

**PART I**  
**IMPLEMENTING THE ECHR IN**  
**IRELAND: PAST, PRESENT AND**  
**FUTURE**

# Chapter 1

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## Introduction

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*“The democratic world lacks a charter of what it guarantees to its people. It is essential that such a charter should be provided and that, once provided, it should be scrupulously observed by big and small nations alike. It should be a banner around which those who believe in national, personal, political and religious liberty throughout the world can rally”.*<sup>1</sup>

[1.01] With these words, Seán MacBride articulated, in the Dáil, Ireland’s initial hopes with respect to the Council of Europe’s Convention on Human Rights, then in its final stages of drafting. Ireland had been an enthusiastic participant in the birth of the Council and played a significant role in the drafting of the Convention.<sup>2</sup> The historical record is clear<sup>3</sup> that there was cross-party support in the Dáil<sup>4</sup> for such forthright engagement for a number of reasons: first, in common with all European nations that took part in its creation, Ireland believed that an organisation dedicated to democracy and the rule of law was vital to the maintenance of peace in Europe by acting as a rampart against the future spread of totalitarianism;<sup>5</sup> and second, on a far more parochial level, Ireland saw the

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  1. Statement of Seán MacBride, Minister for External Affairs, Dáil Debates, 12 July 1950, vol 122(8), col 1606.
  2. See generally, Schabas, “Ireland, the European Convention on Human Rights and the Personal Contribution of Seán MacBride” in Morison, McEvoy & Anthony, *Human Rights, Democracy, and Transition: Essays in Honour of Stephen Livingstone* (OUP, 2006).
  3. On Ireland’s participation in the development of the Council of Europe, see Kennedy & O’Halpin, *Ireland and the Council of Europe* (Council of Europe Publishing, 2000); Hederman, *The Road to Europe: Irish Attitudes 1948–61* (IPA, 1983).
  4. See Statement of Mr deValera, Dáil Debates, 12 July 1949, vol 117(5), col 706: “... I can say for my part, and I think on behalf of our Party, that we support the ratification and that every step that is reasonably taken to bring about the unity of the States of Europe we will support ...”.
  5. In setting out the rationale for Ireland’s active participation in the Council, MacBride alluded to the threat of war, the threat of communism and Russian imperialism and commented that: “To those who, through cynicism or lack of idealism, may consider that Ireland has no mission to perform in this field, (contd .../)

Council as a vehicle for the newly independent State to establish its own identity on the international stage,<sup>6</sup> as well as a means of drawing attention to the festering sore of Partition.<sup>7</sup> Even the Convention, it seems, was perceived by MacBride as a potential path to reunification.<sup>8</sup>

[1.02] Ireland's contribution to the drafting of the Convention manifested in two significant ways: first, the state led the charge for the inclusion of three rights that were to be included later in the terms of the First Protocol: protection of property, the right to education (including, in particular, parental control over the choice of such education) and the right to free elections;<sup>9</sup> and second, in its strong support for the inclusion of a right of individual petition. In this respect, Ireland was the first State to accept the compulsory jurisdiction of the Court when it ratified the Convention on 25 February 1953 and the second, after Sweden, to accept the right of petition to the European Commission of Human Rights.<sup>10</sup> The fact that the state was in the unique position of being the only signatory with significant experience of rights review<sup>11</sup> undoubtedly made it less

5. (contd) I would like to point out that Ireland is very practically and vitally interested in ensuring the peace of Europe and of the world": Dáil Debates, 12 July 1950, vol 122(8), cols 1600–1606.
6. Kennedy, "The Foundation and Consolidation of Irish Foreign Policy: 1919–45" in Tonra, Kennedy, Doyle and Dorr (eds), *Irish Foreign Policy* (Gill & Macmillan, 2012) 20, 34–35.
7. Reporting to the Dáil on Ireland's representation in the Council in its first year of operation, MacBride stated: "From a national point of view, they succeeded in focussing the attention of the leading parliamentarians of the principal countries of Western Europe on the question of the unnatural division of our country, and in making known to them the facts concerning this injustice ... if close cooperation is to be achieved between European nations, the first essential is to discuss and, if possible, remove the causes of friction that may exist between the nations that compose the Council of Europe. Partition is certainly one of the outstanding causes of friction in Western-Europe today": Dáil Debates, 12 July 1950, vol 122(8), cols 1591–1592.
8. European Convention Basis for Irish Unity? (1960) *Irish Times*, 30 November, Mac Bride also apparently saw the Convention as potentially contributing to German unity: "Mr. MacBride's Proposal to Europe Council": (1951) *Irish Independent*, 22 September.
9. See Kennedy & O'Halpin, *Ireland and the Council of Europe* (Council of Europe Publishing, 2000) 86; and Schabas, "Ireland, the European Convention on Human Rights and the Personal Contribution of Seán MacBride" in Morison, McEvoy and Anthony, *Human Rights, Democracy, and Transition: Essays in Honour of Stephen Livingstone* (OUP, 2006), 18–19.
10. See report on Ireland's ratification in (1953) *Irish Independent*, 25 February.
11. See Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe" (2012) 1 J Global Constitutionalism 53, 65.

distrustful than other states of the prospect of an international court of human rights, empowered to issue binding decisions on whether a state had violated any of the rights in the Convention.<sup>12</sup> Like most of the states that favoured an individual right of petition to the Court, Ireland clearly did not envisage that the Court's focus would ever be turned in its direction.<sup>13</sup> However, the significance of the government of the day's willingness to embrace the right of individual petition was evidently not lost in all quarters. The *Irish Independent's* editorial marking the government's ratification in Strasbourg warned, in tones that were to resurface years later in debates regarding incorporation of the Convention, that it conferred on:

“... an external judicial body the right to adjudicate on matters of purely Irish concern ... It seems to us that this external court may even reverse or render nugatory a decision made by our Supreme Court”.<sup>14</sup>

[1.03] At first, these dire predictions appeared to be wide of the mark, as the right of petition was initially very slow to take hold.<sup>15</sup> The Commission initially received very few applications,<sup>16</sup> while the Court itself was not established until 1959, following acceptance of its jurisdiction by the requisite eight Contracting States.<sup>17</sup> In an ironic twist, one of its most enthusiastic supporters found itself to

12. During the drafting, MacBride is on record as having stated that a “...convention on human rights which did not grant any right of redress to individuals was not worth the paper it was written on”: *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights* (Martinus Nijhoff, 1981) vol 1, 112.
13. In his memorandum to government as to whether Dáil approval was necessary to ratify the Convention, the Attorney General of the day apparently advised that “in practice ... the likelihood of this country being brought before the Commission or the Court is very remote, as all the “rights” set out in the Convention are already conceded here”: See Schabas, “Ireland, the European Convention on Human Rights and the Personal Contribution of Seán MacBride” in Morison, McEvoy and Anthony, *Human Rights, Democracy, and Transition: Essays in Honour of Stephen Livingstone* (OUP, 2006), 19.
14. “A Grave Issue” (1953) *Irish Independent*, 28 February.
15. Steven Greer characterizes the first 30 years of the Convention's operation as a period of “dormancy”: Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006) 34–36.
16. Kennedy & O'Halpin report that the Commission (established in 1954) only received 675 applications between 1955 and 1959, the vast majority of which were deemed inadmissible under the Convention: *Ireland and the Council of Europe* (Council of Europe Publishing, 2000), 126.
17. According to the initial text of Article 56 of the Convention, the Court could only be established after eight of the Contracting States had accepted its jurisdiction under the terms of Article 46.

be the first in the dock as a result of the proceedings in *Lawless v Ireland*.<sup>18</sup> The ruling of the Court in *Lawless* was of immense significance in procedural and substantive terms.<sup>19</sup> First, it resulted in the Court softening the barrier that initially existed in the Convention, preventing individuals from bringing cases directly to the Court.<sup>20</sup> In *Lawless*, the Court ruled that notwithstanding the strict terms of the Convention, the Court would be entitled to hear an applicant as a witness in proceedings before it and that the Commission could, in any event, represent the applicant's views before the Court of its own volition or if called upon to do so.<sup>21</sup> In this respect, the judgment introduced a measure of equality of bargaining power between the state and the individual in terms of representation before the Court that otherwise would have been stifled by a narrower interpretation of the Convention.<sup>22</sup> On the merits, the Court's ruling also clarified an important issue concerning the application of Article 15 of the Convention which allows states to derogate from their obligations in times of war or other public emergency. Whereas the Irish government had sought to argue that governments must not be second-guessed in their assessment of whether a state of emergency existed in their jurisdiction or on the measures required to contain it, the Court's judgment clarified that the Strasbourg institutions did have competence to review whether such assessments were "reasonably deduced" on the facts.<sup>23</sup> While the Court was criticised for the deferential stance which it ultimately took to the government's views on the

18. The Court issued three separate judgments in the proceedings. The judgments in regard to preliminary objections raised by the Irish government, *Lawless v Ireland (No 1)* (14 November 1960) and questions of procedure *Lawless v Ireland (No 2)* 7 April 1961, both available on the Court's HUDOC website at: <http://www.echr.coe.int/Pages/home.aspx?p=home&c=>. The judgment on the merits of the case in *Lawless v Ireland (No 3)* is reported in (1979–1980) 1 EHRR 15.
19. See generally, O'Higgins, "The Lawless Case" (1962) 20(2) Cambridge Law Journal 234–251; and Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010) 201–204.
20. Under Article 44 of the original text of the Convention, only the High Contracting Parties and the Commission had the right to bring a case before the Court; the individual applicant did not have a right of access to the Court.
21. *Lawless v Ireland (No 1)* (14 November 1960), point Iiii.
22. O'Higgins, "The Lawless Case" (1962) 20(2) Cambridge Law Journal 234–251, 247. A contemporary text described the outcome as "... one of the outstanding landmarks in the international protection of human rights", Morrison, *The Developing European Law of Human Rights* (Leyden: Sitjhoff, 1967) 63 cited in Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010) 204 (n 174).
23. *Lawless v Ireland (No 3)* (1979–1980) 1 EHRR 15, para 37.

latter points,<sup>24</sup> the ruling was nonetheless extremely important, as Bates notes, in disclosing "... just how deep Strasbourg review could *potentially* cut into the constitutional structures of sovereign States".<sup>25</sup>

[1.04] Ireland's participation in the Convention system was to give rise to another ground breaking moment in the Court's evolution by its initiation of the proceedings and referral to the Court of the circumstances in *Ireland v United Kingdom*.<sup>26</sup> The case concerned the use of internment without trial again<sup>27</sup> – this time by the British government of suspected terrorists in Northern Ireland – and the use by security forces of certain interrogation techniques on those detained.<sup>28</sup> Not surprisingly, the case proved to be highly significant in procedural terms – being the first inter-state case to reach the Court under the Convention system<sup>29</sup> – and controversial in substantive terms, primarily because of the Court's interpretation of the prohibition on torture in Article 3.<sup>30</sup> In that respect, the Court laid down some enduring parameters on the scope of that provision, holding that treatment at issue must reach a minimum level of severity and must

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24. O'Higgins, "The Lawless Case" (1962) 20(2) Cambridge Law Journal 234–251, 250: "... it must be confessed that along with the majority of his fellow inhabitants of the Irish Republic the writer was unaware of a threat which could not have been met by the ordinary law of the land". See also Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010), 206–207.
  25. Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010), 207.
  26. *Ireland v United Kingdom* (1979–80) 2 EHRR 25.
  27. It is interesting to note here the unfortunately inaccurate prediction of Seán MacBride (who had acted for *Lawless* in the proceedings) in the aftermath of the Court's judgment in that case that it would be unlikely, in the light of the Court's ruling "... that any other government will attempt to resort to internment without trial": (1961) *Irish Times*, 3 July.
  28. See generally Dickson, *The European Convention on Human Rights and the Northern Ireland Conflict* (OUP: 2010), 53–68 and 147–153; Bonner, "Of Outrage and Misunderstanding: Ireland v United Kingdom – Governmental Perspectives on the Inter-State Application under the European Convention on Human Rights" (2014) 34 (1) *Legal Studies* 47–75; Donahue, "Human Rights in Northern Ireland: Ireland v United Kingdom" (1979–1980) 3 *Boston College International and Comparative Law Review* 377; and Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010), 271–276.
  29. As to this, see generally Scott Leckie, "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?" (1987–88) 10 *Human Rights Quarterly* 249.
  30. Article 3 provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". (contd .../)

be evaluated on the basis of subjective and objective facts.<sup>31</sup> Further, it held that a “special stigma” attached to the concept of torture;<sup>32</sup> and that the distinction between “torture” and “inhuman and degrading treatment” derived mainly from a distinction between the intensity of the suffering inflicted.<sup>33</sup> But whereas the Commission on Human Rights, in assessing the facts of the case, had reached the view that the five techniques at issue constituted “torture” within the meaning of Article 3, the Court notoriously reached the less damning conclusion that they reached the level of “inhuman and degrading” treatment as opposed to torture.<sup>34</sup> Though the Court’s ruling was again the subject of widespread criticism at the time,<sup>35</sup> the basic principles articulated in *Ireland v*

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30. (contd) As with *Lawless*, the case also concerned the question of whether the State’s derogation under Article 15 of the Convention in respect of its usage of extrajudicial detention was valid such as to rule out a finding of a violation of Article 5 on the facts. The Court’s ruling in the affirmative on this point was heavily critiqued at the time for being overly deferential; this time not as regards the existence of an emergency, but because of its acceptance of the government’s estimation that the measures in question were “strictly required” to avert it: See, for example, Bonner, “*Ireland v United Kingdom*” (1978) ICLQ 897, 905: “What can be criticised is the Court’s failure to examine any alternatives to internment ... Surely such an approach can be expected of a body charged with the protection of human rights and aiming to give guidance to decision-makers in States party to the Convention.”
  31. *Ireland v United Kingdom* (1979–80) 2 EHRR 25: “... [I]ll treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc” (para 162).
  32. *Ireland v United Kingdom* (1979–80) 2 EHRR 25: “... it was the intention that the Convention with its distinction between torture and inhuman treatment should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.”
  33. *Ireland v United Kingdom* (1979–80) 2 EHRR 25: “In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction embodied in Article 3, between this notion and that of inhuman or degrading treatment. In the Court’s view, this distinction derives principally from a difference in the intensity of the suffering inflicted” (para 167).
  34. *Ireland v United Kingdom* (1979–80) 2 EHRR 25. The Court held that although the five techniques, “... as applied in combination, undoubtedly amounted to inhuman and degrading treatment ... they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood” (para 167).
  35. See Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010), 274–276. (contd .../)

*United Kingdom* are still enduring and form the basis of every substantive judgment on the issue to this day. Moreover, the Court has demonstrated in subsequent case law that its attitude to the application of the concept of torture is far more demanding (or less ideologically conservative)<sup>36</sup> than was clearly the case in the late 1970s.<sup>37</sup>

[1.05] Following these two high profile cases, Ireland's engagement with the Strasbourg Court became sporadic in nature, arising initially in areas where the Convention's reach was noticeably at variance with the fundamental rights provisions of the Irish Constitution, such as private and family life (see further Section II of this collection).<sup>38</sup> The second chapter of this section, by Egan and Forde, picks up on this theme in its consideration of early cases like *Airey v Ireland*, *Norris v Ireland*, *Keegan v Ireland* through to more recent judgments in *ABC v Ireland* and in *O'Keefe v Ireland*. In their contribution, Egan and Forde analyse the level and pace at which a negative ruling in Strasbourg has triggered a change in the domestic legal landscape. The analysis is informed by a consideration of international relations literature that has emerged in recent years aimed at distilling, in particular, the various internal dynamics *within* states that may affect compliance with judgments of the Strasbourg Court. In scrutinising the response of successive governments and the Oireachtas to these deeply challenging rulings, the chapter concludes that the State's compliance

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35. (contd) Despite the watering down of the Commission's position, the Irish Government and all the political parties in Ireland at the time presented to the world the position that it had won a victory in Strasbourg by ensuring that the five techniques were illegal and should never be re-introduced: (1978) *Irish Times*, 19 January. The British government, similarly presented the view that it was satisfied that the Court had "rejected the charge of torture; has agreed with the Commission that the introduction of detention did not go beyond what was strictly required, and that there was no discrimination in its use ...": (1978) *Irish Times*, 19 January.
36. See Robertson & Merrills, *Human Rights in Europe* (4th edn, Manchester University Press, 2001), 39.
37. See, for example, the Court's statement in *Selmouni v France* (2000) 29 EHRR 403: "[C]ertain acts which were classified in the past as 'inhuman and degrading' as opposed to 'torture' could be classified differently in the future. [The Court] takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."
38. For analysis of early Irish cases before the Strasbourg Court, see Connelly, "Ireland and the European Convention" in Dickson (ed), *Human Rights and the European Convention* (Sweet & Maxwell, 1997), 185–196; and later, O'Connell, Comiskey, Meenaghan and O'Connell, *The ECHR Act 2003: A Preliminary Assessment of Impact* (Law Society, 2006), 1–10.

record in such cases has mainly been one of reluctant, but ultimately obedient compliance; and that the drive toward such compliance is greatly influenced by the activities of strong domestic institutions that play a role in the field of human rights. This analysis gives readers some insight into compliance expectations for more recent and prospective negative rulings from Strasbourg, at least as far as similar issues are concerned.

**[1.06]** But the extent to which judgments of the Court in Strasbourg aimed at the Irish State have had any impact on the domestic legal landscape is only one part of the picture that needs to be looked at in considering Ireland's *implementation* of the ECHR. A further aspect is the extent to which the Convention has been incorporated into domestic law. As is well known, at the time the Convention was drafted, the notion of incorporating the Convention into domestic law was not regarded as necessary or expedient. Because of the general perception of the instrument as a "bulwark" against totalitarianism and a "collective guarantee" of democracy, it was assumed that participating states were *already* protecting human rights. The most that could be envisaged, therefore, was that signatories to the Convention would bring their domestic laws into line and their machinery of justice into effect to ensure the realisation and enforcement of the rights. This position was ultimately reflected in the principle of subsidiarity inherent in the Convention system and manifested in Articles 1,<sup>39</sup> 13<sup>40</sup> and 35<sup>41</sup> of the text.<sup>42</sup>

**[1.07]** This view was clearly endorsed by the Irish government at the time of the Convention's drafting and was maintained by successive governments for decades thereafter. It was maintained by reference to the fact that many of the rights articulated in the Convention were already provided for in the fundamental rights provisions of the Constitution, which in turn were buttressed

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39. Under Article 1, the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" defined in the Convention.

40. "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

41. Article 35(1) makes it clear that resort to domestic remedies is a *sine qua non* for an application to the Court in Strasbourg, since the Court must deem a case inadmissible where the applicant has failed to exhaust such remedies.

42. The principle of subsidiarity essentially means that international supervision by the European Court of Human Rights of each State's implementation of the Convention is subsidiary to domestic implementation. It has been summed up by Petzhold as follows: "... what is essential is that the law of the Contracting States secures in substance those rights and freedoms to everyone within their jurisdiction regardless of the form in which they choose to do so": Petzhold, "The Convention and the Principle of Subsidiarity" in McDonald, Matscher & Pezhold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993), Ch 4, 44.

by a robust power of judicial review on the part of the courts.<sup>43</sup> At the same time, Ireland's dualist approach to treaty law was being robustly upheld by the Irish courts, such that reliance on the Convention in domestic human rights litigation became a largely pointless exercise.<sup>44</sup> Although mooted at various junctures over the years in legal circles,<sup>45</sup> the question of incorporating the Convention into domestic law was only seriously raised at a political level in the context of the negotiations that led to the signing of the Good Friday/Belfast Agreement.<sup>46</sup> At the time the Agreement was being negotiated, the United Kingdom had already embarked on the process of incorporating the Convention into its domestic law. In tandem with a series of specific commitments aimed at strengthening human rights protection in Northern Ireland,<sup>47</sup> a firm commitment was extracted on its part to finalise the process of incorporation in the terms of the Agreement.<sup>48</sup> By

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43. The State's official position on this was expressed, for example, in *Ireland's Second Report on the Measures Adopted to Give Effect to the Provisions of the International Covenant on Civil and Political Rights* (Department of Foreign Affairs, 1998), paras 13–17 in respect of all international human rights agreements, including the ICCPR and the ECHR.
  44. See O'Connell, "Ireland" in Blackburn and Polakiewicz (eds), *Fundamental Rights in Europe* (OUP, 2002), 423–473; Murphy, "Ireland and the UK in the European Union and European Convention on Human Rights: A Tale of Two Island Legal Systems?" in Martinico & Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Gronigen: Europa Publishing, 2010); and Dillon-Malone, "Individual Remedies and the Strasbourg System in an Irish Context" in Heffernan (ed), *Human Rights: A European Perspective* (The Round Hall Press, 1994) 48, 48–49.
  45. For example, in 1996 the Constitution Review Group recommended that the fundamental rights guarantees in the Constitution be supplemented by selected provisions of the Convention where the Convention standard was higher than existing domestic law: *Report of the Constitution Review Group* (Government Publications, 1996), 213–388. Interestingly, one early exponent of the view that provisions of the ECHR should find expression in domestic law was the former Chief Justice, Cearbhall Ó Dálaigh: (1971) *Irish Times*, March 13.
  46. The term "Good Friday/Belfast Agreement" is a collective one denoting the two documents entitled (1) The "Multi-Party Agreement" and (2) The British-Irish Agreement: <http://cain.ulst.ac.uk/events/peace/docs/agreement.htm>. See generally Morgan, *The Belfast Agreement: A Practical Legal Analysis* (The Belfast Press, 2000), Ch 1 and O'Cinnéide, *The Implications of the Multi-Party Agreement for the Further Development of Equality Measures for Northern Ireland and Ireland* (The Equality Authority, 2005), 7–13.
  47. See paras 3–8 of s 6 of the Good Friday/Belfast Agreement, entitled "Rights, Safeguards and Equality of Opportunity" regarding *inter alia* the establishment of the Northern Ireland Human Rights Commission and enhanced equality legislation.
  48. See para 2.

way of reciprocal commitment, the Irish government agreed *inter alia* to bring forward measures to ‘strengthen and underpin constitutional protection of human rights’, drawing upon the European Convention on Human Rights and other international human rights instruments and to examine, in this context, the possibility of incorporating the ECHR into the domestic legal system.<sup>49</sup> Apparently motivated by a desire to demonstrate to the political parties negotiating the agreement that Ireland intended to “practice what it preached” in the matter of human rights,<sup>50</sup> the government undertook that the measures brought forward “... would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland”.<sup>51</sup> Thus, at the turn of the century, almost 50 years after Ireland had ratified the Convention, the political commitments made in the context of a peace settlement regarding Northern Ireland, ultimately set the stage for a full-blooded debate on *how* rather than *whether* to incorporate the Convention into Irish law.<sup>52</sup>

**[1.08]** Three of the chapters in this section deal with the effects of the ultimate fruits of that debate, namely, the European Convention on Human Rights Act 2003. Amidst polarised views of the “best” method of domesticating the Convention, the government of the day ultimately decided to go down the route of “interpretive” incorporation.<sup>53</sup> In Chapter Three, Fiona de Londras explores the purposes behind the Act, which she identifies as primarily “domestication” of the Convention and to a secondary degree, satisfying the commitment to equivalence in the Belfast Agreement. Outlining the basic structure of the Act,

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49. Paragraph 9. The section stipulated further specific measures to be undertaken by the Irish government, including the establishment of a Human Rights Commission with a mandate equivalent to that of the Northern Irish Human Rights Commission; ratification of the *Framework Convention on National Minorities*; implementation of enhanced employment equality legislation and equal status legislation; and to continue to take active steps to demonstrate its respect for the different traditions in the island of Ireland.

50. See Egan & Murray, “A Charter Of Rights For The Island Of Ireland: An Unknown Quantity In The Good Friday/Belfast Agreement” (2007) 54 *International and Comparative Law Quarterly* 797, 812.

51. See Egan & Murray, “A Charter Of Rights For The Island Of Ireland: An Unknown Quantity In The Good Friday/Belfast Agreement” (2007) 54 *International and Comparative Law Quarterly* 797, 812.

52. For a flavour of this debate, see “Need for Human Rights Debate”, (2000) *Irish Times*, September; “Hogan Criticises AG’s Model for European Human Rights”, (2000) *Irish Times*, 16 October; “Ministers Differ over Aspects of Rights Convention”, (2000) *Irish Times*, 13 November; Government Dilemma on Human Rights Convention, (2001) *Irish Times*, 1 November; and “McDowell Backs Payment for Infringement of Rights”, (2001) *The Irish Times*, 12 February.

53. See O’Connell, “*The ECHR Act 2003: A Critical Perspective*” and (contd .../)

she critiques its implementation across four key parameters which include: the interpretive provision (in s 2(1) of the Act which broadly stated, places a statutory obligation on the courts to interpret statutes and the common law, in so far as is possible and subject to rules of law relating to such interpretation and application, in a manner that complies with the Convention); the “performative” obligation (in s 3(1) which obliges every organ of state to perform its functions in a manner compatible with the State’s obligations under the Convention); the development of an autonomous understanding within legal practice of the provisions of the Convention (facilitated by s 4 of the Act which requires the Irish courts to take “due account” of the principles laid down in *inter alia* judgments of the European Court of Human Rights in their own interpretation and application of Convention provisions); and finally in political processes (by a discussion of the extent to which the Oireachtas has engaged with the 2003 Act). De Londras concludes that while the results across all four parameters have been distinctly underwhelming, there is still hope for greater entrenchment of the Act in the future through *inter alia* enhanced measures of pre-legislative scrutiny, more comprehensive engagement by organs of State and a more robust approach to interpretation of the Act on the part of the Irish courts.

[1.09] Chapter Four by Cliona Kelly picks up on this latter theme by focusing attention on the untapped potential of the s 2 interpretive obligation in the Act to enhance human rights protection in Ireland. Thus far, she argues, this section has been underutilised by litigants and restrictively interpreted and applied by the courts. Through an analysis of recent case law in which s 2 has been pleaded, she argues that the methodological approach deployed by the courts in considering s 2 arguments necessarily pre-empts the adoption of a Convention compliant construction, thus delimiting the scope of the provision. Drawing on literature from behavioural economics and psychology, she demonstrates further how the way in which issues are framed can influence the manner in which such issues are finally determined. Accordingly, the chapter suggests that by approaching the interpretation of s 2 differently, there would be greater potential to maximise the reach of the Convention in the domestic legal system.

[1.10] In Chapter Five, Gerard Hogan presents a slightly less sanguine view of the future potential of the ECHR Act 2003 to effect further significant change on the domestic legal landscape of rights protection. While acknowledging that the enactment of the Act has made a difference at a symbolic and practical level

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53. (contd) Hogan, “*Incorporation of the ECHR: Some Issues of Methodology and Process*” in Kilkelly, *The ECHR and Irish Law* (Jordans, 2004), 1–11 and 13–34 respectively; and Egan, “*The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation*” (2003) DULJ 230–247.

(in terms of the judiciary's greater openness in considering Strasbourg jurisprudence), he argues that it has not had a transformative effect precisely because this was never intended nor even remotely possible given the superior status of the Constitution in domestic law and in judicial decision-making. Further, he interrogates why this state of affairs should necessarily be viewed pejoratively (or why the Convention is sometimes assumed to be more "rights affirming") when, in fact, the Constitution has deep roots in the European constitutional tradition which actually influenced the drafting of the ECHR; and because in many instances, its provisions appear to protect rights in even more emphatic terms than the ECHR. Some of the case law on Article 40.5 and Article 41 of the Constitution and Article 8 ECHR is examined in this context. The chapter thus opens up and explores aspects of comparative constitutional law and constitutional history which heretofore have received surprisingly little attention.

**[1.11]** In Chapter Six, Francesca Klug and Amy Williams provide a comparative perspective on the experience of incorporation of the ECHR into domestic law from the United Kingdom.<sup>54</sup> Operating in an entirely different constitutional context, in which the doctrine of parliamentary sovereignty reigns supreme, they demonstrate how the enactment of the Human Rights Act 1998 (HRA), imposing rights-review obligations on the judiciary for the first time has (in contrast to the position in Ireland) had a transformative effect in that jurisdiction. Whereas debate on the progress of the Irish Act is largely confined to legal circles, implementation of the HRA in recent years has resulted in a strong political backlash in the UK and calls for it to be replaced by a "regressive" Bill of Rights. Klug and Williams ascribe this backlash partly to the failure of the HRA's Labour architects to clearly explain the carefully crafted limits on judicial power conferred by the HRA and to promote unambiguously the virtues of maximalist interpretation; and partly to the way in which the UK courts have subsequently been applying Strasbourg jurisprudence, compounded by media misrepresentation of a "slavish" adherence to same. Against this backdrop, the chapter provides insights into the UK Bill of Rights debate and the implications of, as well as objections to, current proposals to replace the HRA.

**[1.12]** The final chapter in this section acknowledges the reality that questions about the influence of European human rights law on Irish domestic law by no means stop and start in Strasbourg. In this respect, Suzanne Kingston's contribution addresses the constitutionalisation of the EU's Charter of

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54. For a detailed comparison of the ECHR Act 2003 with the Human Rights Act 1998, see further Besson, "The Reception Process in Ireland and the United Kingdom" in Stone Sweet and Keller, *The Reception of the ECHR in the National Legal Orders* (OUP, 2008), 31ff.

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Fundamental Rights in 2009, henceforth presenting domestic courts with a further source of rights protection, additional to the Constitution, the ECHR and the general principles of EU law previously identified by the Luxembourg Court. This chapter examines the extent to which the Irish courts have used the EU Charter to resolve cases falling within its scope, finding that the courts have generally been more receptive to its usage compared with their treatment of the ECHR Act 2003.<sup>55</sup> Kingston concludes that the picture thus far emerging is that reliance on the Charter will generally be a more effective and speedier option for the litigant, albeit that the scope of its application remains limited.

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55. For a contrasting perspective, see de Búrca, “The Domestic Impact of the EU Charter of Fundamental Rights” (2013) *Irish Jurist* 49–64.