

International human rights law: operation and impact

No. 2 of 2016

Contents

Executive summary	2
Introduction	3
Ratification and implementation processes	4
United Nations	6
Council of Europe	9
European Union	12
European Convention on Human Rights Act 2003	13
Conclusion	15

Editorial

Human rights issues often attract attention when high-profile legal challenges are won in the Supreme Court or heard before the European Court of Human Rights in Strasbourg. Human rights issues demand a large degree of political engagement whether that is at the international level or in response to a judicial decision or policy objective. Government representatives frequently travel to Geneva to appear before committees of international experts and sometimes experts travel to Ireland to examine the country's human rights record. The most recent review was on the 11th May 2016. The recommendations of international monitoring groups are then often used as a lobbying tool.

This *Spotlight* provides an overview of the operation of international human rights law. It seeks to highlight how international human rights law impacts upon Irish law as well as the work of parliament.

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9 June 2016
Library & Research Service
Central Enquiry Desk: 618 4701

Executive summary

Introduction

The Constitution, Bunreacht na hÉireann, is the supreme source of human rights law in Ireland. Human rights are also protected by European (EU) and international law. International human rights law is a collection of treaties which have been drawn up by international organisations such as the United Nations (UN) and the Council of Europe.

Implementation of international human rights in Irish law

Ireland has a dualist approach to international law. While Ireland is legally bound by the obligations set out in treaties that it has ratified, those treaties are not directly applicable in Irish law. In order to be enforceable domestically, a treaty must be domestically incorporated, either through an Act of the Oireachtas or an amendment to the Constitution.

Developments in the Houses of the Oireachtas suggest that there has been some movement towards parliament becoming more involved in the realisation of human rights at national level. These include the establishment in 2015 of a Sub-Committee on Human Rights and Equality Relative to Justice Matters and the scrutiny role given to the Committees of the Houses of the Oireachtas in relation to the newly established Irish Human Rights and Equality Commission (IHREC). With the formation of a new Government in May 2016, calls have been made by a number of Irish NGOs for the establishment of a new Oireachtas Committee on Human Rights.

United Nations

The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, laid the foundations for international human rights law.

Following on from this, the UN now has nine core human rights instruments, each dealing with distinct issues. Ireland has ratified six of these but none have been incorporated into domestic law. As a result, the impact of these instruments on Irish law is limited in practice. However, under international law Ireland is obliged to respect the terms of human rights treaties.

The UN has developed a range of mechanisms to monitor and promote compliance with human rights treaties. This includes the monitoring by different bodies of both the general human rights situation and also of the implementation of state parties obligations in key instruments.

Council of Europe

The Council of Europe describes itself as “the continent’s leading human rights organisation”. It is comprised of 47 member states, all of which have ratified the European Convention on Human Rights (ECHR), the Council’s flagship treaty. The European Social Charter is the other key instrument in the Council’s human rights infrastructure.

The European Court of Human Rights, which provides a forum for litigation, is the key human rights enforcement mechanism in the Council of Europe. Under the revised Social Charter, there is a facility for collective complaints to be made to the European Committee of Social Rights (ECSR).

European Union

Although human rights were not specifically mentioned in the founding treaties of the European Union, the European Court of Justice confirmed human rights as being a general principle of Community law. The Charter of Fundamental Rights of the European Union now codifies the understanding of human rights law within the European Union.

Unlike the ECHR, the Charter enshrines civil and political rights as well as social and economic rights. Since the Charter may only be invoked when a domestic Court is applying EU law, its impact has been limited.

European Convention on Human Rights Act 2003

The *European Convention on Human Rights Act 2003* indirectly incorporates the ECHR into Irish law. The Act does not give direct effect to the ECHR in Irish law but instead sets out certain obligations and remedies.

Many commentators have criticised individual sections of the Act and have highlighted the restrictive nature of the legislation as a reason for the arguably minimal impact of the Convention on the development of Irish law.

Conclusion

The ways in which international law operates in Ireland curtails the impact on domestic law. It may however have persuasive effect. Given that its operation is underpinned by political processes, it is not surprising that the role of parliament in the promotion and protection of human rights is becoming more relevant.

Introduction

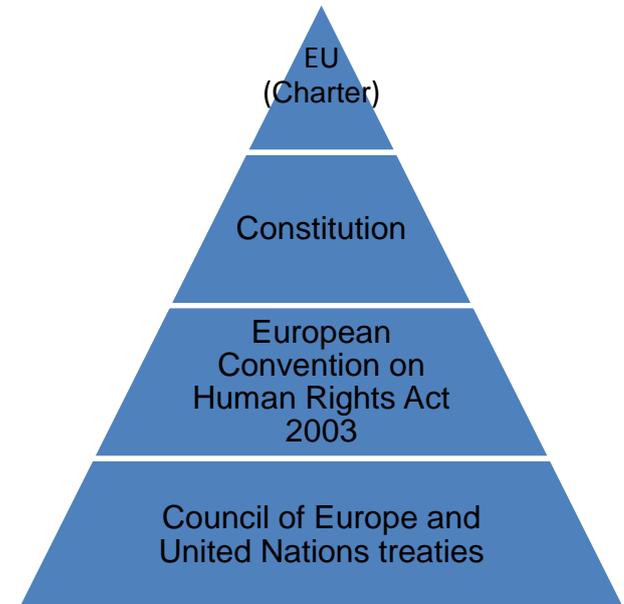
Fundamental human rights, such as privacy, freedom of expression, and protection of the dwelling, are protected by Articles 40 – 44 of the Constitution of Ireland. Other rights, such as the right to bodily integrity¹, have been recognised by the so-called doctrine of unenumerated rights.² The Constitution is the supreme

¹ *Ryan v Attorney General* [1965] IR 264.

² In Doyle (2008) *Constitutional Law: Text, Cases and Materials* (Clarus Press) it is argued at p. 108 that the doctrine is no longer of use in modern Irish constitutional law. This view is evidenced by the fact that in *Fleming v Ireland* [2013] IESC 19 the Supreme Court decided not to expand upon the doctrine to recognise the right of the person, as discussed in Kenny (2013) "Recent Developments

source of human rights law in Ireland and there are many examples of this in case law.³ Human rights are also protected by European Union (EU) and international law. The hierarchy of these sources of law is represented by Figure 1 below.

Figure 1: Sources of human rights law



Source: L&RS 2016

International human rights law is a collection of treaties which have been drawn up by international organisations such as the United Nations (UN) and the Council of Europe. These treaties place legal obligations on state parties to respect, protect and fulfil human rights. Ireland is a state party to a range of international agreements.

This *Spotlight* is divided into five sections. It gives an overview of international human rights infrastructure as well as providing examples of how international human rights law can have an impact upon Irish law as well as the work of

in the Right of the Person in Article 40.3: *Fleming v Ireland and the Spectre of Unenumerated Rights*" 1 *Dublin University Law Journal* 323.

³ For example in *Carmody v Ireland* [2010] 1 IR 635 the Plaintiff claimed that the administration of the criminal legal aid scheme was both unconstitutional and in breach of the European Convention on Human Rights (ECHR). The Supreme Court, having found a breach of the Constitution, did not consider the ECHR issue.

parliament. The examples provided are for illustration purposes only and it is acknowledged that the factors influencing the outcomes are multi-faceted. The following areas will be addressed:

- Ratification and implementation processes;
- United Nations;
- Council of Europe;
- European Union;
- *European Convention on Human Rights Act 2003*.

Ratification and implementation processes

In *Re Haughey*⁴ the Supreme Court held that “the Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government”. This doctrine is known as the separation of powers. It seeks to provide each organ of State with its own sphere within which to fulfil its functions with as little interference as possible from the other organs and by providing for a system of checks and balances. The operation of this doctrine is particularly evident with respect to international law which traditionally falls both into the realm of Government (for example, when negotiating international agreements) and the courts.⁵ However, there is a move towards greater involvement of parliament in human rights realisation and protection.⁶

⁴ [1971] IR 217, at 250. See Hogan and Whyte (2003) *Kelly: The Irish Constitution*, at 103-141.

⁵ The judiciary tend to exercise caution in human rights matters which are not regulated by legislation. For example, in *Fleming v Ireland* [2014] 1 ILRM 153 the Supreme Court at para. 108 clearly stated that the judgment in that particular case would not preclude the Oireachtas from legislating for assisted suicide.

⁶ See University of Oxford, School of Law, research project [resources](#) on *Parliaments, the Rule of Law and Human Rights*.

Ratification process

Similar to the ratification of other international agreements,⁷ the Houses of the Oireachtas do not play a significant role in the ratification of international human rights treaties. The authority to conclude such agreements is exercised by the Minister for Foreign Affairs and Trade on behalf of the Irish Government. In practice, however, relevant Ministers are often engaged in the negotiation of treaties.

All international agreements concluded must be laid before the Houses of the Oireachtas in accordance with Article 29.5.1° of the Constitution. Parliament will only become actively involved in the ratification process if the terms of an international agreement would impose a charge on public funds. In such a case approval of Dáil Éireann must be sought.⁸ At a meeting in 2015 of the Sub-Committee on Human Rights and Equality relative to Justice Matters, Dr. Éilíonóir Flynn⁹ recommended a stronger role for the Oireachtas in the ratification of international human rights treaties.¹⁰

Implementation of international human rights in Irish law

Once ratified, the way in which international human rights law is applied in domestic law depends on whether the

⁷ The treaty ratification process is explained in the L&RS Note, *‘International law: an overview’*, available at: http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/lrsnotes/LRSNoteInternationalLaw_121942.pdf

⁸ Article 29.5.2° of Bunreacht na hÉireann.

⁹ Deputy Director of the Centre for Disability Law and Policy and Senior Lecturer, School of Law, National University of Ireland, Galway.

¹⁰ Committee debate, 14 May 2015, available at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/JU22015051400002?opendocument>

In her evidence, Dr. Flynn referred to examples of national parliament involvement in the ratification of the UN Convention on the Rights of Persons with Disabilities.

State follows a monist¹¹ or dualist legal tradition. Ireland has a dualist legal system, in keeping with the common law tradition. This means that while Ireland is legally bound by the obligations set out in specific treaties in international law, those treaties are not directly applicable in Irish law.

The dualist nature of Irish law is enshrined in Article 29.6 of the Constitution which provides that:

“no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas”.

In *Re Ó Laighléis*¹² the Supreme Court refused to give effect to the European Convention on Human Rights because it purported to grant rights and/or impose obligations additional to those set out in domestic law.¹³ Therefore, the Supreme Court was cautious to obey the separation of powers doctrine since the Constitution clearly states that the Oireachtas has “the sole and exclusive power to make laws for the State”.¹⁴

However, Hogan and Whyte argue that international agreements may have indirect legal effect either as a result of actions of the Executive¹⁵ or a presumption of compatibility of domestic legislation with international obligations.¹⁶ Lysaght also argues that if legislation may be invalidated because it conflicts with a

generally recognised principle of international customary law this principle should logically extend to international agreements.¹⁷

Implementation of human rights in the parliamentary context

Some developments in the Houses of the Oireachtas indicated that there was some movement towards parliament becoming more involved in the realisation of human rights at national level. For example, in 2015 a Sub-Committee on Human Rights and Equality Relative to Justice Matters was established to “examine issues, themes and proposals, legislative or otherwise, in regard to compliance with the human rights of persons within the State.”¹⁸

With the return of the 32nd Dáil, calls have been made by a number of Irish NGOs for the establishment of a new Oireachtas committee on Human Rights. According to the Minister for Justice and Equality, Frances Fitzgerald, the establishment of such a committee is an issue to be considered by the Oireachtas now that a new Government is in place.¹⁹

In 2015, the Committees of the Houses of the Oireachtas were also given a scrutiny role in relation to the newly established Irish Human Rights and Equality Commission (IHREC). The Director must account to the Committees for the performance of the Commission’s functions.²⁰ IHREC’s functions are as follows:

(a) to protect and promote human rights and equality,

¹¹ In general terms, in monist States international law forms part of domestic law once the agreement is ratified.

¹² [1960] IR 93 the Supreme Court held that it could not give effect to the European Convention on Human Rights because it was not part of domestic law.

¹³ The superior courts have maintained a strict position on dualism, particularly in refugee law where applicants routinely raise the argument that the Minister failed to comply with the UN Convention on the Rights of the Child. For discussion see judgment of McDermott J in *Dos Santos & ors -v- Minister for Justice & Equality & ors* [2014] IEHC 559 which was applied in *O.I. r v Refugee Appeals Tribunal* [2015] 6 JIC 1705.

¹⁴ Article 15.2.1° of the Constitution.

¹⁵ Hogan and Whyte (2004), *Kelly: the Irish Constitution*, para 5.3.125, citing *Fakih v Minister for Justice* [1993] 2 IR 427.

¹⁶ *Ibid* at para 5.3.126 citing *O’Domhnaill v Merrick* [1984] IR 151.

¹⁷ Lysaght “The Status of International Agreements in Domestic Law” (1994) 12 *Irish Law Times* 171.

¹⁸ See: <http://www.oireachtas.ie/parliament/mediazone/presreleases/name-27376-en.html>

¹⁹ See, ‘Call for committee to enforce rights recommendations’, Irish Times, 12 May 2016, available at <http://www.irishtimes.com/news/social-affairs/call-for-committee-to-enforce-un-recommendations-on-human-rights-1.2644371>

²⁰ Sections 22-23 *Irish Human Rights and Equality Commission Act 2014*.

(b) to encourage the development of a culture of respect for human rights, equality, and intercultural understanding in the State,
 (c) to promote understanding and awareness of the importance of human rights and equality in the State,
 (d) to encourage good practice in intercultural relations, to promote tolerance and acceptance of diversity in the State and respect for the freedom and dignity of each person, and
 (e) to work towards the elimination of human rights abuses, discrimination and prohibited conduct.²¹

United Nations

The UN General Assembly adopted the Universal Declaration of Human Rights (UDHR) on 10 December 1948. It signalled global commitment to core universality, interdependence and indivisibility, equality and non-discrimination. The Preamble describes the Declaration as a common standard of achievement for all peoples and all nations. The UDHR therefore laid the foundations for international human rights law. Core human rights treaties which form part of the UN human rights architecture built upon those key principles.

The United Nations has nine core human rights instruments. Many of the conventions are supplemented by additional treaties, known as optional protocols. Ireland has ratified the following key instruments:

- International Convention on the Elimination of All Forms of Racial Discrimination;²²

- International Covenant on Economic, Social and Cultural Rights;²³
- International Covenant on Civil and Political Rights;²⁴
- Convention on the Elimination of All Forms of Discrimination against Women;²⁵
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;²⁶
- Convention on the Rights of the Child.²⁷

At the time of writing none of these treaties have been incorporated into Irish law. While Ireland has not yet ratified the Convention on the Rights of Persons with Disabilities, according to the newly appointed Minister of State with Responsibility for Disabilities, Finian McGrath, the government has committed to its ratification within the next six months.²⁸

Operation of UN human rights mechanisms

The United Nations has developed a range of mechanisms, including charter and treaty based mechanisms to both monitor and promote compliance with human rights treaties. The Human Rights Council and the Universal Periodic Review emanate from the United Nations Charter. These bodies are concerned with the **general human rights situation** and cover all UN states as well as a range of thematic areas. The other mechanisms, known as treaty monitoring bodies, were

²¹ Section 10(1) *Irish Human Rights and Equality Commission Act 2014*.

²² Following the enactment of the *Employment Equality Act 1998* and the *Equal Status Act 2000*, the Convention was ratified by Ireland in December 2000 and entered into force in January 2001.

²³ Ireland ratified the Covenant in December 1989.

²⁴ Ireland ratified the Covenant in December 1989.

²⁵ Ireland ratified the Convention in December 1985.

²⁶ Ireland ratified the Convention in April 2002.

²⁷ The UNCRC is the most universally ratified Convention. The United States of America is now the only country which has not ratified it. Ireland ratified the Convention in September 1992.

²⁸ See 'UN Convention on disabilities will be ratified, says Finian McGrath', *Irish Times*, 10 May 2016, available at <http://www.irishtimes.com/news/social-affairs/un-convention-on-disabilities-will-be-ratified-says-finian-mcgrath-1.2641487>

set up to monitor the implementation of state parties obligations set out in **specific instruments**, including the key instruments outlined above which have been ratified by Ireland. The Office of the High Commissioner for Human Rights supports both of these mechanisms and acts as “the principal focal point of human rights research, education, public information, and human rights advocacy activities in the United Nations system”.²⁹

Treaties monitoring bodies

There are treaty bodies to monitor the specific human rights instruments.³⁰ These bodies are made up of committees of independent experts who are appointed for a specific term by the United Nations. The UN treaty monitoring bodies carry out the following functions:

- Reviewing state periodic reports and engaging States in dialogue³¹;
- Public Hearings;
- Assessment of individual complaints or communications;
- Publication of concluding observations;
- Publication of General Comments³²;

²⁹ More information is available at: <http://www.ohchr.org/EN/AboutUs/Pages/HowWeDolt.aspx>

³⁰ The main human rights instruments are: International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Rights of Persons with Disabilities; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; International Convention for the Protection of All Persons from Enforced Disappearance.

³¹ In Ireland the Department of Foreign Affairs and Trade, the Department of Justice and Equality and the Department of Children and Youth Affairs are responsible for preparing such reports.

³² General Comments are the committees’ interpretation of the treaties and their function is to assist state parties in the fulfilment of obligations.

- Facilitation of Days of General Discussion.

Figure 2 below depicts the typical workflow of the United Nations treaty monitoring process.

Figure 2: Treaty monitoring process



Source: L&RS 2016

One of the key outcomes of this process is the publication of concluding observations which includes recommendations from the committee to the state party on what actions it needs to take in order to ensure compliance with the instrument in the future. The functioning of these bodies can be complex and their operation continues to be the subject of review by the Office of the High Commissioner.³³

Human Rights Council

The Human Rights Council is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe. It is also responsible for

³³ OHCHR (2012) *Strengthening the UN human rights treaty body system*.

addressing situations of human rights violations and making recommendations. The Council is comprised of 47 States, which are elected by the United Nations General Assembly. In 2012 Ireland was elected to the Council for the first time. That term will expire in 2015.

Under the special procedures, experts may be appointed by the Human Rights Council, to act as a rapporteur on either thematic human rights issues or the human rights situation in certain countries. This work involves visits to State parties. Ireland has extended an open invitation to all experts appointed under the special procedures. As of 27 March 2015 there are 41 thematic and 14 country mandates.

Universal Periodic Review

In 2006 the UN Human Rights Council established the Universal Periodic Review (UPR), which is a mechanism that allows UN member states to examine each other on their human rights record. According to its operating procedures the UPR consists of three stages of engagement culminating in an “interactive dialogue” where states are encouraged to undertake voluntary commitments and pledges.³⁴ This peer review system has been criticised for its highly political nature. For example, West (2014) contends that States tend to praise the human rights record of their allies and refrain from criticising allies.³⁵

Ireland submitted its first National Report in 2011 and is taking part in the second cycle in 2016. As part of this second cycle, Ireland’s interactive dialogue under the UPR took place in Geneva on 11 May 2016.³⁶ A total of 262 recommendations were made to Ireland,³⁷ of which 152 have

³⁴ Human Rights Council Resolution 5/1, June 18, 2007.

³⁵ West (2014) “Piercing the veil of state sovereignty—the role of the universal periodic review in the enforcement of human rights” (32) *Irish Law Times* 73.

³⁶ For further information see: <http://www.upr.ie/> and <http://www.irishtimes.com/news/social-affairs/many-states-question-irish-record-on-abortion-at-un-1,2644354>

³⁷ Further information on the UPR is available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

been immediately accepted. These include recommendations in relation to the need for Ireland to ratify the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to the UN Convention against Torture. Ireland has committed to further study another 97 recommendations, including recommendations for reform of the State’s abortion laws. Only 13 of the 262 recommendations were rejected.

Impact of UN mechanisms

UN mechanisms and legal practice

As set out above Ireland is a dualist State, which means that UN treaties do not form part of domestic law. At the time of writing no UN human rights treaties, have been incorporated into Irish law. In *Kavanagh v Governor of Mountjoy Prison*³⁸ it was held that the decision of a UN treaty monitoring body, in this case the Human Rights Committee, did not represent a legally binding decision. In addition, it was held that ratification of a UN treaty (in this case the International Covenant on Civil and Political Rights) did not give rise to a legitimate expectation that the State would respect the terms of the Covenant. This was relied upon more recently by Clark J in *Olaniran & Ors v. Minister for Justice Equality and Law Reform*:

“The fact that Ireland is a signatory to the CRC [Convention on the Rights of the Child] confers no rights on individuals to rely on its provisions before the domestic courts nor does it impose any obligations on the Irish state to police the adherence of other states who are signatories to the same Convention to that instrument.”³⁹

These decisions illustrate the limited potential of UN human rights instruments to have an impact on Irish law in practice. However, under international law Ireland is obliged to respect the terms of human

³⁸ [2002] 3 IR 97.

³⁹ [2010] IEHC 83.

rights treaties. Article 18 of the *Vienna Convention on the Law of Treaties 1969* provides “a State is obliged to refrain from acts which would defeat the object and purpose of a treaty”. This obligation applies when the State has either signed or ratified a treaty or even consented to be bound by the treaty.

UN mechanisms and parliament

In 2014 the Seanad Public Consultation Committee invited submissions and held hearings on Ireland’s compliance with the International Covenant on Civil and Political Rights in advance of Ireland’s examination by the Human Rights Committee in 2014.⁴⁰ The Committee also produced a report of its findings which was sent to the Human Rights Committee to consider during its deliberations. Some of the issues raised by the Seanad Committee were also highlighted by the UN Human Rights Committee in its Concluding Observations,⁴¹ including the following:

- Survivors of symphysiotomy;
- Gender-based violence;
- Human trafficking;
- Direct provision;
- Gender recognition;
- Traveller ethnicity;
- Education and patronage.

While the Concluding Observations do not have any legal implications, Ireland remains accountable to the UN for the implementation of obligations set out in the treaties. With respect to the ICCPR, the previous Government (2011 – 2016) provided supplementary information to the Committee on symphysiotomy, institutional abuse and prison conditions.⁴²

⁴⁰ Information on the Seanad Public Consultation Committee is available at: http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/public-consultation-seanad/

⁴¹ Human Rights Committee (2014), [Concluding Observations](#).

⁴² Follow-up report available at this [link](#).

Council of Europe

In addition to the UN, another organisation with key Human Rights competence is the Council of Europe. The Council of Europe describes itself as “the continent’s leading human rights organisation”.⁴³ This is primarily attributable to the fact that all 47 member states have ratified the European Convention on Human Rights which is implemented by the European Court of Human Rights and has been indirectly incorporated into Irish law via the *European Convention on Human Rights Act 2003* (hereafter ‘the ECHR Act’). The ECHR is the Council of Europe’s flagship treaty, which primarily protects civil liberties such as the right to a fair trial and freedom of expression.⁴⁴

The European Social Charter, which has a committee rather than a court as its implementation mechanism, is the other key instrument in the Council of Europe’s human rights infrastructure.

The Council of Europe also has a number of thematic instruments, many of which are focused on protecting the rights of minorities. Ireland has ratified the following conventions:⁴⁵

- Convention for the Protection of Human Rights and Fundamental Freedoms;
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- Framework Convention for the Protection of National Minorities;

⁴³ More information available at this [link](#).

⁴⁴ The ECHR differentiates between absolute (Article 3 prohibits torture and inhuman and degrading treatment) and non-absolute rights. It is not possible for state parties to justify a violation of an absolute right. For discussion see *Saadi v Italy*, Application no. 37201/06.

⁴⁵ Ireland has not ratified the European Charter for Regional or Minority Languages or the Convention on preventing and combating violence against women and domestic violence.

- Council of Europe Convention on Action against Trafficking in Human Beings.

In the 2015 Autumn legislation programme, published by the previous government (2011 – 2016), it was announced that a Bill would be published to give legislative effect to the UN Optional Protocol to the Convention on Torture (OPCAT) and to put the Council of Europe inspection regime on a statutory footing.

Operation of Council of Europe human rights mechanisms

European Court of Human Rights

The European Court of Human Rights is the key human rights enforcement mechanism in the Council of Europe. The Court was set up in 1959 and determines violations by Member States of rights under the ECHR.

In 2012 a high level conference on the future of the European Court of Human Rights was held at the initiation of the UK to discuss key operational challenges facing the Court, such as the treatment of applications to the court and the execution of judgments. On a more general level the conference discussed the implementation of the Convention at national level; the interaction between the Court and national authorities and the future of the Court.⁴⁶ A further high level conference on the implementation of the European Convention on Human Rights was held in Brussels in March 2015.⁴⁷

The operation of the European Court of Human Rights has been debated at national level in the UK for a number of years.⁴⁸ In May 2015 it was suggested in

⁴⁶ European Court of Human Rights (2012) *Brighton Declaration*, available at:

http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf

⁴⁷ European Court of Human Rights (2015) *Brussels Declaration*, available at:

http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf

⁴⁸ Klug and Williams “The UK’s 1998 Human Rights Act: Clarity and Confusion” in Egan, Thornton and

the Queen’s Speech that a Bill was being prepared to repeal the *Human Rights Act 1998*, which indirectly incorporates the ECHR into UK law. This move was criticised by the National Human Rights Institutions of Great Britain, Northern Ireland and Scotland.⁴⁹ At a meeting of the Joint Committee on the Implementation of the Good Friday Agreement in June 2015 both the Northern Ireland Human Rights Commission (NIHRC) and the Irish Human Rights and Equality Commission (IHREC) met with the Committee to express their concerns about the impact this might have on the operation of the Good Friday/Belfast Agreement.⁵⁰

Treaty monitoring mechanisms

The Council of Europe monitoring mechanisms are similar to the UN mechanisms in the sense that each body is composed of independent experts and are primarily linked to Council of Europe treaties, with the notable exception of the European Commission and Racial Intolerance (ECRI).⁵¹ The Council of Europe bodies also use similar tools to the UN mechanisms and the primary mode of monitoring is through the review of State periodic reports. The similarity with the UN monitoring processes is evident in the workflow employed by the Group of Experts on Action against Trafficking in Human Beings. On the other hand there are some activities which Council of Europe bodies engage in which are not pursued by UN bodies. For example, some bodies, such as the Committee on the Prevention of Torture also visit the state party under review to observe compliance with the treaty in question.⁵²

Walsh (2014) *Ireland and the European Convention on Human Rights: 60 Years and Beyond*, (Bloomsbury), at 87-106.

⁴⁹ The open letter is available at this [link](#).

⁵⁰ Oireachtas debate, 25 June 2015, available at: <http://oireachtasdebates.oireachtas.ie/debates%20authoring/DebatesWebPack.nsf/committeetakes/GFJ2015062500002>

⁵¹ ECRI was established by *Resolution on the Statute of the European Commission and Racial Intolerance*. For further information, see:

http://www.coe.int/t/dghl/monitoring/ecri/about/ECRI_statute_en.asp

⁵² See <http://www.cpt.coe.int/en/visits.htm>

Impact of Council of Europe’s human rights mechanisms

In contrast to the UN, the Council of Europe’s human rights mechanisms provide a **forum for litigation** via the **European Court of Human Rights**.

European Court of Human Rights

Having exhausted all domestic remedies in Ireland (i.e. following a decision of the Supreme Court), applicants may litigate alleged human rights violations before the European Court of Human Rights. Ireland ranks among the state parties with the fewest human rights violations.

Between 1949 and 2014 only 32 judgments were handed down with respect to Ireland and in six of those cases no violation was found. Half of these cases relate to alleged violations of Article 6 ECHR, which protects the right to a fair trial, and many of those decisions were in respect of the length of legal proceedings in Ireland.⁵³ Ireland has also been found to be in breach of Article 8 ECHR (the right to family and private life) on five occasions and many of these cases have had a considerable impact on Irish law. For example, *Airey v Ireland*⁵⁴ led to the introduction of a civil legal aid scheme and *Norris v Ireland*⁵⁵ led to the decriminalisation of homosexuality.

Collective complaints under the Revised Social Charter

There is a facility for collective complaints under the Revised European Social Charter to be made to the European Committee of Social Rights (ECSR).

At the time of writing, the outcome of one collective complaint lodged against Ireland

⁵³ A recent example of such a decision is *McFarlane v Ireland*, Application no. 31333/06, where the prosecution of the applicant over a ten and a half year period was found to be so excessive that it amounted to a breach of Article 6.

⁵⁴ (1979–80) 2 EHRR 305.

⁵⁵ Application no. 10581/83.

is pending. This complaint relates to social housing.⁵⁶

The decision of the ECSR on a complaint against Ireland relating to the provision of appropriate accommodation for travellers was recently made public.⁵⁷ The committee unanimously found a violation of Article 16 of the Charter (right of the family to social, legal and economic protection) on the grounds of insufficient accommodation for Travellers and the inadequate condition of many Traveller sites. Breaches were also found on the grounds that Irish law provides inadequate safeguards for Travellers threatened with eviction and that evictions are carried out in practice without the necessary safeguards.

Box 1 overleaf provides an example of the impact of a recent ECSR decision.

Box 1: Impact of European Committee of Social Rights decisions on corporal punishment

In the past 15 years two collective complaints have been lodged against Ireland claiming that the failure to prohibit corporal punishment of children in all forms violates Article 17 of the *Revised European Social Charter*.⁵⁸ Article 17 states: “children and young persons have the right to appropriate social, legal and economic protection”.

In May 2015, the European Committee of Social Rights concluded Irish law

⁵⁶ *FIDH v Ireland*, Complaint No. No. 110/2014

⁵⁷ *European Roma Rights Centre v Ireland*, Complaint No: 100/2013. The decision of the European Committee of Social Rights became public on 16th May 2016. Further information is available at http://www.coe.int/en/web/turin-european-social-charter/home/-/asset_publisher/Vugk5b0dLMWq/content/the-decision-on-the-merits-of-the-complaint-errc-v-ireland-became-public?_101_INSTANCE_Vugk5b0dLMWq_viewMode=view/

⁵⁸ *World Organisation against Torture (OMCT) v Ireland*, Complaint No. 18/2003, [27 May 2005](#); *All Children (APPROACH) Ltd. v. Ireland* Complaint No. 93/2013, [27 May 2015](#).

breaches Article 17 due to the lack of prohibition.⁵⁹

In December 2015, the then Minister for Children and Youth Affairs, James Reilly, signed a commencement order which removed the defence of 'reasonable chastisement' where corporal punishment was used against a child.

European Union

Although human rights were not specifically mentioned in the founding treaties of the European Union, the European Court of Justice⁶⁰ confirmed human rights as being general principles of Community law.⁶¹ After many years of developments in the case-law and modification of treaties, the Charter of Fundamental Rights of the European Union (hereafter 'the Charter') now codifies the understanding of human rights law within the European Union. Following the entry into force of the Lisbon Treaty, the Charter received the same constitutional status as the other EU treaties, namely the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU).

Rights contained in the Charter

The Charter, unlike the ECHR, enshrines **civil and political rights as well as social and economic rights** and is organised by title as follows:

- Title 1: Dignity (Articles 1-5) includes the right to human dignity and the prohibition of torture, inhuman and degrading treatment, slavery and forced labour;

⁵⁹ *All Children (APPROACH) Ltd. v. Ireland* Complaint No. 93/2013, [27 May 2015](#).

⁶⁰ Following the Lisbon Treaty, the Court was renamed the Court of Justice of the European Union (CJEU).

⁶¹ Case 11/70 *Internationale Handelsgesellschaft*.

- Title 2: Freedom (Articles 6-19) includes the right to work, the right to freedom of expression and the right to the protection of personal data;
- Title 3: Equality (Articles 20-26) includes a non-discrimination guarantee;
- Title 4: Solidarity (Articles 27-38) includes the right to fair working conditions and the right to strike. This title also includes principles relating to social security;
- Title 5: Citizen's Rights (Articles 39-46) sets out the rights of EU citizens already formulated in EU treaties, e.g. the right to freedom of movement;
- Title 6: Justice (Articles 47-50) includes the right to a fair trial and an effective remedy.

Operation and impact of the Charter

The Charter also contains some guidance about the scope and application of the Charter as follows:

- Article 51(1) provides that the Charter applies to all European Union institutions when applying EU law;
- Article 51(2) states that the Charter does not extend beyond Union law;
- Article 53 states that the operation of the Charter should not interfere with the ECHR or national constitutions.

Since the Charter may only be invoked when a domestic Court is applying EU law, the impact of the Charter has been quite limited. However, Kingston and Thornton (2015) note the Charter has had an impact on asylum and immigration law and predict "an even greater impact in the coming years".⁶² It has also been

⁶² Kingston and Thornton (2015) [Report on the application of the European Convention on Human](#)

suggested that since the Charter has brought human rights within the remit of the Court of Justice of the European Union (CJEU), the Court has made significant decisions on key human rights issues, particularly data protection and the right to privacy.⁶³

The Lisbon Treaty, the Charter and the ECHR

The Lisbon Treaty also included a provision enabling the EU to become a state party to the ECHR. Following years of negotiations a draft accession agreement was issued in 2013 which was rejected by the CJEU.⁶⁴ At the time of writing the European Union remains committed to the accession process.

European Convention on Human Rights Act 2003

Ireland ratified the European Convention on Human Rights in 1953. Fifty years later the *European Convention on Human Rights Act 2003* (hereafter referred to as 'the ECHR Act') was enacted. It is a common misconception that the ECHR Act incorporated the Convention into Irish law. In fact, the long title of the Act states that its purpose is "to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention". The status of the Convention was set out clearly by McKechnie J in *Foy v An tÁrd-Clárúitheoir*:

"It is a misleading metaphor to say that the Convention was incorporated into domestic law. It was not. The rights contained in the Convention are now part of Irish law. They are so by reason of the Act of 2003. That is their source. Not the Convention. So it

Rights Act 2003 and the EU Charter of Fundamental Rights: Evaluation and Review.

⁶³ See 'European Court of Justice is human rights Rottweiler', Irish Times, 28 April 2016, available at <http://www.irishtimes.com/business/technology/european-court-of-justice-is-human-rights-rottweiler-1.2626809>

⁶⁴ *Opinion 2/13.*

is only correct to say, as understood in this way, that the Convention forms part of our law."⁶⁵

This view was reiterated by the Supreme Court in *McD v L*,⁶⁶ where Murray CJ stated:

"Even though the contracting parties undertake to protect convention rights by national measures, the Convention does not purport to be directly applicable in the national legal systems of the high contracting parties. Nor does the Convention require those parties to incorporate the provisions of the Convention as part of its domestic law. So far as the Convention is concerned it is a matter for each contracting party to fulfil its obligations within the framework of its own constitution and laws. The Convention does not seek to harmonise the laws of the contracting states but seeks to achieve a minimum level of protection of the rights specified in the Convention leaving the states concerned to adopt a higher level of protection should they choose to do so."⁶⁷

The decision in *McD v L* was also followed in *M.D. (a minor) v Ireland*,⁶⁸ where Denham CJ held that it is not possible for an administrative action of the State to be "in breach of" the Convention because this would presume that the Convention has direct effect in Irish law and that the Court "has the power to grant a declaration that a section is in breach of the Convention".⁶⁹

In general terms, the Act places obligations on State institutions to comply with the Convention and provides remedies for individuals whose rights have been infringed. These obligations are

⁶⁵ [2007] IEHC 470, at para 93.

⁶⁶ *McD v L* [2010] 2 IR 199.

⁶⁷ *Ibid*, at 279.

⁶⁸ *M.D. (a minor) v Ireland* [2012] IESC 10.

⁶⁹ *Ibid* at para 59.

summarised in Table 1 below.

The Act has been criticised by many commentators consistently throughout the years. For example, when the legislation was enacted it was suggested that given the overlap between the Constitution and the ECHR, litigants may be adequately compensated by remedies already available for a breach of constitutional rights.⁷⁰ Having examined the operation of the Act in light of the former Chief Justice’s comments, Doyle and Ryan concluded that the “the picture to emerge is one of restraint and caution”.⁷¹

Table 1: ECHR Act 2003 - summary of key provisions

Section	Summary of provision
S. 2 – the interpretative obligation	This provision requires the judiciary to interpret Irish law in a manner which is compatible with the Convention.
S. 3(1) – the obligation on organs of the State	This provision requires organs of the State (including the Oireachtas but excluding the courts) to perform its functions in a manner which is compatible with the Convention.

⁷⁰ For early criticism of the Act see Keane (2003) “Issues for the Judiciary in the Application in the Application of the ECHR Act 2003”, presented at the Irish Human Rights Commission on New Human Rights Legislation, 18 October 2003. See also Egan, Thornton and Walsh *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (2014 Bloomsbury).

⁷¹ Doyle and Ryan (2011) “Judicial Interpretation of the European convention on Human Rights Act 2003: Reflections and Analysis”(1) *Dublin University Law Journal* 369. See also O’Connell (2009) “Watched Kettles Boil (Slowly): The Impact of the ECHR Act 2003” in Kilkelly (ed.) *ECHR and Irish Law* (2nd ed., Jordans) at 1-19.

S. 3(2) – damages	This allows individuals who have suffered “injury, loss or damage” to recover damages.
S. 4 – interpretation of Convention provisions	This provision requires the judiciary to take account of judgments, decisions and opinions of the European Court of Human Rights as well as ensuring these are considered when interpreting Convention provisions.
S. 5 – declaration of incompatibility	This is one of the main remedies provided by the ECHR Act 2003. It may be issued by a court where Irish legislation is deemed to be inconsistent with the Convention.

Source: L&RS 2016

Many commentators have criticised individual sections of the Act and highlighted the restrictive nature of the legislation as a reason for the arguably minimal impact of the Convention on the development of Irish law.⁷² However, in the frequently litigated area of asylum and immigration law, Kingston and Thornton (2015) note that the Convention can result in “an additional measure of protection”.⁷³

⁷² DeLondras (2011) “Using the ECHR in Irish Courts: More Whisper than Bang?”, PILA seminar.

⁷³ Kingston and Thornton (2015) [Report on the application of the European Convention on Human Rights Act 2003 and the EU Charter of Fundamental Rights: Evaluation and Review](#). This report examines a range of areas including mental health law, criminal law, child and family law.

Declaration of incompatibility

Section 5(1) of the ECHR Act provides that the superior courts may make a declaration that “a statutory provision or rule of law is incompatible with the State’s obligations under the Convention provisions”. This is the only section of the Act which makes specific reference to the Houses of the Oireachtas.

The Taoiseach is required by section 5(3) of the ECHR Act to lay a copy of any order containing a declaration of incompatibility before the Houses of the Oireachtas within 21 days of the order being made. However, the Taoiseach is not obliged to state what remedial action is required.⁷⁴ Moreover, the Houses of the Oireachtas are not required to debate the decision. According to the Explanatory Memorandum which was published alongside the Bill, the purpose of this provision was to provide a notification mechanism for the Houses of the Oireachtas.⁷⁵ DeLondras and Kelly suggest that the purpose of this provision was to ensure that Government decisions could be challenged within parliament.⁷⁶ Box 2 provides an example of its operation.

Box 2: Impact of the declaration of incompatibility mechanism

At the time of writing only one High Court order containing a declaration of incompatibility has been laid before the Houses of the Oireachtas; *Foy v An tArd Cláráitheoir* [2007] IEHC 470. In that case the applicant sought a new birth certificate recognising her gender as a woman. The declaration was first issued in 2007 but the State initially lodged an appeal. Ultimately the High Court order was laid before the Houses of the Oireachtas in 2010. There is no record of

a debate in either of the Houses following the laying of the order but the Gender Recognition Advisory Group had then been established to make recommendations to the Government on introducing legislation, which was ultimately passed by the Houses as the *Gender Recognition Act 2015*.

One of the key criticisms of the operation of the declaration of incompatibility has been the length of time it took to introduce legislation. Michael Farrell, senior solicitor with the Free Legal Advice Centres (FLAC) represented Dr. Foy throughout the legal proceedings. Comparing the Irish legislation to its counterpart in the UK, the Human Rights Act 1998, Farrell highlights the effectiveness of the ‘fast-track’ procedure in the UK legislation whereby a government Minister could amend the offending legislation to bring it into line with the Convention following a Declaration of Incompatibility.⁷⁷ This procedure has been used in 18 out of the 19 cases where Declarations of Incompatibility have been made. Nevertheless, Ní Muirthile comments that the Strasbourg jurisprudence has helped to “move the conversations on ... in Ireland”.⁷⁸

Conclusion

It is clear from the discussion above that the ways in which international law operates in Ireland curtails the impact on domestic law. For example, the dualist nature of Irish law means the international human rights treaties which Ireland ratified do not have any legal standing in Irish courts. In addition, the implementation mechanisms for those treaties are also weakened because their decisions are not

⁷⁴ *Fennell v Dublin City Council* [2005] 1 IR 604, at 619.

⁷⁵ Explanatory Memorandum to European Convention on Human Rights Bill 2001, available at: <http://www.oireachtas.ie/documents/bills28/bills/2001/2601/m2601.pdf>

⁷⁶ DeLondras and Kelly (2012) *European Convention on Human Rights Act: Operation, Impact and Analysis*, at 192.

⁷⁷ Farrell (2015) “Foy case highlights need to strengthen European Convention on Human Rights Act”, PILA Bulletin July 2015.

⁷⁸ Ní Muirthile (2014) “Article 8 and the Realisation of the Right to Legal Gender Recognition” in Egan, Thornton and Walsh (eds.) *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury, Dublin) at 218.

binding on Irish courts. Even in the case of the European Convention on Human Rights, which has been indirectly incorporated into Irish law, its impact is limited by the operation of the ECHR Act 2003.

However, the examples provided above give some insight into the potential of international human rights law to “move the conversation on”, as was the case with gender recognition. Lastly, given the fact that the operation of international human rights law is underpinned by political processes, it is not surprising that the role of parliament in the promotion and protection of human rights is becoming more relevant.