



**AN BILLE FÁN gCOINBHINSIÚN EORPACH UM CHEARTA
AN DUINE, 2001
EUROPEAN CONVENTION ON HUMAN RIGHTS BILL, 2001**

EXPLANATORY MEMORANDUM

Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a binding International Treaty of the Council of Europe. It was adopted by the Council in Rome and signed by the then Irish Minister for External Affairs on 4 November, 1950. Its provisions were later confirmed and formally ratified by Ireland on 25 February, 1953, and the Convention entered into force for Ireland on 3 September that year. It may be noted in passing that Ireland and Sweden were the first two Member States to accept the all-important right of individual petition to the Court of Human Rights in Strasbourg at the time of its ratification of the Convention in 1953. The United Kingdom, for example, only accepted this jurisdiction in 1966 and France in 1981.

The aim of the Convention, as stated by the President of the Court of Human Rights on the occasion of its fortieth anniversary in 1990, was to lay the foundation for the new Europe, which it was hoped would be built on the ruins of a continent ravaged by a fratricidal war of unparalleled atrocity. It may also be viewed as the European development of the earlier 1948 United Nations Declaration of Human Rights, which was also a response to the Holocaust and the brutality of the second world war. The general purpose of the Convention has been described as being to protect human rights and fundamental freedoms and to maintain and promote the ideals and values of a democratic society. The rights as set out in the Convention are given a broad interpretation rather than a strict legalistic one, so as to ensure that they are practical, relevant and effective within a changing society.

In general terms, the Convention (the text of which for ease of reference is scheduled to the Bill) protects the right to life; the right to freedom from torture and inhuman or degrading treatment or punishment; the right to freedom from slavery, servitude and forced or compulsory labour; the right to liberty and security of the person; the right to a fair and public trial within a reasonable time; the right to freedom from retrospective criminal law and no punishment without law; the right to respect for private and family life, home and correspondence; the right to freedom of thought, conscience and religion; the right to freedom of expression; the right to freedom of assembly and association; the right to marry and found a family; the right to an effective remedy; and the prohibition of discrimination in the enjoyment of the rights as set out under the Convention.

Again, for ease of reference, the texts of the four operational additional Protocols to the Convention which are also covered by the terms of the Bill, are scheduled to it. The 1952 Protocol deals with property, educational and electoral rights; the Fourth Protocol

prohibits imprisonment for inability to pay a debt, contains the right to freedom of movement, and also prohibits the individual or collective expulsion of nationals; the Sixth Protocol deals exclusively with the abolition of the death penalty; and the Seventh Protocol (which is in the process of formal ratification by the State) contains procedural safeguards concerning the expulsion of lawfully resident aliens, the right of appeal in criminal matters, compensation for wrongful conviction, the right not to be punished twice for the same offence, and equality between spouses.

Insofar as the constitutional and legal position of the Convention is concerned, this may be explained by the statement that it has already been law for Ireland since 1953 on the International plane, as it forms part of the State's obligations in the area of Public International Law. The decisions of the Court of Human Rights in relation to any breaches of the Convention's provisions by the State are binding, but under our constitutional scheme of things, it is the prerogative of the Government to decide precisely how any incompatible provision of national law or administrative practice may be reconciled with a ruling by the Court. More simply put, this means that the Convention is law *for* Ireland, but not actually law *in* Ireland. The reason for this will be found in Article 15 of the Constitution, which provides that the only law making authority in the State is the Oireachtas. Accordingly, at present arguments based on Convention rights, if they can be raised at all before domestic courts, are not of persuasive effect in Irish law. If a person wishes to vindicate a right under the Convention they must first exhaust all possible remedies which may be availed of under national law, before going on to plead their case before the Court of Human Rights in Strasbourg.

Provisions of the Bill

The provisions in the Bill will alter the current position fundamentally. It is designed to facilitate the bringing of cases involving alleged breaches of rights under the Convention in Irish courts. In other words, it will make rights under the Convention enforceable in Irish courts, and this means that cases of this type will be able to be processed much more expeditiously than under the present arrangements.

The question of incorporating the Convention into domestic law so as to allow its provisions to be pleaded directly before Irish Courts has previously been considered, most recently by the Constitution Review Group, in its 1996 Report. In the context of the possible incorporation of the Convention directly into the Constitution, the Group came out cogently and strongly against such a course, on the grounds that there is already a very high degree of overlap between the Constitution's guarantees in the area of fundamental rights, and the provisions of the Convention. Furthermore, the Group was of the opinion that this form of incorporation could very well lead to a diminution in some individual rights in the Constitution. Neither would incorporation have the effect of filling in any gaps in protection, since every substantive right afforded by the Convention is either expressly protected by the Constitution, or has already been recognised as an unenumerated right by the Supreme Court under Article 40.3.1. The Group also thought that incorporation might lead to new gaps in protection in fundamentally important areas, such as the right to trial by jury.

Furthermore, since the enactment of the Constitution in 1937, Irish Courts have been working within a system of judicial review of legislation which confers on them far reaching powers, under which statutory provisions, statutory instruments and common law rules may be

struck down as being repugnant to, or inconsistent with, the Constitution. It is against this background, almost unique in common law jurisdictions, coupled with the fact that incorporation of the Convention by other States without written Bills of Rights, or lesser systems of Constitutional protection of human rights, have not been that effective or transparent, that the view was taken that it was preferable in our case to leave the Convention as a source of non-cognisable and non-justiciable rights in the strict sense.

Nevertheless, the matter was reconsidered in some detail (including the possibility of making the Convention effective at the legislative rather than the constitutional level) on foot of the commitment by the Government in the Good Friday Agreement on Northern Ireland to bring forward measures to strengthen and underpin the constitutional protection of human rights in the State, which would draw on the provisions of the Convention on Human Rights. Under the Agreement, these measures were to ensure an equivalent level of protection of human rights as would pertain in Northern Ireland, and it was very relevant to the examination of the matter that the United Kingdom had already decided, through the medium of the 1998 Human Rights Act, to give further and better effect to the Convention throughout its constituent jurisdictions, particularly in Northern Ireland, fully from 2 October, 2000. Accordingly, following its consideration of the matter, the Government decided to adopt a similar interpretative type approach and legislate so as to give further effect to the Convention in the State. The European Convention on Human Rights Bill provides accordingly, though it goes somewhat further than the legislation in the United Kingdom and also takes into account the four remaining operational Additional Protocols to the Convention, as previously outlined. The provisions of the Bill will ensure that there are two complementary systems in place in Ireland for the protection of fundamental rights and freedoms, with the superior rules under the Constitution taking precedence, in accordance with the State's dualist doctrine on the giving of effect to international obligations and the primary role of the Oireachtas in that regard.

Section 1 (Interpretation)

This is a standard provision which provides for the definition of certain terms used in the Bill. It may be noted that Article 1 of the Convention is not included in the definition of Convention provisions. This is because the purpose of the Bill as a whole is to give effect to the obligation in the Article on the Member States to secure for everyone within their jurisdictions the rights and freedoms as set out in Section 1 of the Convention. Protocol No. 12 to the Convention on the subject of discrimination is not referred to, as it is not yet in force, no State having deposited Instruments of Ratification as yet. Ten ratifications are required to bring it into effect. So far 26 countries, including Ireland, have signed this latest Protocol to the Convention. All courts have been excluded from the definition of organ of the State on the basis that they are already under a duty to administer justice in accordance with the provisions of the law and the Constitution.

Section 2 (Interpretation of laws)

The Bill establishes the framework through which further effect is to be given to the provisions of the Convention. *Section 2* provides for such a framework, whereby any statutory provision (defined in *section 1* as meaning any provision of an Act of the Oireachtas, or of any order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created thereunder or any statute, order, regulation, rule, licence, bye-law or other like document made, issued or otherwise created under a statute which continued in force

by virtue of Article 50 of the Constitution) and any rule of law shall be interpreted, in so far as possible, in a manner compatible with the State's obligations under the Convention. It will be noted the section will apply retrospectively and prospectively.

Section 3 (Performance of functions in a manner compatible with Convention provisions)

Subsection (1) provides that all organs of the State shall, subject to any statutory provision or rule of law (other than the Act), perform their functions in a manner compatible with the State's obligations under the Convention. This requirement has been phrased in a positive manner. An organ of the State is defined in *section 1* of the Bill and includes tribunals or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law, or through which any of the legislative, executive or judicial powers of the State are exercised. The courts are excluded from the definition on the basis that they are already under a duty to administer justice by virtue of the Constitution.

Where a person has suffered injury, loss or damage as a result of a breach of *subsection (1)*, *subsection (2)* provides that the person may, if no other remedy is available, institute proceedings in either the High Court or the Circuit Court, to recover damages arising from such a loss. In proceedings before the Circuit Court, *subsection (3)* limits the amount of damages payable to the monetary jurisdictions of that Court.

Under *subsection (5)(a)*, proceedings must be brought within one year of the alleged breach, on the basis that such proceedings would have considerable importance for the administrative functions under attack, and it would be preferable, therefore, for any claims to be brought as expeditiously as possible. However, *paragraph (b)* provides that this limitation period may be extended at the discretion of the Court, where it considers it appropriate in the interests of justice.

The effect of *section 3*, is that damages will be awardable in a case where an organ of the State commits a breach of the Convention, unless the body in question could not, under the law of the State, have acted differently. Where this is the case, it will be a matter for consideration as to whether the statutory provision or rule of law with which the organ of the State was complying could be found to be incompatible with the Convention under the provisions of *section 5* of the Bill. If the statutory provision or rule of law in question is found to be incompatible with the Convention, the High Court or the Supreme Court on appeal, may make a declaration of incompatibility under *section 5(1)*. In this instance, it would be a matter for the injured party to apply to the Government through the Attorney General for compensation, by way of an *ex gratia* payment, as is provided under *section 5(4)* of the Bill.

Section 4 (Interpretation of Convention provisions)

The purpose of this section is to provide a statutory aid to the interpretation of the provisions of the Convention and the relevant Protocols thereto, to which further effect is being given in the Bill. This will allow the Courts to examine the interpretation of the Convention's provisions by the European Court of Human Rights, the former European Commission on Human Rights and the Committee of Ministers of the Council of Europe, and to take their interpretations into account.

Section 5 (Declaration of incompatibility)

Subsection (1) provides that where the High Court or Supreme Court on appeal, decide in any case that it is not possible to interpret a statutory provision or rule of law in a way which is compatible with the Convention, and where there is no other legal remedy adequate and available, the Court may, either on application by the injured party or of its own motion, make a declaration that the provision or rule of law is incompatible with the provisions of the Convention.

Subsection (2)(a) provides that a declaration under this section shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law which was found to be incompatible with the Convention. This means that, because of the primary law making role assigned to the Oireachtas under the Constitution, the statutory provision or rule of law will remain in place and it will be a matter for the Government to consider what steps should be taken to remedy the particular incompatibility in question. This situation is similar to that which obtains at present when the Strasbourg Court rules that a provision in Irish law contravenes the Convention.

Subsection (2)(b) preserves the existing right of a party to an action in which a declaration under this section is made to bring a case to the European Court of Human Rights in Strasbourg, if they so wish. The purpose of this provision is to preserve the right of individual petition to the Court of Human Rights.

Subsection (3) provides that the Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before the Houses of the Oireachtas within 21 days of the making of that order. The purpose of this provision is to provide a mechanism to ensure that both Houses of the Oireachtas are notified as to the making by the Court of a declaration of incompatibility.

Subsection(4) creates a new compensatory scheme whereby, following a declaration of incompatibility by the Courts, the injured party may apply to the Government, through the Attorney General, for an *ex-gratia* compensation payment in respect of any loss, injury or damage suffered as a result of the incompatibility. The reason any such payment would be made by the Government and not the Courts, is that the Courts could not award damages where there is compliance with a statutory provision or rule of law which, while incompatible with the Convention, remains Constitutionally valid. In the absence of such a compensation scheme, the injured party seeking damages would have to take a case to Strasbourg, and this would be inconsistent with the principle underlying the Bill to give further effect to the Convention in national law by enabling cases to be taken and remedies obtained before national courts in respect of violations of the Convention.

Subsection(4) provides for the appointment by the Government of an adviser to advise them as to the quantum of damages, if any, to be paid to the injured party. Where the Government considers that it may be appropriate to make such payment, *subsection (5)* provides that in advising the Government the adviser will take account of the principles and practice of the Court of Human Rights in affording just satisfaction to an injured party under Article 41 of the Convention.

Section 6 (Notice of proceedings under the Act)

This is a technical section providing for the Attorney General to be given notice of proceedings in which a court may make a declaration of incompatibility and, provides that the Attorney General shall be entitled to appear in any such proceedings. The purpose of

this provision is to ensure that, before a Court makes its decision, the Attorney General can bring to its attention all constitutional and legal arguments which may be relevant to the issues before the Court.

Section 7 (Amendment of the Human Rights Commission Act, 2000)

Paragraph (a) of this section provides for the necessary technical amendments to the Human Rights Commission Act, 2000, to increase the number of ordinary Human Rights Commissioners from 8 to 14 in line with a recent Government decision.

Paragraph (b) provides for an amendment to section 11 of the Human Rights Commission Act, 2000, to allow the Commission to institute proceedings in any Court of competent jurisdiction for the purposes of obtaining relief of a declaratory or other nature in respect of matters concerning the human rights of a person or persons under the *European Convention on Human Rights Act, 2001*. This amendment is required because the Convention would not be embraced within the existing definition in the section as it is not a treaty which is being made part of the law of the State.

Section 8 (Expenses)

This is a standard provision providing for the payment of any expenses arising under the Act out of moneys provided by the Oireachtas.

Section 9 (Short title and commencement)

Subsection (1) provides for the short title of the Bill.

Subsection (2) provides that this Act will come into force on a day appointed by the Minister for Justice, Equality and Law Reform, which must be not later than 6 months following the enactment of the Bill. The purpose of the provision is to allow some time to elapse for the implications of the changes which will be effected by the Bill to be considered by the Judiciary, the legal profession and all organs of the State. The formal ratification process relating to Protocol No. 7 to the Convention, which is already underway, has also to take place within this period.

This subsection also provides that *paragraph (a)* of *section 7*, dealing with the increase in the membership of the Human Rights Commission, shall have immediate effect on the enactment of the Bill. This will enable the Minister on enactment to make the necessary Establishment Day Order to establish the Commission, which is operating on an interim basis at present, on a statutory basis.

An Roinn Dlí agus Cirt, Comhionannais agus Athchóirithe Dlí, Aibreán, 2001.