Human Rights and the National Judge: His Constitution; The European Union; The European Convention

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Abstract Starting from the perspective of a national (Irish) judge, the author examines the complex system of human rights' protection guaranteed by national law, EU law and the European Convention. Human rights protection at these different levels is illustrated by a rich selection of case-law all originating from Ireland. At the first level, the Irish Constitution already grants a high level of judicial protection on the basis of an extensive catalogue of fundamental rights. In addition, the Irish courts have to apply the European Convention and the decisions of the European Court of Human Rights on the basis of the Human Rights Act of 2003 which however ranks below the Constitution. This is different for EU law in general and for the EU treaties in particular, including their reference to human rights protection and also regarding the Charter of Fundamental Rights which is now given primary law effect. Courts have to face a particular dilemma when applying decisions of United Nations organs as implemented in EU or national law which may be in conflict with human rights.

Keywords Human rights · EU · ECHR · Constitution · Charter of Fundamental Rights · UN decisions

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1 Introduction

The ground may seem all too well-trodden from the blank human-rights page of the Treaty of Rome, through the early abstinence of the Court of Justice in the matter¹ of rights to require repetition. As always in European law, we are at a new cross-roads. We must look to the future.

As we do so, we pay well-deserved tribute to the distinguished career of John Toulmin. Apart from his judicial career in the United Kingdom, he has served as President of the CCBE and as Chairman of the Board of Trustees of ERA. His contribution to the development of European law is very considerable.

The Court delicately dipped its toe in the human-rights water in *Internationale Handelsgesellschaft*.² Having insisted that “...the validity of a Community measure...” cannot be considered in response to a claim “that it runs counter to either fundamental rights as formulated by the constitution of that [member] state or the principles of a national constitutional structure.”

The Court found itself able to declare, nonetheless, that:

“An examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.”

It is of no concern to us and a matter of mere historical curiosity as to how the Court discovered this “integral part” of the general principles. By 2002 the Court repeated the refrain in unqualified terms:

*“According to settled case-law, fundamental rights form an integral part of the general principles of law observance of which the Court ensures.”*³

In any event, the Court’s adventure had been fully vindicated by the Member States in the form of Article F of the Treaty of European Union, the new entity created by the Treaty of Maastricht. Article 6 of that Treaty as now formulated following the Treaty of Lisbon enables us to start from the position that respect for fundamental human rights is a *fait accompli*.

In modern times, the social function of laws is to regulate relations between people within a community. It became increasingly recognised that law must also and perhaps above all serve the interests of justice. Law moves from the word to justice and now to the over-riding imperative of respect for human rights.

Article 34 of the Constitution of Ireland provides that “justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution...” Article 15 provides that the “sole and exclusive power of making laws for the State is ... vested” in the national parliament. The framers of the Constitution may not have intended to create a dichotomy between law and justice. There

¹ See Case 1/58 *Stork v High Authority* [19598-9] ECR 41. The Court of Justice of the European Coal and Steel Community held that it had no power to consider whether a decision infringed principles of German constitutional law.

² Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3.

³ Case C-94/00 *Roquette Frères* [2002] I-9011, at paragraph 23.

is, nonetheless, a difference. The framers undoubtedly assumed that laws would be just, that they are the means by which justice is to be achieved.

This tension or difference is present whenever the judicial function is exercised. The dichotomy between law and justice like the word and the spirit, the meaning and the purpose work together to produce a just outcome.

Nowhere is this more evident than in the sphere of the exercise by the judge of his function of interpretation and application of laws so as to comply with his duty to respect fundamental human rights as guaranteed variously in the national Constitution and the sometimes competing international human-rights instruments which bind him but jostle with each other for influence.

The courts of the Member States of the European Union find themselves at the centre of an interlocking system of differing sometimes competing sources of law, jurisdictions and human rights instruments.

2 The Irish Judicial Background

I write from the perspective of a national judge, specifically a judge of the Supreme Court of Ireland. I commence by drawing attention to the historic national background against which that judicial function is performed. I do not think that, in its essence, this experience is different from that of any other national judicial system in the Union.

Prior to 1950, Ireland was a small, sovereign, independent and democratic state. It was governed under a Constitution adopted by the people in 1937 under which, as it declared in Article 6, each of the “*powers of government, legislative, executive and judicial,*” derives “*under God, from the people...*”⁴ The Supreme Court interpreted the Constitution from the very beginning so as to give reality to the sovereignty and independence of the State from all external sources of executive, legislative or judicial power. Interpreting Article 6 of the Constitution, the Court held:

*“The manifest object of this Article was to recognise and ordain that, in this State, all powers of government should be exercised in accordance with the well-recognised principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers should not be exercised otherwise.”*⁵

Any tensions or conflicts between the three arms of government were exclusively for domestic resolution. Prior to World War II, Ireland shared with the United States the distinction of being the only two countries in the common-law world whose Constitution imposed obligations on the State to respect and guarantee the fundamental rights of its citizens.

It was a matter for the High Court and the Supreme Court on appeal and for them alone to hold the other two branches of government, the executive and the parliament to account.

⁴Article 6 of the Constitution.

⁵Judgment of O’Byrne J in *Buckley and Ors (Sinn Féin) v. Attorney General and Another* [1950] 1 I.R. 67 at 81.

Article 29.6 of the Constitution provides that:

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

This provision entrenches in the Irish Constitution the principle of dualism in respect of international agreements, inherited from the common law. Its effect was vividly demonstrated by the decision of the Supreme Court in the historic case of *In re O’Laighléis*.⁶ The applicant in that case was, as it happens, the first individual petitioner before the European Court of Human Rights.⁷ Ireland had acceded to the Convention and was one of the first countries to accept that petitions could be lodged against it. O’Laighléis had been detained without charge on a warrant issued by the Minister for Justice on the ground that he was “engaged in activities which in [the] opinion [of the Minister] were prejudicial to the security of the State...” This detention was authorised under emergency legislation enacted in response to IRA campaigns. In answer to O’Laighléis’ invocation of the European Convention on Human Rights, the Supreme Court refused to “accept the idea that the primacy of domestic legislation [was] displaced by the State becoming a party to the Convention...” In the words of Maguire C.J.:

“No argument can prevail against the express command of section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws.”

From this perspective, Ireland was an entirely closed legal system, impermeable to all international influence, save where its parliament decided to give effect to any particular treaty. It would have been impossible for Ireland to accede to membership of the European Economic Community, as it then was, without the most fundamental amendment to the Constitution.

Consequently, it was necessary to amend Article 29 of the Constitution on no less than five occasions between 1972 and 2009 so as to ensure that effect would be given to the European Treaties beginning with the Treaty of Rome and ending with the Treaty of Lisbon. Ireland has adopted, in those respects, the treaties and laws of the Union in their own demanding terms. No provision of the Constitution is allowed to stand in the way of the laws, decisions and judgments of the institutions, including the courts, of the Union.⁸

Prior to any consideration of the respective effects of the European Convention on Human Rights and the European Treaties, it is important to appreciate that Ireland had a highly developed antecedent corpus of human-rights law of its own.

The Irish Constitution, Articles 40 to 44, contains an extensive catalogue of fundamental personal or human rights. The State, by these articles, provides a constitutional guarantee to respect these rights and, as far as is practicable, by its laws to defend and vindicate them. It falls to the courts to ensure compliance by the State with these obligations.

⁶1960 I.R. 93.

⁷*Lawless v Ireland* (1979-80) 1 EHRR 1.

⁸Article 29.4.10 of the Constitution.

In performing this task, the High Court (and the Supreme Court on appeal) is equipped to exercise a number of powers expressly conferred by the Constitution and others which have been developed in the case law. The courts are the custodians of the rights set out in the Constitution and their powers are as ample as the defence of the Constitution requires.⁹ In particular:

- The High Court has power, under Article 40, to conduct an inquiry into the legality of the detention of any person, to require that any authority detaining a person to produce the person before the court (*Habeas Corpus*) and to demand that the authority in question justify the lawfulness of the detention and to order the person's release from custody where the detention is unlawful;
- The High Court has power under Article 34.3.2 and Article 15.4 to declare any law invalid for being repugnant to any provision of the Constitution including any of the provisions guaranteeing respect for personal rights;
- The Supreme Court has power, under Article 26 of the Constitution, to consider and to declare invalid any bill passed by the national parliament which the President refers to the Court for its compatibility with the Constitution;
- The High Court exercises power of judicial review of the legality of any decisions of state or public authorities;
- The High Court has power to make orders by way of injunction or prohibition restraining the State from acting unlawfully or infringing personal rights and to award damages against the State.

I draw attention to these aspects of the constitutional law and jurisprudence of Ireland and the Irish courts for two principal reasons.

Firstly, Irish courts and their judges have extensive experience in the interpretation and application of principles of fundamental human rights. The catalogue of rights contained in the Constitution pre-dated the Second World War and, of course, the adoption of the European Convention on Human Rights. Articles 41 and 42 of the Constitution contain special provisions regarding marriage, the family and education. Articles 40 to 44 contain provisions regarding equal treatment, personal liberty, the inviolability of the citizens' dwelling house, freedom of expression, of assembly and of association, of conscience and the free practice of religion and of individual ownership of property. By way of a complement to these rights, the courts have developed principles of respect for unenumerated personal rights, i.e. rights not expressly mentioned in the Constitution. Notable among these are the rights to due process and fair procedures, of integrity of the person and to personal privacy.

My second reason for laying emphasis on Ireland's pre-existing recognition of the obligation to protect fundamental rights flows from the first. It relates to the judicial function and to the mindset of the individual judge. Each judge is appointed pursuant to laws adopted under the Constitution and makes a declaration that he or she¹⁰ will "*execute the office of judge without fear or favour, affection or ill-will towards any man, and [to] uphold the Constitution and the laws.*" It follows that each judge is

⁹*The State (Quinn) v. Ryan* [1965] IR 70.

¹⁰In the interests of brevity, I use the masculine gender to encompass both. There are women judges at every level of the judiciary.

culturally conditioned by a primary allegiance to his own national Constitution. He will have been educated in that Constitution and the laws enacted under it. He would tend, in the first instance, to look to the Constitution as the source of law and is the primary repository of protection of fundamental rights. In some respects, particularly with regard to marriage, the family and the protection of the right to life of the unborn, the Irish Constitution contains provisions which are not replicated in other human-rights instruments.

I will now address the issues and problems which arise in the new world of multiple human-rights instruments. It is important, however, to bear in mind the national setting and background as part of the judicial experience.

3 Things Have Changed: A Brave New World

Now, in 2011, to paraphrase the Irish poet W. B. Yeats, all is “*changed, changed utterly.*” The national law and Constitution are but one aspect of a multi-level and many faceted jurisdictional complex. Article 6 of the Treaty on European Union provides a useful starting point, even if it does not present the full picture. I cite those parts which demonstrate that the Article provides for recognition of rights as protected by three distinct sets of instruments.

1. *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. (. . .)*
2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. (. . .)*
3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.*

As I have already stated, the Constitution has been amended to the intent that the treaties, laws, decisions and judgments which emanate from the institutions of the European Union will have effect in their own terms in Irish law. Secondly, in 2003, Ireland enacted a law giving effect, in accordance with its terms, within the State to the European Convention on Human Rights.¹¹ The Act of 2003 is in broadly similar terms to the Human Rights Act of 1998, adopted by the Parliament of the United Kingdom.

Irish courts must consequently recognise as potential sources of law:

- The Irish Constitution and laws;
- The European Convention on Human Rights and decisions of the European Court of Human Rights in accordance with the terms of the European Convention on Human Rights Act, 2003;

¹¹European Convention on Human Rights Act, 2003.

- The European treaties, as they now appear following the ratification and entry into force of the Lisbon Treaty;
- The Charter of Fundamental Rights of the European Union, as given effect by the Lisbon Treaty;
- Decisions of organs of the United Nations as implemented in national law.¹²

Depending on the method of counting one adopts, there are potentially four distinct levels of jurisdiction. Each of these sources takes effect in national law in accordance with its own system.

The European Convention on Human Rights Act, 2003 gives effect in certain respects to the Convention in Irish domestic law. However, as has been stated by Murray, C.J., it remains the case that “*the Convention is not directly applicable as part of the law of the State and may only be relied upon in the circumstances specified in the European Convention on Human Rights Act of 2003.*”¹³

The Act of 2003 gives effect in Irish domestic law to the Convention in three principal ways, set out below. Contrary to what is often misguidedly said, the Act does not make the Convention part of domestic law. The three ways in which effect is given to the Convention are:

1. The Act obliges the courts to interpret any rule of law, whether statute law or common law, “*in a manner compatible with the State’s obligations*” under the Convention.¹⁴ This is an interpretative provision only. Thus a court must, so far as possible, interpret any “statutory provisions” or “rule of law” consistently with the Convention, but subject to any rule of law relating to interpretation and application. To assist the courts in performing their interpretative task, section 4 of the Act provides that judicial notice is to be given to a wide range of materials, not only the Convention provisions, but, *inter alia*, also “*any declaration, decision, advisory opinion or judgment of the European Court of Human Rights...*” and that courts shall “*take due account of the principles*” they lay down. Compliance by the courts with their interpretative obligations is a complex and difficult matter, to which I will refer again.
2. Section 3 of the Act obliges every organ of state to perform its duties in a manner compatible with the Convention.¹⁵ Damages may be recovered for any contravention. This section enables an individual to invoke a provision of the Convention directly in the national court. A number of cases¹⁶ have already been taken against public housing authorities, alleging that they have acted in breach of Article 8 of

¹²See the discussion of the *Bosphorus* litigation below.

¹³*McD v L* [2009] IESC 81.

¹⁴Section 2(1) provides: “*In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.*”

¹⁵Section 3(1) provides: “*Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.*”

¹⁶*Pullen and others v Dublin City Council and others* [2008] IEHC 379; *Leonard v. Dublin City Council and Ors* [2008] IEHC 79.

the Convention by failing to respect family life when seeking possession pursuant to a process for the rapid recovery of dwellings from local-authority tenants who are alleged to have been in breach of their rental agreements. The courts necessarily have regard, pursuant to section 4 of the Act, to relevant decisions of the European Court of Human Rights imposing procedural safeguards on such authorities.¹⁷

3. The third provision and, in effect, the remedy of last resort is that the court may, pursuant to section 5 of the Act, make a declaration of incompatibility of any law with the Convention provisions. This provides no remedy to the claimant but obliges the legislature to reconsider the law being impugned.

It is beyond question that the advent of the Convention, the European Treaties and now the Charter of Fundamental Rights has transformed the legal landscape in many ways. The judges are confronted not merely with different instruments but also with the need to distinguish their respective legal standing in national law.

The national judge takes, as his starting point, the national Constitution and laws enacted thereunder as having automatic and implicit governing effect and legitimacy. The European treaties have been welcomed into national law through the mechanism of successive amendments of the Constitution combined with the European Communities Acts. Thereafter, the national judge must accept the full panoply of principles that follow: direct effect of the treaty provisions, regulations, decisions and judgments of the Court of Justice. He must also apply the principle of conforming interpretation, when considering the meaning of a national law and knows that he may refer questions of interpretation to the Court of Justice, where necessary. Most importantly, the entire corpus of the law of the European Union is capable, in the event of conflict, of superseding any provision of the national law including the Constitution itself. This, of course, represents an entirely novel and radical invasion of the principles of sovereignty enshrined in that Constitution from the outset of Irish national independence.

The status of the Convention is different. As already explained, it does not, in principle, have direct effect in national law. It is mediated through the European Convention on Human Rights Act, 2003 a statute which does not accord direct effect to the Convention to the same extent as the Constitution¹⁸ provides in the case of the European Treaties. Furthermore, the Act of 2003 is enacted at a sub-constitutional level, which means that, in the event of conflict, the Constitution must prevail.

Thus the European Treaties supersede the Constitution, whereas the Convention does not. Even this proposition requires some qualification. In the event that the subject matter of any legal proceeding is governed by a provision of European Union law which, in turn, potentially requires to be interpreted in the light of the Charter of Fundamental Rights, the precedence of the Treaties, to that extent, displaces the Constitution.

I now turn to consider some examples from actual litigation all arising in one way or another in Ireland of interaction between national legal and constitutional

¹⁷ *Connors v. United Kingdom* [2004] 40 E.H.R.R. 189.

¹⁸ And the European Communities Acts which implement the constitutional provisions and give effect to the treaties.

provisions on the one hand and the European Treaties and the Convention on the other.

4 Interaction Between National Constitutional Law, Convention and Charter: An Example

This relationship between the different systems of law is well illustrated by the case of a reference sent by the Supreme Court of Ireland to the Court of Justice in 2010. The applicant in the case was the unmarried father of two children, whose mother removed them from Ireland to England. He applied to the English courts for their return pursuant to the Hague Convention. The English Court sought the assistance of the Irish courts on the question of the “rights of custody” of the applicant for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction.¹⁹ The meaning of “rights of custody” for the purposes of Article 5 of the Hague Convention was now affected by Article 2.9 of Council Regulation (EC) No 2201/2003.²⁰ Up to this point, an Irish court considered “rights of custody” in accordance with the Hague Convention, which, in turn, deferred to the national law of the state of habitual residence of the child at the time of its removal.²¹ That position in Irish national law was clear. The unmarried father did not have “rights of custody” in the absence of a court order. However, in interpreting its national legal provisions, the Irish Court made it clear that sections 2 and 4 of the European Convention on Human Rights Act, 2003 required it, subject to the overriding requirements of the Constitution, to take judicial notice of decisions of the European Court of Human Rights. It would decide questions of family rights in the light, so far as possible, of Article 8 of the European Convention on Human Rights and of any relevant judgments of the European Court of Human Rights.

As it happened, the Court at Strasbourg had decided that a person in the position of the applicant, i.e. a person who had not obtained a court order granting him rights of custody or access, could not invoke infringement of his family rights pursuant to Article 8 of the Convention.²²

Nonetheless, the applicant claimed that Regulation No 2201/2003 had substantially replaced the provisions of the Hague Convention on rights of custody and that the amendment of Article 6 of the Treaty on European Union following the entry into force of the Treaty of Lisbon had effects on the interpretation of “rights of custody.” Article 6.1 TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Article 7 of the Charter protects private and family life. This left open the possibility, at least at a theoretical level, that

¹⁹*J. McB v L.E.* [2010] IESC 48.

²⁰Council Regulation (EC) No 2201/2003 of 27th November 2003 on the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23.12.2003, p. 1.

²¹Article 3 of the Hague Convention.

²²See *Guichard v. France* (2nd September, 2003) ECHR 56838/00, [2003] ECHR 714.

the Court of Justice would interpret Article 7 of the Charter in a different way from the European Court of Human Rights' interpretation of Article 8 of the Convention.

The Supreme Court therefore referred to the Court of Justice the question whether the Regulation considered in the light of the Charter precluded "*a Member State from requiring by its law that the father of a child who is not married to the mother shall have obtained an order of a court of competent jurisdiction granting him custody in order to qualify as having "custody rights" which render the removal of that child from its country of habitual residence wrongful for the purposes of Article 2.11 of that Regulation?*"

The Court of Justice delivered judgment on 5th October 2010.²³ It held that Ireland was not precluded from maintaining such a rule. The interest of the case is rather in the reasoning. The Court held that "*in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR.*" Hence, "*Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights. . .*"

It is a comfort for the national court to see that the Court of Justice has adopted quite a firm policy of interpreting the Charter as closely as possible to the corresponding provisions of the Convention. Thus, the national court will not be exposed to the risk of conflicting loyalties. At the same time, it is implicit in the judgment that, in the event that the European Court of Human Rights adopts, in the future, a different interpretation of the Convention, the Court of Justice would adjust its decisions accordingly. The national Court, being bound not only by judgments of the Court of Justice but by its own obligation to take judicial notice of and to take due account of the decisions of the court at Strasbourg will also follow.

Moreover, the Court of Justice, while stating that, according to Article 52(3) of the Charter, "*in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the European Convention on Human Rights,*" that "*provision does not preclude the grant of wider protection by European Union law.*" This leaves open the intriguing possibility that "rights of custody" might, in future, be interpreted more extensively in EU law than under the Convention.

5 Interaction Between National Constitutional Law and the Convention: An Example

The decision of the national court need not always be so simple. It is especially true in respect of private and family rights under Article 8 of the Convention that we live in a rapidly changing environment. Changes in many states to the rights of homosexuals and to persons in same-sex relationships constitute a striking example of this rapid change. National courts have been presented on more than one occasion with a dilemma. Should it simply follow the decisions of the European Court of Human Rights or should it anticipate them?

²³Case 400/10 PPU *McB v L.E.* See paragraph 53.

McD v L concerned the claim of the natural father of a child to be given rights of access. The child in question had been conceived by means of the donation of the applicant's sperm to the mother who was in a same-sex relationship with another woman. The dispute came before the High Court, which held that the two women together with the child of one of them constituted a *de facto* family for the purposes of Article 8 of the Convention. The judge referred to the decision of the Strasbourg Court in *X, Y and Z v. U.K.*²⁴ as demonstrating a "substantial movement" towards recognition of a same-sex couple as a family.

The High Court had not, however, been referred to the decision of the European Court in 2001 in *Mata-Estevez v Spain*,²⁵ where the Court held that "*according to the established case law of the Convention Institutions, long term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention.*" Although the Court recognised a "growing tendency in a number of European States toward the legal and judicial recognition of stable *de facto* partnerships between homosexuals," it considered that there was "little common ground between the Contracting States, [in] an area in which they still enjoy a wide margin of appreciation. . ."

Thus, as matters stood in 2009, the European Court had not treated couples in longterm same-sex relationships as constituting families within the meaning of Article 8 of the Convention. On appeal in the case of *McD v L* the Supreme Court held that the High Court judge had been mistaken in his interpretation of the Convention case law and that two people living in a homosexual relationship did not enjoy the rights attributable to a family within the meaning of the Convention. It was noted by one of the judges that the quoted passage from *Mata-Estevez v Spain* undoubtedly left the door open for further development. However, the Court took the view that it was the European Court which had the primary task of interpreting the Convention: national courts do not become Convention courts.

In adopting this cautious approach, the Court decided to follow the principles laid down by the English courts as explained by Lord Bingham in *R. (Ullah) v. Special Adjudicator*:²⁶

"... the House [of Lords] is required. . . to take into account any relevant Strasbourg case law. . . Courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court. . . This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court. From this it follows that a national Court . . . should not without strong reason, dilute or weaken the effect of the Strasbourg case law. . . It is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national Courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of

²⁴[1997] 24 E.H.R.R. 143.

²⁵No. 56501/00, ECHR 2001-VI.

²⁶[2004] 2 AC 323.

national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

Accordingly, the Supreme Court chose the cautious path. It held that the lesbian couple and the child of one of them did not constitute a *de facto* family cognisable in Irish law. At the time of its decision in *McD v L*, the Supreme Court would appear to have been applying the Strasbourg case law as it stood.

In the meantime, however, the European Court has taken a significant further step along the road. It delivered judgment on 22nd July 2010 in *P.B. and J.S. v Austria*,²⁷ a case concerning a claim by a homosexual partner to be treated in the same way as a heterosexual partner for the purposes of a law relating to accident and sickness insurance for dependants. The Court took the opportunity to review its case law on homosexual relationships. It recalled its decision in *Mata Estevez v Spain*, observing that it had “only accepted that the emotional and sexual relationship of a same-sex couple constitutes “private life” but has not found that it constitutes “family life”, even where a long-term relationship of cohabiting partners was at stake.”

The Court reversed its former case law in the following two paragraphs:

“29. The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many Member States. Since then a considerable number of Member States have afforded legal recognition to same-sex couples ... Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of “family” ...

30. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.”

This saga gives rise to a number of observations. Some concern the way in which the jurisprudence of the European Court of Human Rights develops. There are no fixed points. Rights do not depend on the text of the articles of the Convention but are to be considered as developing in accordance with developments in the laws and practices of the Member States. This, of course, leads to uncertainty. Disappointed parties in the earlier cases may feel aggrieved when the Court appears to change the law but only to the benefit of parties to the later cases. The assessment of evolution of social attitudes appears almost perfunctory. What had been considered to be a lack of “common ground” at the time of *Mata Estevez* in 2001 has become a “rapid revolution in social attitudes” nine years later. Neither judgment contains any explanation as to how these conclusions are reached. The Court does not decide according to the views of a majority of the Member States. It merely says that a “considerable number of Member States have accorded recognition to same-sex couples...” The margin of appreciation permitted to one Member State depends, therefore, on an assessment by

²⁷Application no. 18984/02.

the European Court of the legislation of a “considerable number” of other Member States. The notion of rapid evolution of social attitudes is even more difficult to grasp. Of necessity, the assessment of consensus is carried out retrospectively. The State learns whether it has acted within that margin only upon delivery of judgment by the Court.

Interpretation of the provisions of the Convention by reference to the existence or otherwise of a consensus in the Member States has, it has to be acknowledged, become a well-established method of reasoning in the European Court, because the Court treats the Convention as a “living instrument” to be interpreted in the light of prevailing circumstances. It resorts to the notion of a dynamic development to expand its interpretations for time to time.²⁸

Such a process of reasoning necessarily harbours the potential for direct conflict between a provision such as that enshrined in the Irish constitution regarding protection for the right to life of the unborn²⁹ and the right claimed by women to have the right to choose an abortion. The European Court delivered judgment in the case of *A, B and C v Ireland*³⁰ on 16th of December 2010 concerning claims that the three applicants had come in different ways to be adversely affected by the Irish provisions restricting the availability of abortion. The court acknowledged that the woman’s right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.³¹ It said that Article 8 could not be interpreted as conferring a right to abortion. On the other hand, the prohibition on abortion in Ireland when a woman is seeking one on the grounds of health, comes within the scope of her right to private life under that article. The Court was of the opinion that “*there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law.*” It is notable that the partly dissenting opinion of Judge Rozakis and five others was that “*there is an undeniably strong consensus among European States . . . to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries’ legislation, her well-being and health, are considered more valuable than the right to life of the foetus.*” Indeed that opinion demonstrates the ambitious objective of harmonising human-rights protection:

“According to the Convention case-law, in situations where the Court finds that a consensus exists among European States on a matter touching upon a human right, it usually concludes that consensus decisively narrows the margin of appreciation which might otherwise exist if no such consensus were demonstrated. This approach is commensurate with the “harmonising” role of the Convention’s case-law: indeed, one of the paramount functions of the case-law

²⁸This topic is discussed in paragraphs 232 to 235 of the Court’s judgment in *A, B, and C v Ireland* discussed below.

²⁹Article 40.3.3 of the Constitution provides: “*The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as is practicable, by its laws to defend and vindicate that right.*”

³⁰Application no. 25579/05, judgment 16th December 2010.

³¹Paragraph 213 of the judgment.

is to gradually create a harmonious application of human rights protection, cutting across the national boundaries of the Contracting States and allowing the individuals within their jurisdiction to enjoy, without discrimination, equal protection regardless of their place of residence.”

It is particularly interesting, in this context, to note that Finlay Geoghegan J, the Irish *ad hoc* judge who participated in the case, had reservations about the way in which the court had used the notion of consensus. She contended that, for the consensus in question to be relevant, it had to relate to the issue before the court which was as to the balance to be struck between the respective “*rights of women to respect for their private lives under Article 8 and a legitimate aim of a recognised public interest in protecting a right to life of the unborn.*” She went on to observe that the court had before it “*no facts in relation to the existence or otherwise of a public interest in the protection or recognition of a right to life of the unborn in the majority Contracting States which permit abortion on broader grounds than in Ireland.*”

Clearly, the question of consensus is an exceedingly difficult and sensitive matter. I merely wish to observe that it introduces a very significant element of uncertainty and unpredictability in the interpretation of the law. It is obvious that, assuming resort to consensus to be a legitimate tool of interpretation, it can only be used by the European Court itself. No national court could presume to pronounce on the matter.

The extent to which the European Court resorts to the notion of consensus has not been without its critics. The Chief Justice of Ireland³² remarked at an opening of the legal year of the Court in 2008 that “*its use as an interpretative tool is inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the Court, but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy.*”

Writing elsewhere,³³ the Chief Justice asked whether there must be an established consensus or whether a mere trend would suffice. He remarked that “*the objective indicia used to determine the existence or otherwise of a consensus are so varied as to leave the court with unfettered discretion as to the sources to which it may refer and, ultimately, the matters to which the Convention applies.*”

6 Interaction Between National Law, European Union Law, Convention Law and United Nations Sanctions: An Example

The *Bosphorus*³⁴ case provides an opportunity to compare the exercise of the power of judicial review by a national court with that of both European Courts. *Bosphorus* gave rise to two separate actions in the Irish High Court, a reference, in the second of those cases, to the Court of Justice and an action against Ireland in the European Court of Human Rights.

³²The Honourable Mr Justice John L. Murray.

³³“The influence of the European Convention on Fundamental Rights on Community Law,” in *Fordham International Law Journal* Vol. 33 No. 5 May 2010.

³⁴Application no. 45036/98) *Bosphorus v Ireland*, judgment 30th June 2005.

The case involved the impounding by Ireland, pursuant to United Nations Security Council resolution of a leased aircraft. A Turkish airline charter company had leased a plane (“dry lease without crew”) from the national airline (JAT) of the former Yugoslavia. The UN Security Council had imposed sanctions, taking the form of a complete trade embargo, pursuant to Chapter VII of the UN Charter, against Yugoslavia. The context was the war in Bosnia. These sanctions were implemented by a European Community Council Regulation and, in Ireland, by a statutory instrument made under the European Communities Act.

The Turkish company sent the plane to a maintenance arm of Aer Lingus at Dublin airport for servicing. The Irish government seized the plane, acting on the direction of the Security Council (given after a degree of temporisation). The aircraft was stopped while it was awaiting air traffic control clearance to take off following completion of the work.

Murphy J, in the High Court,³⁵ was asked to decide whether the Minister was bound, as he claimed, by the Council Regulation to impound the aircraft. Article 8 obliged Member States to impound aircraft where “*a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia...*” Murphy J considered that:

“...*the degree or extent of the interest referred to in the Article must have been intended to identify a situation in which the person in or operating from Yugoslavia could exercise a decision-making function in relation to the use on a day to day basis of the asset in question. Any other construction would seem to be both unreal and unjust. To impound an asset for the possession and enjoyment of which a wholly innocent party has a theoretical right to receive a nominal rent must be absurd.*”

Emphasising that *Bosphorus* was innocent of all involvement of any kind in the war in Bosnia, which was the target of the UN sanctions, he held that the Minister had not had the power to impound the aircraft. He reached this result by using a method of interpretation typical of an Irish judge applying a penal measure: any interference with rights should be interpreted strictly.

Unfortunately for *Bosphorus*, this was to be the high point of the litigation. The Minister continued to detain the aircraft, resorting to a power under Article 9 of the same Council Regulation. *Bosphorus* succeeded in a second action before Barr J also in the High Court. The Supreme Court, on appeal, referred questions to the Court of Justice.

There a very different approach to interpretation was adopted.³⁶ Firstly, the Court held that Article 8 clearly applied. JAT was the owner of the aircraft, which was not affected by the fact that it had leased it to *Bosphorus*. It held that “*the fundamental rights invoked by Bosphorus Airways are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community.*”

³⁵*Bosphorus v Minister for Transport, Energy and Communications* [1994] 2 I.L.R.M. 551.

³⁶Case 84/95 *Bosphorus* [1996] ECR I-3953.

The Court considered that “*the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators*” and concluded:

“As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.”

Thus, the innocence of Bosphorus did not avail.

Bosphorus next brought its complaint against Ireland before the Court of Human Rights.³⁷ Ireland, as a State, was, of course, also entirely innocent. It had acted on instructions given on behalf of the UN Security Council.

Bosphorus failed in its claim, because the Court, in a decision of the first importance, adopted the entirely novel doctrine of “equivalent protection.” There the Court of Human Rights held that the review of the contested act by the Court of Justice offered “*equivalent protection*,” to that provided by the Court of Human Rights. It defined that concept as follows (paragraphs 155 and 156 of the judgment):

“In the Court’s view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. . . . By “equivalent” the Court means “comparable”: any requirement that the organisation’s protection be “identical” could run counter to the interest of international co-operation pursued. . . . However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights’ protection.

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.”

In effect, the Court of Human Rights deferred to the Court of Justice. Provided that Court offered protection of rights equivalent to that which would be offered by the Court of Human Rights itself, the latter would not normally re-examine the matter. While the statement is subject to qualifications, it is an important development. The two courts thus demonstrate a level of mutual understanding and respect. It is notable, however, that no such deference is offered to national courts. It is tempting to raise the question why a similar approach should not be taken in the case of national courts or at least some of them. What is the difference, in logic, between the two situations? The European Union is not a contracting member of the Council of Europe; it has

³⁷ *Bosphorus v Ireland* (Application no. 45036/98). Judgment 30th June 2005.

not acceded to the Convention,³⁸ though Article 6 now envisages that it will do so, following necessary amendment of the Convention.

7 Conclusion

The Italian physicist, Enrico Fermi, is supposed to have said that he had been confused before he had heard a lecture and was still confused afterwards “but at a higher level.” I have not tried to present a systematic analysis. The subject-matter defies it. I have wished to start from the single national judge from a unitary state and to show where he functions as a cog in a complex system of national and international wheels. The three systems of national, Union and Convention law have in common the objective of protection of human rights. In the first two, that objective is incidental to the daily business of governing and lawmaking; but, in each case, there is a court at the heart of the system, charged with balancing the protection of rights against other aims. In the third, the Convention system, it is the sole objective. The European Court of Human Rights is not part of a tripartite polity like the nation state. It is a court without a government. It is also a court with a flexible approach to interpretation.

I have discussed a small number of examples, all emanating from or connected with Ireland to illustrate the interaction between the different systems. It is a rapidly changing scene. Will the Court of Human Rights succeed in advancing its harmonising agenda? There are signs of some approaching rebellion in the UK following decisions about prisoners’ voting rights and right of appeal from being placed on the register of sex offenders, the latter a decision of their own Supreme Court. What will be the effect of EU accession to the Convention? It is all a work in progress.

³⁸In its *Opinion 2/94*, cited above, the Court of Justice held that it did not have the competence to accede.