

Chapter 6

The European Convention on Human Rights: Implementation Mechanisms and Compliance

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‘La Cour de Strasbourg est un phare, une vigie’¹

INTRODUCTION

The Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR),² is the ‘essential reference point for the protection of human rights in Europe’.³ Concluded by the Council of Europe (CoE) on 4 November 1950, the ECHR defines rights and freedoms which the Contracting parties ‘shall secure to everyone within their jurisdiction’ under Art 1 of the ECHR, and sets up the mechanisms for controlling Contracting parties’ compliance with the obligation to secure these rights and freedoms. Since its entry into force on 3 September 1953, the ECHR has arguably become the single most successful international instrument of human rights protection, as attested by the activity of its Court. The European Court of Human Rights (ECtHR or Court) has ruled in over 20,000 cases on many societal issues such as assisted suicide, domestic slavery, abortion-related questions, adoption by homosexuals, discrimination against Roma, or the wearing of the Islamic headscarf in schools and universities. The geographical scope of the protection under the ECHR, which covers 47 state parties with a combined population of over 800 million people, is another sign of its prominence, as is the fact that the European Union (EU) is now legally bound to become a party to it under Art 59(2) of the ECHR.⁴ All 47 members of the CoE, which include the 28 member states of the EU, are subject to the international supervision of the ECtHR.⁵ Also, in accordance with the principle of subsidiarity (ie that compliance with ECHR rights is better ensured at domestic level), the ECHR now forms an integral part of the domestic legal order of all state parties. Despite these achievements, the ECHR system faces a number of challenges which call for further initiatives in order to guarantee the long-term effectiveness of its enforcement mechanism, the improvement of the work and legitimacy of its court in particular.

Ireland’s involvement with the ECHR dates back from the origin of the system. Ireland was one of the first signatories of the ECHR and ratified it on 25 February 1953. Ireland made a few other ‘firsts’ since it was the first state to accept the right of individual petition *and* the jurisdiction of the ECtHR – and this, for an unlimited duration; it was the first State against which a case was decided (*Lawless v Ireland* of 1961),⁶ and the first state which brought an inter-state application which resulted in a

¹ ‘The Court of Strasbourg is a lighthouse, a lookout’ in Costa, *La Cour Européenne Des Droits De L’Homme : Des Juges Pour La Liberté* (Daloz, 2013) 257. Costa is a former President of the ECtHR (2007-2011).

² The text of the ECHR is available on the website of the Treaty Office of the Council of Europe at <<http://conventions.coe.int/>> under ‘Full List of Treaties of the Council of Europe’ (ETS No 005).

³ Recommendation Rec(2004)4 of the Committee of Ministers to Member States on the European Convention on Human Rights in University Education and Professional Training, 12 May 2004, 114th Session.

⁴ Art 59(2) of the ECHR states: ‘The European Union may accede to this Convention.’ The corresponding provision in the Treaty on European Union is Article 6(2) which states: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms’

⁵ All European States are now members of the CoE, except Belarus, Kazakhstan, Kosovo, and Vatican City. Still, the word ‘European’ does not feature in the full title of the ECHR. In theory, a non-European State could access the system. Among existing States parties, large parts of Turkey and Russia are in Asia.

⁶ *Lawless v Ireland* (No 3) (1979-80) 1 EHRR 15 (judgment on the merits).

finding of violation (*Ireland v United Kingdom* of 1978).⁷ This early enthusiasm for the Strasbourg system did not lead to a sustained interest and Ireland was, somehow paradoxically, the last state to incorporate the ECHR into its domestic law.⁸ It did so by enacting the European Convention on Human Rights Act in 2003 (ECHR Act 2003 or 2003 Act) which, by making ECHR rights actionable before domestic courts, now stands as the most relevant piece of national human rights legislation, although its overall impact has been disappointing.

The aim of this chapter is to consider the ECHR system and its implementation in Ireland. The first part examines the ECHR's institutional framework and, in considering the challenges faced by the Strasbourg system, discusses the latest reforms, in particular Protocols No 15 and No 16, as well as the issue of accession of the EU to the ECHR. The second part focuses on Ireland's involvement with the ECHR system in two ways, namely Ireland's record of compliance with ECtHR's judgments and Ireland's domestic implementation of the ECHR via the operation of the ECHR Act 2003.⁹ This short study does not allow for extensive developments of all these points. The aim is rather to provide a concise account thereof that will help understand and, to some extent, unlock the above mentioned apparent contradictions, namely that the ECHR is a successful instrument but under severe criticism, and that the 2003 Act is a significant piece of Irish legislation but still underused in domestic legal practice.

THE ECHR SYSTEM: INSTITUTIONAL FRAMEWORK AND CHALLENGES

The ECHR stands out among other international instruments of rights protection thanks to the remarkable effectiveness of its enforcement machinery. The ECtHR has acquired an unparalleled authority credited to the expertise of its members and the advances promoted by its case law. Along with this success, or perhaps because of it, came many challenges, leading to the leitmotif often ascribed to the court as the 'victim of its own success'. The issues of untenable caseload and undermined legitimacy have, however, led to some innovative solutions to address the sustainability of the overall ECHR system.

The ECHR as part of a network of rights protection instruments

The ECHR is part of a network of international human rights treaties of universal or regional application. In terms of instruments of universal application, the ECHR stands as the regional equivalent of the International Covenant on Civil and Political Rights of 1966 to which all ECHR states are simultaneously party.¹⁰ In terms of regional instruments, the ECHR is comparable with human rights conventions and systems for their enforcement in the Inter-American (ie American Convention on Human Rights 1969)¹¹ and African contexts (ie African Charter on Human and Peoples' Rights 1981),¹² as well as with less developed mechanisms in South East Asia (ie Association of Southeast Asian Nations 1967)¹³ and the Middle East (ie Arab Charter on Human Rights as revised, 2004).¹⁴

⁷ *Ireland v United Kingdom* (1979-80) 2 EHRR 25.

⁸ See Schabas, 'Ireland, the European Convention on Human Rights and the Personal Contribution of Sean Mc Mac Bride' in Morison, McEvoy and Anthony, *Human Rights, Democracy and Transition: Essays in Honour of Stephen Livingstone* (Oxford University Press, 2006).

⁹ For an exhaustive and recent study on Ireland's engagement with the ECHR at international level and an assessment of the impact of the ECHR through the 2003 Act, see Egan, Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014).

¹⁰ 999 UNTS 171 (entered into force on 23 March 1976). The Optional Protocol to the ICCPR provides for an optional right of individual communication. All ECHR states parties have accepted this right except Monaco, Switzerland, and the UK. On the ICCPR, see, **Ch 5**, Egan, The UN Human Rights Treaty System, para [5.05].

¹¹ 1144 UNTS 123 (entered into force on 18 July 1978).

¹² 1520 UNTS 143 (entered into force on 21 October 1986).

¹³ The ASEAN is a regional organisation of 10 Southeast Asian countries intended to promote political and economic cooperation and regional stability. The 1967 ASEAN Declaration formalized its principles of peace and cooperation. The adoption of the ASEAN Charter (entered into force on 15 December 2008) contributed to its recognition as a fully-fledged international organisation.

Historically, the ECHR originated in the deliberate choice to establish a regional system for the protection of human rights which encapsulated, in the post-war era, two strands of public opinion, namely the human rights movement and the idea of a unified Europe.¹⁵ Designed to protect rights first spelt out in the 1948 Universal Declaration of Human Rights, the ECHR operated, in less than two years, a remarkable qualitative leap from a non-legally binding proclamation to a multilateral international treaty imposing legally binding obligations accepted by states parties. Set up to promote democracy and protect human rights and the rule of law in Europe, the CoE – of which Ireland is a founding member – is the international organisation that supported the concretisation of this choice.¹⁶ The ECHR now features as one of the five legal instruments of the CoE, together with the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the 1992 European Charter for Regional or Minority Languages, the 1995 Framework Convention for the Protection of National Minorities, the 1996 revised European Social Charter, and the 2005 Convention on Action against Trafficking in Human Beings, that have laid down European legal standards and set up monitoring mechanisms to help implement these standards. These regional instruments are part of a real pan-European legal area in the fields of democracy, human rights and the rule of law that the CoE has helped to achieve by concluding more than 200 treaties in all areas of its competence.¹⁷

The ECHR system of rights protection

The rights guaranteed

The rights and freedoms secured under the ECHR include the right to life, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, the right to an effective remedy, and the protection of property. The ECHR also prohibits torture, forced labour and slavery, arbitrary and unlawful detention, and discrimination in the enjoyment of the rights and freedoms secured by the ECHR. These rights are contained in the ECHR itself and in its additional Protocols¹⁸ which have the same legally binding force as the rights contained in the ECHR.¹⁹ The ECHR also contains amending Protocols with no autonomous content, which have changed procedures, especially the work of the ECtHR, and are legally binding on all state parties.²⁰

¹⁴ The ACHR (entered into force on 15 March 2008) is intended to promote principles affirmed in other international human rights instruments including those contained in the 1990 Cairo Declaration on Human Rights in Islam which, controversially, rallies the human rights' perspective of members around the Islamic sharia. Thirteen members of the League of Arab States have ratified the ACHR.

¹⁵ Note the divergence at the time between two conceptions of the protection of human rights: one based on universal implementation of human rights via the 1948 Universal Declaration, as championed by René Cassin; the other centred on a protection at regional level deemed to be more effective, as proposed by Pierre-Henri Teitgen.

¹⁶ The CoE's aim is to achieve a greater unity between its members which it shall pursue through its organs, by agreements and common action in the maintenance and further realisation of human rights and fundamental freedoms in particular.

¹⁷ The last instrument being the CoE Convention on the Manipulation of Sports Competitions signed on 18 September 2014.

¹⁸ The additional Protocols to the ECHR now bind a majority of the states parties, with the notable exception of Protocol No 12 on the prohibition of discrimination which has only 19 signatories, including Ireland. The other additional Protocols are the First Protocol (on protection of property, right to education, right to free elections), Protocol No 4 (on freedom of movement, prohibition of expulsion of nationals, prohibition of collective expulsion of aliens), Protocol No 6 (on prohibition of the death penalty), Protocol No 7 (on procedural safeguards relating to expulsion of aliens, and rights in criminal matters and procedure), and Protocol No 13 (on prohibition of the death penalty in all circumstances).

¹⁹ Hereinafter, 'ECHR rights' mean the rights protected under the ECHR and its Protocols.

²⁰ Protocol No 11, entered into force on 1 November 1998, replaced all provisions of the previous amending protocols; and Protocol No 14, entered into force on 1 June 2010, substantially amended the control system of the ECHR.

The ECHR mainly protects civil and political rights and leaves aside economic, social, and cultural rights. At the time of the signature of the ECHR, the agreement over this particular category of rights was regarded as 'a matter of priorities and tactics'.²¹ Stronger disagreements about economic, social, and cultural rights meant that they should be left to later negotiating efforts whilst sufficient compromise on civil and political rights, regarded as 'essential for a democratic way of life',²² was eagerly reached by the drafters. Besides, there is no 'water-tight division'²³ separating the two categories of rights.²⁴ Several rights protected under the ECHR are regarded as having an economic, social or even cultural dimension, such as, for example, the right to respect for family life or the right to property. Conversely, the ECHR does not protect all rights of civil and political nature such as, for example, the right of members of minority groups.

The extent of the substantive protection offered under the ECHR has been enhanced through the recognition by the ECtHR of positive obligations.²⁵ In principle, civil and political rights imply negative obligations on the part of the state, meaning that the state is required to abstain from interference with rights and must, for example, refrain from impermissible restrictions on the enjoyment of such rights. The obligation to secure human rights is also of positive character in the sense that the state must take action to secure to everyone within their jurisdiction the rights and freedoms defined under the ECHR in its Art 1. Positive obligations result expressly or necessarily from the ECHR such as, for example, the obligation to protect the right to life by law under Art 2(1) or to hold free elections under Art 3 of the First Protocol, or may be read into the ECHR by the ECtHR, such as in the *Airey v Ireland* case.²⁶ More generally, the dynamic and evolutive interpretation of the ECHR by the ECtHR has enriched the scope of the protection of rights, some being unqualified rights, such as the prohibition of torture, inhuman or degrading treatment in Art 3, others admitting interferences or limitations by the states Parties in order to secure certain interests, such as the freedom of expression in Art 10 of the ECHR admitting limitations in the interests, among others, of national security, or for the protection of the reputation of the rights of others, or for maintaining the authority and impartiality of the judiciary.

The enforcement machinery

Compared to most other international treaties, the ECHR has a very strong enforcement mechanism which comprises the ECtHR, as a single full-time permanent court, and the Committee of Ministers, as a permanent body composed of government representatives of all states parties.²⁷ The ECtHR and the Committee of Ministers are entrusted with, respectively, the role of adjudicating on violations of ECHR rights (Art 19 of the ECHR), and carrying out the supervision of the execution of the judgments of the ECtHR (Art 46 of the ECHR). As the main wheelwork of the ECHR system, the ECtHR handles both the admissibility and merits phases of an application. Composed of 47 judges, one from each state party,²⁸ the ECtHR has four levels of judicial formation, namely that of single judge, Committee, Chamber and Grand Chamber.²⁹ These four layers of judicial formation have provided the much-

²¹ Harris et al (eds), *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press, 2014), 5.

²² Pierre-Henri Teitgen, CE Consult. Ass, Debates, 1st Session, p 408, 19 August 1949, cited in Harris et al (eds), *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press, 2014), 5.

²³ *Airey v Ireland* A 32 (1979) 2 EHRR 305, para 26.

²⁴ See **Ch 2**, Finlay, 'The Philosophical Development of Human Rights', paras [2.00] and **Ch 9**, Thornton, 'Socio-Economic Rights and Ireland', paras [9.00].

²⁵ See Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart, 2004).

²⁶ *Airey v Ireland* (1979) 2 EHRR 305: the case determined that the right to respect for family life under Art 8 of the ECHR could entail a positive obligation involving public expenditure to provide effective access to court in civil proceedings See also the landmark case *Marckx v Belgium* A 31 (1979) 2 EHRR 330, para 31.

²⁷ Protocol No 14 ended the two-tier system for applications which used to comprise a European Commission of Human Rights and Court, both of which operated part-time.

²⁸ The conditions for appointment and the role of judges to the Court are provided for in Arts 20 and 22 of the ECHR.

²⁹ The ECtHR is also organised into five sections for administrative purposes; each Chamber is formed within each of these sections which are designed to be balanced in terms of regional and gender representation. Each section has a President, a Vice-President and a number of other judges. The Plenary Court and Registry are also essential parts of the Strasbourg machinery.

needed rationalisation of the adjudicatory procedure by allocating the examination of the admissibility and merits of an application to the appropriate level, thereby boosting greater efficiency of the system. Applications which are plainly inadmissible are disposed of by a single judge formation. Applications which are clearly admissible and of repetitive nature are dealt with, on their merits, at the level of a Committee of three sitting judges which can decide on whether there is a violation of ECHR rights. Committees now appear to be the ordinary formation of the ECtHR with the highest number of pending applications before them – at 32,050 in 2014.³⁰ Chambers, consisting of seven rotating sitting judges, can also decide on admissibility and currently hear most cases that are declared admissible by a single judge or Committee.³¹

The Grand Chamber, made up of 17 judges, is the highest judicial formation and, as such, bears the role of developing a consistent body of case law on the interpretation and application of the ECHR.³² Having handed down over 300 judgments since 1999, the Grand Chamber has clarified many aspects of ECHR rights such as, in recent years, the interaction between the ECHR and EU law, or the interplay between the ECHR and international law with regard to the United Nations and the issue of immunity. The Grand Chamber has also given further guidance on the conditions of admissibility and on the scope of the margin of appreciation left to the states, and on their positive obligations under the ECHR. The Grand Chamber has had the opportunity to examine measures adopted at national level after the delivery of a 'pilot judgment' and endorsed domestic remedies introduced subsequent to a pilot-judgment procedure in the areas of length of proceedings and failure to execute final judicial decisions. In addition, the Grand Chamber has reiterated the importance of applying the ECHR, as interpreted by the ECtHR, at national level.³³

The ECHR provides for both inter-state and individual applications, each of which is characterised by a relatively simple application process. Article 33 of the ECHR allows a state party to bring an application against another state party about an alleged breach of ECHR rights by the authorities of the respondent state, without requiring a threat to any particular individual. Due to the risk associated with directly clashing with another state, such applications have been rare. The first case to ever reach the ECtHR was brought by Ireland against the UK in respect of the treatment of prisoners in Northern Ireland under emergency legislation introduced in the 1970s. There has been a resurgence of such applications with judgments against Turkey and Russia in 2000s.³⁴ However, this is the right of individual petition under Art 34 of the ECHR which represents the bulk of the applications lodged each year in the ECtHR.³⁵ All states parties accept the right of 'any person, nongovernmental organisation or group of individuals' claiming to be a victim of a breach of the ECHR to bring an application against it. Nationals and non-nationals of the respondent state can bring an application and the alleged violation must have taken place within the territory of a state party. The application, which is free and does not require the assistance of a lawyer,³⁶ is straightforward

³⁰ In 2014, for the first time in over 10 years, there was a 30 per cent reduction in the Court's caseload. See Analysis of statistics 2014, ECtHR Report (CoE Publications, January 2015) <http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf> accessed 4 May 2015.

³¹ Like those of Committees, Chambers' judgments are final. There is a possibility of appealing a judgment of a Committee or a Chamber if the State or the applicant is not satisfied with it.

³² Cases may either be relinquished or referred to the Grand Chamber in the exceptional circumstances provided for in Arts 30 and 43, ECHR, respectively.

³³ See Overview of the ECtHR's recent case law 2013 <http://www.echr.coe.int/Documents/Short_Survey_2013_ENG.pdf>, and 2014 <http://www.echr.coe.int/Documents/Short_Survey_2014_ENG.pdf> accessed 4 May 2015.

³⁴ The Irish government has recently requested the ECtHR to review its 1978 ruling in *Ireland v UK* after new information was uncovered which may constitute evidence that the 'five techniques' used against prisoners amounted to 'torture' and not 'inhuman and degrading treatment' as was held at the time. See Mac Cormaic, 'Government urged to review "hooded men" torture claim' (2014) Irish Times 24 November.

³⁵ The right of individual complaint was made compulsory by Protocol No 11; before then, the right was only applicable as against those states parties that made a declaration accepting it.

³⁶ The assistance of a lawyer becomes necessary once the ECtHR has given notice of the case to the respondent government for their observations. Legal aid may be granted to applicants, if necessary, from that stage in the proceedings.

from a formal point of view, thus providing an easy access to the ECtHR; it is sufficient to send the ECtHR a duly completed application form with the requisite documents.³⁷

Applications must meet certain admissibility requirements though if they are to be examined on their merits by the court. First, under Art 35(1) of the ECHR, cases can only be brought to the ECtHR after available and effective domestic remedies have been exhausted.³⁸ Second, applications must be lodged within six months following the last domestic judicial decision in the case, which will usually be a judgment by the highest court in the state concerned.³⁹ Third, under Art 34 of the ECHR, the applicant must be personally and directly a victim of a violation of the ECHR and must have suffered a significant disadvantage. Fourth, the application must not be substantially the same as a matter that has already been examined by the ECtHR, or has already been submitted to another procedure of international investigation or settlement – although a certain flexibility is allowed when the Court may decide to look afresh at an application where new relevant information is presented which fundamentally changes the circumstances of the case since its previous examination.⁴⁰

The ECtHR's judgment, on whether there has been a violation of one or several ECHR rights, is declaratory and does not affect the validity of the relevant act(s) of the respondent state. The judgment is nevertheless binding in international law since, under Art 46 of the ECHR, states parties are obliged to abide by the final judgment of the ECtHR in any case to which they are parties. This obligation involves the adoption of all individual measures applicable under domestic law in order to eliminate the consequences of the violation found as regard the applicant.⁴¹ In addition to individual measures, a state party is obliged to enact general measures, such as the amendment of national law, changes in interpretation by the courts or other types of measures, in order to prevent further similar violations, or to put an end to the violation subsisting at domestic level.

The role of the ECtHR has been central in two respects: first, in providing remedies in a high number of individual cases, and secondly, in developing a body of case law on the interpretation of the ECHR against which state parties can benchmark their own system of human rights protection. By ruling against states, the ECtHR has created a system of state responsibility. Costa rightfully reminds us of this distinctive trait in order to dispel some misunderstanding about the actual role of the ECtHR.⁴² While the ECtHR can put blame on states parties, it cannot intervene in their domestic legal systems, but has to rely instead on their collaboration for the execution of judgments. This sanction-collaboration tandem is what makes the ECHR so successful when states parties abide by judgments of the Court – which they do in a large majority of cases. On the other hand, it also has the effect of subjecting the system to a perpetual delicate equilibrium in case of tensions as regards the full execution of adverse rulings. The introduction of the pilot judgment procedure typically exemplifies this by the way it obliges the respondent state to rectify multiple violations of the same ECHR right(s).⁴³ While the immediate objective of the procedure was to help the ECtHR manage its workload more diligently by reducing the number of similar cases and offer a possibility of speedier redress to the individuals concerned, the procedure is also meant to assist states parties in solving at national level systemic issues underlying repetitive cases. The ECtHR uses the 'pilot' case (ie one or a small number of singled-out applications) not only to decide whether a violation of the ECHR occurred in the specific case, but also to give the government a clear indication of the type of

³⁷ A new application PDF form has been available since January 2014 on the Court's website with accompanying notes, including an admissibility guide and a checklist.

³⁸ On the rationale for the domestic remedies rule and its parameters, see *Akdivar v Turkey* (1996) 23 EHRR 143.

³⁹ These first two admissibility criteria (ie exhaustion of domestic remedies and six-month rule) relate to both kinds of applications, individual and inter-state. See the projected changes under Protocole No 15 below.

⁴⁰ The application must also not be anonymous, manifestly ill-founded, constitute an abuse of the right of complaint, or be incompatible with the ECHR.

⁴¹ If domestic law allows only partial reparation to be made, the ECtHR will afford, under the ECHR, Art 41, 'just satisfaction' to the applicant.

⁴² Costa, *La Cour Européenne Des Droits De L'Homme : Des Juges Pour La Liberté* (Dalloz, 2013), 70.

⁴³ The first pilot judgment was given in *Broniowski v Poland* 2004-V; 40 EHRR 559 GC, in which a structural problem about property rights was identified.

remedial measures needed to resolve the systemic issue. By disposing of other related cases, the ECtHR shifts the burden of compliance on the respondent state, which has to act promptly in order to bring the domestic legislation into line with the ECHR.⁴⁴

As the judgments of the ECtHR are not self-executing, the supervision of their execution is carried out by the Committee of Ministers. The role of the Committee is based on continuous assessment of action plans submitted by states on measures they have taken to remedy violations. The Committee's final resolutions mark the end of the monitoring process by signalling that the state concerned has, after a detailed evaluation of its final action report, taken all the necessary measures, individual and/or general, to abide by the final judgment of the ECtHR.⁴⁵ Out of the realm of adjudication, the enforcement process conducted is thus a non-judicial one based on persuasion rather than imposition; there is indeed nothing much the ECtHR can do if a state does not execute a judgment except rely on 'peer pressure and political persuasion',⁴⁶ and it is worth noting that bad compliance is not only the *fait* of reputed difficult states.⁴⁷

Challenges faced by the ECHR system

The ECtHR has no choice but to constantly transform itself in order to build on its achievements and maintain the sustainability of the ECHR system in the longer term. The way the ECtHR has improved over the last two decades in terms of internal organisation (ie different formations from single judge to Grand Chamber) and rationalisation of the adjudicatory procedure (ie pilot judgment procedure) is quite remarkable. However, the ECtHR is not 'off the hook' and has still to battle on the front of performance and legitimacy. The way forward appears to point towards deepening its relationships with states and better sharing the responsibility in human rights protection with domestic institutions and courts. This outward-looking strategy also implies reconfiguration of its engagement with the EU.

Protocols No 15 and No 16 and the accession of the EU to the ECHR are the latest developments that reflect this strategy.⁴⁸ Protocol No 15, signed on 24 June 2013, adds a new recital to the ECHR Preamble which contains a reference to the principle of subsidiarity and the doctrine of the margin of appreciation.⁴⁹ At this juncture in time, it has appeared necessary to make these characteristics of the ECHR system transparent and accessible, and consistent with the ECtHR's case law. The aim is also to recall the states parties' commitment to give full effect to their obligation to secure ECHR rights and freedoms and in particular to provide an effective remedy before a national authority for everyone whose rights are violated.⁵⁰ On the other hand, this emphasis on states parties can

⁴⁴ The related cases are in fact adjourned for a period of time and the ECtHR can resume examining these cases whenever the interests of justice so require. Some 3130 'Pending Government Action' applications are reported in 2014 relating to applications following a judgment applying the pilot procedure. See Analysis of statistics 2014, ECtHR Report (n 30).

⁴⁵ There is the possibility of infringement proceedings being taken by the Committee to the ECtHR against any state that refuses to abide by its judgments under the ECHR, Art 46(4). Other functions of the Committee of Ministers include supervision of the execution of the terms of friendly settlement under the ECHR, Art 39(4), and the adoption of interim resolutions to provide information on the state of progress of the execution and, where appropriate, express concern and/or make suggestions with respect to the execution. The Parliamentary Assembly of the Council of Europe is also involved in the task of supervising ECtHR's judgments. On this role, see Resolution 1268(2002), Implementation of Decisions of the European Court of Human Rights, 22 January 2002; Lambert Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (2nd edn, Council of Europe Publishing 2008), 59-63.

⁴⁶ Harris et al, *Law of the European Convention on Human Rights* (3rd edn, Oxford University Press, 2014), 180.

⁴⁷ Costa, *La Cour Européenne Des Droits De L'Homme : Des Juges Pour La Liberté* (Dalloz, 2013), 252.

⁴⁸ EU accession to the ECHR, see Ch 7, O'Leary, *The Protection of Fundamental Rights in the EU: Origins, Evolution and Trends*, paras [7.27]- [7.30].

⁴⁹ Protocol No 15 includes other procedural changes, namely the reduction from six to four months of the time limit within which an application must be made to the ECtHR; an amendment of the 'significant disadvantage' admissibility criterion; the removal of the right of the parties to a case to object to relinquishment of jurisdiction over it by a Chamber in favour of the Grand Chamber; a change to the upper age limits for judges by a requirement that candidates be less than 65 years at the date by which the list of candidates has been requested by the Parliamentary Assembly.

⁵⁰ See Explanatory report to Protocol No 15

<http://www.echr.coe.int/Documents/Protocol_15_explanatory_report_ENG.pdf> accessed 4 May 2015.

arguably be analysed more negatively as ‘a move to entrench exclusively the margin of appreciation that is the “negative part of the principle of subsidiarity” ... as a way to prevent the ECtHR to exercise further oversight into the laws of [States parties] for the future’.⁵¹ Protocol No 15 essentially codifies the ECtHR’s case law on the margin of appreciation doctrine and constitutionalises the principle of subsidiarity which previously was not expressly laid down, but rather inferred from Arts 1 (on the obligation to respect ECHR rights), 13 (on the right to an effective remedy), and 35 (on admissibility criteria) of the ECHR. Protocol No 16, signed on 2 October 2013, seeks to establish an institutional collaborative tie between the ECtHR and national authorities. Protocol No 16 allows ‘highest courts and tribunals’ to request the ECtHR to give non-binding advisory opinions on questions of principle relating to the interpretation or application of ECHR rights, before these national courts rule on the matter.⁵² Lastly, the long anticipated accession of the EU to the ECHR reached a significant step with the conclusion of a final Draft (revised) Agreement on 5 April 2013.⁵³ Indeed, the prominence reached by human rights in EU governance after the 2007 Treaty of Lisbon gave a new impetus to the issue of accession and the EU eventually committed to it. The aim of accession is to allow individuals whose ECHR rights have been breached by EU legal acts to directly seek redress before the ECtHR as well as to prevent the emergence of divergent interpretations of European human rights law between the two courts – the ECtHR and the Court of Justice of the European Union (CJEU).⁵⁴

Each of these steps, however, needs further substantive action. Protocol No 15 will only enter into force when it has been ratified by all the states parties, which might happen sooner than expected.⁵⁵ The coming into force of Protocol No 16 might prove more difficult since some kind of rephrasing would be needed to ensure that any use of the new procedure by national courts cannot undermine the EU preliminary ruling procedure, presumably by ruling out its use where EU law issues are involved.⁵⁶ As regards accession, the majority view is that its momentum has been completely lost following the negative opinion of the CJEU on the matter.⁵⁷ Without being unduly optimistic, one may argue that the timing was not right and that the parties to the negotiation will come back to the matter of accession which, after all, remains a legal obligation under both European treaties. What is sure is that, as long as Protocol No 15 is not ratified and accession has not progressed, the centrality of the ECHR in human rights protection in Europe will not be clearly enhanced. In addition to the development of a principled and consistent case law, these reforms will arguably help the ECtHR to resist the ‘tide of discontent’⁵⁸ it currently faces and assist it in guiding states in their implementation of ECHR rights, as well as in anticipating violations.⁵⁹ A strong and respected ECtHR is indeed more

⁵¹ Fabbrini, *The Margin of Appreciation and the Principle of Subsidiarity: A Comparison* iCourts Working Paper Series No 15, 2015, 6.

⁵² The ECtHR has already competence to render advisory opinions within the limits defined under the ECHR, Art 47.

⁵³ Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, April 5, 2013, 47+1(2013)008 <www.coe.int/t/dlapil/cahdi/Source/Docs2013/47_1_2013_008rev2_EN.pdf> accessed 4 May 2015.

⁵⁴ See Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart, 2013); Costa, Skoutaris and Tzevelekos (eds), *The EU Accession to the ECHR* (Hart, 2014); Paris, ‘Paving the Way: Adjustments of Systems and Mutual Influences between the European Court of Human Rights and European Union Law before Accession’ (2014) 51 *Irish Jurist* 59.

⁵⁵ Protocol No 15 has been signed by 26 States and ratified by 14. Ireland has already signed it without reservation as to ratification.

⁵⁶ Protocol No 16 has been signed by only 14 States, not including Ireland. On the pros and cons of the reform, see Dzehtsiarou and O’Meara, ‘Advisory Jurisdiction and the European Court of Human Rights: A Magic Bullet for Dialogue and Docket-Control?’ (2014) *Legal Studies* 34(3) 444.

⁵⁷ Opinion 2/13 pursuant to Article 218(11) TFEU - Draft international agreement - Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014. For an analysis, see Peers, ‘The CJEU and the EU’s Accession to the ECHR: A Clear and Present Danger to Human Rights Protection’ <<http://eulawanalysis.blogspot.ie/2014/12/the-cjeu-and-eus-accession-to-echr.html>> accessed 4 May 2015.

⁵⁸ Flogaitis, Zwart and Fraser (eds), *The European Court of Human Rights and Its Discontents: Turning Criticism into Strength* (Edward Elgar, 2013). The attitude towards the ECHR system has deteriorated in the last decade. While criticism is generally fuelled by controversial rulings, it seems that only the UK has turned it into a broader political issue with the threat of exiting the ECHR system altogether. See, for example, Amos, ‘The UK and the European Court of Human Rights’ *UK Const L Blog* (24 November 2014) <<http://ukconstitutionallaw.org>> accessed 4 May 2015.

⁵⁹ Costa, *La Cour Européenne Des Droits De L’Homme : Des Juges Pour La Liberté* (Dalloz, 2013), 246.

necessary than ever to guard against the dangers of an uncertain future for the ECHR. It is to this issue of compliance and implementation by domestic authorities and courts to which we now turn with specific reference to the case of Ireland.

THE ECHR IN IRISH LAW: COMPLIANCE AND IMPLEMENTATION⁶⁰

The record of a state's compliance with the ECHR is to be measured at two levels: first, at the level of its compliance with adverse judgments of the ECtHR; and second, at the level of its reception of the ECHR in domestic law in accordance with the subsidiary character of the Convention. States parties are indeed responsible at the international level only for the result of their implementation of the ECHR. The ECHR leaves it to them to decide in what manner they will implement it domestically. One method in dualist states, such as Ireland, is the incorporation of the ECHR via the enactment of domestic provisions.⁶¹ This is only one aspect of the reception process, the other being the effective operation of the legislation of incorporation. At both international and domestic levels, compliance is a complex process which involves 'interactive social processes'⁶² and depends upon a variety of factors and actors within states, including national courts, parliamentarians, civil servants, national human rights institutions, civil society organisations and other state bodies.⁶³ The overall picture in the case of Ireland is a conflicted one. While its profile in implementing judgments of the ECtHR is a positive one, Irish authorities and courts have adopted a more ambivalent attitude at domestic level.

International supervision: Compliance with judgments of the ECtHR

Examining the profile of a state in respect of judgments of the ECtHR involves looking at two aspects, namely the number of recorded violations of ECHR rights, and the way the domestic political and legal system has responded to such violations. Ireland has performed relatively well on both fronts. As a preliminary point, it should be noted that several cases brought against Ireland, whether resulting in a finding of a violation or not, have been seminal in the development of the ECtHR's case law either because of the questions of principle decided upon (eg *Bosphorus v Ireland* and the question of the relationships between the ECHR and EU law)⁶⁴ or the societal issues involved, engaging key interpretative methods of the ECtHR (eg *A, B, C v Ireland* and the consensus method in abortion-related issues).⁶⁵

In terms of established violations, Ireland has a favourable statistical record with just over 20 adverse rulings to date.⁶⁶ This modest figure may surprise when considering the long involvement of Ireland with the ECHR. As a matter of fact, legal systems with efficient domestic remedies, before constitutional or supreme courts, have a much more satisfactory ratio of applications per individual than those which do not – and this has been well demonstrated in the case of Ireland where a well-developed judicial protection of constitutional rights has contributed to keeping the number of

⁶⁰ On the ECHR and Irish law, see Egan et al, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014); Kilkelly, *ECHR and Irish Law* (2nd edn, Jordans, 2009); Dickson, *The ECHR and the Conflict in Northern Ireland* (Oxford University Press, 2010). On the ECHR Act 2003, see de Londras and Kelly, *European Convention on Human Rights Act : Operation, Impact and Analysis* (Round Hall, 2010); Moriarty and Massa (eds), *Human Rights Law* (Law Society of Ireland, Oxford University Press, 2010).

⁶¹ Incorporation measures in dualist states may be at constitutional or sub-constitutional level. Unlike dualist states, monist States regard international and national law as part so the same legal system. A domestic measure of incorporation is therefore not needed and the international text can be received and applied as such in the domestic legal order.

⁶² Keller and Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008).

⁶³ Egan and Forde, 'From Judgment to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court' in Egan et al, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 19-20.

⁶⁴ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (2006) 42 EHRR 1; ECHR 2005-VI.

⁶⁵ *A, B and C v Ireland* (2011) 53 EHRR 13.

⁶⁶ See Analysis of statistics 2014, ECtHR Report (n 30).

applications at a low level.⁶⁷ In terms of compliance *per se*, Ireland can be categorised as an obedient state. Many significant changes have been introduced in different areas of substantive law – including civil legal aid, planning and development, private and family life, abortion and child protection – as well as procedural law, upon findings of violations against the state. This deserves to be nuanced though. If some cases did not create any particular difficulties of execution,⁶⁸ others were more problematic. Cases affecting private and family life in particular have revealed more hesitant steps in bringing national law in conformity with the ECHR. The *Airey, Norris* and *Keegan* cases are illustrative in this regard where the Irish government, reluctant to challenge the foundations of Irish society and family, reacted with delay and often, initially, half measures.⁶⁹

The two most recent cases against Ireland have not refuted this trait of a reluctantly compliant state. Ireland does not have a tendency to object to adverse ECtHR rulings but often complies with delay and when put under pressure. The first case relates to the divisive issue of abortion which was the object of new developments in the case of *A, B, and C* in 2010.⁷⁰ The case concerned three women who, having travelled abroad to terminate their pregnancy, argued that the criminalisation of abortion services under Irish law had jeopardised their health and well-being, and even their life, in violation of a number of ECHR rights.⁷¹ Taking into account the margin of appreciation available to the state, the ECtHR ruled that Ireland was entitled to prohibit abortion for health and well-being reasons, in a context where the right to travel abroad lawfully for a termination with access to appropriate information and medical care was now available. However, the ECtHR found a violation of Art 8 of the ECHR in respect of one applicant who argued that, in the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure, she could not establish whether she qualified for a lawful abortion in accordance with Art 40.3.3° of the Constitution, thus making the law confusing, in particular as regards the assessment of the risk for the life of the mother.

Having established an expert group to advise on the issue, the Irish government committed to the implementation of the ruling in the framework of an enhanced supervision by the Committee of Ministers.⁷² After expressing concerns over the delay in putting in place substantive measures, the Committee noted the view of the expert group that only a statutory framework would provide a defence from criminal prosecution. The Committee concluded that the entry into force in January 2014 of the Protection of Life During Pregnancy Act 2013 effectively gave effect to the ruling, hereby ending ‘one of the most high-profile outstanding judgments of the Court in recent years’.⁷³ The new legislation details three circumstances in which an abortion can now be legally performed, namely in case of risk of loss of life from physical illness (eg terminal illness), risk of loss of life from physical

⁶⁷ Austin, ‘Exhaustion of Domestic Remedies: Importance of Constitutional Remedies’, Promoting and Protecting Human Rights in Ireland: The Role of the Irish Constitution and European Law, Law Society of Ireland & Irish Human Rights Commission Conference (Law Society, Dublin, 13 October 2012). The population factor is also to be taken into account; a country with less than five millions inhabitants such as Ireland has less chance to be challenged before the ECtHR than a bigger country such as Russia, Turkey or the UK.

⁶⁸ See, eg, *Pine Valley Developments Ltd and Others v Ireland* A 222 (29 November 1991) ; 14 EHRR 319.

⁶⁹ *Airey v Ireland* A 31 (1979); 2 EHRR 305 on access to civil legal aid, *Norris v Ireland* A 142 (1988); 13 EHRR 186 on depenalization of homosexuality, *Keegan v Ireland* A 290 (1994); 18 EHRR 342 on the rights of natural fathers. See further Egan and Forde, ‘From Judgment to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court’ in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, 2014).

⁷⁰ See Egan and Forde, ‘From Judgment to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court’ in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 30–33.

⁷¹ ECHR, Arts 2 (right to life), 3 (prohibition of torture), 8 (right to respect for family and private life) and 14 (prohibition of discrimination).

⁷² The Irish government also awarded the sum of €15,000 to the applicant in respect of non-pecuniary damages.

⁷³ Lynch, ‘Council of Europe closes case against Ireland on abortion’ (2014) Irish Times 4 December. See Committee of Ministers (29 October 2014), Action Report DH-DD(2014)1314 provided by the government; and Committee of Ministers (4 December 2014), Resolution CM/ResDH(2014)273 Execution of the judgment of the European Court of Human Rights *A, B and C against Ireland*, 1214th meeting.

illness in case of emergency, and risk of loss of life from suicide (former ground).⁷⁴ Despite the controversies raised by the new law and the sentiment in some quarters of 'unfinished business',⁷⁵ the matter has now been closed at international level.

The second case is about child protection and the consequences to be drawn from *O'Keeffe v Ireland*.⁷⁶ The ECtHR found Ireland in breach of Art 3 on the prohibition of degrading treatment and Art 13 on the right to an effective remedy in the case of Louise O'Keeffe who had been abused as a child by her teacher at a primary national school. The sexual, physical and emotional abuse of children in a range of institutional settings is a recurring issue which has, for a long time, cast a dark shadow on Irish politics and society.⁷⁷ The *O'Keeffe* case highlights the usefulness of resorting to the international supervision of the ECtHR in order to hold the State responsible as regards its positive obligations especially, in this case, the failure to put in place proper measures to prevent and punish abuse in the educational sector. The ECtHR held that the State must have been aware of the extent of the abuse suffered by children in its educational institutions in view of the numerous criminal cases brought before its domestic courts, yet it had failed to supplement the prosecution of such offences with effective mechanisms to prevent them and to protect the children from such crimes. The aftermath of an adverse ruling is never plain sailing though and *O'Keeffe* has been no exception. In addition to a formal cathartic apology, the Irish government has committed to adopting legislation and several other measures in the area of child protection. But its ensuing action plan has been marked by tensions between complacent and slow-acting authorities and a critical public opinion (with the main victim of the case, Ms O'Keeffe, at its forefront) whose close scrutiny and active lobbying have bolstered the supervision of the Committee of Ministers and maintained the pressure on the government to attain an adequate execution.⁷⁸ The current plan includes the issuance and updating of guidelines on the reporting of child abuse and the following up on litigation against the State on child sexual abuse by the State Claims Agency. It also encompasses a suite of legislative measures which extend beyond the educational sector to other State services dealing with children and includes the National Vetting Bureau (Children and Vulnerable Persons) Act 2012, the Children First Bill 2014 which establishes the Child and Family Agency, and the Teaching Council (Amendment) Bill 2015.⁷⁹

The two cases illustrate how ECtHR's judgments can act as triggers forcing public authorities to re-evaluate societal issues which involve complex political, legal and ethical considerations in the context of a rapidly evolving society. In other words, these cases highlight the potential of ECHR-based rights litigation in improving pre-existing constitutional rights or enhancing statutory frameworks in specific areas of law, thus enriching the Irish legal system. Apart from the above-mentioned areas of substantive law, Ireland has been alerted to the issue of excessively lengthy judicial proceedings and was found in breach of Art 6(1) of the ECHR on the right to a trial within reasonable time and Art 13 on the right to an effective remedy in several civil and criminal cases.⁸⁰ The creation of the Court of Appeal in 2014 was intended partly to address the general measures implied by these judgments.

⁷⁴ For a discussion of the genesis and adoption of the 2013 Act, see the special issue of the Irish Journal of Legal Studies, vol 3(3) 2013; in particular Bacik, 'Legislating for Article 40.3.3' at 18-35.

⁷⁵ See the ill-fated Private Member's Bill providing for abortion in cases of fatal foetal abnormalities seeking to build on the momentum of the abortion debate which was eventually defeated in the Dáil in February 2015.

⁷⁶ *O'Keeffe v Ireland*, Application No 35810/09, 28 January 2013.

⁷⁷ Commission to Inquire into Child Abuse, 2009 Report, Volumes I to V. (Dublin: The Stationery Office) available at <www.childabusecommission.ie>. The Report is now in its Implementation Plan Third Progress Report (12 November 2012).

⁷⁸ Roche, 'Jan O'Sullivan says Government "fair" in Louise O'Keeffe case' (2015) Irish Times 4 March.

⁷⁹ See Committee of Ministers (29 January 2015), Action Plan DH-DD(2015)138, Communication from Ireland concerning the case *O'Keeffe* against Ireland (Application No 35810/09), 1222th meeting (to be updated in July 2015).

⁸⁰ Civil cases: *Doran v Ireland*, Application No 50389/99, 31 October 2003, ECHR 2003- X, *O'Reilly and Others v Ireland*, Application No 54725/00, 29 July 2004, *McMullen v Ireland*, Application No 42297/98, 29 July 2004, *Superwood Holdings plc and Others v Ireland*, Application No 7812/04, 8 December 2011; criminal cases: *Barry v. Ireland*, Application No 18273/04, 15 December 2005, *McFarlane v Ireland*, Application No 31333/06, 10 September 2010.

National implementation: The operation of the ECHR Act 2003

Without revisiting the ECHR incorporation debate, suffice is to indicate here that, apart from some expert-group led initiatives, this was not an issue discussed in the public sphere and even the political parties failed to commit to any specific agenda in this regard until the late 1990s. Such a reserved attitude laid not so much in a frank hostility towards the Strasbourg system (unlike what could be observed in the UK) than in a relative indifference towards the ECHR whose incorporation was regarded as devoid of immediate purpose. The position was that many of the rights articulated in the ECHR were already provided for in the fundamental rights provisions of the Constitution, which in turn were buttressed by a robust power of judicial review on the part of the courts.⁸¹ If incorporation was not a legal imperative at the time, it became a political one after the signature of the 1998 Belfast/Good Friday Agreement in the context of the peace settlement in Northern Ireland. The institutional setup envisaged in the Agreement (ie establishment of national human rights commissions) was to be complemented by a substantial commitment towards the guarantee of human rights and freedoms aimed at ensuring the success of the peace process. The requirement of equivalence of protection between the two jurisdictions on the island of Ireland prompted the Irish government to commit to incorporating the ECHR which was seen as a neutral safeguard to ensure that the institutions the Agreement had created would work effectively.⁸² The challenge was to accept the principle of incorporation without disrupting too drastically domestic constitutional arrangements. Ireland eventually replicated the UK model of the Human Rights Act 1998 (HRA 1998) and proceeded to incorporate the ECHR by a similar indirect interpretative method through the terms of the ECHR Act 2003. From the start, this has proved to be an 'awkward fit'⁸³ given the differences in constitutional contexts between Ireland and the UK.

The ECHR Act 2003 is the HRA 1998's non-identical twin. Aimed essentially at 'domesticating' the ECHR into Irish law, the 2003 Act signals a less ambitious purpose than the HRA 1998 which was intended to transform the conception of rights protection by the judiciary and political branches at domestic level in the UK. As per its title, the 2003 Act is attached to the ECHR, thereby representing a limited conception of incorporation and not, for obvious reasons, any long-term objective of a possible home-grown bill of rights as was the apparent intention in the UK.⁸⁴ The rights in the 2003 Act are given effect in domestic law 'subject to the Constitution'. The 2003 Act is modelled on the same three-part structure as the HRA 1998 (ie judicial interpretation, rights-compliant performance of functions, and declaration of incompatibility) which involves all the organs of the State, namely the judiciary, the legislative and the executive. Section 2 of the ECHR Act 2003 places an obligation on the courts to interpret, in so far as is possible, any rule of law (whether it derives from the common law or statute) in a manner consistent with Ireland's obligations under the ECHR. In construing the ECHR, courts are to take 'due account' of the ECtHR jurisprudence. Section 3 establishes a performative obligation requiring 'organs of the State'⁸⁵ to conduct their activities in a manner that is

⁸¹ Egan 'Introduction' in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 10–11.

⁸² See Good Friday/Belfast Agreement 10 April 1998, 'Rights, Safeguards and Equality of Opportunity', 'Comparable Steps by the Irish Government' para 9; and Article 29.7.1° of the Constitution which was amended to reflect Ireland's commitment towards the Agreement. Incorporation was part of a broader array of rights-related measures, some realized (i.e. establishment of national human rights commissions), some only considered (ie a Charter of Rights for the Island of Ireland, and a Bill of Rights for Northern Ireland).

⁸³ De Londras, 'Declarations of Incompatibility under the ECHR Act 2003: A Workable Transplant?' (2014) 35 Statute Law Review 50.

⁸⁴ The current political debate shows that a completely different turn has been taken with proposals not only on exiting the ECHR system (see 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws', 3 October 2014) but also repealing the HRA 1998 altogether (see, eg, Starmer, 'The arguments against the Human Rights Act are coming. They will be false' *The Guardian* <<http://www.theguardian.com/commentisfree/2015/may/13/arguments-human-rights-act-michael-gove-repeal-myth-busting>> accessed 15 May 2015).

⁸⁵ For the purpose of the 2003 Act, and as defined under s 1, an organ of the State is a 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

compatible with Ireland's ECHR-based obligations. Section 5 provides that Irish courts may, where no other legal remedy is adequate and available, make a declaration of incompatibility that a statutory provision or rule of law is incompatible with the State's obligations under ECHR provisions. Crucially, it is then for the Oireachtas, and not for the courts, to decide whether, and if so how, to remedy the judicially declared incompatibility since, under s 5, the declaration does not disturb the operation, validity or enforcement of the impugned legislation. There are a few omissions and differences compared to the HRA 1998: the 2003 Act does not include an equivalent of s 19 of the HRA 1998 on pre-legislative scrutiny; and courts are excluded from the ECHR rights-compliant performative obligations.

On the face of it, the ECHR Act has enhanced the Irish legal system with two new remedies: firstly, a new tort-type action for breach of statutory duty derived from a violation of ECHR rights by State organs for which damages or equitable relief can be awarded where no other remedy is available; and secondly, a declaration of incompatibility by way of judicial review which may lead to an *ex gratia* payment of damages. The ECHR Act 2003 has 'made a difference at a symbolic and practical level',⁸⁶ especially in terms of the judiciary's greater openness in considering Strasbourg jurisprudence. The 2003 Act now forms part of the regular arguments in domestic judicial proceedings and is being invoked in an increasing number of areas of law such as administrative law, tax law, employment law, family law, criminal law, and asylum law.

However, an assessment of the impact of the 2003 Act since its operation reveals that its influence in rights-based litigation has not been as salient as expected.⁸⁷ The omission of mechanisms such as the requirement to certify that a proposed bill is compliant with the ECHR (comparable to s 19 of the HRA 1998) and a dedicated parliamentary committee for rights-related pre- and post- legislative scrutiny (comparable to the UK Joint Committee on Human Rights), has certainly not helped to ingrain the ECHR Act in the political decision-making process. The absence of a training programme (in contrast with the intensive programme operational in the UK)⁸⁸ as well as the drastic reduction in funding of bodies in charge of promoting human rights⁸⁹ were arguably other missed opportunities to establish more prominently the 2003 Act in the litigation landscape. Also, the priority given to constitutional matters over ECHR-related matters mandated by the Supreme Court's judgment in *Carmody v Minister for Justice, Equality and Law Reform*⁹⁰ has reinforced the impression that 'rights with non-constitutional bases do not occupy as significant a position on the Irish politico-legal landscape as they might'.⁹¹

More significantly, the inadequacy of the declaration of incompatibility has impeded the 2003 Act from becoming more entrenched in political and judicial habits. The declaration of incompatibility has

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.

⁸⁶ Egan 'Introduction' in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 13.

⁸⁷ See a first assessment in O'Connell et al, 'ECHR Act 2003: A Preliminary Assessment of Impact' (Law Society and Dublin Solicitors Bar Association 2006). This will be followed up by a similar study to be updated and completed in June 2015 by Liam Thornton and Suzanne Kingston. See also de Londras, 'Neither Herald nor Fanfare: The Limited Impact of the ECHR Act 2003 on Rights Infrastructure in Ireland' in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 37.

⁸⁸ The lack of training arguably led to some misconceptions being held by lawyers in their use of the 2003 Act. See Kelly, 'Maximising the Potential of the European Convention on Human Rights Act 2003: The Interpretative Obligation and the Importance of Framing' in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 55.

⁸⁹ The budget of the Irish Human Rights Commission which was charged with advising government on law, policy and practice in the State, based on domestic and international human rights law (including the ECHR and the ECHR Act 2003) for eg, was cut by 32% in 2009: see, (2009) Irish Times, 'IHRC Warns of Budget Cut Risks' 9 July.

⁹⁰ *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71.

⁹¹ De Londras, 'Declarations of Incompatibility under the ECHR Act 2003: A Workable Transplant?' (2014) 35 *Statute Law Review* 50, 62.

not been a ‘workable transplant’ afterall.⁹² An unfortunate tendency on the part of practitioners to view s 5 as the centre-piece of the 2003 Act has diverted attention from ss 2 and 3 which have been underutilised and restrictively applied by the courts, thereby preventing an optimum use of the 2003 Act in domestic legal practice.⁹³ The inherent weaknesses of the declaration of incompatibility – which has no effect on the impugned legislation and is a second-ranked remedy according to *Carmody* – has meant that practitioners have been understandably keener to resort to the more efficient constitutional remedies (which allow for the invalidation of legislation in cases of unconstitutionality) or even to appropriate EU law remedies. The lack of any transformative effect achieved by the 2003 Act in this regard is best exemplified by the low number of declarations of incompatibility which have been issued – three so far, two in relation to the same issue.⁹⁴ Besides, although granted in significant areas of law such as transgender rights and the eviction of tenants from social housing,⁹⁵ these declarations have been followed up but with significant delay by the legislator. In the case of transgender rights, the Gender Recognition Bill 2013 was eventually drafted on foot of the declaration granted in the *Foy* case, in which the High Court held that Irish law was incompatible with Art 8 of the ECHR by reason of its failure to provide recognition for transgender persons.⁹⁶ While the new Bill aims to provide a process enabling transgender persons to achieve full legal recognition of their acquired gender, there has been criticism of some of its terms and of the delay in its implementation.⁹⁷ As for the other declarations on the incompatibility between Irish social housing law and Art 8 of the ECHR⁹⁸, the contentious provision was removed with the enactment of the Housing (Miscellaneous Provisions) Act 2014 so as to provide procedural safeguards to council housing tenants who face expedited removal under court order for possession by a local authority.⁹⁹ In view of the delays in giving effect to each of these declarations of incompatibility, it is doubtful that a s 5 remedy can ever be regarded, as it stands, as an attractive option for litigants, or even an efficient remedy under Art 13 of the ECHR.¹⁰⁰

CONCLUSION

The ECHR represents a landmark in the development of international human rights law. Its legal, political and human significance cannot be underestimated and, in the case of Ireland, the ‘ECHR system, for all its shortcomings, has been of vital importance to the promotion and protection of human rights’.¹⁰¹ Although problems remain at both international and national levels, there are good reasons to believe that these will be eased off thanks to appropriate action. At international level, planned reforms will certainly tackle the issues of case backlog and difficulties regarding enforcement caused, in part, by a misplaced judicial activism of the ECtHR encroaching on the sovereignty of the states. In this regard, Irish authorities may witness with some dismay and caution that one of the biggest players in Europe, the UK, is considering the possibility of withdrawing from

⁹² De Londras, ‘Declarations of Incompatibility under the ECHR Act 2003: A Workable Transplant?’ (2014) 35 Statute Law Review 50, 50.

⁹³ Kelly, ‘Maximising the Potential of the European Convention on Human Rights Act 2003’ in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 55. See, however, successful involution of these provisions of the 2003 Act in *Ellen O'Donnell and others v South Dublin Council* [2015] IESC 28 (13 March 2015) discussed by Thornton in Ch 9, ‘Socio-Economic rights and Ireland’, paras [9.31]- [9.36].

⁹⁴ This may be compared with the 29 declarations issued under the UK HRA 1998, of which 20 have become final.

⁹⁵ See *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470 (transgender rights case), and *Donegan v Dublin City Council & Others* [2008] IEHC 288 (upheld by the Supreme Court in *Donegan v Dublin City Council* [2012] IESC 18) and *Dublin City Council v Liam Gallagher* [2008] IEHC 354 (both about housing law case).

⁹⁶ See *Foy v An t-Ard Chláraitheoir* [2007] IEHC 470.

⁹⁷ For further information, see TENI, Legal Gender Recognition in Ireland <<http://www.teni.ie/page.aspx?contentid=586>> accessed 8 July 2015. The Bill was passed by Seanad Éireann in February 2015.

⁹⁸ See *Donegan v Dublin City Council & Others* [2008] IEHC 288 (upheld by the Supreme Court in *Donegan v Dublin City Council* [2012] IESC 18) and *Dublin City Council v Liam Gallagher* [2008] IEHC 354.

⁹⁹ See Housing (Miscellaneous Provisions) Act 2014 s 18(3), which give the District Court more discretion to independently review any proceedings for possession of a local authority dwelling.

¹⁰⁰ *A, B and C v Ireland* (2011) 53 EHRR 13, para 150.

¹⁰¹ O’Connell cited in in Egan and Forde, ‘From Judgments to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court’ in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 36.

the ECHR thereby challenging the future of the system. In any case, it has always been the idea that domestic law, rather than international law, should be at the forefront in the protection of human rights, as expressed in numerous provisions of the ECHR. In Irish law, this must definitely be achieved by a better entrenchment of the ECHR Act 2003 which is yet to be regarded as part and parcel of the politico-legal culture.

To dispel this sense of superfluity and underuse of the 2003 Act,¹⁰² as compared with the routine use of the fundamental rights protection afforded under the Irish Constitution, requires not only legislative change but also a change of mindset. An obvious legislative adjustment would be to address the identified defects of the 2003 Act in terms of parliamentary legislative process and develop a standard pre-legislative scrutiny of bills for compliance with the ECHR taking into account not only Ireland's international commitments but also the commitment – implicit within the 2003 Act – that legislation would be given effect in a manner that is Convention-compliant to the extent possible.¹⁰³

Most of all, change needs to happen in judicial and political processes in terms of how courts and State organs, broadly understood, approach the 2003 Act. Suggestions include considering making more effective use of ss 2 and 3 of the 2003 Act. One possibility is to change the 'initial reference point' in the judicial interpretation process by making the ECHR the anchor for the court's determination of a case. Arguably, starting with a 'ECHR friendly' interpretation will more likely – albeit not certainly – result in a ECHR compliant interpretation.¹⁰⁴ This reordering of the sequence between constitutional and conventionality reviews is not unusual as French law has done, in recent years, exactly the opposite, shifting the anchor from the ECHR to the Constitution, thereby showing that a change of judicial practice is possible. Still culturally conditioned by a primary allegiance to their own national Constitution,¹⁰⁵ Irish judges would certainly be willing to contribute to a more robust approach to interpretation of the 2003 Act and a better acculturation of the ECHR. In the case of a declaration of incompatibility being made, the authorities involved should aim at effectively triggering a meaningful political debate on the opportunity to remedy the incompatibility – maybe by setting a specified time-limit within which the government and Oireachtas will have to respond. This would avoid *Foy* case-like situations in which there has been a five-year gap between the declaration and the Bill (which is not even adopted yet).¹⁰⁶ The Irish judiciary is generally keen on a dialogue with the European judge – this famous 'dialogue of judges' which has become an essential element of the European protection of fundamental rights in Europe.¹⁰⁷ What needs to be improved in this regard is the dialogue at domestic level between the judicial and political branches to provide reasonably fast and effective remedial actions.

¹⁰² Roche, 'European Court of Human Rights underused in Irish law' (2015) Irish Times 28 January.

¹⁰³ De Londras, 'Declarations of Incompatibility under the ECHR Act 2003' in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 64.

¹⁰⁴ Kelly, 'Maximising the Potential of the European Convention on Human Rights Act 2003' in Egan et al (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional, 2014), 71–72.

¹⁰⁵ Fennelly, 'Human Rights and the National Judge : His Constitution ; The European Union ; The European Convention' (2011) ERA-Forum 87, 92.

¹⁰⁶ Farrell (unpublished communication), '(Trans)Gender Recognition in Germany : The Role of the German Courts', FLAC & UCD Human Rights Network Conference (UCD Sutherland School of Law, Dublin, 5 February 2015).

¹⁰⁷ O'Boyle (unpublished communication), 'European Court of Human Rights and National Courts: A Challenging Dialogue', Promoting and Protecting Human Rights in Ireland: The Role of the Irish Constitution and European Law, Law Society of Ireland & Irish Human Rights Commission Conference (Law Society, Dublin, 13 October 2012).

FURTHER READING

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Specialised bodies such as the Irish Human Rights and Equality Commission (IHREC) and the Irish Council for Civil Liberties (ICCL) provide practical and easily accessible information on the ECHR system in the Irish context on their website and in their publications (eg IHREC *Guide to Taking A Case to Strasbourg*, or ICCL *Pack on Know Your Rights – The European Convention on Human Rights in Ireland* 2010).