

CHAPTER 8

INTRODUCTION: THE CONVENTION IN THE PRIVATE SPHERE

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[8.01] Convention jurisprudence concerning the private sphere is an especially dynamic field of human rights law. In this short chapter we clarify the meaning of the term ‘private sphere’, make some general observations on the salience of relevant case law, and then introduce the four substantive chapters.

[8.02] For the purposes of this Part, the term ‘private sphere’ refers, firstly, to the most intimate aspects of human experience. Addressed directly under Article 8, protection of one’s private and family life, is critical for human flourishing. As the chapters in this section demonstrate, the Strasbourg Court has moved beyond traditional human rights doctrine, which tended to consider the inner circles of our lives as a zone to be safeguarded from an overreaching state. Secondly, the term ‘private sphere’ denotes the application of Convention provisions to the activities of non-state actors. Here too the ECtHR has developed the frontiers of human rights standards in both what Donnelly describes as “the partially private sphere (where private actors perform governmental functions or provide public services pursuant to governmental outsourcing or privatisation) and the “wholly private sphere” (which refers to relationships between private actors)”.¹

[8.03] ECHR case law addressing the private sphere, in both senses deployed here, has stretched the parameters of human rights law. We first address some salient features of Article 8, going on to consider the Convention’s application to the activities of non-state actors. The mis-alignment of Irish human rights law and practice with Article 8 is a consistent thread of Strasbourg judgments, including the 2010 finding of a procedural violation in the area of reproductive rights.² Indeed, compliance with that Convention provision also gave rise to the first two declarations of incompatibility under the ECHR Act

¹ Donnelly, “The Convention in the Private Sphere: A Noteworthy Achievement” in Egan, Thornton & Walsh, *The ECHR and Ireland: 60 Years and Beyond* (Bloomsbury Professional, 2014), 9.01.

² *A, B and C v Ireland* (2011) 53 EHRR 13. For a review of ECtHR case law in which Ireland was found to have breached Article 8 see Egan & Forde, “From Judgment to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court” in Egan, Thornton & Walsh, *The ECHR and Ireland: 60 Years and Beyond* (Bloomsbury Professional, 2014), 2.08-2.18.

2003.³ As noted above, the ECtHR has developed the Convention's guarantee of respect for private and family life in novel directions. Indeed two chapters in this Section focus exclusively on how the Convention's evolving conception of private and family life has shaped and continues to impact domestic human rights standards in the spheres of deportation and gender recognition.⁴ Two features of the Strasbourg Court's Article 8 jurisprudence are especially noteworthy: the broad understanding of 'private life' adopted and the development of positive obligations.

[8.04] Article 8 has been accorded an extensive reach, so that it covers matters such as the person's physical and moral integrity, the right to express one's identity and sexuality, and a right to form and maintain relationships. The Court has also ensured the provision is not limited to circumstances where a state takes action that 'interferes' with a protected interest (the negative obligation); it imposes positive obligations on states to take measures aimed at securing effective respect for private and family life.⁵ Such measures include enacting gender recognition laws, enabling individuals to access information about their origins, and establishing procedures to ensure that parties can participate in proceedings that may affect their family life.⁶ In these domains the Strasbourg Court's broad and positive conception of private life has impacted considerably on domestic law and policy. Recently, for instance, the Court found that France breached Article 8 by failing to recognise the parentage of children born through surrogacy in another jurisdiction.⁷ The right to respect for private life meant that a child should be able to establish the essence of his or her identity and given that parentage was a key aspect of that identity the State's margin of appreciation was exceeded, according to the Court. Currently Irish law does not regulate surrogacy and is arguably non-compliant with Convention standards. However, at the time of writing the full text of the Children and Family Relationships Bill 2014 is awaited, as is the Supreme Court's judgment in the State's appeal against a High Court finding that the genetic parents of twins born to a surrogate are entitled to be registered on their birth certificates as their legal parents.⁸

³ In *Foy v An tArd-Chláraitheoir* [2012] 2 IR 1 and *Donegan v Dublin City Council* [2012] 2 ILRM 233, respectively.

⁴ Murphy, "Challenging Deportation on the Basis of 'Private Life': The Evolving Impact of Article 8 on Irish Immigration Law" and Ní Mhuirthile, "Article 8 and the Realisation of the Right to Gender Recognition" in Egan, Thornton & Walsh, *The ECHR and Ireland: 60 Years and Beyond* (Bloomsbury Professional, 2014).

⁵ The other primary facet of the positive obligations inherent in Article 8 extends the provision's reach into the wholly and partially private spheres; it is considered further below along with the obligations imposed by other Convention provisions: paras 8.08-8.11.

⁶ See generally Akandji-Kombe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Council of Europe, 2007).

⁷ Application No 65192/11, *Mennesson v France*; Application No 65941/11, *Labasse v France*, judgment of 26 June 2014.

⁸ *MR & Anor v. An tArd-Chláraitheoir & Ors* [2013] IEHC 91.

[8.05] Significantly, when an interest falls within the ambit of Article 8 the Convention's prohibition of discrimination is applicable. Significantly, Article 14 has been held to cover not only the enjoyment of the rights that States are obliged to safeguard under the ECHR but also those rights and freedoms that a State has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention. Thus, while Article 8 does not confer a right to citizenship, for example, processes in place regulating its acquisition must be non-discriminatory.⁹ Similarly where a member states creates a parental leave scheme, it must do so in a manner which is compatible with Article 14.¹⁰

[8.06] Future ECHR Act case law concerning Article 8 should see an increasing resort to Article 14.¹¹ The Irish judiciary's reticence to engage substantively with the application of the discrimination guarantee may in part be explained by the dearth of robust Convention jurisprudence. Where the Strasbourg Court has determined that the primary provision has been breached it generally does not go on to consider arguments based on Article 14; such analysis is generally only undertaken where there is a clear inequality of treatment in the enjoyment of the substantive right in question which is a fundamental aspect of the case.¹² The ECtHR has developed substantive human rights standards to address the circumstances of minority groups as opposed to focusing its analysis on discrimination *per se*. However, in recent years the ECtHR has developed its discrimination jurisprudence considerably, if inconsistently.¹³ In particular, the concept of indirect discrimination could be usefully invoked in ECHR Act cases. The Strasbourg Court has ruled that disparate outcomes may establish discrimination for the purposes of Article 14, absent proof that they are connected to a ground of discrimination.¹⁴ In *Thlimmenos v Greece*¹⁵ the Court established that: "The right

⁹ See *Genovese v Malta* (2014) 58 EHRR 25.

¹⁰ See for example, *Markin v Russia* [2010] ECHR 1435 and *Topcic-Rosenberg v Croatia* (2014) 58 EHRR 39.

¹¹ Article 14 has received relatively little scrutiny under the ECHR Act to date. It would appear that the Irish Courts have adopted the ECtHR practice of finding that no separate issue arises under the provision where a substantive Convention Article has been infringed. For instance in *Mc D. v L. & Anor* [2008] IEHC 96, Mr. Justice McKechnie did not rely on the Convention's discrimination prohibition in considering whether a distinction could be drawn as between heterosexual and homosexual *de facto* families. The Court's decision rested instead on Article 8 jurisprudence. In *O'Donnell & Ors v South Dublin County Council & Ors.* [2008] IEHC 454, Mr. Justice Edwards held that no violation of Article 14 had been established in circumstances where severe overcrowding in caravan accommodation gave rise to a breach of one plaintiff's Article 8 rights and hence a violation of the statutory duty under s.3. The High Court did not elaborate as to its reasoning in this regard.

¹² *Chassagnou and others v France* (2000) 29 EHRR 615.

¹³ See generally O'Connell, "Cinderella comes to the Ball: Art 14 and the right to non-discrimination in the ECHR" (2009) 29(2) Legal Studies 211-229.

¹⁴ *DH v Czech Republic* (2008) 47 EHRR 3. Compare *Doherty v South Dublin County Council* [2007] IEHC 4: With respect to arguments founded in EC law, Charleton J. observed (at para 10): "insofar as accusations of unequal treatment and mentions of the Race Directive may give rise to the suspicion that the worse forms of motivation for human conduct are at play here, the Court finds no evidence on the papers before it that the

not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”¹⁶ De Schutter classifies the finding of discrimination in this case as one of indirect discrimination since the Court established that States should provide exemptions for general measures that impact adversely on social groups protected by Article 14.¹⁷ The UK Court of Appeal applied *Thlimmenos* in a 2012 case that challenged a perceived failure to recognise disability-related factors when imposing a so-called bedroom tax.¹⁸ The tax penalised people in receipt of housing benefit for occupying accommodation that was larger than was apparently required on the basis of family size. The Court found that the applicable statutory criterion amounted to unjustified disability discrimination since it failed to treat persons in different situations differently. It remains to be seen whether the ECHR Act will be applied in a similar manner so as to require consideration of the distinct needs of especially vulnerable groups such as Travellers and people with disabilities.

[8.07] Notwithstanding such developments Article 8 has been of limited use in generating rights to minimum levels of social provision in areas that fall within its ambit, including health care and housing. As several contributions to this collection note, the primary positive obligations recognised to date concern procedural rather than substantive facets of such rights.¹⁹

[8.08] We now turn to consider briefly the Convention’s application in the partially and wholly private spheres respectively. The application of human rights law to harm caused by non-state actors is contentious on both the domestic and international planes. At domestic level, direct horizontal application connotes the enforceability of constitutional rights by one private party against another; national bills of rights do not generally give rise to such a cause

respondents have acted out of prejudice against Travellers.” Yet intent is not an element of discrimination under either the Convention (*Jordan v United Kingdom* (2003) 37 EHRR 2, para 154) or under EC law (Case 170/84, *Bilka-Kaufhaus* [1986] ECR 1607).

¹⁵ *Thlimmenos v. Greece* (2000) 31 EHRR 411.

¹⁶ *Ibid*, para 44.

¹⁷ De Schutter, *The prohibition of discrimination under European human rights law: Relevance for EU Racial and Employment Equality Directives* (Office for Official Publications of the European Communities, 2005), 16-17.

¹⁸ *Burnip v Birmingham City Council* [2012] EWCA Civ 629.

¹⁹ See in particular Murphy, “Challenging Deportation on the Basis of ‘Private Life’: The Evolving Impact of Article 8 on Irish Immigration Law”, Thornton, “The European Convention on Human Rights: A Socio-Economic Rights Charter?” and Whyte, “Public Interest Litigation in Ireland and the ECHR Act 2003” in Egan, Thornton & Walsh, *The ECHR and Ireland: 60 Years and Beyond* (Bloomsbury Professional, 2014).

of action.²⁰ Private actors such as individuals and corporations are certainly not directly bound by international human rights standards. However, a growing body of ECtHR jurisprudence has established a variety of ways by which states can be held liable for the actions of non-state actors. In other words, European case law renders human rights guarantees ‘indirectly’ applicable to the relations between private actors in certain situations. This occurs in two primary ways: (1) where human rights provisions are applied to the activities of private entities that are seen as wielding public power; (2) where a state breaches its positive obligations to protect individuals’ human rights against interference by another private party.

[8.09] For the past four decades various privatisation initiatives associated with neo-liberalism have become ubiquitous.²¹ Privatisation is frequently associated with an outright change from public ownership of given assets to private ownership, but in fact it encompasses a range of phenomena.²² One of the most pervasive forms involves the competitive tendering or ‘contracting out’ of public services, which although delivered and managed by corporations are collectively financed. The critical issue for our purposes is whether such practices create a human rights protection gap. Donnelly’s chapter in this Part considers how relevant Strasbourg Court jurisprudence affects this form of privatisation. Although the case law of the ECtHR is apparently neutral on decisions to privatise²³, it does insist that states cannot evade their obligations when delegating certain state functions to private bodies. Precisely which functions are covered remains uncertain, however. While certain state functions such as the enforcement of court judgments²⁴, as well as the operation of prisons and immigration detention centres should remain subject to the Convention if delegated to a private body, it is less clear whether this applies to all services ‘classically’ provided by the state.²⁵ A distinction between functions which public authorities have powers rather than duties to perform may emerge in future case law. Non-profit private organisations,

²⁰ On the development of constitutional torts in this jurisdiction see O’Cinneide, ‘Ireland: Irish Constitutional Law and Direct Horizontal Effect – A Successful Experiment’ in Fedtke & Oliver (eds), *Human Rights in the Private Sphere: A Comparative Study* (Routledge-Cavendish, 2007) 213.

²¹ Neo-liberalism as a political-economic ideology dates from the 1930’s, but only took hold as state policy with the advent of Thatcherism and Reganism during the 1980’s according to Harvey: *The New Imperialism* (Oxford University Press, 2003), 157-158. For an explanation of the various meanings attached to the term ‘neo-liberalism’ see Larner, “Neo-liberalism: Policy, Ideology, Governmentality” (2000) 63 *Studies in Political Economy* 5-25.

²² See generally de Feyter and Gómez (eds), *Privatisation and Human Rights in the Age of Globalisation* (Intersentia, 2005).

²³ For an interesting account of how domestic human rights law has been deployed to block privatisation initiatives see Medina, “Constitutional limits to privatization: The Israeli Supreme Court decision to invalidate prison privatization” (2010) 8(4) *International Journal of Constitutional Law* 690-713.

²⁴ Application No 4773/02, *Sychev v Ukraine*, 11 October 2005.

²⁵ This point is illustrated by the divergent judicial interpretations of relevant ECtHR jurisprudence in *YL v Birmingham City Council and others* [2007] 3 All ER 957.

including those established by various religions, have long been centrally involved in ‘public’ service provision in many sectors, medical services and education being two prominent examples in this country. As Donnelly’s chapter explains even where such services are construed as non-governmental, a state will be bound to protect individuals from interferences with their Convention rights in defined circumstances since the State’s positive obligations also apply to the wholly private sphere.²⁶

[8.10] It should also be noted that two “of the less obvious ways of privatising are to abolish or reduce severely public services in favour of private voluntary provision and to decrease the financial resources of publicly funded bodies to encourage private funding alternatives”.²⁷ Reduced levels of social protection, associated in recent years with the global economic crisis, have significant consequences for the protection of socio-economic rights. This theme is addressed in Part III of this collection.

[8.11] The wholly private sphere concerns relations between non-state actors and so ostensibly is not captured by the state-individual nexus at the heart of human rights law. Critical commentators argue that the designation of some matters as private shelters oppression and ignores disadvantage stemming from that sphere. Moreover, the very construction of something as ‘private’ is political and effected by *public* institutions including the legal system:

The state defines as ‘private’ those aspects of life into which it will not intervene, and then paradoxically, uses this privacy as the justification for its non-intervention.²⁸

Feminist theorists have sought to expose the gendered nature of the public/private dichotomy as embedded in human rights law and practice, arguing that it neglects to tackle harm disproportionately experienced by women, such as violence committed by family members.²⁹ A line of Strasbourg case law dating from the mid-1980’s responds to some of these concerns. Of critical import here is the Court’s positive obligations jurisprudence, specifically that which enjoins states to protect individuals from harm by regulating the behaviour of private parties such as family members, landlords, employers, and medical service providers.

²⁶ See further para 8.11 below.

²⁷ Daintith and Sah, “Privatisation and the Economic Neutrality of the Constitution” (1993) [1993] *Public Law* 465-487, 470.

²⁸ Rose, “Beyond the Public/Private Division: Law, Power and the Family” (1987) 14 (1) *Journal of Law and Society* 61-76, 64-65.

²⁹ See, for example, Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press, 2006), Chapter 7; Radacic, “Gender equality jurisprudence of the European Court of Human Rights” (2008) 19(4) *European Journal of International Law* 841-857.

States must adopt appropriate criminal law provisions and legal procedures which protect individuals from serious offences and prosecute offenders.³⁰ Moreover, the contracting parties are obliged to take all reasonable steps to protect individuals from a real and immediate risk of harm stemming from third parties, where there is actual or constructive knowledge of that risk. A public authority may, therefore, be accountable under the Convention where the circumstances were such that it ought to have known of the risk because the situation was one which warranted monitoring or investigation. In accordance with such principles, states have been found liable for the severe neglect of children by their parents³¹ and for sexual and physical abuse carried out by family members.³² In *Opuz v Turkey*³³ the Court found that domestic violence is a form of gender-based violence, which constitutes discrimination against women. The Turkish State violated Articles 2 and 3 in failing to take adequate steps to protect victims of repeated domestic violence. Ireland's record in protecting children from abuse in national schools came under scrutiny in *O'Keeffe v Ireland*.³⁴ The State breached Article 3 by not putting in place effective mechanisms for the detection of such abuse. The Court emphasised that "the positive obligation of protection assumes particular importance in the context of the provision of an important public service such as primary education, school authorities being obliged to protect the health and well-being of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities."³⁵

[8.12] This Part also provides a useful overview of the Convention standards applicable to members of two minority groups who encounter routine and egregious human rights violations: transgender persons and refugees. ECtHR jurisprudence has undoubtedly advanced rights in the area of gender recognition across Europe, but it also underscores the limits of international human rights law as a vehicle of change. Courts are of course reactive institutions and to date the Strasbourg Court has issued relatively few judgments, most of which have dealt with the rights of post-operative transsexuals as opposed to broader gender identity issues.³⁶ Those judgments leave intact, and indeed rely upon, a binary construction of

³⁰ See, for example, *X and Y v the Netherlands* (1986) 8 EHRR 235; *M C v Bulgaria* (2005) 40 EHRR 20; Application No 71127/01, *Bevacqua and S v Bulgaria*, 12 June 2008; *Siliadin v France* (2006) 43 EHRR 16.

³¹ *Z v United Kingdom* (2002) 34 EHRR 97.

³² *E v United Kingdom* (2003) 36 EHRR 31: The European Court held that to engage the responsibility of the State there must be a failure by the state authority to take reasonably available measures which could have a real prospect of altering the outcome or mitigating the harm.

³³ *Opuz v Turkey* (2010) 50 EHRR 28.

³⁴ Application No 35810/09, *O'Keeffe v Ireland*, 28 January 2013.

³⁵ *Ibid*, para 145.

³⁶ See further Sivonen, "Gender Identity Discrimination in European Judicial Discourse" (2011) 7 Equal Rights Review 11-26.

gender in law, which in turn can lead to the pathologisation of those who seek to cross or eschew that binary. Given the principle of subsidiarity, states are of course primarily responsible for giving effect to human rights standards and the Strasbourg Court must operate within such constraints. Nonetheless its construction of the margin of appreciation in *Goodwin*³⁷ arguably protects highly coercive state measures from scrutiny under the Convention, including forced sterilisation. Council of Europe states are of course free to adopt best practice measures above the floor set in Strasbourg, including steps to eliminate binary gender categories.³⁸ As Naffine points out “there is nothing intrinsic to law that compels *it* to compel *us* to have a sex and then only the one sex.”³⁹

[8.13] Writing of the genocides which occurred between the two world wars Hannah Arendt stated: “The world found nothing sacred in the abstract nakedness of being human.”⁴⁰ Human rights, she opined, were enjoyed only by citizens of powerful states. Reflecting on this in June 2014, the President of Ireland, Michael D. Higgins noted:

[T]he national appropriation of ‘human rights’ – their entanglement with citizenship – has given rise to new categories of persons without rights, such as refugees, displaced and stateless persons. How are we to conceive of the rights of these people, whose number is in the millions in the world today?⁴¹

The treatment of those excluded from globally privileged citizenship continues to cast a shadow over human rights regimes forged in the aftermath of the Holocaust. The cosmopolitan legal order sought by human rights activists, “is intended to create a new political community to replace nations organized around states, a global community that is set up to abolish the distinction between citizen and non-citizen on which national states are founded”.⁴² That project is manifestly incomplete. Within Ireland campaigners continue to highlight the precarious situation of asylum seekers, undocumented people and migrants generally. The direct provision system and deportation mechanisms are scrutinised for

³⁷ *Goodwin v United Kingdom* (2002) 35 EHRR 447.

³⁸ See further European Network of Legal Experts in the non-discrimination field, *Trans and intersex people: Discrimination on the grounds of sex, gender identity and gender expression* (Office for Official Publications of the European Union, 2012).

³⁹ Naffine, “Our legal lives as men, women and persons” (2005) 24 Legal Studies, 621-642, 622.

⁴⁰ Arendt, *The Origins of Totalitarianism* (Allen & Unwin, 1967), 299.

⁴¹ Higgins, “International Human Rights and Democratic Public Ethics”, *Royal Irish Academy: Summer Discourse*, University of Limerick, 06 June 2014.

⁴² Nash, “Dangerous Rights: Of Citizens and Humans” in Banakar (ed) *Rights in context: law and justice in late modern society* (Ashgate, 2010), 73.

compliance with Convention standards in Smyth and Murphy's chapters respectively.⁴³ We now briefly review the four chapters that comprise this Part.

[8.14] The opening chapter examines the Convention's reach into the private sphere, which Catherine Donnelly posits as one of the ECtHR's most striking contributions to the evolution of human rights. She focuses on the partially private sphere as constituted through governmental outsourcing: in some countries key government functions such as the administration of social welfare schemes, the management of prisons and immigration detention centres, are now carried out by corporations. With respect to Ireland, although recent social partnership agreements and several legislative provisions enable outsourcing it has not taken hold to the same extent as in other jurisdictions. As Donnelly notes the direct provision system is "perhaps the most striking example". Her analysis thus provides a useful platform for the discussion of that system in the following chapter. Outsourcing poses significant challenges since human rights are generally enforceable only against governmental actors and Donnelly assesses how the Strasbourg Court's positive obligations jurisprudence responds to those challenges. She considers that the case law surveyed has significant implications for contractual arrangements with private providers.

[8.15] Ciara Smyth's chapter assesses whether Ireland's direct provision system is compatible with the ECHR, paying particular regard to the position of children many of whom, she notes, have spent a substantial proportion of their lives in designated accommodation centres. Her contribution is opportune since at the time of writing a High Court challenge to the system is underway.⁴⁴ It remains to be seen whether and to what extent the ECHR Act avails the applicants in that case. As the only EU country that denies asylum seekers the right to work, Ireland compels people to rely on direct provision and so State responsibility for living conditions within the system is clearly engaged. Drawing on Articles 3 and 8, Smyth explains the difficulties with invoking the Convention in this context, but she isolates some favourable Strasbourg judgments that could be used to challenge the poor standards highlighted in numerous studies. She then turns to examine the specific position of children, arguing that enhanced levels of protection should apply with reference to the best interests principle and the vulnerability jurisprudence of the Strasbourg Court, buttressing

⁴³ Smyth, "Children, Direct Provision and the European Convention on Human Rights" and Murphy, "Challenging Deportation on the Basis of 'Private Life': The Evolving Impact of Article 8 on Irish Immigration Law" in Egan, Thornton & Walsh, *The ECHR and Ireland: 60 Years and Beyond* (Bloomsbury Professional, 2014).

⁴⁴ *A v Minister for Justice, Equality and Law Reform* (Record No 2013/751JR).

those arguments with a consideration of the UN Convention on the Rights of the Child. Smyth concludes there is, at the very least, an arguable case that the operation of direct provision in Ireland may be susceptible to legal challenge.

[8.16] Clíodhna Murphy, explores the potential of utilising Article 8 ECHR as a basis for challenging deportation under Irish immigration law. Rather than focussing on the family life limb of the guarantee, she considers how the Strasbourg and Irish courts take account of individuals' social and cultural ties within the host state in assessing interferences with the 'private life' element of Article 8. Murphy's review of domestic case law reveals that while arguments based on severance of familial relationships are a routine and dominant feature of judicial review proceedings, applicants' integration into Irish society has played a marginal role. Moreover, such jurisprudence does not yet fully reflect applicable Convention standards, according to the author. Noting some shifts in the Irish judiciary's approach over the past few years, Murphy suggests that 'settled migrants', practitioners and other advocates could fruitfully place greater reliance on this element of Article 8 in contesting removal from the State.

[8.17] Tanya Ní Mhuirthile's chapter on gender recognition concludes this Section. In 2002 the ECtHR, in *Goodwin v UK*⁴⁵, found that Article 8 obliges states to allow for the possibility of changing one's gender under the law. Ní Mhuirthile explores the trajectory of Strasbourg jurisprudence prior to *Goodwin* and then assesses the impact of that decision at national level. Her appraisal of relevant Strasbourg jurisprudence places particular emphasis on the dissenting judgments; she traces both the factors which led to the narrowing of states' margin of appreciation and the resilience of conservative opposition to transgender rights. The author then outlines how *Goodwin* gave rise to the first declaration of incompatibility under the ECHR Act in 2007⁴⁶, yet legislation is still awaited. Since the Strasbourg judgment allows states discretion to regulate the process of legal gender recognition matters of considerable concern to the trans community fall to be resolved at national level. Ní Mhuirthile critiques the latest draft proposals for relying on diagnostic criterion and requiring applicants for gender recognition to be single.

⁴⁵ *Goodwin v United Kingdom* (2002) 35 EHRR 447.

⁴⁶ *Foy v An tArd Chlaraitheoir & Ors (No 2)* [2007] IEHC 470.