Report of the Legal Advisory Group on Defamation, March 2003. The LAG felt that the division of functions suggested by the 1991 LRC Report was inadvisable, since the trial judge would have no way of knowing how seriously the jury had viewed the defamation in question. Appropriate directions to the jury might include rerefernce to the purchasing power of the award, the scale of awards in previous defamation cases, and the level of income an award might produce.

[102] I.e. the National Newspapers of Ireland (the representative body for Irish national newspapers, including those owned by the applicants), Associated Newspapers (Ireland) Limited (part of a UK group which publishes an Irish Sunday newspaper), The Irish Times Limited, Thomas Crosbie Holdings and Examiner Publications (Cork) Limited (publishers and distributors of national and regional newspapers in Ireland and the UK), Mirror Group Newspapers (the defendant in the *O'Brien* case), Newsgroup Newspapers and News International plc (publishers of daily and weekly newspapers in Ireland and the UK), and the National Union of Journalists (the representative body for 97% of Irish journalists and, interestingly, the largest union of journalists in the world – see paragraph 86 of the Court's judgment).

[103] For example, both MGN and Associated Newspapers (Ireland) Limited argued that "various aspects of Irish defamation law acted as a chilling effect on freedom of expression including the Supreme Court's inability to substitute its own award" (paragraphs 84 and 81 respectively of the judgment), while Thomas Crosbie Holdings felt that the failure to implement the LRC Report was "prejudicial" to the Irish media (paragraph 83).

Unsurprisingly, the Court of Human Rights had little difficulty in holding that the award constituted an interference with the applicant's Article 10 rights *per se*;[104] however, having regard to the ECtHR's judgment in *Tolstoy*, this interference was proportionate. The Court indicated that it approached actual directions to the jury "with some caution", since "such directions are inevitably framed to respond to specific issues arising at the different trials".[105] In this case, the jury benefited from "two concrete indications" on damages that were not given to the *Tolstoy* jury; i.e. the Irish judge gave the example of a relatively minor instance of defamation (the allegation in *Barrett v. Independent Newspapers*[106] that a politician tweaked a journalist's beard), and followed this example with the statement, "I think there can be no question in this case but that if you are awarding damages you are talking about substantial damages."[107] On the basis of these two remarks, the Strasbourg Court concluded that the directions to the jury at first instance gave "somewhat more specific guidance" than those given by the trial judge in *Tolstoy*.[108] In its assessment of the Supreme Court's second instance review of the award, the ECtHR was impressed by the Supreme Court's requirement that the award be proportionate; no proportionality test was applied by the House of Lords in *Tolstoy*, an important point of distinction in the eyes of the Court of Human Rights.[109] The fact that actual figures could not, under Irish law, be suggested to a jury did not prevent the Supreme Court from conducting its own proportionality test on appeal; nor did the fact that the losing party would have to undertake such an appeal to avail themselves of this proportionality test mean that the Irish position breached the Convention.[110] On this point, the Strasbourg Court appeared to consider that, since costs generally followed the event, the expense of an appeal to the Supreme Court could not be considered a barrier to obtaining a proportionate award.[111] It is thus clear that the safeguards currently in place in this jurisdiction do meet the requirements of the European Convention on Human Rights.

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[104] At paragraph 112.
[105] At paragraph 122.
[106] [1986] IR 13.
[107] At paragraph 123.
[108] At paragraph 124.
[109] At paragraph 129.
[110] At paragraph 131.
[111] *See* paragraph 131.

The Defamation Bill 2006 attempts to defuse the controversy of defamation damages by allowing both parties to address the court on the issue of damages (section 29(1)), while section 29(2) goes further and requires the presiding judge in High Court actions to direct the jury on quantum. In making that award, the court must have regard to eleven factors, including the nature and gravity of the allegation, the means of publication, the extent to which the defamatory statement was circulated, and the reputation of the plaintiff (presumably on the basis that some plaintiffs may not have a good name to lose).[112] However, the Bill makes no reference to a power to refer juries to previous awards, either in defamation cases or in other types of action, and it may be that the Court of Human Rights in Strasbourg has merely postponed the inevitable by not imposing more exacting standards on Ireland in respect of safeguards against excessive awards.

Constitution v. Convention: Problematic Areas of Irish Law

Legal Aid: A Legal Right Post-McLibel?

In spite of Strasbourg's recognition of the central importance of freedom of expression in society, the Court has long declined to oblige Contracting Parties to provide legal aid for those seeking to vindicate this right in the context of defamation proceedings. In *McVicar v. United Kingdom*[113] the applicant journalist was the defendant in defamation proceedings, having accused British athlete Linford Christie of using banned performance-enhancing drugs. He argued that the UK Legal Aid Act of 1988 arbitrarily excluded all defamation proceedings from legal aid no matter what the circumstances; however, the Court held that neither the applicant's Article 6(1) right of access to court nor his Article 10 right to freedom of expression was affected by the absence of legal aid to mount a defence. The Court ruled that the applicant's Article 10 rights were subject to the journalist's duty to act in good faith; his right to present information in this way and to defend himself in court was not infringed by his exclusion from the legal aid scheme. Nor are those who seek to protect their good name entitled to legal aid: in *A v. United Kingdom* (discussed above) the applicant,

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[112] Section 29(4).
[113] (2002) 35 EHRR 22, also noted at [2002] *EHRLR* 693.

who wanted to sue an MP for defamation, lost on this point by 6 votes to 1.[114] In both of these cases, the Court arguably placed undue emphasis on the possibility that the applicants could defend themselves – particularly in *McVicar*, where the Court made unflattering comparisons between the journalist's ability to represent himself and Mrs Airey's.[115] Given the sometimes Byzantine complexities of libel law, and the resulting implications for legal costs, it appears somewhat artificial of the Court to state that either Mr McVicar or Ms A had any real possibility of presenting an effective case in the absence of legal aid.

As an aside, it should be noted that, in *A*, the Court did refer to the possibility of the applicant negotiating a conditional fee arrangement (a CFA): the English Access to Justice Act of 1999 allows lawyers to take on cases on a no-win, no-fee basis. However, the introduction of CFAs in the context of English defamation law has been roundly criticised: they are arguably being misused to facilitate frivolous and trivial claims, with the result that publishers are settling cases in order to off-set the risk of "mind-boggling" costs – particularly where the plaintiff is not insured, and will never be able to pay the defendant's costs in the event of the claim being thrown out. The chilling effect on free speech is obvious. The "ransom factor" means that even weak cases are being settled as a result of this process,[116] and cost-capping can sometimes come too late,[117] particularly where the plaintiff has elected to be represented by an expensive London firm of solicitors.[118]

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[114] As noted above, Ms A also failed to persuade the Court of the more fundamental argument that absolute parliamentary privilege amounted to a disproportionate interference with her Article 6 right of access to the courts.

[115] *Airey v. Ireland* (1979-80) 2 EHRR 305 was the case which led to the establishment of the civil legal aid system in Ireland.

[116] *See*, e.g., David Hooper, "Freedom of Speech is Being Held to Ransom", *The Times Law Section*, 23 September 2003, at 4.

[117] The British courts have the theoretical right to impose cost-capping regimes in defamation cases, e.g. where the vast costs a claimant might incur might restrict the defendant's right to freedom of speech (in the sense that he would be discouraged from defending the action at all if the settlement would be cheaper than his legal fees): e.g. *King v. Telegraph Group*, Court of Appeal, 18 May 2004, *The Times*, 21 May 2004. That case involved suggestions by *The Sunday Telegraph* that Mr King was a supporter of violent Muslim fundamentalists such as Osama Bin Laden. The newspaper apologised and reached a settlement – but not before exorbitant costs had been run up (by the time the parties had set out their cases, Mr King's representatives had run up costs of £60,000). In a later application, the Court of Appeal imposed a cost-capping regime.

[118] Benjamin Beabey points to one case where *The Sun* succeeded in having the amount of the plaintiff's legal fees payable by the newspaper reduced by two thirds from £91,779 to £32,633. The newspaper had mistakenly "outed" the plaintiff as a paedophile by publishing his picture with a story about a convicted paedophile who lived in his street – *The Sun* published an apology and offered

However, those civil libertarians who bemoan the current state of the Irish civil legal aid system[119] may have cause to thank an unlikely, clown-shaped benefactor: in the recent case of *Steel and Morris v. United Kingdom*,[120] Strasbourg held that the failure to provide the applicants with legal aid in the context of a libel action amounted to a breach of Articles 6 and 10 of the Convention. The applicants in question were two members of London Greenpeace who were successfully sued by the fast food giant McDonald's for producing leaflets which accused McDonald's of a number of serious transgressions, including knowingly selling food that was likely to cause cancer and heart disease, the wholesale destruction of the rain forest for cattle-raising, and applying employment practices which exploited their staff.[121]

In the course of the longest-running court case in English history,[122] the applicants had denied being responsible for the leaflets, and argued that the contents were substantially true in any case. In spite of their lack of resources,[123] the applicants were refused legal aid because it was (and is) not available for defamation proceedings in the UK, a situation which mirrors the current Irish position. The applicants received some *pro bono* assistance from lawyers but for the most part were left alone to conduct a complicated and lengthy legal battle. Their lack of resources left them unable to buy up to date transcripts of the hearing, which hampered their cross-examination and the formulation of their appeal.[124] McDonald's, by contrast, were represented by one of the largest solicitors' firms in England and by senior and junior counsel well versed in libel law. English defamation law, like that of this jurisdiction, presumes that the allegedly defamatory statement is untrue; the defendant therefore

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compensation, but the man sued and the case was subsequently settled. *See* "Will Newspapers Now Have to Run Scared?", *The Times Law Supplement*, 15 June 2004, 4.

[119] Editorial, (2004) 9(4) *Bar Review*, 122.

[120] (2005) 41 EHRR 22

[121] It is worth noting that section 11 of the Defamation Bill puts the right of companies to sue for defamation in this jurisdiction beyond doubt: 'The provisions of this Act apply to a body corporate as they apply to a natural person, and a body corporate may bring a defamation action under this Act in respect of a statement concerning it that it claims is defamatory whether or not it has incurred or is likely to incur financial loss as a result of the publication of that statement.'

[122] The case, dubbed "McLibel" by the press, lasted 9 years and 6 months from the issuing of the proceedings to the refusal of leave to appeal by the House of Lords.

[123] Helen Steel was a part-time bar worker earning £65stg per week; David Morris an unwaged single parent.

[124] McDonald's initially bought transcripts for the applicants, but soon stopped when they refused to promise that they would not make the contents public or use them for any purpose other than the instant proceedings.

bears the burden of proving justification (i.e. that factual allegations are substantially true), or, where the statement amounts to a comment, that that comment is "fair" – i.e. is based on fact, which the defendant must also prove.

In distinguishing *McVicar*, discussed above, the ECtHR noted that the journalist in the earlier case had only been required to defend the truth of a single allegation, whereas "McLibel" involved proceedings of quite a different scale, and included 40,000 pages of documentary evidence and 130 oral witnesses, including many scientists and other experts on areas including disease and nutrition. Furthermore, the case involved many complex legal points and procedural issues. Even though the applicants were articulate and resourceful, "The inequality of arms could not have been greater."[125] The Court of Human Rights found that the denial of legal aid made it impossible for them to present their case effectively and amounted to a breach of Article 6(1). The applicants were faced with a stark choice, neither of which options Strasbourg considered to be reasonable:

> "[E]ither to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it. Given the enormity and complexity of the undertaking, the Court does not consider that the correct balance was struck between the need to protect the applicants' right to freedom of expression and the need to protect McDonald's rights and reputation. The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible 'chilling effect' on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion..."[126]

The Court concluded that a breach of Article 10 had thus occurred.

Interestingly, the ECtHR also took the view that the size of the award was disproportionate, and therefore in breach of Article 10, because of the modest incomes

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[125] Paragraph 50 of the Court's judgment.
[126] At paragraph 95 of the Judgment.

of the applicants.[127] The idea that the income of the author of a libel should be taken into account in deciding quantum is quite radical, and possibly objectionable. If the main purpose of the defamation award were punitive, then this innovation would have a certain attraction, as it would arguably lead to true justice; however, the aim of damages in defamation is generally expressed as being to restore the plaintiff's reputation – punitive damages are a separate category. It will be interesting to see whether Irish judges will include the proviso that defamation juries must have regard to the resources of defendants along with the warning that the award must be proportionate. In spite of the obvious attraction of this development, it is submitted that Irish courts would have serious difficulty in accepting the means of the defendant as a further limitation on the size of defamation awards, given their consistent application of the doctrine that such awards should reflect the amount necessary to re-establish the plaintiff's reputation.

The Death-Knell of the Presumption of Falsehood?

No sooner had the result been announced than the European leg of "McLibel" was being hailed as a major dent in that cornerstone of both British and Irish defamation law: the presumption of falsehood.[128] However, it is submitted that the *Steel and Morris* judgment in no way requires the removal of this presumption. The ECtHR itself stated that "The Court...does not consider that the fact that the plaintiff in the present libel case was a large multinational company should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made."[129] The Court was not rolling back from its earlier jurisprudence on this point;[130] rather, the applicants

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[127] The trial judge, Bell J, awarded McDonald's a total of £60,000; Morris was severally liable for the whole amount, Steel and Morris jointly and severally liable for £55,000. The Court of Appeal reduced these amounts to £40,000 in the case of Morris and £36,000 in the case of Steel. Given the seriousness of the allegations, the awards may, in fact, indicate that the applicants' means *were* tacitly taken into account by the English Court; after all, the awards were actually quite small by English standards.

[128] Eoin O'Dell 'Defamation Reform In England and Ireland After *McLibel*' (2005) 121 LQR 395.

[129] At paragraph 94. One of the applicants' grounds of appeal in the Court of Appeal had been that powerful corporate entities such as McDonald's should not be allowed to maintain defamation actions at all. They were unsuccessful on this point.

[130] In *McVicar v. United Kingdom* (2002) 35 EHRR 22, the Court had ruled that the requirement that defendants in defamation proceedings must prove the truth of certain types of allegation was not necessarily incompatible with the ECHR.

succeeded because of a unique combination of factors, the most important of which may be summarised as follows:

1. The applicants were people of extremely limited financial resources;
2. In spite of their relative poverty, the applicants were denied legal aid in a case that was complex both in terms of the legal issues arising and the sheer number of statements the truth of which had to be proven (as we have seen, the issue in *McVicar* was much more net);
3. The statements themselves concerned matters of great public importance such as public health and the environment (arguably, the matters discussed were of greater public interest than McVicar's article on a lone athlete's alleged doping);
4. The applicants were defending their right to freedom of expression (as was McVicar, though this argument did not avail him);[131]
5. Their opponent in the action was a multi-national company with almost limitless resources and whose legal representation reflected this – hence the inequality of arms;
6. The legal proceedings involved were longer and involved more intricate legal questions than anyone could have predicted (indeed, even Strasbourg could not have predicted them – the Commission had declared an earlier application by the pair inadmissible[132]);
7. And, when combined with all of the above, particularly the absence of legally aided representation, the presumption of falsehood was one burden too many for the applicants to be expected to discharge.

It is submitted that Strasbourg's focus is clearly on the *cumulative effect* of the obstacles faced by Steel and Morris in vindicating their right to freedom of expression. The reasoning of the Court is clear: the presumption of falsehood in and of itself does not amount to a breach of Article 10; however, if other factors such as the complexity of the case and the absence of legal aid make it more difficult to raise the defences of justification and fair comment, then there may well be an infringement of the

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[131] The Court's emphasis on the fact that the applicants were defending their right to free speech as opposed to their right to reputation may provide some inkling of the Court's view as to the hierarchy between those particular rights.

[132] Application No. 21325/93, *HS and DM v. United Kingdom*, Admissibility Decision of the European Commission on Human Rights of 5 May 1993.

Convention right. Arguably, the mere denial of legal aid to a person of poor financial resources defending a libel action (and thus asserting the right to free speech) will not amount to a breach of Article 10 in all future cases; a breach is only likely to arise in circumstances where the matter is complicated because of its scope and/or the attendant legal issues – and, presumably, where the other side has adequate legal representation.

It may, however, be very difficult for Contracting Parties to assess which defamation defendants deserve legal aid and which do not, given the absence of any clear formula for deciding this question. In many cases, the unfairness or otherwise of the refusal of legal aid may only be apparent after the case has run its course – hardly a satisfactory result from the point of view of either freedom of speech or procedural fairness. In order to be certain of being Convention-compliant, Ireland might be well-advised to introduce legal aid for persons of low income who intend defending defamation proceedings. This solution would, nevertheless, raise serious questions about the hierarchical values of free speech and reputation, both of which are protected by the Constitution, not to mention the possibility that this would infringe the equality guarantee, unless the plaintiff seeking to defend his good name was also entitled to legal aid. *Steel and Morris* certainly represents a landmark decision by the Court of Human Rights, and one which shows that the Court will not necessarily abide by the hard and fast rules of the past when such would lead to an unfair result. Nevertheless, the case may prove too difficult for domestic courts to consistently and accurately apply, leaving open the possibility that they will simply limit its application to the facts of *Steel and Morris*, which would be a disappointing end to one of the longest sagas in free speech litigation.

Article 8 ECHR: Celebrity's Charter?

Article 10 rights are not absolute; the circumstances where the right may legitimately be restricted, as set down in 10(2), are not the only justifications for limiting free speech: the other Convention rights must, where appropriate, be balanced against the right to free speech. This principle was undoubtedly behind the injunction granted by David Eady J prohibiting the press from disclosing any details of the post-release whereabouts of Maxine Carr, girlfriend and false alibi witness of infamous child

murderer Ian Huntley.[133] The court was not merely concerned with preserving Carr's peace and quiet, but her very life: the public opprobrium of her had reached such a degree that her life would have been at risk were her location known. The injunction thus restricted the media's Article 10 rights in favour of Carr's Article 2 right to life. It is submitted that, if the right to a good name can often trump free speech, it is only logical that the more important right to life be allowed to do so. A similar injunction was granted in favour of Mary Bell,[134] who murdered two young boys when she herself was aged only 11; in that case, the rationale behind the ban was not due to any threat on Bell's life, but rather out of a desire to protect her daughter, whose private life would have been seriously interfered with if her acquaintances had discovered who her mother was.[135]

However, it is Article 8, the Convention's privacy guarantee, that is most often cited as the provision most likely to be effective in curbing the dangerous freedom bestowed by Article 10 on an unscrupulous or overly intrusive media. A Contracting Party may be held to be in breach of its Article 8 obligations if its domestic law is such that it allows the media or others to unjustly undermine a person's right to privacy – particularly where the complainant is a private (as opposed to a public) figure. The question might well be asked whether the incorporation of Article 8 into Irish law will actually diminish the right to freedom of expression in introducing to Irish law a specific "right to be left alone".[136]

In reality, the impact of the Privacy Bill 2006 (if enacted) is likely to have a much greater impact than the amorphous concepts enshrined in Article 8. That Bill creates a new tort of violation of privacy,[137] actionable without proof of special damage. Section 5 contains a nod to Article 10 ECHR, in providing a defence to the tort where the act committed "was an act of newsgathering" – provided it was done in good faith, in order to discuss a subject of public importance, and was fair and reasonable in all

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[133] Unreported, Eady J, 24 February 2005.
[134] *X (A Woman Formerly Known as Mary Bell) v. O'Brien* Unreported, QB, Family Division, Butler-Sloss J, 21 May 2003.
[135] Both decisions are discussed by Amber Melville-Brown, "It takes more than a few rare cases to make a privacy law", *The Times Law Section*, 8 June 2004, 6-7.
[136] The idea of a "right to be left alone" originates, of course, in the much-quoted article by Warren and Brandeis, "The Right to Privacy" (1890) 4 *Harv. L.R.* 193.
[137] Section 2 of the Privacy Bill, 2006.

the circumstances. It is submitted that this Bill, if enacted, could well have a chilling effect on investigative journalism, at least in the short term until the courts have clearly defined what they consider to be "fair and reasonable".[138] The Working Group on Privacy stated that the Bill was necessary in order to clarify the law in the area, as the enforcement mechanisms for the right to privacy lack clarity;[139] this may be so, in that the law in the area has not been codified; however, it is submitted that the courts have not had any significant difficulty in delimiting the sphere of privacy in the past.

Early whispers of such a possibility began following the institution of proceedings in the *Campbell* and *Douglas* cases, in both of which wealthy, influential celebrities attempted to rely on their putative right to privacy in order to prevent their photographs being published. The facts of both are well known. In *Campbell v. MGN Ltd*,[140] the supermodel Naomi Campbell sought damages for breach of confidentiality after *The Mirror* printed photographs of her leaving a Narcotics Anonymous meeting and published details of her therapy at the group meetings. Campbell, "a public figure who has sought publicity",[141] had publicly and untruthfully stated that she did not take drugs. She accepted that the newspaper had a right to publish the fact of her addiction and treatment, but argued that the breach of confidence occurred when they published details of her therapy and covertly taken photographs of her outside a meeting, even though she had been in a public place at the time.

Three members of the House of Lords agreed with Campbell: the disclosure of the information about Campbell's therapy went beyond what was necessary to add credibility to the story.[142] Even though they were taken in a public place, where Campbell could have had no real expectation of privacy, the publication of the photographs, too, was held to amount to breach of confidentiality by the majority. Lord Hope of Craighead went so far as to draw the (arguably dubious) conclusion that, were it not for the photographs, he would have regarded the balance between the two

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[138] Although given that this clearly depends on the circumstances of the case it will not be easy to predict from one case to the next.
[139] *Report of the Working Group on Privacy*, March 31 2006, at 8.
[140] [2004] 2 AC 457.
[141] [2004] 2 AC 457. *Per* Lord Hoffman (dissenting), at 473.
[142] Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell; Lord Nicholls of Birkenhead and Lord Hoffmann dissenting.

parties as even.[143] Lord Hope's analysis focused on the fact that, like most photographs taken by Fleet Street photographers and the paparazzi, the pictures were taken covertly, and did not confirm the story published alongside them as neither the location nor the person were instantly recognisable.[144] This reasoning is surely flawed: if it was acceptable to publish the story, then what difference does it make whether the subject knew she was being photographed or not?

All in all, the majority of the House of Lords simply felt that, in the circumstances, the newspaper had gone too far. The decision did not create a new tort of invasion of privacy; it merely provided "a useful re-statement of where [English] law stands now"[145]. Nevertheless, one might legitimately question the logic of the majority judgment: Campbell was a public figure, albeit not one who worked in the political arena – indeed, her profession and lifestyle ensure that she is photographed more regularly than most politicians; she lied about her drug habit, presenting a clean image, and a newspaper correctly pointed out that she was lying; in a reasonably sympathetic piece, the paper revealed that she was seeking treatment for her addiction, and published certain details thereof along with photographs. Aside from minor details, the article was substantially true.[146] The photographs, so influential in the minds of the majority of the House of Lords, were taken in the street – *The Mirror*'s photographer had not trained his zoom lens on Campbell's bathroom window, or tried to climb through her cat-flap. Unsurprisingly, defenders of freedom of speech and of the press have been less than impressed by the judgment: David Pannick notes that the judgment "will inevitably have the damaging effect of deterring newspaper editors from publishing other stories that impinge on privacy even when there are good

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[143] At 491.
[144] At 492.
[145] Maddie Mogford, "Mirror Was Just Too Revealing", *The Times Law Section*, 11 May 2004, 8.
[146] E.g. the article indicated that the photograph was taken as Campbell arrived at the NA meeting when in fact she was leaving; it also stated that she regularly attended group counselling twice a day, when she did not. None of these errors could be said to amount to defamation. Admittedly, attending two meetings a day might indicate that a person had a particularly bad addiction problem, but one might alternatively suppose that the person was merely trying very hard to kick the habit.

reasons to do so".[147] As Pannick says, it will undoubtedly come as little comfort to MGN that the majority of the judges who heard the case actually sided with them![148]

The facts of *Douglas and Others v. Hello! Limited*,[149] like its protagonists, are scarcely less famous than those of *Campbell*. Actors Michael Douglas and Catherine Zeta Jones had sold the exclusive right to publish their wedding photographs to *OK!* magazine. *Hello!*, a rival publication, managed to obtain pictures of the wedding that had been taken surreptitiously. Douglas et al had obtained an injunction preventing the publication of these unofficial pictures, but this was overturned by the Court of Appeal, which held that the balance was tilted firmly against prior restraint and that damages would be an adequate remedy if the plaintiffs could prove a breach of confidentiality. Of the three judgments,[150] that of Sedley LJ caused most controversy as a result of his statement that Douglas and Jones had a strong argument, to be advanced at the substantive hearing of the action, that they had a right of privacy "which English law will today recognise and, where appropriate, protect."[151] He based this conclusion on the case law of the Strasbourg Court, noting that nothing in that jurisprudence contra-indicated the establishment of a qualified right of privacy, which was already protected in France and Germany.[152]

Brooke LJ warned that those relying on Article 10 should beware the restrictions set out in 10(2), including privacy. Keene LJ noted that the tort of breach of confidence seemed to be evolving, and accepted that it could apply in the present circumstances to the photographs in question.[153] He also said that "if persons choose to lessen the degree of privacy attaching to an otherwise private occasion, then the balance to be struck between their rights and other considerations is likely to be affected."[154] It was thus "of considerable relevance" that the wedding was to be the subject of widespread

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[147] David Pannick, QC, "Why Naomi Campbell's Privacy Case is not a Model Judgment", *The Times Law Section*, 18 May 2004, 4.
[148] *Ibid.* Pannick is referring to the fact that all three judges who heard the case in the Court of Appeal, plus two members of the House of Lords, felt the paper had acted lawfully, as against the trial judge and the majority of three in the House of Lords, who ruled that it had not.
[149] The case has gone through a number of stages. The judgment referred to here is that of the Court of Appeal of [2001] QB 967.
[150] The Court of Appeal was composed of Brooke LJ, Sedley LJ and Keene LJ.
[151] At 1001.
[152] *Ibid.*
[153] At 1011.
[154] At 1012.

publicity in *OK!*. In selling the photographs in the first place, the first and second plaintiffs had effectively given up any right to injunct the publication of the unofficial pictures.

Keene LJ's preoccupation with breach of confidence proved prescient: when the action was eventually determined post-publication by Lindsay LJ, *Hello!* lost on only four heads of the claim, two of which concerned breach of confidence. In the final analysis, the post-HRA High Court preferred to ground its judgment in the common law rather than the ECHR, and stopped well short of recognising a formal right to privacy. Arguably, the court regarded the "exclusive" nature of the arrangement with *OK!* in the same way as it would a valuable trade secret – one that *Hello!* had no right to reveal.[155] The division of damages supports this view: Douglas and Jones received a paltry £14,600 between them, while the real winner was *OK!*, which was awarded £1m.[156] There are strong arguments for regarding this case as being a commercial case rather than a privacy one.[157]

The potential scope of *Campbell* and *Douglas* has undoubtedly been overstated by some. In reality, these cases did not involve only strict Article 8 versus Article 10 arguments, but relied in large measure on the judges' interpretation and revision of certain aspects of English common law, particularly the law in relation to breach of confidence. In addition, both cases turn on relatively unusual facts. Most significantly of all, the House of Lords, in another case, has explicitly rejected the invitation to create a tort of invasion of privacy: in *Wainwright*,[158] the claimants were strip-searched while visiting a relative who had been imprisoned for drugs offences. In the leading judgment of the House of Lords, Lord Hoffmann clarified the words of Sedley LJ in *Douglas*, stating that these amounted to no more than a plea for the extension and possible renaming of the tort of breach of confidence. The ECHR only required

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[155] On this point, *see* Alex Wade, "OK! Perhaps it was Hello! that won the battle, but lost the war", *The Times Law Section*, 15 April 2003, 3.

[156] It appears clear that, while the UK courts may allow the rich and famous to take action for breach of confidence, they will not be further enriched for so doing: Campbell's final award was only £3,500stg. If she shares the notorious views of one of her colleagues, she may well be sorry she got out of bed to attend court in the first place!

[157] *See* Alex Wade, "Big-budget drama with OK! Ending", *The Times Law Section*, 18 November 2003, 8.

[158] *Secretary of State for the Home Department v. Wainwright and Another* [2003] 3 WLR 1137.

English law to provide an adequate remedy in any given case where an invasion of privacy could not be justified.

Two relatively recent judgments of the Strasbourg Court on the extent of the privacy guarantee also emphasise that almost everything turns on the individual circumstances of the case. In *Peck v. United Kingdom*,[159] the Court of Human Rights accepted that one's privacy could, in appropriate circumstances, be violated by the publication in the press of CCTV pictures taken in a public place. Although this case does not concern a direct conflict between Articles 8 and 10, it is still instructive as to the ECtHR's views on the privacy rights of private citizens. The applicant suffered from severe depression, and eventually attempted suicide by slitting his wrists. Shortly after this attempt, he was captured by his town's CCTV system walking along a public street at 11.30pm holding a kitchen knife. Brentwood Borough Council later released stills and extracts from the footage to various newspapers and a TV station as evidence of how well the CCTV system worked as a means of crime prevention and defusing dangerous situations. The footage was also used as part of a crime detection show called "Crime Beat"; the applicant's face was disguised when the programme aired, but had been clearly visible during the trailers for the show. In some publications and TV airings, the applicant's face was not masked at all, in others, it was inadequately disguised such that the applicant's neighbours, family and friends were able to recognise him, resulting in the public exposure of a distressing incident in his life, which he had sought to keep private. The applicant took judicial review proceedings of the Council's decision to release the footage, but the High Court held that the Council's actions could not be said to fail the "irrationality" test and were thus lawful.[160]

The Court of Human Rights summarised the salient facts as follows:

> "The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of distress. While he was walking in public wielding a knife, he was not later charged with any offence. The actual suicide attempt was neither recorded nor therefore

[159] Application No. 44647/98, Judgment of 28 January 2003.
[160] *Peck v. Brentwood Borough Council*, High Court, 25 November 1997.

disclosed. However, footage of the immediate aftermath was recorded and disclosed by the Council directly to the public in its *CCTV News* publication."

In disclosing the footage, the Court unanimously held that the respondent had unjustly interfered with the applicant's Article 8 rights. Even though the disclosure did pursue the legitimate aim of public safety, the interference was not justified in the circumstances. The Court was particularly swayed by the fact that it would have been simple to avoid the problem, either by obtaining the applicant's consent, or by masking his features themselves before they released the footage, or by obtaining a written agreement from the media that this would be done.[161]

Peck recognises that a person's right to privacy can extend to their actions while in a public place; however, it is submitted that the ramifications of the judgment will not be particularly broad. The Court was clearly very influenced by the fact that Peck was in an extremely emotional state at the time his picture was taken (he argued that his condition was such that his being in a public place could not be said to be voluntary), and by the fact that it would have been very simple for the Council to ensure that his identity was not disclosed. So long as the relevant authorities take steps to mask the identities of such persons, there is no reason why they should fear to release CCTV footage. Furthermore, it is submitted that where the footage is released in order to identify a crime suspect, the public interest will automatically outweigh the privacy rights of the person captured on camera, unless the authority releases film that is not actually linked to a crime. The case certainly demonstrates that the ECtHR will take a very broad view of the definition of "private life",[162] but all this really means is that the Court must take into account all the facts of the case.

The real impact of *Peck* lies in the Court's ruling on the question of whether the UK had provided an adequate domestic remedy pursuant to Article 13. Strasbourg was less than impressed with the application of the "irrationality" test in the judicial review proceedings. This test meant that "the threshold at which the High Court could find the impugned disclosure irrational was placed so high that it effectively excluded any consideration by it of the question of whether the interference with the applicant's

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[161] This was *contra* the view of the High Court, which did not think it would have been reasonable for the Council to seek such written assurances.

[162] *See* paragraph 57 of the ECtHR's judgment: "Private life is a broad term not susceptible to exhaustive definition."

right answered a pressing social need or was proportionate to the aims pursued, principles which…lie at the hear of the Court's analysis of complaints under Article 8 of the Convention."[163] The Court unanimously held that the UK had been guilty of a breach of Article 8 in conjunction with Article 13. For those in the UK who regard the expansion of the law of breach of confidence as sufficient to ensure the respect of Article 8 rights, the case is a wake-up call.[164] The Irish courts would do well to take note of this decision, since it effectively warns that domestic methods of judging the reasonableness of administrative decisions on judicial review may not be sufficient to constitute an effective remedy unless the domestic courts also have regard to ECtHR's own test (whether there has been an interference, prescribed by law, pursuing a legitimate aim, and whether the interference is proportionate).

However, it is the case of *Von Hannover v. Germany*[165] that is likely to prove more worrying for the editors of tabloid newspapers and gossip magazines. In that case, Princess Caroline of Monaco claimed that German law failed to adequately respect her right to private life when the German Constitutional Court refused to prevent the publication of several photographs taken of her while she was going about her daily business in public places.[166] Caroline had relied upon the fact that, although she attended official occasions in her capacity as the daughter of the Prince of Monaco, she had no official public role, and argued that the photographs taken of her were for entertainment purposes only, a purpose that could not defeat her right to privacy.

The German Constitutional Court disagreed, noting that entertainment also played a role in informing public opinion and as such was protected by the Basic Law; furthermore, the public interest that had long been regarded as legitimate in the case of politicians was not confined to that group, and existed in respect of other public figures. Caroline, as a "public figure *par excellence*" would have to put up with the

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[163] At paragraph 106.

[164] The UK failed to plead that the applicant should have exhausted this remedy, so the Court of Human Rights felt that it must not have been open to him, particularly since there did not seem to be any obligation of confidence between him and the authorities (paragraphs 110ff). On this point, *see also* Deirdre Fottrell, "When a private life is not public", *The Times Law Section*, 18 March 2003, at 8.

[165] Application No. 59320/00, Judgment of 24 June 2004.

[166] Judgment of the Constitutional Court of 15 December 1999. The Constitutional Court allowed Princess Caroline's appeal in part, and held that pictures that had shown her with her children infringed her right to the protection of her personality rights (protected by sections 2(1) and 1(1) of the German Basic Law, taken in conjunction with her right to family protection under section 6.

paparazzi's intrusions unless it could be shown that she had isolated herself in a secluded place for the specific purpose of being alone. Other domestic proceedings were equally fruitless.

Despite her failure in Germany, Caroline's application to Strasbourg was an unqualified success: the Court unanimously held that she had been a victim of a breach of Article 8. In a judgment which reeks of the Court's disdain for the gossip-fuelled publications that are so ubiquitous today, and for the paparazzi whose work fills their pages, the Court noted that the information disclosed in the photographs "did not concern the dissemination of 'ideas', but of images containing very personal or even intimate 'information' about an individual".[167] The pictures did not contribute to any debate of general interest, but related to the applicant's private life; furthermore, such pictures tended to be taken "in a climate of continual harassment".[168]

A "fundamental distinction" had to be drawn between reporting controversial facts about figures such as politicians in the exercise of their functions in order to contribute to public debate, and reporting the details of the private life of a person who exercised no such official functions; this was not, in the Court's view, a case where the State could rely on the media's watchdog role as a ground for limiting an individual's privacy to exonerate itself.[169] To put it bluntly, the public had no legitimate interest in the applicant's behaviour in her private life.[170] The majority of the Court summed up their position as follows:

> "[T]he decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life."[171]

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[167] At paragraph 59.
[168] At paragraph 59.
[169] At paragraph 63.
[170] At paragraph 77.
[171] At paragraph 76.

This conclusion is, it is submitted, overly restrictive – a view which is supported by the two concurring judgments, both of whom were very uneasy with the above test.[172]

The majority's test appears to limit the press's right to report to matters of "general interest". "General interest" is not really defined by the Court, but it clearly does not include the habits of members of a European royal family, or, presumably, those of publicity-seeking supermodels, famous actors or philandering footballers. Few would disagree that topics such as political dishonesty,[173] urban racism,[174] the environment,[175] and even the protection of wildlife[176] are more important than the comings and goings of a royal European party girl. The public *should* be more interested in topics such as government corruption, the legality of wars, and Third World debt. Certainly, that seems to be the view of the Court of Human Rights. However, the fact remains that some of the time, some of the public are "interested" in things that have no political, environmental, cultural or historical importance; the vast number of magazines devoted to nothing but the private lives of celebrities on the wall of every newsagent are testament to that fact. And if persons who are not "public figures" in the traditional sense choose to catapult themselves into the public eye, one may legitimately question the extent to which they can later limit the exposure of their actions, particularly when, as in this case, those actions took place in public[177] and Princess Caroline could have no expectation of privacy. When we are out in public, we all know that our actions may be observed and scrutinised by anyone who happens to cross our path; as David Pannick put it, Caroline "should bear in mind what her late mother no doubt told her: 'Remember you're out.'"[178] Well-known people of all pedigrees would do well to remember that more people will simply be interested in what they say and do.

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[172] *See* the concurring judgments of Cabral Barreto and Zupancic JJ.
[173] E.g. *Lingens v. Austria* (1986) 8 EHRR 103.
[174] *Jersild v. Denmark* (1995) 20 EHRR 442
[175] *Steel and Morris v. United Kingdom*, discussed above.
[176] *Bladet Tromso v. Norway* (2000) 29 EHRR 125. The case involved allegations of cruelty on the part of seal hunters.
[177] Or, at least, relatively open places. One of the photographs of Princess Caroline was taken while she was on a private beach. Access by the press was only permitted with the permission of the hotel, but the photos had been taken from a neighbouring property with a long range lens. The German Court held that this was not a secluded place because, although the press needed permission to enter, anyone else could get in on payment of a fee. There was thus no expectation of privacy.
[178] David Pannick, QC, "What Every Princess Should Know About Her Public Image", *The Times Law Section*, 18 November 2003, 4. Lest the reader should be confused by the date of the article, Pannick was urging the Court of Human Rights to reject Princess Caroline's application.

The judgment is certainly worrying from the perspective of press freedom in this jurisdiction. The German editors who intervened in the case argued that German law was half way between the extremely restrictive French law (which allowed publication of photographs of the Princess on public or State occasions, and required her permission in all other cases), and the liberal UK law (presented in the judgment as a virtual press free-for-all by comparison). Irish law is closer to that of the UK in this area, and if the immediate reactions in the UK to the judgment are correct, the case sounds a clear warning that domestic courts have positive obligations under Article 8 – obligations they may fail to meet unless greater weight is lent to Article 8 arguments.[179] Nevertheless, while the case may pave the way for some celebrities to use the ECHR Act as a way of muzzling the press, it does not necessarily mean that Ireland is obliged to introduce any form of generic privacy law.

Conclusion

In the UK, the HRA has made some positive strides in the field of free speech, including the extension of the right to report in the public interest: see *Tillery Valley Foods Ltd v. Channel Four Television Corporation and Another*,[180] where Mann J dismissed an application for an injunction to restrain the broadcast of a Channel Four documentary highlighting the claimant's unhygienic production of NHS food. In other areas, the law in the UK remains what it was before: the Privy Council has stated that the offence of criminal libel is compatible with Article 10;[181] the Bar Council may validly discipline a barrister for comments made on the court steps;[182] and defamation

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[179] Heather Rodgers and Hugh Tomlinson, "Caroline Ruling Sounds Alarm for British Press", *The Times Law Section*, 29 June 2004, 4. They describe the judgment as "a highly significant extension of the right to privacy."

[180] Chancery Division (MannJ), Judgment of 11 May 2004; *The Times*, 21 May 2004.

[181] *Worne and Another v. Commissioner of Police of Grenada*, 3 July 2003, *The Times*, 30 July 2003. Their Lordships were correct: the Court has never struck down the offence of criminal libel as offensive to the Convention *per se*, although the way in which it operates can be; *see* e.g. *Lingens v. Austria* (1986) 8 EHRR 103.

[182] The barrister in question was disciplined after contrasting an inquiry's treatment of his (black) client with that of the (white) men who killed Stephen Lawrence. The client was a social worker who was called to the inquiry into the death of Victoria Climbie, the young girl who was tortured and starved to death under the noses of the social services. *See* David Pannick, "Barristers Have a Right to Speak Their Mind, However Foolishly", *The Times Law Section*, 15 June 2004, 4.

suits are threatened in the most bizarre of circumstances.[183] As we have already seen, in many cases British judges continue to favour the common law over the HRA and to adopt the position that their domestic law is more or less in line with Strasbourg in the area of free speech. Whether Irish judges will adopt this position remains to be seen. Certainly, the judgment of Ó Caoimh J in *Hunter v. Duckworth*[184] indicates that the Irish judiciary still follow UK developments closely – arguably more closely than they should, given the many differences between the two systems.

It is difficult to assess the potential impact of the ECHR on domestic judicial decision-making given that only three cases citing a breach of Article 10 have so far been decided by Strasbourg, with the score currently at 2-1 to the State.[185] It is thus difficult to predict with accuracy the ECHR Act's true potential in the field of freedom of expression; an attempt has been made here to identify some of the major areas which may require reform if Ireland is really to "take judicial notice" of the jurisprudence of the Strasbourg Court. Only one thing is certain: for those with the courage to advance convincing Convention-based arguments, finding out how far the Courts will allow Article 10 to go will certainly be interesting.

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[183] Even food critics must beware: the owners of one Westminster restaurant threatened to sue a reviewer who likened their crab and brandy soup to a weapon of mass destruction; *see* Charles Boundy, "Spicy Criticism Must be Malice Free", *The Times Law Section*, 10 February 2004, 5.

[184] Also known as *Callaghan v. Duckworth*. High Court (Ó Caoimh J), 31 July 2003. In that case, the High Court cited with approval the House of Lords' decision in *Reynolds v. Times Newspapers Ltd* [1998] 3 All ER 961, in which the House of Lords rejected the idea that the common law should develop a separate category of political information, which would attract qualified privilege automatically. Their Lordships felt that this did not adequately protect reputation, and the question whether political information should attract any such privilege was more nuanced and depended on a number of factors.

[185] Ireland lost in *Open Door Counselling v. Ireland* (1992) 14 EHRR 131, but won in *Murphy v. Ireland* (2004) 38 EHRR 212, and in *Independent Newspapers v. Ireland*, Application No. 55120/00, Judgment of 16 June 2005.

CONCLUSION

Incorporation of the European Convention on Human Rights: To What End?

In spite of the impassioned arguments of its proponents,[1] it is apparent that the incorporation of the ECHR into Irish law will not act as a panacea for all the ills of the current system. First, for domestic incorporation to be an adequate substitute for an application to Strasbourg, the national courts would have to apply the provisions of the Convention in precisely the same way as that Court would,[2] an eventuality which is all the more unlikely because it would mean the national courts subjugating the Constitution, not to mention their own reasoning, to each decision handed down by Strasbourg. Such an exercise would be particularly thankless given that the Court of Human Rights, unlike our own Supreme Court, does not operate on a system of binding precedent. Secondly, the ECtHR often applies the margin of appreciation to cases which do not involve non-derogable rights,[3] and while it is perfectly legitimate for a national court to apply some sort of proportionality test to purported interferences with fundamental rights, it is arguably inappropriate for it to borrow this broader test, which is based on the fact that national authorities are better placed to make certain value judgments than is an international tribunal, and might be viewed as a blank cheque by national courts.[4]

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[1] For an analysis of the main arguments in favour of incorporation in the Irish context, *see* Chapter 1.
[2] Joseph Jaconelli, "The European Convention on Human Rights as Irish Municipal Law" (1987) *Irish Jurist* 13, at p14.
[3] Under Article 15 ECHR, it is possible to derogate from some of the Convention rights in times of war or national emergency; however, it is not permissible to derogate from the Article 2 right to life (except as regards deaths caused by lawful acts of war), the Article 3 prohibition on torture and inhuman and degrading treatment, the Article 4(1) prohibition of slavery, and the Article 7 prohibition on punishment without law.
[4] Stephen Grosz, Jack Beatson, QC, and Peter Duffy, QC, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, 2000), at 114. Clayton argues that "The margin of appreciation reflects a principle of subsidiarity": Richard Clayton QC, "Principles for Judicial Deference" [2006] 11(2) *JR* 109, at 110. Thus, while it is appropriate for an international tribunal to apply the margin, it is less so for a domestic court, which has no need to defer to the choices of the legislature, when the courts are perfectly capable of assessing whether the legislature has elected to go too far in the pursuit of the common good and to trample on the rights of the individual.

The most cogent argument in favour of incorporation is this: thanks to Ireland's ratification of the ECHR and acceptance of the right of individual petition, everyone in the State has certain rights as a matter of international law – the rights set out in the European Convention on Human Rights. Without some form of incorporation, a person whose Convention rights had been violated would have to apply to the Strasbourg Court for relief, "at considerable inconvenience and expense and with uncertain consequences."[5] If the domestic courts have the power to uphold Convention rights, there is at least a possibility that some applicants will be spared this hardship. It is far from certain that incorporation in any form acts as a break on the number of applications from a given State to the ECtHR: Turkey and Italy have both incorporated the Convention, but the number of applications from these two countries remains high.[6] Thus, while there are many problems with the mode of incorporation chosen by Ireland, and while it may not decrease the number of applications against the State in the Strasbourg Court, it *is* nevertheless possible that some applicants at least will benefit from the enactment of the ECHR Act and will be spared a journey.

The European Convention on Human Rights was not granted its present status in Irish law because it was deemed necessary to enhance the protection of fundamental human rights in this jurisdiction; rather, the 2003 Act was passed as the most convenient way of abiding by a promise made under another treaty to ensure an equivalent standard of rights protection throughout the whole island of Ireland.[7] The reasons for incorporation were diplomatic and pragmatic, not ideological.[8] The

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[5] Patrick Dillon-Malone, "Individual Remedies and the Strasbourg System in an Irish Context" in Liz Heffernan (ed) (with James Kingston) *Human Rights: A European Perspective* (Round Hall Press, 1994), 48 at 64.

[6] Official statistics for the period 1/11/98 to 31/07/01 indicate that 1197 applications against Italy were declared admissible during that period. The figure for Turkey was also high, standing at 452. Only 5 applications against Ireland successfully negotiated this first hurdle – see the Evaluation Group, 58-59. It is also likely that, as Jaconelli suggests, cultural and political factors influence the number of individual petitions to Strasbourg, not to mention the size of the population, the general awareness of the Convention among the legal profession, the nature and availability of domestic remedies, the public acceptability of litigation, and the extent to which the legal system conforms with European standards as regards the culture of rights, and the novelty of the questions raised in the application: Jaconelli (n2), at 15-16.

[7] On this point, *see* Chapter 1. *See*, also, Donncha O'Connell, "Ireland", from Robert Blackburn and Jorg Polakiewicz (ed) *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford University Press, 2001), at 423.

[8] We are not alone in this. In the UK, incorporation seems to have come about more because it was part of the Labour manifesto rather than due to any campaigning by the public or non-governmental organisations. Clayton has referred to the "absence of any real social momentum behind the HRA"

method chosen is revealing: it is a less detailed version of the British Human Rights Act of 1998, evidence that the incorporating legislation was not a major priority for the parliamentary draftsman, who apparently did not delve deep into his imagination on the project, except insofar as was necessary to give the Convention even less scope in this jurisdiction than it has in our neighbour by severely limiting the definition of "organs of the state".[9] It is submitted that the absence of any cogent definition of the term "organ of the State" may mean that challenges to action which may or may not be attributed to such a body are likely to be more tentative than they would have been had a clear definition been provided. Further evidence of an apparent intention to limit the domestic scope of the Convention lies in the specific exclusion of the courts from the definition of the "organs of the State" expected to comply with the requirements of the Convention (they are specifically included in the UK Act). In addition, a number of provisions "borrowed" straight from the HRA operate to limit the application of the ECHR Act: the fact that declarations of incompatibility do not invalidate laws (and that the choice about what happens to an offensive provision is left up to the executive and legislature); the short, one-year limitation period; the fact that damages for breach of Convention rights are only available under the Act where there is no other remedy in damages under Irish law.

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which "has required us to formulate human right principles in something of a vacuum – informed only by an injunction under s. 2(1) to take account of Strasbourg decisions": Clayton (n4), at 111.

[9] These are defined in section 1(1)(d) as those which are "established by law or through which any of the legislative, executive or judicial powers of the State are exercised." O'Connell suggests that the definition of an "organ of the state" should be broader if it is to include all bodies linked to the state in any official capacity. In his view, this was not done in order to limit the horizontal application of the Bill and confine it to vertical relationships between individuals and the state: Donncha O'Connell, speaking at the Brian Walsh Memorial Lecture in the Distillery Building, Dublin, on 26 November 2002. If this is so, then it is both irrational and even somewhat sinister: the Irish courts have long accepted the horizontal application of constitutional rights; if the state were really concerned with increasing the standard of rights protection in the jurisdiction there is surely no good reason for distinguishing between rights whose origin is the Constitution and those found in the Convention.

Was Incorporation at Constitutional Level the Only Real Solution?

Today, written constitutions are the rule, rather than the exception,[10] and even countries with no written constitution frequently have some form of bill of rights.[11] The Irish Constitution, in spite of its age (and, consequently, the fact that its relevance to modern life is sometimes open to question) wears its years relatively well. The credit for this must go to the judges who have interpreted it down the decades since its promulgation, and who have ensured that it provides, for the most part, a stringent standard of rights protection. It is clear that neither the Constitution, nor the courts charged with upholding it, could have done so in the absence of the all-important power to curb legislative forays into individual rights by striking down laws. This power to invalidate statutes for disproportionate interferences with constitutional rights is one of the key elements in any system of fundamental rights protection; its absence is one of the most criticised aspects of the UK Human Rights Act and has led to allegations that that Act does not provide an effective domestic remedy for abuses of Convention rights.[12] This criticism is equally valid in the Irish context, if not more so. Given our judges' familiarity with the practice of assessing the compatibility of legislation with the Constitution, there is no reason why they would have been incapable of doing the same with the Convention, particularly as they would have been guided by the wealth of case law from the European Court of Human Rights. Furthermore, it is arguable that, whatever the legal culture and

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[10] It was not always thus. As Grant Huscroft remarks: "It is not long since the United States was one of the few western democracies to have a bill of rights. Now, it seems, countries without bills of rights are in a minority, and they are criticised for not having them. Countries like New Zealand and the United Kingdom, which have recently adopted bills of rights, do not escape criticism; they are criticised because their bills of rights preclude the judiciary from overturning legislation. This, it is said, offers inadequate protection for rights"; Grant Huscroft, "Rights, Bills of Rights, and the Role of Courts and Legislatures" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002), 3, at 3.

[11] "Democratic countries around the world overwhelmingly have written constitutions. The only exceptions are Israel, the United Kingdom and New Zealand, and even these three are not totally free of constitution-like elements or restrains. Israel has a series of Basic Laws that purport to be beyond ordinary legislative modification; the United Kingdom has the recently enacted Human Rights Act which, though just a statute and not allowing judges to strike down other Acts, does allow judges to make declarations of incompatibility with the European ..."; James Allan, "Rights, Paternalism, Constitutions and Judges" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002), 29, at 38.

[12] This point is made by, *inter alia*, Andrew S Butler, who argues that the lack of a judicial power to invalidate or refuse to apply statutes in accordance with bill of rights leads to absence of an effective remedy: Andrew S Butler, "Judicial Review, Human Rights and Democracy" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002), 47, at 52.

history of a nation, only the knowledge that the ECHR ranks alongside the Constitution will lead to its effective enforcement in domestic law.

Incorporation at constitutional level is simply the highest and most perfect form of incorporation. It is arguably the most effective, particularly in a country with a history of a written constitution whose courts have extensive experience of judicial review. The fact that this method was not used was, as stated, a political decision. At best, it sends a mixed message to the courts and legal professions about the importance of the ECHR at domestic level: it is part of our law, but not a particularly important part. At worst, it sends the message that the Convention is something that is neither required nor useful; perhaps, even, something to be viewed with suspicion. Admittedly, as has been argued in the course of this thesis,[13] the actual method of incorporation used is only one of a large number of factors which affect the domestic success of an international norm. The other important (if self-evident) influences include the extent to which the judiciary (and legal profession in general) is educated about what the new law actually *does*; the prevailing attitude to laws of foreign or international extraction; and the political status quo in the country.

It is possible to conclude that the Irish judiciary are in a better position than their European colleagues to bolster the impact of incorporation through the judicial review of legislation and acts of state for compatibility with the Convention. This is so because the Irish legal system is not compartmentalised into civil and administrative jurisdictions in the way that many other European legal systems are: the same courts (albeit in different guises) hear all cases in Ireland, whether they involve private or state actors, or civil or criminal actions. Furthermore, both the High Court in all its forms (including that of the Central Criminal Court) and the Supreme Court are the recognised guardians of the Constitution. Why should they not also have been appointed guardians of the Convention? Whatever the reason for the method of incorporation chosen in Ireland, it certainly may not be argued that any inadequacy on the part of the judicial system precluded incorporation at constitutional level.

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[13] *See*, in particular, Chapters 2-4.

Of course, the question of *how* the ECHR could have been incorporated into the Constitution was itself not uncontroversial. A simple but inelegant suggestion was the wholesale "copy and pasting" of the Convention into the Constitution. An alternative was the more tailored approach suggested by the Constitution Review Group.[14] A third possibility was that a constitutional amendment could have been entered specifying that, where the standard of protection granted by the Convention was higher than that embodied in the Constitution and resulting jurisprudence, the latter should apply. This obligation to apply whichever provision, from Convention or Constitution, that granted better safeguards to individual rights, could apply to all courts, with the proviso that only the Superior Courts could strike down offensive legislation (in order to maintain consistency with the current constitutional practice whereby only the High and Supreme Courts may invalidate laws on the basis of unconstitutionality). This approach would have the benefit of avoiding the principal danger of a wholesale "cut and paste" exercise whereby the existing constitutional rights provisions were excised and replaced by the ECHR: i.e. the danger that this could have a "levelling down" effect on rights.[15] An amendment along the lines of that used to facilitate Ireland's accession to the EU would also lend to the ECHR an advantage currently enjoyed by European Union law, in that such an amendment would empower all domestic judges and could remove the stigma currently associated with the Strasbourg Court. This stigma (although the use of that word is arguably stretching the point) lies in the fact that the Court of Human Rights frequently reviews the work of the domestic judge – and those reviews are not all "raves"! The Court of Justice, on the other hand, preserves the fiction of the

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[14] The Constitution Review Group suggested that the Constitution be revised so as to incorporate those articles of the ECHR affording a higher level of protection than the equivalent constitutional article (or where no corresponding right is protected by the Constitution, or where its wording is unclear) would have ensured the maximum level of protection for the individual. Careful analysis of the Constitution and the relevant case law of both the Irish courts and Strasbourg would have revealed which provision, Irish or international, gave greater clarity or protection, and none of the advantages secured by those constitutional articles giving higher protection would be lost: Report of the Constitution Review Group, 1996, 219.

[15] This point has been made by Gerard Hogan, SC, when he rebutted the misconception that the Convention automatically involves a superior standard of protection by examining the judgment of the Supreme Court in reference, in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill* [2000] 2 IR 360. In that case, the Court upheld the validity of a provision allowing illegal immigrants and unsuccessful asylum seekers to be detained in prison for up to eight weeks pending deportation, and concluded that it would not offend against the European Convention on Human Rights because, in the leading case of *Chahal v. United Kingdom* (1997) 23 EHRR 413, the ECtHR held that the applicant's detention for many years did not in itself violate the Convention. *See* Gerard Hogan, SC, "The Incorporation of the ECHR into Irish Domestic Law", Law Society of Ireland Conference Paper, October 14, 2000, at 3-4 of the paper in particular.

autonomy of the national judiciary by interpreting EU law and (theoretically at least) leaving the final decision up to the domestic court.[16] But if the Convention had constitutional status, it would give domestic judges more power, not less.[17]

As against this, it must be admitted that there are many areas where the guarantees of the Constitution overlap with those of the Convention, and that there was no need to give the same rights two forms of protection at constitutional level.[18] It is true that there is invariably a high degree of correlation between the fundamental rights protected by domestic bills of rights and those enumerated in the ECHR. Where variations do exist, the domestic instrument often gives a higher level of protection. However, individual States should not be too complacent: for many years national authorities all over Europe have, somewhat self-indulgently, assumed that their own Constitutions easily went as far as (if not further than) the Convention's guarantees, without much in the way of proof to support this pervasive idea. Yet if such were the case, there would not have been so many adverse decisions by the European Court and Commission against member states whose legal and administrative authorities were ostensibly acting in accordance with their own bills of rights.

To argue that the Convention ought to have had constitutional status when its position in the hierarchy of norms has already been determined by the 2003 Act arguably involves crying over the proverbial spilt milk. The status of the Convention

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[16] *See* Chapter 2.

[17] There is also, of course, the argument that any form of incorporation will lead to a greater judicial dialogue between the domestic courts and the Court of Human Rights, opening up the possibility that the national interpretation of the Convention might actually sway the international court. This point was originally made in the UK context by Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department at the second reading of the HRA in the House of Lords (HL2R; 16 February 1998). *See*, further, Parosha Chandran, *A Guide to the Human Rights Act, 1998* (Butterworths, 1999), at 24; and the remarks of the Lord Chancellor, Lord Irvine of Lairg, who stated that the Human Rights Act would "allow British judges for the first time to make their own distinctive contribution to the development of human rights in Europe": Lord Chancellor, Lord Irvine of Lairg, addressing the House of Lords during the Opening Speeches at the second reading of the Human Rights Bill, from Jonathan Cooper and Adrian Marshall-Williams (eds) *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill* (Hart Publishing, 2000) at 1. For the official report, *see* Official Report, House of Lords, 3 November 1997, vol 582, col 1227.

[18] Indeed, on a negative note, it might be observed that both documents share similar weaknesses, particularly as regards the rights of the child: the Irish Constitution is an adult-centred bill of rights whose drafters appeared to presume that the interests of the children of Ireland would best be preserved by respecting the autonomy and inalienable rights of the marital family; and the Convention has been described as an adult's charter first and foremost, which contains no requirement that the exercise of rights by adults must be properly balanced against the competing rights of the child: Jonathan Herring, *Family Law* (Longman, 2001), at 346-348. Ireland has ratified the UN Convention on the Rights of the Child 1989, but has yet to incorporate it into domestic law.

in Irish law has been determined; it was, it is submitted, a political choice; the value given to international law at domestic level always is, and the method of incorporation chosen says more about us and our priorities than it does about the importance of the international law in question. Ironically, such choices often appear to evidence a distrust of and even hostility towards "foreign" law, all the while conveniently forgetting that international law applies to Ireland largely because Ireland elected to circumscribe her own sovereignty in that way. Giving such measures domestic effect when they are already binding on the state is simply to take the next logical step in respecting our international obligations.

The Impact of the ECHR Act: The Future of the Convention in Irish Law

However optimistic one is tempted to be about the ECHR Act's potential to usher in reform, it remains the case that the Act has elicited nowhere near as much praise in this jurisdiction as the HRA has in the UK (the HRA has been described as "a beautifully drafted and subtle measure"[19]); nor has it had anywhere near so immediate an impact.[20] The ECHR Act has now been in force for three years. By the same point in England, its impact had been much more radical.[21] As an Irish lawyer, it is tempting to be smug about this difference, and to attribute it to the fact that fundamental rights in this jurisdiction already received adequate protection under the Constitution. But that would involve ignoring the bigger picture; for although the UK's legal system did not have a culture of invalidating legislative norms or state action for violating fundamental rights, nor was it, pre-HRA, a country on the brink of totalitarianism. Ought this difference to surprise us? Perhaps not. From our examination of incorporation in Italy and Sweden,[22] it is clear that, even where the same model of incorporation is used, the resulting internal impact of the Convention can differ widely depending on the attitude of the domestic courts. Furthermore, it may be that, given time, the HRA's legacy will not seem so profound as it did at first

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[19] Anthony Lester QC, "The Human Rights Act 1998 – Five Years On" [2004] EHRLR 258, at 259.
[20] On this point, *see* John Wadham, "The Human Rights Act: One year on" [2001] EHRLR 620, who notes that, out of 149 cases in which the Act was relied upon during its first year in force, it affected the outcome, reasoning or procedure in 85.
[21] For the most significant HRA cases decided by 2003/2004, *see*, e.g., Richard Clayton QC, Alex Ruck Keene, and Rory Dunlop, "Key Human Rights Cases in the Last 12 Months" [2004] EHRLR 614.
[22] *See* Chapter 4.

blush; the current global political climate is likely to provide the greatest test of the HRA's effectiveness in protecting human rights, however, for it is clear that judges are far from immune to the political climate in which they work. In spite of its many successes, the usefulness of the HRA has undoubtedly been grossly overestimated by litigants and lawyers alike, and where the UK has derogated from its Convention obligations there will be no redress at Strasbourg for the wrongly accused in the "war on terror".

The contrast between the ramifications of the two Acts is clear even when we take account of the fact that the HRA has been in force for almost twice as long as the 2003 Act: in their 2003 book, Jowell and Cooper argued that

> "History is packed with examples of fine constitutional documents which have been honoured mainly in their breach. The drafters of these documents have congratulated themselves on the contours of their institutional design, but bothered little about their subsequent implementation.
>
> "By contrast, the impact of the UK's Human Rights Act 1998 ('The Act') has been immediate."[23]

The impact of the Irish European Convention on Human Rights Act 2003 has been far from immediate. From its inception it was decried as "a wasted opportunity",[24] and the case law to date has been neither from impressive in its scope nor profound in its implications. Early cases reveal two main trends: some judges appear to be at ease with and open to arguments based on the Convention. Others are tending to retain their earlier stance, applying Irish case law and constitutional jurisprudence rather than the Convention. This trend is all the more justifiable given that, in a number of cases brought under the ECHR Act, the Convention should not have been pleaded at all.[25] Reliance on the old familiar constitutional remedies is understandable given the years of experience our courts have in dealing with constitutional arguments and, so long as the applicants involved are successful, it does not cause injustice. Admittedly, this difference may be due in part to the type of

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[23] Jeffrey Jowell QC and Jonathan Cooper, "Introduction", from Jeffrey Jowell QC and Jonathan Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing, 2003), 1 at 1.

[24] Suzanne Egan, "The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation" (2003) 10(1) *DULJ* 230.

[25] *See* Chapter 6.

challenges based on the ECHR Act that have thus far reached the courts and the extent to which the Convention was actually relied upon. Furthermore, the State appears to have settled some of the more meritorious cases based on the Act rather than await a judgment.[26]

Given the weaknesses inherent in the ECHR Act, it may be that its real (indeed, its only) strength will lie in an enhanced role in constitutional interpretation. It may be that the courts, freed from the constraints of *Ó Láighléis*, will make more frequent use of Convention principles and case law in defining the nature and extent of constitutional rights. On the most positive reading, this could lead to the boundaries on the exercise of certain rights being pushed back to reflect the Convention standard, where this is higher. The most obvious (arguably, at the present time, the only) area in which this might be so is in relation to the rights of the non-marital family in all its guises, which receives scant protection under the Constitution at present. Nor would such a development be confined to cases on the rights of families per se: as can be seen from the post- EHCR Act cases on immigration, there could be a small but significant number of cases where the recognition of the rights of the non-marital family might lead to a more evolved policy in relation to deportations of persons with family ties within the jurisdiction who are either not married or who have not been so for any great period of time. Furthermore, should the courts accept and adopt the application of the proportionality principle in all cases where fundamental rights are in issue, there could be a re-evaluation of the extent to which state action can infringe those rights.[27]

How are the courts to be persuaded that this is the right course? It may, in time, be possible to persuade them to look beyond the question of the Convention's nominal legal status, to the way in which it is actually referred to and applied by the domestic courts. It has been suggested that

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[26] *See*, e.g., *Lonergan v. Minister for Defence*; *Bosango v. Minister for Justice*.

[27] Admittedly, there has been little indication of this to date, with the judiciary apparently divided on the application of a more stringent test in judicial review of administrative action affecting human rights: *see* Chapter 3. However, optimists argue that "the case law of the Commission and Court can throw fresh light on the balance of interest between the individual and the State and serve as a source of constitutional ideas and concepts which can only be to the benefit of our own legal system": Dillon-Malone (n5), at 64.

> "All common lawyers know that the best way to get judges to do something new is to show them that it is so close to what they have been doing all along that they could claim that it was what they have been doing all along."[28]

It may not be easy to convince Irish judges that what they have been doing all this time amounts to the domestic application of the ECHR and the judgments of its Court, but it would appear of fundamental importance that they be persuaded to give teeth to their obligation under the 2001 Bill to take "judicial notice" of the Strasbourg jurisprudence.[29] Only if the Irish courts allow themselves to be influenced by the broad interpretations of the Convention that have been handed down by its own court has the ECHR Act any real prospect of making a difference to Irish law.

Furthermore, it might be argued that the ECHR Act does have the capacity to empower the lower courts to some extent, for while only the High Court and Supreme Court have the power to grant a declaration of incompatibility under the Act, all courts are bound to uphold the Convention and to "take judicial notice" of the decisions of the Strasbourg organs. It is possible that, over time, this may lead to a greater awareness of the Convention among all levels of the judiciary and, as a result, among litigants and lawyers alike. It has been remarked of the HRA that,

> "Ultimately the changed judicial climate and creativity that it has ushered in may be more important than the lack of formal powers for the courts to strike down legislation. And there can be little doubt that the climate has changed dramatically. The courts are now entertaining inventive Convention arguments on a daily basis as they grapple to graft into UK law a substantial body of Convention jurisprudence."[30]

Whether Irish lawyers will adapt their pleadings to entertain similarly inventive and relevant arguments remains to be seen; however, it is certainly possible that, in spite of the differences between our jurisdictions which inevitably made the Convention's incorporation a more dramatic affair in the UK, Irish jurisprudence may too come to benefit from the "grafting" of Convention principles onto our existing law.

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[28] Martin Shapiro and Alec Stone Sweet, "Judicial Law Making and Precedent" from their book, *On Law, Politics and Judicialization* (Oxford University Press, 2002) 90, at 93.
[29] Section 4 of the European Convention on Human Rights Bill.
[30] Ian Leigh, "The UK's Human Rights Act 1998: An Early Assessment" Murray Hunt, "Human Rights Review and the Public-Private Distinction" from Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, 2002, 323, at 343.

To date, the cases in which the Convention has been raised have not led to any dramatic rethinking of Irish human rights law. At its highest, the Convention has been used to curtail, ever so slightly, the Minister for Justice's power to deport (and even here, the cases in which the applicant succeeded were the exception rather than the rule). At its lowest, both Act and Convention have been effectively ignored. In time, the middle road whereby the Convention is used as an additional tool of constitutional interpretation may be the most common. If so, it is unlikely that the impact of the European Convention on Human Rights Act will be particularly dramatic; as an English lawyer has remarked, "the Human Rights Act is only a method of interpretation: it may make blue purple, but it does not make blue red."[31] The same is likely to be true in Ireland.

[31] Valentine le Grice QC, commenting on the dubious use made of the HRA by the British government's legal advisors in asserting that Prince Charles's marriage in a registry office was valid, even though the legislation in question explicitly excluded the British Royal Family. *See* Dominic Kennedy, "Ministers were told that civil wedding would not be legal", *The Times* 9 June 2006 (from http://www.thetimesonline.co.uk/article/0,,200-2217999,00.html, visited 10 October 2006).

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Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13

The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed.

(Registry of the European Court of Human Rights, September 2003)

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

The governments signatory hereto, being members of the Council of Europe, Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective

political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1. Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I. RIGHTS AND FREEDOMS

Article 2. Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    a. in defence of any person from unlawful violence;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3. Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4. Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term forced or compulsory labour shall not include:

a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
d. any work or service which forms part of normal civic obligations.

Article 5 . Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
    a. the lawful detention of a person after conviction by a competent court;
    b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
    c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
    d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
    e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
    f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6. Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
    a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7. No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

Article 8. Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9. Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10. Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 . Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12. Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13. Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14. Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15. Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16. Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17. Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18. Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II . EUROPEAN COURT OF HUMAN RIGHTS

Article 19. Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 20. Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21. Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22. Election of judges

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 23. Terms of office

1. The judges shall be elected for a period of six years. They may be reelected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
2. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.
5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
6. The terms of office of judges shall expire when they reach the age of 70.
7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Article 24. Dismissal

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Article 25. Registry and legal secretaries

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

Article 26. Plenary Court

The plenary Court shall

a. elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
b. set up Chambers, constituted for a fixed period of time;
c. elect the Presidents of the Chambers of the Court; they may be re-elected;
d. adopt the rules of the Court, and
e. elect the Registrar and one or more Deputy Registrars.

Article 27. Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

Article 28. Declarations of inadmissibility by committees

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

Article 29. Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.
3. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30. Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31. Powers of the Grand Chamber

The Grand Chamber shall

a. a determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and

b. consider requests for advisory opinions submitted under Article 47.

Article 32. Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33. Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34. Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35. Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
    a. is anonymous; or
    b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36. Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Article 37. Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
   a. the applicant does not intend to pursue his application; or
   b. the matter has been resolved; or
   c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

   However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.
2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38. Examination of the case and friendly settlement proceedings

1. If the Court declares the application admissible, it shall
   a. pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;
   b. place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.
2. Proceedings conducted under paragraph 1.b shall be confidential.

Article 39. Finding of a friendly settlement

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Article 40. Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41. Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42. Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43. Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44. Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
    a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or
    b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
    c. when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

Article 45. Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46. Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Article 47. Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48. Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49. Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50. Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51. Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

SECTION III. MISCELLANEOUS PROVISIONS

Article 52. Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53. Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 54. Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55. Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56. Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57. Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58. Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act

which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59. Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The present Convention shall come into force after the deposit of ten instruments of ratification.
3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
4. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as the Convention.),

Have agreed as follows:

Article 1. Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2. Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3. Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4. Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

Article 5. Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6. Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the

Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto

Strasbourg, 16.IX.1963

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the Convention) and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

Article 1. Prohibition of imprisonment for debt

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 2. Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3. Prohibition of expulsion of nationals

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4. Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

Article 5. Territorial application

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.
5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the

Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol..

Article 6. Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7. Signature and ratification

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.
2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty

Strasbourg, 28.IV.1983

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as the Convention.),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

Article 1. Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2. Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3. Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4. Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 5. Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6. Relationship to the Convention

As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7. Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8. Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9. Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with articles 5 and 8;
d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as the Convention.),

Have agreed as follows:

Article 1. Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
    a. to submit reasons against his expulsion,
    b. to have his case reviewed, and
    c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Article 2. Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3. Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4. Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been

finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

No derogation from this Article shall be made under Article 15 of the Convention.

Article 5. Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Article 6. Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.
6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

Article 7. Relationship to the Convention

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 8. Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 9. Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 10. Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 6 and 9;
d. any other act, notification or declaration relating to this Protocol. In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 22nd day of November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the

Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as .the Convention.);

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

Article 1. General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 2. Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

Article 3. Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 4. Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 5. Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 6. Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 2 and 5;
d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Rome, this 4th day of November 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the abolition of the death penalty in all circumstances

Vilnius, 3.V.2002

The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention");

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1. Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2. Prohibitions of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3. Prohibitions of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 4. Territorial application

1. Any state may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any state may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 5. Relationship to the Convention

As between the states Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6. Signature and ratification

This Protocol shall be open for signature by member states of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member state of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7. Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member states of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.
2. In respect of any member state which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8. Depositary functions

The Secretary General of the Council of Europe shall notify all the member states of the Council of Europe of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 4 and 7;
d. any other act, notification or communication relating to this Protocol;

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Vilnius, this 3rd day of May 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member state of the Council of Europe.

Council of Europe Treaty Series No. 194

PROTOCOL No. 14 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AMENDING THE CONTROL SYSTEM OF THE CONVENTION

2 CETS 194 – Convention for the Protection of Human Rights (Protocol No. 14), 13.V.2004

Preamble

The member States of the Council of Europe, signatories to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Having regard to Resolution No. 1 and the Declaration adopted at the European Ministerial Conference on Human Rights, held in Rome on 3 and 4 November 2000;

Having regard to the Declarations adopted by the Committee of Ministers on 8 November 2001, 7 November 2002 and 15 May 2003, at their 109th, 111th and 112th Sessions, respectively;

Having regard to Opinion No. 251 (2004) adopted by the Parliamentary Assembly of the Council of Europe on 28 April 2004;

Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;

Considering, in particular, the need to ensure that the Court can continue to play its preeminent role in protecting human rights in Europe,

Have agreed as follows:

Article 1

Paragraph 2 of Article 22 of the Convention shall be deleted.

Article 2

Article 23 of the Convention shall be amended to read as follows:

Article 23 – Terms of office and dismissal

1. The judges shall be elected for a period of nine years. They may not be re-elected.
2. The terms of office of judges shall expire when they reach the age of 70.
3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
4. No judge may be dismissed from office unless the other judges decide by a majority of two thirds that that judge has ceased to fulfil the required conditions."

Article 3

Article 24 of the Convention shall be deleted.

3 CETS 194 – Convention for the Protection of Human Rights (Protocol No. 14), 13.V.2004

Article 4

Article 25 of the Convention shall become Article 24 and its text shall be amended to read as follows:

Article 24 – Registry and rapporteurs

1. The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.
2. When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's registry."

Article 5

Article 26 of the Convention shall become Article 25 ("Plenary Court") and its text shall be amended as follows:

1. At the end of paragraph d, the comma shall be replaced by a semi-colon and the word "and" shall be deleted.

2. At the end of paragraph e, the full stop shall be replaced by a semi-colon.
3. A new paragraph f shall be added which shall read as follows: " f make any request under Article 26, paragraph 2."

Article 6

Article 27 of the Convention shall become Article 26 and its text shall be amended to read as follows:

" Article 26 – Single-judge formation, committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned."

Article 7

After the new Article 26, a new Article 27 shall be inserted into the Convention, which shall read as follows:

" Article 27 – Competence of single judges

1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.
2. The decision shall be final.
3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination."

Article 8

Article 28 of the Convention shall be amended to read as follows:

" Article 28 – Competence of committees

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
   a. declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
   b. declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
2. Decisions and judgments under paragraph 1 shall be final.
3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b."

Article 9

Article 29 of the Convention shall be amended as follows:

1. Paragraph 1 shall be amended to read as follows: "If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately."
2. At the end of paragraph 2 a new sentence shall be added which shall read as follows: "The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise."
3. Paragraph 3 shall be deleted.

Article 10

Article 31 of the Convention shall be amended as follows:

1. At the end of paragraph a, the word "and" shall be deleted. Paragraph b shall become paragraph c and a new paragraph b shall be inserted and shall read as follows:

" b. decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and".

Article 11

Article 32 of the Convention shall be amended as follows:

At the end of paragraph 1, a comma and the number 46 shall be inserted after the number 34.

Article 12

Paragraph 3 of Article 35 of the Convention shall be amended to read as follows:

" 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or

b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal."

Article 13

A new paragraph 3 shall be added at the end of Article 36 of the Convention, which shall read as follows:

"3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings."

Article 14

Article 38 of the Convention shall be amended to read as follows:

" Article 38 – Examination of the case

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

Article 15

Article 39 of the Convention shall be amended to read as follows:

" Article 39 – Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
2. Proceedings conducted under paragraph 1 shall be confidential.
3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision."

Article 16

Article 46 of the Convention shall be amended to read as follows:

" Article 46 – Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

Article 17

Article 59 of the Convention shall be amended as follows:

1. A new paragraph 2 shall be inserted which shall read as follows:

   " 2. The European Union may accede to this Convention."

2. Paragraphs 2, 3 and 4 shall become paragraphs 3, 4 and 5 respectively.

Final and transitional provisions

Article 18

1. This Protocol shall be open for signature by member States of the Council of Europe signatories to the Convention, which may express their consent to be bound by
    a. signature without reservation as to ratification, acceptance or approval; or
    b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 19

This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol, in accordance with the provisions of Article 18.

Article 20

1. From the date of the entry into force of this Protocol, its provisions shall apply to all applications pending before the Court as well as to all judgments whose execution is under supervision by the Committee of Ministers.
2. The new admissibility criterion inserted by Article 12 of this Protocol in Article 35, paragraph 3.b of the Convention, shall not apply to applications declared admissible before the entry into force of the Protocol. In the two years following the entry into force of this Protocol, the new admissibility criterion may only be applied by Chambers and the Grand Chamber of the Court.

Article 21

The term of office of judges serving their first term of office on the date of entry into force of this Protocol shall be extended ipso jure so as to amount to a total period of nine years.

The other judges shall complete their term of office, which shall be extended ipso jure by two years.

Article 22

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. the date of entry into force of this Protocol in accordance with Article 19; and
d. any other act, notification or communication relating to this Protocol.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol. Done at Strasbourg, this 13th day of May 2004, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Number 20 *of* 2003

EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.

2. Interpretation of laws.

3. Performance of certain functions in a manner compatible with Convention provisions.

4. Interpretation of Convention provisions.

5. Declaration of incompatibility.

6. Notice of proceedings under Act.

7. Amendment of Human Rights Commission Act 2000.

8. Expenses.

9. Short title and commencement.

SCHEDULE 1

Convention for the Protection of Human Rights and Fundamental Freedoms

SCHEDULE 2

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

SCHEDULE 3

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the convention and in the first protocol thereto

[*No.* **20.**] *European Convention on Human Rights Act* 2003.

SCHEDULE 4

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

SCHEDULE 5

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

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Act Referred to

Human Rights Commission Act 2000, No. 9

Number 20 *of* 2003

EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

AN ACT TO ENABLE FURTHER EFFECT TO BE GIVEN, SUBJECT TO THE CONSTITUTION, TO CERTAIN PROVISIONS OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS DONE AT ROME ON THE 4th DAY OF NOVEMBER 1950 AND CERTAIN PROTOCOLS THERETO, TO AMEND THE HUMAN RIGHTS COMMISSION ACT 2000 AND TO PROVIDE FOR RELATED MATTERS. [30*th June*, 2003]

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

1.—(1) In this Act unless the context otherwise requires—

''the Convention'' means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950 (the text of which, in the English language, is, for convenience of reference, set out in *Schedule 1* to this Act), as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994;

''Convention provisions'' means, subject to any derogation which the State may make pursuant to Article 15 of the Convention, Articles 2 to 14 of the Convention and the following protocols thereto as construed in accordance with Articles 16 to 18 of the Convention:

(*a*) the Protocol to the Convention done at Paris on the 20th day of March, 1952;

(*b*) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of September, 1963;

(*c*) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;

(*d*) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984;

Interpretation.

S.1 Interpretation of laws. (the texts of which protocols, in the English language, are, for convenience of reference, set out in *Schedules 2*, *3*, *4* and *5* respectively, to this Act);

''declaration of incompatibility'' means a declaration under *section 5*;

''European Court of Human Rights'' shall be construed in accordance with *section 4*;

''functions'' includes powers and duties and references to the performance of functions includes, as respects powers and duties, references to the exercise of the powers and the performance of the duties;

''Minister'' means the Minister for Justice, Equality and Law Reform;

''organ of the State'' includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised;

''rule of law'' includes common law;

''statutory provision'' means any provision of an Act of the Oireachtas or of any order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created thereunder or any statute, order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created under a statute which continued in force by virtue of Article 50 of the Constitution.

(2) In this Act—

(*a*) a reference to any enactment shall, unless the context otherwise requires, be construed as a reference to that enactment as amended or extended by or under any subsequent enactment including this Act,

(*b*) a reference to a section is a reference to a section of this Act unless it is indicated that reference to some other enactment is intended,

(*c*) a reference to a subsection, paragraph or subparagraph is a reference to a subsection, paragraph or subparagraph of the provision in which the reference occurs unless it is indicated that reference to some other provision is intended.

2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of *subsection (1)*, may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to *subsection (3)*, in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

(3) The damages recoverable under this section in the Circuit Court shall not exceed the amount standing prescribed, for the time being by law, as the limit of that Court's jurisdiction in tort.

(4) Nothing in this section shall be construed as creating a criminal offence.

(5) (*a*) Proceedings under this section shall not be brought in respect of any contravention of *subsection (1)* which arose more than 1 year before the commencement of the proceedings.

(*b*) The period referred to in *paragraph (a)* may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice.

4. —Judicial notice shall be taken of the Convention provisions and of—

(*a*) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,

(*b*) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,

(*c*) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction, and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

5. —(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section 2*, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as ''a declaration of incompatibility'') that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

(2) A declaration of incompatibility—

(*a*) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and

(*b*) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.

(3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.

(4) Where—

(*a*) a declaration of incompatibility is made,

(*b*) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and

(*c*) the Government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment of compensation to that party (''a payment''), the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.

(5) In advising the Government on the amount of compensation for the purposes of *subsection (4)*, an adviser shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention.

6. —(1) Before a court decides whether to make a declaration of incompatibility the Attorney General and the Human Rights Commission shall be given notice of the proceedings in accordance with rules of court.

(2) The Attorney General shall thereupon be entitled to appear in the proceedings and to become a party thereto as regards the issue of the declaration of incompatibility.

7. —The Human Rights Commission Act 2000 is hereby amended in section 11, by the substitution in subsection (3)(*b*) for ''such force;'' of: ''such force, and

(*c*) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Convention provisions within the meaning of the *European Convention on Human Rights Act 2003*;''.

8. —The expenses incurred by the Minister for Finance in the administration of this Act shall be paid out of moneys provided by the Oireachtas and the expenses incurred by any other Minister of the Government in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

9. —(1) This Act may be cited as the European Convention on Human Rights Act 2003.

(2) This Act shall come into operation on such day not later than 6 months after its passing as the Minister may appoint by order.

SCHEDULE 1

Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1.1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. Section I 1

Rights and freedoms

Article 2.1

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

1. Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

Sch. 1

Sch. 1

a. in defence of any person from unlawful violence;
b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3.1

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4.1

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term ''forced or compulsory labour'' shall not include:

a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
d. any work or service which forms part of normal civic obligations.

Article 51

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
    a. the lawful detention of a person after conviction by a competent court;
    b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
    c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
    d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
    e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6.1

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

1 Heading added according to the provisions of Protocol No. 11 (ETS No. 155).

a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b. to have adequate time and facilities for the preparation of his defence;

c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7.1

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8.1

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic

society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9.1

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10.1

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11.1

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II1

European Court of Human Rights

Article 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as ''the Court''. It shall function on a permanent basis.

Article 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22

Election of judges

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 23

Terms of office

1. The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
2. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.
5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
6. The terms of office of judges shall expire when they reach the age of 70.
7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Article 24

Dismissal

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Article 25

Registry and legal secretaries

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

Article 26

Plenary Court

The plenary Court shall

a. elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
b. set up Chambers, constituted for a fixed period of time;
c. elect the Presidents of the Chambers of the Court; they may be re-elected;
d. adopt the rules of the Court, and
e. elect the Registrar and one or more Deputy Registrars.

Article 27

Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under

Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

Article 28

Declarations of inadmissibility by committees

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

Article 29

Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
2. A Chamber shall decide on the admissibility and merits of inter- State applications submitted under Article 33.
3. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30

Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31

Powers of the Grand Chamber

The Grand Chamber shall

a. determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and

b. consider requests for advisory opinions submitted under Article 47.

Article 32

Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33

Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34

Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35

Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that
    a. is anonymous; or
    b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36

Third party intervention

1. In all cases before a Chamber of the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Article 37

Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
    a. the applicant does not intend to pursue his application; or
    b. the matter has been resolved; or
    c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38

Examination of the case and friendly settlement proceedings

1. If the Court declares the application admissible, it shall
    a. pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;
    b. place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.
2. Proceedings conducted under paragraph 1.b shall be confidential.

Article 39

Finding of a friendly settlement

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Article 40

Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41

Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42

Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43

Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44

Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
    a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or
    b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

c. when the panel of the Grand Chamber rejects the request to refer under Article 43.

3. The final judgment shall be published.

Article 45

Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Article 47

Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48

Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49

Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50

Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51

Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III1, 2

Miscellaneous provisions

Article 52

Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53

Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

The articles of this section are renumbered according to the Provisions of Protocol No. 11 (ETS No. 155).

Article 54

Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55

Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56

Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57

Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58

Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six

months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article

Article 59

Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The present Convention shall come into force after the deposit of ten instruments of ratification.
3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
4. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe.

The Secretary General shall transmit certified copies to each of the signatories.

Text amended according to the provisions of Protocol No. 11 (ETS No. 155).

SCHEDULE 2

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms1

Paris, 20.III.1952

THE GOVERNMENTS SIGNATORY HERETO, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as ''the Convention''),

Have agreed as follows:

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Sch. 2 Article 41

Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

Article 5

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6

Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments

of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified. Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

SCHEDULE 3

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the convention and in the first protocol thereto

Strasbourg, 16.IX.1963

THE GOVERNMENTS SIGNATORY HERETO,

being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the ''Convention'') and in Articles 1 to 3 of the First Protocol to the Convention signed at Paris on 20th March 1952,

Have agreed as follows:

Article 1

Prohibition of imprisonment for debt

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 2

Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3

Prohibition of expulsion of nationals

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4

Prohibition of collective expulsion of aliens. Collective expulsion of aliens is prohibited.

Article 5

Territorial application

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.
5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.

Article 6

Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7

Signature and ratification

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently,

the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified. In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

SCHEDULE 4

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty

Strasbourg, 28.IV.1983

THE MEMBER STATES OF THE COUNCIL OF EUROPE,

signatory to this Protocol to the Convention for the Protection of

Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as ''the Convention''), Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3

Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4

Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 5

Territorial application.

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6

Relationship to the Convention

As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7

Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8

Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9

Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 5 and 8;
d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

SCHEDULE 5

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms1

Strasbourg, 22.XI.1984

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as ''the Convention''),

Have agreed as follows:

Article 1

Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
    a. to submit reasons against his expulsion,
    b. to have his case reviewed, and
    c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Article 2

Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3

Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4

Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 5

Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Article 6

Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.
4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as

separate territories for the purpose of the reference in Article 1 to the territory of a State.

6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

Article 7

Relationship to the Convention

As between the States Parties, the provisions of Articles 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 8

Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 9

Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 10

Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

a. any signature;
b. the deposit of any instrument of ratification, acceptance or approval;
c. any date of entry into force of this Protocol in accordance with Articles 6 and 9;
d. any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Strasbourg, this 22nd day of November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

HUMAN RIGHTS ACT 1998

ARRANGEMENT OF SECTIONS

Introduction

Section

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SCHEDULES

Human Rights Act 1998

1998 Chapter 42

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes.

BE IT ENACTED

by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Introduction

HUMAN RIGHTS ACT 1998 - SECT 1

The Convention Rights.

1.

- (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in-

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention-

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

HUMAN RIGHTS ACT 1998 - SECT 2

Interpretation of Convention rights.

2.

- (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section-

(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

Legislation

HUMAN RIGHTS ACT 1998 - SECT 3

Interpretation of legislation.

3.

- (1) 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.

(2) This section-

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

HUMAN RIGHTS ACT 1998 - SECT 4

Declaration of incompatibility.

4.

- (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied-

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section "court" means-

(a) the House of Lords;

(b) the Judicial Committee of the Privy Council;

(c) the Courts-Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility")-

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

HUMAN RIGHTS ACT 1998 - SECT 5

Right of Crown to intervene.

5.

- (1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies-

(a) a Minister of the Crown (or a person nominated by him),

(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department, is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection

(2) may, with leave, appeal to the House of Lords against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)-

"criminal proceedings" includes all proceedings before the Courts-Martial Appeal Court; and

"leave" means leave granted by the court making the declaration of incompatibility or by the House of Lords.

Public authorities

HUMAN RIGHTS ACT 1998 - SECT 6

Acts of public authorities.

6.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

HUMAN RIGHTS ACT 1998 - SECT 7

Proceedings.

7.

- (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of-

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes-

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means-

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force, rules made by a Northern Ireland department for those purposes, and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to-

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "The Minister" includes the Northern Ireland department concerned.

HUMAN RIGHTS ACT 1998 - SECT 8

Judicial remedies.

8.

- (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining-

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated-

(a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section-

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under section 6(1).

HUMAN RIGHTS ACT 1998 - SECT 9

Judicial acts.

9.

- (1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only-

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review;

or

(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section-

"appropriate person" means the Minister responsible for the court concerned, or a person or government department nominated by him;

"court" includes a tribunal;

"judge" includes a member of a tribunal, a justice of the peace and a clerk or other officer entitled to exercise the jurisdiction of a court;

"judicial act" means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and

"rules" has the same meaning as in section 7(9).

Remedial action

Remedial action

HUMAN RIGHTS ACT 1998 - SECT 10

Power to take remedial action.

10.

- (1) This section applies if-

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies-

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this

section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from
the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers-

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section, he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister
proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section "legislation" does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

Other rights and proceedings

HUMAN RIGHTS ACT 1998 - SECT 11

Safeguard for existing human rights.

11.

A person's reliance on a Convention right does not restrict-

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

HUMAN RIGHTS ACT 1998 - SECT 12

Freedom of expression.

12.

- (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied-

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-

(a) the extent to which-

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section-

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

HUMAN RIGHTS ACT 1998 - SECT 13

Freedom of thought, conscience and religion.

13.

- (1) 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.

(2) In this section "court" includes a tribunal.

Derogations and reservations

HUMAN RIGHTS ACT 1998 - SECT 14

Derogations.

14.

- (1) In this Act "designated derogation" means-

(a) the United Kingdom's derogation from Article 5(3) of the Convention; and

(b) any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The derogation referred to in subsection (1)(a) is set out in Part I of Schedule 3.

(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to Schedule 3 as he considers appropriate to reflect-

(a) any designation order; or

(b) the effect of subsection (3).

(6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

HUMAN RIGHTS ACT 1998 - SECT 15

Reservations.

15.

- (1) In this Act "designated reservation" means-

(a) the United Kingdom's reservation to Article 2 of the First Protocol to the Convention; and

(b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.

(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to this Act as he considers appropriate to reflect-

(a) any designation order; or

(b) the effect of subsection (3).

HUMAN RIGHTS ACT 1998 - SECT 16

Period for which designated derogations have effect.

16.

- (1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act-

(a) in the case of the derogation referred to in section 14(1)(a), at the end of the period of five years beginning with the date on which section 1(2) came into force;

(b) in the case of any other derogation, at the end of the period of five years beginning with the date on which the order designating it was made.

(2) At any time before the period-

(a) fixed by subsection (1)(a) or (b), or

(b) extended by an order under this subsection, comes to an end, the Secretary of State may by order extend it by a further period of five years.

(3) An order under section 14(1)(b) ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.

(4) Subsection (3) does not affect-

(a) anything done in reliance on the order; or

(b) the power to make a fresh order under section 14(1)(b).

(5) In subsection (3) "period for consideration" means the period of forty days beginning with the day on which the order was made.

(6) In calculating the period for consideration, no account is to be taken of any time during which-

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

(7) If a designated derogation is withdrawn by the United Kingdom, the Secretary of State must by order make such amendments to this Act as he considers are required to reflect that withdrawal.

HUMAN RIGHTS ACT 1998 - SECT 17

Periodic review of designated reservations.

17.

- (1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)-

(a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and

(b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(2) The appropriate Minister must review each of the other designated reservations (if any)-

(a) before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and

(b) if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(3) The Minister conducting a review under this section must prepare a report on the result of the review and lay a copy of it before each House of Parliament.

Judges of the European Court of Human Rights

HUMAN RIGHTS ACT 1998 - SECT 18

Appointment to European Court of Human Rights.

18.

- (1) In this section "judicial office" means the office of-

(a) Lord Justice of Appeal, Justice of the High Court or Circuit judge, in England and Wales;

(b) judge of the Court of Session or sheriff, in Scotland;

(c) Lord Justice of Appeal, judge of the High Court or county court judge, in Northern Ireland.

(2) The holder of a judicial office may become a judge of the European Court of Human Rights ("the Court") without being required to relinquish his office.

(3) But he is not required to perform the duties of his judicial office while he is a judge of the Court.

(4) In respect of any period during which he is a judge of the Court-

(a) a Lord Justice of Appeal or Justice of the High Court is not to count as a judge of the relevant court for the purposes of section 2(1) or 4(1) of the Supreme Court Act 1981 (maximum number of judges) nor as a judge of the Supreme Court for the purposes of section 12(1) to (6) of that Act (salaries etc.);

(b) a judge of the Court of Session is not to count as a judge of that court for the purposes of section 1(1) of the Court of Session Act 1988 (maximum number of judges) or of section 9(1)(c) of the Administration of Justice Act 1973 ("the 1973 Act") (salaries etc.);

(c) a Lord Justice of Appeal or judge of the High Court in Northern Ireland is not to count as a judge of the relevant court for the purposes of section 2(1) or 3(1) of the Judicature (Northern Ireland) Act 1978 (maximum number of judges) nor as a judge of the Supreme Court of Northern Ireland for the purposes of section 9(1)(d) of the 1973 Act (salaries etc.);

(d) a Circuit judge is not to count as such for the purposes of section 18 of the Courts Act 1971 (salaries etc.);

(e) a sheriff is not to count as such for the purposes of section 14 of the Sheriff Courts (Scotland) Act 1907 (salaries etc.);

(f) a county court judge of Northern Ireland is not to count as such for the purposes of section 106 of the County Courts Act Northern Ireland) 1959 (salaries etc.).

(5) If a sheriff principal is appointed a judge of the Court, section 11(1) of the Sheriff Courts (Scotland) Act 1971 (temporary appointment of sheriff principal) applies, while he holds that appointment, as if his office is vacant.

(6) Schedule 4 makes provision about judicial pensions in relation to the holder of a judicial office who serves as a judge of the Court.

(7) The Lord Chancellor or the Secretary of State may by order make such transitional provision (including, in particular, provision for a temporary increase in the maximum number of judges) as he considers appropriate in relation to any holder of a judicial office who has completed his service as a judge of the Court.

Parliamentary procedure

HUMAN RIGHTS ACT 1998 - SECT 19

Statements of compatibility.

19.

- (1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill-

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

HUMAN RIGHTS ACT 1998 - SECT 20

Orders etc. under this Act.

20.

- (1) Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.

(2) The power of the Lord Chancellor or the Secretary of State to make rules (other than rules of court) under section 2(3) or 7(9) is exercisable by statutory instrument.

(3) Any statutory instrument made under section 14, 15 or 16(7) must be laid before Parliament.

(4) No order may be made by the Lord Chancellor or the Secretary of State under section 1(4), 7(11) or 16(2) unless a draft of the order has been laid before, and approved by, each House of Parliament.

(5) Any statutory instrument made under section 18(7) or Schedule 4, or to which subsection (2) applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) The power of a Northern Ireland department to make-

(a) rules under section 2(3)(c) or 7(9)(c), or

(b) an order under section 7(11), is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979.

(7) Any rules made under section 2(3)(c) or 7(9)(c) shall be subject to negative resolution; and section 41(6) of the Interpretation Act Northern Ireland) 1954 (meaning of "subject to negative resolution") shall apply as if the power to make the rules were conferred by an Act of the Northern Ireland Assembly.

(8) No order may be made by a Northern Ireland department under section 7(11) unless a draft of the order has been laid before, and approved by, the Northern Ireland Assembly.

HUMAN RIGHTS ACT 1998 - SECT 21

Interpretation, etc.

21.

- (1) In this Act-

"amend" includes repeal and apply (with or without modifications);

"the appropriate Minister" means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the Crown Proceedings Act 1947);

"the Commission" means the European Commission of Human Rights;

"the Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;

"declaration of incompatibility" means a declaration under section 4;

"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975;

"Northern Ireland Minister" includes the First Minister and the deputy First Minister in Northern Ireland;

"primary legislation" means any-

(a) public general Act;

(b) local and personal Act;

(c) private Act;

(d) Measure of the Church Assembly;

(e) Measure of the General Synod of the Church of England;

(f) Order in Council-

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in paragraph (a), (b) or

(c); and includes an order or other instrument made under primary legislation (otherwise than by the National Assembly for Wales, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to

bring one or more provisions of that legislation into force or amends any primary legislation;

"the First Protocol" means the protocol to the Convention agreed at Paris on 20th March 1952;

"the Sixth Protocol" means the protocol to the Convention agreed at Strasbourg on 28th April 1983;

"the Eleventh Protocol" means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

"remedial order" means an order under section 10;

"subordinate legislation" means any-

(a) Order in Council other than one-

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in the definition of primary legislation;

(b) Act of the Scottish Parliament;

(c) Act of the Parliament of Northern Ireland;

(d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(e) Act of the Northern Ireland Assembly;

(f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);

(g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c),

(d) or (e) or made under an Order in Council applying only to Northern Ireland;

(h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;

"transferred matters" has the same meaning as in the Northern Ireland Act 1998; and

"tribunal" means any tribunal in which legal proceedings may be brought.

(2) The references in paragraphs (b) and (c) of section 2(1) to Articles are to Articles of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(3) The reference in paragraph (d) of section 2(1) to Article 46 includes a reference to Articles 32 and 54 of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(4) The references in section 2(1) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

(5) Any liability under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 to suffer death for an offence is replaced by a liability to imprisonment for life or any less punishment authorised by those Acts; and those Acts shall accordingly have effect with the necessary modifications.

HUMAN RIGHTS ACT 1998 - SECT 22

Short title, commencement, application and extent.

22.

- (1) This Act may be cited as the Human Rights Act 1998.

(2) Sections 18, 20 and 21(5) and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

(5) This Act binds the Crown.

(6) This Act extends to Northern Ireland.

(7) Section 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends.

SCHEDULES

Schedule 1

THE ARTICLES PART I

THE CONVENTION RIGHTS AND FREEDOMS ARTICLE 2 RIGHT TO LIFE

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

   (a) in defence of any person from unlawful violence;

   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3 PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4 PROHIBITION OF SLAVERY AND FORCED LABOUR

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

   (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

   (c) any service exacted in case of an emergency or calamity

threatening the life or well-being of the community;
(d) any work or service which forms part of normal civic obligations.

ARTICLE 5 RIGHT TO LIBERTY AND SECURITY

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6 RIGHT TO A FAIR TRIAL

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

   (b) to have adequate time and facilities for the preparation of his defence;

   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7 NO PUNISHMENT WITHOUT LAW

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9 FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10 FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11 FREEDOM OF ASSEMBLY AND ASSOCIATION

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12 RIGHT TO MARRY

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 14 PROHIBITION OF DISCRIMINATION

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 16 RESTRICTIONS ON POLITICAL ACTIVITY OF ALIENS

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17 PROHIBITION OF ABUSE OF RIGHTS

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18 LIMITATION ON USE OF RESTRICTIONS ON RIGHTS

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

PART II

THE FIRST PROTOCOL

ARTICLE 1 PROTECTION OF PROPERTY

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ARTICLE 2 RIGHT TO EDUCATION

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3 RIGHT TO FREE ELECTIONS

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

PART III THE SIXTH PROTOCOL

ARTICLE 1

ABOLITION OF THE DEATH PENALTY

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

ARTICLE 2 DEATH PENALTY IN TIME OF WAR

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Schedule 2

REMEDIAL ORDERS

Orders

1. - (1) A remedial order may-

(a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;

(b) be made so as to have effect from a date earlier than that on which it is made;

(c) make provision for the delegation of specific functions;

(d) make different provision for different cases.

(2) The power conferred by sub-paragraph (1)(a) includes-

(a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and

(b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).

(3) A remedial order may be made so as to have the same extent as the legislation which it affects.

(4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

Procedure

2. No remedial order may be made unless-

(a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or

(b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft

3. - (1) No draft may be laid under paragraph 2(a) unless-

(a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and

(b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.

(2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing-

(a) a summary of the representations; and

(b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases

4. - (1) If a remedial order ("the original order") is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.

(2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing-

(a) a summary of the representations; and

(b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.

(3) If sub-paragraph (2)(b) applies, the person making the statement must-

(a) make a further remedial order replacing the original order; and

(b) lay the replacement order before Parliament.

(4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).

Definitions

5. In this Schedule-

"representations" means representations about a remedial order (or proposed remedial order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and

"required information" means-

(a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and

(b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.

Calculating periods

6. In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which-

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

Schedule 3

DEROGATION AND RESERVATION

PART I DEROGATION

The 1988 notification

The United Kingdom Permanent Representative to the Council of Europe presents his compliments to the Secretary General of the Council, and has the honour to convey the following information in order to ensure compliance with the obligations of Her Majesty's Government in the United Kingdom under Article 15(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950.

There have been in the United Kingdom in recent years campaigns of organised terrorism connected with the affairs of Northern Ireland which have manifested themselves in activities which have included repeated murder, attempted murder, maiming, intimidation and violent civil disturbance and in bombing and fire raising which have resulted in death, injury and widespread destruction of property. As a result, a public emergency within the meaning of Article 15(1) of the Convention exists in the United Kingdom.

The Government found it necessary in 1974 to introduce and since then, in cases concerning persons reasonably suspected of involvement in terrorism connected with the affairs of Northern Ireland, or of certain offences under the legislation, who have been

detained for 48 hours, to exercise powers enabling further detention without charge, for periods of up to five days, on the authority of the Secretary of State. These powers are at present to be found in Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984.

Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984 provides for a person whom a constable has arrested on reasonable grounds of suspecting him to be guilty of an offence under Section 1, 9 or 10 of the Act, or to be or to have been involved in terrorism connected with the affairs of Northern Ireland, to be detained in right of the arrest for up to 48 hours and thereafter, where the Secretary of State extends the detention period, for up to a further five days. Section 12 substantially re-enacted Section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1976 which, in turn, substantially re-enacted Section 7 of the Prevention of Terrorism (Temporary Provisions) Act 1974.

Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984 (SI 1984/417) and Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 (SI 1984/418) were both made under Sections 13 and 14 of and Schedule 3 to the 1984 Act and substantially re-enacted powers of detention in Orders made under the 1974 and 1976 Acts. A person who is being examined under Article 4 of either Order on his arrival in, or on seeking to leave, Northern Ireland or Great Britain for the purpose of determining whether he is or has been involved in terrorism connected with the affairs of Northern Ireland, or whether there are grounds for suspecting that he has committed an offence under Section 9 of the 1984 Act, may be detained under Article 9 or 10, as appropriate, pending the conclusion of his examination. The period of this examination may exceed 12 hours if an examining officer has reasonable grounds for suspecting him to be or to have been involved in acts of terrorism connected with the affairs of Northern Ireland.

Where such a person is detained under the said Article 9 or 10 he may be detained for up to 48 hours on the authority of an examining officer and thereafter, where the Secretary of State extends the detention period, for up to a further five days.

In its judgment of 29 November 1988 in the Case of Brogan and Others , the European Court of Human Rights held that there had been a violation of Article 5(3) in respect of each of the applicants, all of whom had been detained under Section 12 of the 1984 Act. The Court held that even the shortest of the four periods of detention concerned, namely four days and six hours, fell outside the constraints as to time permitted by the first part of Article 5(3). In addition, the Court held that there had been a violation of Article 5(5) in the case of each applicant.

Following this judgment, the Secretary of State for the Home Department informed Parliament on 6 December 1988 that, against the background of the terrorist campaign, and the over-riding need to bring terrorists to justice, the Government did not believe that the maximum period of detention should be reduced. He informed Parliament that the Government were examining the matter with a view to responding to the judgment. On 22 December 1988, the Secretary of State further informed Parliament that it remained the Government's wish, if it could be achieved, to find a judicial process under which extended detention might be reviewed and where appropriate authorised by a judge or other judicial officer. But a further period of reflection and consultation was necessary before the Government could bring forward a firm and final view.

Since the judgment of 29 November 1988 as well as previously, the Government have found it necessary to continue to exercise, in relation to terrorism connected with the affairs of Northern Ireland, the powers described above enabling further detention without charge for periods of up to 5 days, on the authority of the Secretary of State, to the extent strictly required by the exigencies of the situation to enable necessary enquiries and investigations properly to be completed in order to decide whether criminal proceedings should be instituted. To the extent that the exercise of these powers may be inconsistent with the obligations imposed by the Convention the Government has availed itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.

Dated 23 December 1988.

The 1989 notification

The United Kingdom Permanent Representative to the Council of Europe presents his compliments to the Secretary General of the Council, and has the honour to convey the following information.

In his communication to the Secretary General of 23 December 1988, reference was made to the introduction and exercise of certain powers under section 12 of the Prevention of Terrorism (Temporary Provisions) Act 1984, Article 9 of the Prevention of Terrorism (Supplemental Temporary Provisions) Order 1984 and Article 10 of the Prevention of Terrorism (Supplemental Temporary Provisions) (Northern Ireland) Order 1984.

These provisions have been replaced by section 14 of and paragraph 6 of Schedule 5 to the Prevention of Terrorism (Temporary Provisions) Act 1989, which make comparable provision. They came into force on 22 March 1989. A copy of these provisions is enclosed.

The United Kingdom Permanent Representative avails himself of this opportunity to renew to the Secretary General the assurance of his highest consideration.

23 March 1989.

Schedule 3, DEROGATION AND RESERVATION

PART II RESERVATION

At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

Dated 20 March 1952

Made by the United Kingdom Permanent Representative to the Council of Europe.

Schedule 4

JUDICIAL PENSIONS

Duty to make orders about pensions

1. - (1) The appropriate Minister must by order make provision with respect to pensions payable to or in respect of any holder of a judicial office who serves as an ECHR judge.

(2) A pensions order must include such provision as the Minister making it considers is necessary to secure that-

(a) an ECHR judge who was, immediately before his appointment as an ECHR judge, a member of a judicial pension scheme is entitled to remain as a member of that scheme;

(b) the terms on which he remains a member of the scheme are those which would have been applicable had he not been appointed as an ECHR judge; and

(c) entitlement to benefits payable in accordance with the scheme continues to be determined as if, while serving as an ECHR judge, his salary was that which would (but for section 18(4)) have been payable to him in respect of his continuing service as the holder of his judicial office.

Contributions

2. A pensions order may, in particular, make provision-

(a) for any contributions which are payable by a person who remains a member of a scheme as a result of the order, and which would otherwise be payable by deduction from his salary, to be made otherwise than by deduction from his salary as an ECHR judge; and

(b) for such contributions to be collected in such manner as may be determined by the administrators of the scheme.

Amendments of other enactments

3. A pensions order may amend any provision of, or made under, a pensions Act in such manner and to such extent as the Minister making the order considers necessary or expedient to ensure the proper administration of any scheme to which it relates.

Definitions

4. In this Schedule-

"appropriate Minister" means-

(a) in relation to any judicial office whose jurisdiction is exercisable exclusively in relation to Scotland, the Secretary of State; and

(b) otherwise, the Lord Chancellor;

"ECHR judge" means the holder of a judicial office who is serving as a judge of the Court;

"judicial pension scheme" means a scheme established by and in accordance with a pensions Act;

"pensions Act" means-

(a) the County Courts Act Northern Ireland) 1959;

(b) the Sheriffs' Pensions (Scotland) Act 1961;

(c) the Judicial Pensions Act 1981; or

(d) the Judicial Pensions and Retirement Act 1993; and

"pensions order" means an order made under paragraph 1.