The Independent Human Rights Act Review

Roundtable with parties from the Republic of Ireland

Date: 8 June 2021

Attendees

IHRAR Panel and Officials	Attendees
Sir Peter Gross	Chief Justice Frank Clarke
Sir Stephen Laws	The Hon. Mr. Justice Donal O'Donnell
Professor Maria Cahill	Professor Eoin Carolan
Alan Bates	Professor Conor O'Mahony
Dr John Sorabji	Paul Brady
Kate Stevenson	Martin McDermott

Sir Peter Gross first introduced the nature and role of IHRAR and thanked everyone for kindly agreeing to take part. He raised the general question of how Ireland appeared to have so successfully managed its relationship with the European Convention on Human Rights (the Convention)?

Justice Donal O'Donnell, began by noting three caveats to his comments: first, that there were obvious constraints on judges discussing the development of the law; secondly, there were constraints on judges discussing legal developments in another jurisdiction; and, thirdly, there would naturally be limits on the level of detail and understanding of UK developments, which participants would have. There is perhaps a fourth caveat: things in one jurisdiction may often appear neater and better organised to the outside viewer than to lawyers and others within that jurisdiction.

There are, however, a number of answers to the question. In the first instance, in *Carmody v Minister for Justice Equality and Law Reform* [2009] IESC 71, [2010] 1 IR 635, the Irish Supreme Court set out the approach to be taken by Irish courts to human rights issues; the 2003 ECHR Act, which gave effect to the Convention only applied if no other remedy was available. As a consequence, and crucially, the Court held that before the Convention could be looked at, it was necessary for Irish courts to first consider rights protection set out in the Constitution. This was a logical reading of the Act but was a significant departure. The general approach to any challenge prior to 2003 was to reach the Constitutional issue last because of the significant consequences of a finding of unconstitutionality for parties not before the court. It might have been thought that this approach would require Convention issues to be addressed before arguments based on the Constitution. Because however the statute was held to require that the Constitution has to be considered prior to the Convention, the effect was that a lot of the analysis concerning rights protection will be dealt with in respect of constitutional rights, (since there is a significant overlap in the rights protected under both instruments) and the Constitution also tends to provide broader protection

and stronger remedies than those available in respect of the Convention under the 2003 Act. For instance, if a breach of constitutional rights is found to have taken place, the Irish courts may strike down legislation, whereas under the 2003 Act they only have the power to make a declaration of incompatibility.

The Irish courts would, however, be likely to look to the Convention where constitutional rights were not well-developed. For instance, there were cases Keena v Mahon [2009] IESC 64 , [2010] 1 IR 336where the Convention was relied upon given the greater development of its jurisprudence concerning freedom of expression and journalistic privilege in particular (Goodwin) . Other areas where there was greater resort to the Convention were where Convention caselaw was very developed, such as art. 2 of the Convention i.e., where positive obligations had been developed.

It was also noted that the history of Irish constitutionalism was historically also that of UK constitutionalism. While it is famously said that the UK has no written constitution , and has moreover a flexible constitution a central feature of which is the unlimited power of parliament , the idea of a parliament with limited powers where moreover the limits on those powers were enforced by court action if necessary , was a part of the law of the United Kingdom or at least the British Empire since that was the legal basis of the establishment of colonial and Dominion legislatures . Specifically in terms of Ireland the question of self-government was a legal issue bound up with the nature of the United Kingdom The questions of the Act of Union , Repeal of the Union, The Home Rule Bills of the late 19th and early 20th centuries and the question of Dominion Status etc, which convulsed Ireland and to some extent the UK generally were questions of Constitutional l Law and formed the backdrop to the development of Irish thinking about constitutions in the 20th century. It might be said that a number of 'happy accidents' had let to the current position in Ireland.

By 1922, both the UK and Ireland, for different reasons, came to view entrenched rights as beneficial (an idea which can be traced by to the Irish Home Rule Bills of the 1890s). The Irish side saw a developed constitution protective of rights was an important signifier of status as a nation. The British saw the entrenchment of rights, in particular property and freedom of conscience as important protections for the unionist minority in the new Irish Free State. By 1937 there was also in Ireland a desire to move away from unpalatable aspects of the Treaty, which led to a new Constitution which tended however to maintain and expand on the rights protection aspects of the 1922 Constitution and retained judicial review. When in the 1960s, the Courts became more active in reviewing and striking down legislation much of the legislation challenged was Victorian legislation that had been adopted and continued upon Independence. Thus the Courts' decisions sometimes appeared modernising and reforming , in and the counter majoritarian aspect of judicial review, which makes it controversial was not so apparent . This all went to establish a degree of public acceptance of the Constitution and judicial review as part of the furniture of the State.

Secondly, Ireland has a relatively easy format for carrying out constitutional amendments. James Madison said that Constitution should only be capable of amendment in rare and significant circumstances but that is not the experience in Ireland. The fact is that Ireland particularly in recent times has seen a large number of amendments to the Constitution proposed and many accepted. Sometimes these are technical or required by international obligations but sometimes they are matters of considerable public controversy. The process has enabled a constitution which faithfully

reflected the social attitudes of Ireland in the late 1930s to be amended to reflect current views. To some extent referenda do not reflect political allegiance and there are examples of proposals being rejected which were supported by the larger political parties. The fact also that in theory decisions on the interpretation of the Constitution can be addressed and perhaps reversed by constitutional amendment means that the decisions of the courts are subject to the possibility of popular endorsement or override. Also more recently the practice of holding Constitutional conventions with randomly selected members of the public who then engage in detailed scrutiny of provisions of the Constitution and possible amendments probably increases engagement with and acceptance of the Constitution, and judicial review As a result, there is a significant (but by no means universal or constant) element of popular buy-in to constitutional review, as the constitution itself is subject to continuing approval by the public.

It might be suggested that the UK has not perhaps had the same degree of public buy-in to human rights as the Convention was acceded to in 1951 by the UK government alone as an international agreement (as indeed Ireland did) and the HRA was enacted by Parliament in 1998. In neither case was there significant public buy-in as there can be said to be in Ireland in respect of its constitution and constitutional rights - through its review and referendum processes.

Chief Justice Clarke
The Chief Justice suggested that there may be a further difference in approach between Ireland and the UK. That was that lawyers in Ireland have since 1922 made significant use of authorities from other jurisdictions when considering rights cases. This stemmed from the adoption of pre-independence UK legislation that was not inconsistent with the Irish constitution, which required consideration of UK judgments. It was furthered in the 1960s through considerable citation of and reliance on US judgments on rights issues. This outward-looking tradition resulted in a very receptive approach to ECtHR judgments.

It was also the case that the Convention, as a persuasive authority, was used as a means to interpret the Irish Constitution. As a consequence, arguments relying on ECtHR case law are often deployed first when the Constitution is being interpreted.

Ireland had also developed human right case law before the European Convention on Human Rights Act 2003 was enacted. This developed from the 1960s through the development of constitutional rights jurisprudence. Due to these developments, it is only necessary to look to the Convention and its case law where constitutional rights are not well-developed.

The general approach to rights adjudication for lawyers, is to look to the Constitution first. To use the Convention to help interpret the Constitution. And only then use the Convention itself where the Constitution is not able to help.

Sir Stephen Laws
Do you get to the same result irrespective of whether you approach issues under the Constitution or the Convention, other than where remedies are concerned?

Chief Justice Clarke

Most of the time the result is the same. There are areas where the Constitution and Convention lead to different results, but they are a significant minority.

If the Convention gives a right, it is likely that the Constitution will also do so and will do so with a more effective remedy. If the Constitution does not give a right, then the Convention may do so, but the remedy will be the same unless you want to strike down the legislation in which case it is not as effective.

Stephen Laws
Can statutory instruments be struck down in Ireland, as they can in the UK under the HRA?

Justice Donal O'Donnell
Irish courts have not yet addressed this question. Courts in Ireland are not public authorities under the 2003 Act, as they are in the UK under section 6 HRA. SIs can be struck down in any event by the strike down power under the Constitution. They can also be set aside on judicial review grounds e.g. if ultra vires. As such it is difficult to see when you would bring a Convention based claim in Ireland to invalidate an SI. If such an approach were taken it would, however, be unremarkable in broad constitutional terms as setting aside SIs is already a feature of the legal system, as indeed is the invalidation of primary legislation.

Looking at judicial dialogue with the ECtHR, it tends to take a very structured approach to rights analysis. In Ireland, the courts do not tend to take such a similarly structured assessment using just the same language and approach as the ECtHR. This is because the Irish courts use their own Constitution and language to approach rights questions. This can sometimes make it perhaps difficult for the ECtHR to see if Irish courts have provided an effective remedy to a rights violation but that is a consequence of the primacy of the Constitutional remedy.

On a different note, the ECtHR's approach in some cases of considering whether there is a Europe-wide consensus on any specific rights issue can be problematic.

Chief Justice Clarke
It is noteworthy that when carrying out rights analysis Irish courts also look at rights jurisprudence from other common law countries (e.g., the US, NZ), as well as from some civilian jurisdictions, to help interpret the Constitution. Such jurisprudence forms persuasive authority. Reference to other common law jurisprudence may, however, complicate the ECtHR's analysis of Irish judgments.

Maria Cahill
The Irish constitutional order adopts a more fulsome approach to taking account of ECtHR jurisprudence than may be the case in the UK. There is an understanding that ECtHR case law is always persuasive authority. There is no controversy over the question whether it is binding or not. Where a right has been subject to systematic examination at common law, that analysis is what commends the decision to you. Where there is no such analysis, then you will look to where there has been such a detailed analysis, which may be the ECtHR or it may be another common law jurisdiction. There are a number of areas where the common law analysis of rights protection is fully developed e.g., criminal procedure. In such cases, that analysis will be adopted.

Conor O'Mahony
There is an overlap between the Constitution and the Convention is a lot of cases. As a result, there has been no real development of convention adjudication. There are, however, areas, where the overlap is not so pronounced, such as where the Convention has developed positive obligations or procedural obligations, which can then be relied upon in Ireland. Such obligations and arguments around them do not fit into the Constitution. Given separation of powers, the courts are slower to engage in criticism of any failures to act consistently with such obligations.

The Irish courts have also been slow to warm up to using the 2003 Act. The 2003 Act imposes obligations that lawyers can use where no other remedy exists. The general tendency remains, however, to go to the Constitution first. This is the reason why the Convention and its case law are not used in Ireland as much as they are in the UK. There continues to be a greater incentive for lawyers to resort to the Constitution than the Convention, which provides another reason why there has been limited use of the 2003 Act.

Tom Mullen
There seems to be a high degree of acceptance by the Government and the public of courts adjudicating rights issues. It also seems that there is no real controversy about the courts over-stepping their role.

Justice Donal O'Donnell
Yes, that's correct although a little over-simplified. There is an undercurrent that that debate is present in Ireland at the present, particularly where there is an unpopular court judgment. It is at that point that criticism is made.

One reason for the difference in approaches in respect of that debate in the UK and Ireland might that the UK is still in the first generation of rights law, whereas due to its longer historic development, Ireland has seen it move through different phases of development to, now, what might be seen as fourth generation rights law. Public support has developed over time, and there is now a degree of public engagement in rights and the adjudicative process. In this there is an echo of Learned Hand's famous *dictum* on liberty resting in hearts and minds rather than in paper constitutions[1]. In Ireland there is, however, no 'cult of constitutionalism' as there might be said to be by some commentators in the US. People are not familiar with the major decisions of the courts in the same way. However when courts make a decision that is unpopular in some quarters (as was the case with one case that concerned the power to hold inquiries), what is being said by the court is 'this is, as far as we know, what was agreed to in the Constitution. You the public can change the Constitution if you disagree'. In the event a proposal to reverse that decision was rejected in a referendum and to that extent the decision becomes 'baked in' to the Constitution by popular decision. This facilitates greater public engagement with the issue and takes a little of the sting out of rights controversy.

Paul Brady

[1] Learned Hand, The Spirit of Liberty, (1944) <http://www.learnedhand.org/?p=4>.

Ireland is more relaxed about recourse by courts to Convention rights because we are used to courts dealing with rights' claims under the Constitution and so questions of legitimacy are not as acute.. In addition, the Irish courts have developed a balanced jurisprudence based on self-restraint when exercising the power to judicially review legislation. That has assisted in limiting tension over the issue of judicial review of legislation. In particular, and in contrast to the approach in certain other constitutional courts elsewhere in the world, the Irish courts have exercised self-restraint when dealing with financial, social and moral issues, which has placed the onus back upon Parliament to consider them effectively. With respect to the positive obligations which arise under the Convention, the onus on giving effect to those is on each Member State – and it is for the law of each state then to deal with how that is to be done. It is generally understood to be better for Parliament than for the courts to implement positive obligations as they tend to require resource and policy decisions. As a result, it is correct that there is less traction under the 2003 Act to enforce positive obligations. But that is perhaps a necessary consequence of the fact that it incorporates the Convention at a sub-constitutional level and so the separation of powers rules under the Constitution must continue to be respected.

A second reason why there is a more relaxed approach to Irish courts dealing with right claims under the Convention is that the Constitution takes the lead in most litigation. In contrast to a claim made under the Constitution, the 2003 Act is generally not very useful as a means of obtaining a concrete remedy for a claimant. A breach of a constitutional right can lead to a finding of invalidity in relation to a piece of primary or secondary legislation. By contrast, under the 2003 Act it will merely be a declaration of incompatibility.

There is, however, an increasing tendency for rights issues to be looked at through the prism of ECtHR case law. This is especially the case where a particular association of lawyers in a certain area of law might be particularly interested in Convention case law on their topic. This can, however, backfire if too much ECtHR case law is cited in argument before the court when the issue is one that is properly focused on the Constitution. The courts have been careful to ensure that constitutional case law is not side-lined by arguing solely through the medium of the Convention case law.

Sir Stephen Laws
There is a reference to the courts taking 'judicial notice' of ECtHR decisions in the 2003 Act? Does this have a specific meaning, or does it refer to the general meaning of 'taking judicial notice'?

The 2003 Act also provides for *ex gratia* payments to be made when a declaration of incompatibility is made. Is there a risk that this can be litigated?

Chief Justice Clarke
Judicial Notice simply means the absence of a need to prove. The provision in the 2003 Act does not make a real difference to what would already happen in respect of taking judicial notice of a matter. ECtHR judgments were persuasive authorities any way, thus the provision in practice does not add anything.

It was not apparent that any litigation had arisen over *ex gratia* payments.

Justice Donal O'Donnell
It was unlikely that questions over *ex gratia* payments would come before the courts; there has been no such litigation thus far. The discretion to make such awards is, in any event, dwarfed by the right to damages for breaches of constitutional rights, where damages awards are generous.

Sir Stephen Laws
What is the measure of damages for a breach of constitutional rights?

Chief Justice Clarke
Damages includes compensatory damages, but often such cases do not involve pecuniary loss. General damages are awarded for non-pecuniary loss, and the trend is to be more generous than where damages are awarded by the ECtHR.

The Irish government would, understandably, prefer rights issues to be resolved in Ireland rather than before the ECtHR. Where the courts are at fault in breaching rights, such as article 6 delays, no compensation is awarded. There is an attempt to establish a scheme to award ECtHR damages for court delay, however.

Eoin Carolan
There is a further point on 'buy-in'.

In the UK, the declaration of incompatibility provides an incentive for reform. In Ireland the declaration does not provide anything of value to litigants. Litigants only pursue a declaration in Ireland if they are bringing a case for political reasons. This can be seen to underpin the use of declarations in the UK too, where they are sought for political reasons i.e., the declaration power promotes political litigation. This then feeds into politicians' perspectives regarding the courts, and whether they are over-stepping constitutional boundaries.

When there is a political campaign group that is bringing litigation seeking declarations of incompatibility, this effects the publics' perception of the courts and can lead to the view that the courts are acting politically. This is particularly the case where the public do not see that there is a specific victim on whose behalf the litigation is being pursued.

The courts do, however, have a strong attachment to the rules on standing to bring litigation. They particularly do not like claims being brought on hypothetical fact. There needs to be a real dispute, and a real litigant who is affected by the alleged breach. This has helped to limit the growth of political litigation.

Maria Cahill
The HRA has tried to minimise disagreement concerning rights; to civilise disagreement with the ECtHR. In Ireland judges are restrained in their approach and will decline to engage in political debates.

There is, however, a legitimate case for there being public and political disagreement and discussion about rights and their content. The Irish system tolerates vigorous debate, so the human rights

infrastructure does become controversial. In the UK, because of the approach that tries to minimise debate, there is an impetus that underpins the growth of a greater critique of the infrastructure i.e., of the HRA.

Conor O'Mahony
In Ireland there is also, to some extent, the conflation of the Convention with the EU, as there is in the UK. This is more of a problem in the UK, given adverse views of the EU, particularly post-Brexit. Ireland is less Euro-sceptic, thus there is less criticism arising from this.

Justice Donal O'Donnell
To a large degree Maria Cahill's points are valid ones. The evolutive approach of the ECtHR can potentially lead courts into contestable areas. That potentially creates problems. If the ECtHR has taken an adverse decision against the Irish Constitution, that would lead to public controversy. Although it should be noted that the ECtHR has been notably less activist recently.

It is very important that the Irish public have to confront major rights decisions. There is no reason to believe that lawyers are better at deciding political issues than other members of society. It is useful to compare the ways in which the US and Ireland treated the issue of abortion. In Ireland, the issue was determined by the public.

Chief Justice Clarke
The issue of abortion was a potential flashpoint with the ECtHR. However, the public were part of the process at all stages of the issue in terms of the case on the Constitutional issue before the Irish courts, the ECtHR decision, and a number of referendums. Public engagement created buy-in.

Eoin Carolan
The Irish courts are reluctant users of rights and particularly the Convention and its case law, not least due to use of the Constitution. Because of the latter the former is not relied on very much, except in specific areas such as article 8 of the Convention.

The ancillary nature of the Convention stems from the more robust approach to constitutional rights.

Chief Justice Clarke
Referendums are better when they are about a concrete proposal, so that the debate can be about a specific text, its meaning and its potential. This helps public understanding and buy-in as it focuses the public more effectively than where a referendum is on a broad idea, which they are asked if they broadly favour or not.

Maria Cahill
Engagement with a specific text legitimises later court interpretations of the referendum text, as that interpretation is part of the public debate.