IRELAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract: This paper explores the concept of the European Convention on Human Rights ('ECHR') as a dynamic conversation between various stakeholders, including the European Court of Human Rights and the member states of the Council of Europe. The paper examines Ireland's participation in this conversation, taking inspiration from the intergenerational nature of constitutional interpretation. This includes Ireland's participation in the Council of Europe, contributions to the creation of the ECHR, alignment of Irish jurisprudence with the rulings of the European Court, and the opportunity for growth and development by incorporating Strasbourg case law into Irish legislation. The argument that the ECHR functions as a discourse across different generations and entities is introduced in the paper's opening section, which emphasizes the metaphorical understanding of a constitution as an ongoing discussion across generations. The paper then explores Ireland's involvement in the creation of the ECHR. The paper looks at an important issue involving Ireland's first interaction with the ECtHR: Gerard Lawless' 1957 petition contesting his incarceration under the Offences Against the State (Amendment) Act 1940. In conclusion, the paper demonstrates the multigenerational and multidimensional nature of the conversation facilitated by the ECtHR. It highlights Ireland's active involvement in forming the Convention and bringing its jurisprudence in line with the rulings of the European Court. The paper also makes the case that adopting Strasbourg case law into Irish law can advance and strengthen human rights values. This paper illuminates the broader dynamics of the ECtHR as an ongoing dialogue across many institutions and generations, promoting the protection and promotion of human rights in Europe, by evaluating the Irish experience.

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Introduction

In 1937, the People of Ireland adopted a Constitution that declared, in the present tense, that 'We, the people of Éire… do hereby adopt, enact and give to ourselves this Constitution…'[1] In 2015, the present Chief Justice observed (in *Jordan v. Minister for Children and Youth Affairs*) that the youngest living person who could be said to have adopted the Constitution in 1937 was, as of the date of his judgment, nearly 100 years old.[2] The concept of 'adopting and giving' the Constitution to 'ourselves' must, therefore comprehend also the acceptance of the Constitution by successive generations, and the accretions to it by the process of constitutional interpretation in the courts. In that context, he described a constitution as 'to some extent an ongoing conversation across the generations'.[3] The somewhat diffuse theme in this article involves stealing that metaphor and suggesting that the European Convention on Human Rights might be described as a conversation, not only across the generations, but also between the ECtHR and the other Strasbourg organs, on the one hand, and the peoples, courts and judges of the contracting States on the other. I want to look at some aspects of the Irish part in that conversation – how Ireland became involved in the Council of Europe, how it assisted in drafting the Convention and bringing it into force, how the Irish jurisprudence enabling growth and development of constitutional principles finds some common ground with the jurisprudence of the European Court of Human Rights, and, finally, how that growth and development may be assisted through the provisions of the legislation enabling the courts to give a more influential role to the Strasbourg case law.

[1] Bunreacht na hÉireann, Preamble.
[2] *Jordan v Minister for Children and Youth Affairs* [2015] IESC 33 [64].
[3] ibid.

Early Human Rights Protections in Ireland

Before examining the European Convention on Human Rights, it is worth extending the reach of the intergenerational nature of the conversation by briefly mentioning an event of legal significance that took place thirteen hundred and twenty-five years ago. In the year 697 AD, St Adomnán convened a Synod, or assembly, in Birr, Co Offaly in the middle of Ireland. Adomnán was a successor (and biographer) of St Columba, the founder of the very influential monastery of Iona. The assembly was well supported by the Irish clergy and kings including Loingsech mac Óengusso, the most powerful king in Ireland and a distant relative of Adomnán. It was also supported by the kings of the Picts and the Dal Riada (who between them controlled much of modern Scotland and part of what is now Northern Ireland). The assembly was called in order to adopt the Cáin Adomnáin, also known as the Lex Innocentium or the Law of the Innocents.[4] It was intended to be applied throughout Ireland and in the areas controlled by the Picts and the Dál Riada. The text records the names of forty senior clerics and fifty-one kings or their representatives, as guarantors, or enforcers, of the new law. The law, the first of its kind in Western Europe, has been described as an early forerunner of the Fourth Geneva Convention, in that it protects non-combatants – the 'innocents' of the title – but I think it has human rights implications beyond the laws of war. It can also probably be described as the first international human rights treaty subscribed to by the rulers of Ireland.

The purpose of the law was stated clearly in the text – to give 'perpetual protection' to clerics, to females and to boys who were not old enough to kill a man. These, obviously, were the categories of people who did not carry arms, could not defend themselves and were insufficiently protected by existing laws. In a significant break with existing legal principle, the penalties for breach of the new law did not, in Adomnán's text, depend on the honour-price of the victims – that is to say, they did not distinguish by social rank or between free and unfree. Normally, in Irish law, the honour-price of a woman was one half that of the man on whom she was dependent. Now, the life of any woman was to be seen as equal in value to the life of even a high-ranking man.

It is impossible to know the effectiveness of the law – there are no records of cases or judgments. However, we do know that the Cáin Adomnáin came to be associated exclusively with the protection of women. We have a legal text written in the early years of the 8th century which, in dealing with the duties of kingship, refers to the Cáin Adomnáin as the type of law which it is proper for a king to make.[5] We have a text from the early 9th century, in which Adomnán is credited with having brought about the 'lasting freedom of the women of the Gaels'.[6] We have a further text from the 10th century describing the law as one of the four chief laws of Ireland.[7] Some additional material inserted around that time into the text of the law described it as 'the first law in heaven and on earth which was arranged for women'. The additional material includes a rather dubious story attributing Adomnán's motivation for introducing the Lex Innocentium to his mother Rónnat, who was appalled by the sight of women's mutilated corpses at battlefield sites. Her efforts to persuade him to do something for the women of Ireland are said to have included burying him in a stone chest for several years. Some men take a lot of persuading, but the power of an Irish mother should not be underestimated.

[4] James W. Houlihan, *Adomnán's Lex Innocentium and the Laws of War* (Four Courts Press 2020).
[5] Daniel Anthony Binchy (ed), *Críth Gablach* (Dublin Stationary Office 1941, repr. 1970).
[6] Whitley Stokes (ed and tr), *Félire Óengusso Céli Dé* (London 1905).
[7] Whitley Stokes and John Strachan (eds), *Thesaurus Paleohibernicus* (Cambridge 1901 – 1903)).

Ireland and the European Convention on Human Rights

Certain historical events over succeeding centuries irrevocably changed the nature and sources of the laws of Ireland. Skipping over those centuries, I want now to look at the next Irish involvement with an international human rights instrument – the European Convention on Human Rights. Ireland was among the founder members of the Council of Europe in 1949. On the 4th November 1950, Ireland was among the 11 States that signed the Convention. Ireland was the first State to accept the compulsory jurisdiction of the Court and the second to accept the right of individual petition.[8]

To put Irish participation in context, it should be noted that Ireland at that time was relatively new to independent statehood, was anxious to assert itself on the international stage and did not have many outlets for international engagement. At a bilateral level, we had diplomatic representation in about a dozen other States but there were at least some politicians who questioned whether even that was too extravagant for a small country. Eamon De Valera had been a strong supporter of the League of Nations and had served as President of its Council, but the League was wound up in 1946. The Soviet Union vetoed Irish membership of the United Nations in 1946, in part because of Irish neutrality in the War, and it continued to do so until 1955.[9] When the creation of the North Atlantic Treaty Organisation was being proposed, the possibility of Ireland joining had been broached. However, the government's position was that it could not enter into a military alliance with Britain while Ireland remained partitioned.[10] In attempting to interest other founder members of NATO in this issue, the government may have underestimated the relationship between Britain and the US, and may also have overestimated Ireland's geographic strategic value to the new organisation, but in any event Ireland did not join. The State did subscribe to some European financial agreements, but these were mainly of a technical nature and were secondary to the economic objective of keeping the link with sterling. After the enactment of the Republic of Ireland Act in 1948, the State left the Commonwealth in April 1949 (although it continued to be part of the preferential trade arrangements and of the sterling financial area). Ireland had taken an active part in the Commonwealth and in the Imperial Conferences concerned with the relationships between Britain and the other States, but that was now over.

The Council of Europe was an opportunity for Ireland to take a role in building a new post-war Europe. It must, of course, be borne in mind that there were many factors in play at the time, pushing in different directions. Ireland wanted to be part of the new initiative, but was wary of some of the proposals being campaigned for, at the time, by those who saw an integrated Europe as the best guarantor of future peace. The Irish did not wish to agree to anything that might jeopardise recently-established Irish sovereignty, and feared that economic integration would imperil the policy of protecting infant Irish industries. In one of the debates about the role of the Council of Europe, De Valera made it clear that his preference was for functional cooperation between sovereign States to address economic and other issues. He said that the Irish had struggled for centuries to prevent their national identity from being 'destroyed, submerged or absorbed' by a larger political entity, and it would be extremely difficult to induce the people to suddenly reverse the current of their

[8] Suzanne Egan, Liam Thornton and Judy Walsh, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury Professional 2014).
[9] Elizabeth Keane, *An Irish Statesman and Revolutionary: The Nationalist and Internationalist Politics of Sean MacBride* (1st edn, Bloomsbury Publishing).
[10] Michael Kennedy and Eunin O'Halpin, *Ireland and the Council of Europe* (Council of Europe Publishing, 2000).

thought.[11] The Irish delegates perhaps lacked experience in international dialogue, and it does appear that their tendency to raise the issue of partition at the Parliamentary Assembly of the Council of Europe went down badly.[12] Other delegates took the view that they were there to discuss new ways for European nations to cooperate, and not to debate the many contentious borders on the continent of Europe. Furthermore, as the Irish Times pointed out at one stage, many of the European delegates had had direct experience of living under dictatorship in the recent dark past, and some had seen or even experienced the concentration camps.[13] They were not inclined to see the situation in Northern Ireland as comparable.

However, the contributions of the Irish in the closer committee and drafting work on the Convention was appreciated. The Foreign Minister at the time was Sean MacBride, a keen internationalist and a believer in the international protection of human rights, who took a direct interest in bringing about agreement that the Assembly should discuss the definition of human rights and fundamental freedoms. He was also influential in the drafting of the Convention. In particular, he argued strongly for the inclusion of a right of individual petition rather than simply leaving the protection of individuals to the initiative of other contracting States. Irish support for the inclusion of specific protection for the right of parents in the education of their children, property rights and free elections helped to secure that protection in the form of the First Protocol to the Convention.[14] The development of a legal regime that could be invoked by individuals against their own States was hugely significant. The recent trials in Nuremberg were of course an innovation in terms of holding people criminally responsible for actions against their own peoples, within their own territories, but the provision of a forum for the binding resolution of human rights complaints brought by individuals was a further, vital step. Naturally, like many of the signatory States, the Irish did not really expect to be a defendant in the European Court of Human Rights and it must have come as an unwelcome surprise when the first petition by an individual to be considered by the Court was that of Gerard Lawless.[15] Lawless, who used the Irish version of his name (Ó Laighléis) when litigating in Ireland, had been a member of a faction that split from the IRA in the 1950s. (He ultimately became a Labour Party councillor in London in the 1980s.) In July 1957 he was arrested and interned under the provisions of the Offences Against the State (Amendment) Act 1940, on foot of a warrant reciting the opinion of the Minister for Justice that he was engaged in activities prejudicial to the security of the State. The provisions conferring a power to intern without trial had been brought into force that month in response to a resurgence in IRA activity, and the government notified the Secretary-General of the European Council by letter 12 days later. Subsequently the Government announced that any detained person who undertook not to engage in unlawful activities contrary to the Act would be released.

In *habeas corpus* proceedings, Lawless argued amongst other grounds that his detention amounted to a violation of Articles 5 and 6 of the European Convention on Human Rights.[16] The case is fascinating for many reasons. To begin with, the legal personnel included figures of significant importance in the development of Irish constitutional rights and also of the

[11] National Archives: 'Statements made by Ireish representatives in the Consultative Assembly in regard to the Federation of Europe'.
[12] Kennedy and O'Halpin op cit.
[13] Irish Times, 13th August 1949.
[14] Kennedy and O'Halpin op cit.
[15] *Lawless v Ireland* (No.1) App No 332/57 (ECHR, 14 November 1960), *Lawless v. Ireland* (No.2) App No 332/57 (ECHR, 7 April 1961), *Lawless v. Ireland* (No.3) App No 332/57 1 July 1961.
[16] *Re Ó Laighléis (Lawless*) [1960] IR 93.

Convention and its jurisprudence. Lawless's senior counsel was Sean MacBride himself, while the State's team was led by Brian Walsh SC, who went on to become a hugely influential judge of the Supreme Court and, later, of the European Court of Human Rights. The members of the Supreme Court that heard the appeal included Cecil Lavery, who had taken part in some of the drafting work on the Convention, as well as Cearbhall Ó Dálaigh, later Chief Justice and judge of the European Court of Justice. MacBride expressly disavowed any argument that the Convention was, in itself, directly effective in Irish law. This was clearly correct, having regard to Articles 15 and 29 of the Constitution. (These provide that the sole and exclusive power to make law for the State is vested in the Irish legislature, and that no international agreement can form part of the domestic law of the State unless it is made so by the Oireachtas.) The case made on behalf of Lawless was that the Convention was an effective agreement and statement of international law; and that any Court construing an enactment should do so in such a way as to avoid any conflict with the principles of international law including the provisions of the Convention. If the enactment could not be so construed then, since the State had become a party to the Convention, the Government, or any person acting under its authority, should not be permitted to rely upon the enactment. The Supreme Court, which delivered judgment on the 6th November 1957, gave the submission short shrift. No argument could prevail against the express terms of the Constitution, and the primacy of domestic law could not be displaced by the State becoming party to the Convention. Nor could an Act passed in 1940 be construed in the light of, for the purpose of finding conformity with, a Convention entered into ten years later. Lawless lodged his application with the European Commission of Human Rights two days later. Meanwhile, he gave the necessary verbal undertaking to the Irish authorities not to engage in any illegal activities, and was released from detention.

As the first individual case *Lawless* was, presumably, seen as a landmark in Strasbourg and elsewhere in Europe, as well as in Ireland, and not surprisingly it gave rise to a number of procedural and jurisdictional disputes and rulings. The first and second judgments are concerned with procedural rules that are no longer in force.[17] However, they are of some interest in that they demonstrate the willingness of the Court from the start to give a broad interpretation to rules that were, on their face, highly restrictive of the rights of the individual complainant. This was seen as being in the interests of both that individual and the proper administration of justice. The substantive judgment was delivered on the 1st July 1961.[18] Among other features, it is interesting to note that the Irish government based some of its case on the *travaux préparatoires* and drafting history, in both English and French, of the Convention – a form of legal argument unknown in the domestic Irish courts, and obviously picked up from European colleagues. The Court, however, found the text to be clear to the point that resort to the preparatory work was not permitted. The detention was unanimously held to be contrary to the terms of Article 5. However, the Court unanimously agreed with the Commission that the government was justified in declaring a public emergency threatening the life of the nation and in derogating from the Convention. It accepted on the evidence that the application of the ordinary law had been unable to check the growing danger, and that even the special courts could not have sufficed to restore peace and order. A secret army was engaged in unconstitutional activities and using violence to attain its objectives, and in its operations outside the territory of the Republic was seriously jeopardising the State's relationship with its neighbour. Alternative measures suggested in

[17] *Re Ó Laighléis (Lawless)* [1960] IR 93.
[18] *Lawless v. Ireland* (No. 3) App No 332/57 (ECHR (Chamber), 1 July 1961).

argument, such as sealing the Border, would have had extremely serious repercussions for the population.

The Act itself was examined and safeguards to prevent abuses were found. On the evidence, there had been grounds justifying Lawless's arrest. The government's public announcement that it would release any person who undertook to observe the law and refrain from activities contrary to the Act constituted a legal obligation in a democratic country such as Ireland, and Lawless had been released on foot of it. It is possible to discern, in this first substantive judgment on an individual complaint, certain themes that became hallmarks of the Strasbourg jurisprudence. The Court accepts that the duties of national governments include the protection of their people and of the interests of the State in its foreign relations. However, claims made by defendant States, and the evidence for those claims, are subjected to scrutiny (although it might perhaps be said that the level of scrutiny did over time become higher, and less deferential, than it was in *Lawless*). Where powers are conferred by national law, safeguards against abuse are looked for. The importance of the availability of remedies in the ordinary courts is emphasised.

Ireland's international outlook changed rapidly in the 1960s, with the abandonment of protectionist economic policies, the move to attract foreign investment and the (initially unsuccessful) attempts to join the European Economic Community. In the meantime, Irish jurisprudence had commenced one of its most exciting periods, with judges developing a deep interest in those provisions of the Constitution that declare and protect fundamental rights. A theme began to emerge in constitutional interpretation that would soon be mirrored in Strasbourg – the concept of a rights instrument as a living document, to be construed in the light of current circumstances rather than being frozen in the time of its drafting. The first explicit reference to this concept in Irish law appears to be in the judgment of Walsh J. in *McGee v. The Attorney General* (1973) where he said:

> According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts. [19]

Similarly, O'Higgins C.J. said in *State (Healy) v Donoghue* (1976):

> In my view, this preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can absorb or be adapted to such changes. In other words, the Constitution did

[19] *McGee v. The Attorney General* [1973] IR 284 [318].

> not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment. [20]

In *Tyrer v United Kingdom* (1978), the ECtHR held that corporal punishment of juvenile offenders, as practiced at that time in the Isle of Man, constituted degrading punishment contrary to Article 3 of the Convention. [21] Part of the case made by the Attorney-General of the Isle of Man was that such punishment could not constitute a violation, since it did not outrage public opinion on the island but was viewed by local people as an effective deterrent. In its response, the Court said:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.[22]

Walsh J. was appointed to the European Court of Human Rights in 1980, and it is clear that he brought with him, and communicated to his new colleagues, his firm endorsement of that view. Writing in *Essays in Honour of Brian Walsh* published in 1992, the then President of the European Court of Human Rights Rolv Vyssdal said of Walsh that he had 'more than actively contributed' to the firm establishment in the Irish Constitution and in the Human Rights Convention of this interpretative principle:

> He has consistently hammered home the message that the Convention, like the Irish Constitution, is written in the present tense and is intended at all times to be read as contemporary law, and not frozen to the particular mischiefs which the drafters may have had in mind. Bearing witness to the universality both of human rights and of their accompanying principles of interpretation, he has quoted in Dublin and in Strasbourg the dictum of Justice Brennan of the Supreme Court of the United States of America '…the ultimate question must be, what do the words of the text mean in our time?'[23]

Meanwhile, true to the ruling in *Re Ó Laighléis*, the courts here held firm against occasional attempts by practitioners to rely directly on the Convention and Strasbourg jurisprudence. However, that did not prevent judges from having some regard to Convention jurisprudence when developing, interpreting or applying constitutional principles. A good example is the landmark judgment of Costello J. in 1994 in *Heaney v Ireland*,[24] pioneering the use of a proportionality test in determining whether legislation infringes constitutional rights. While the formulation of the test was borrowed directly from a judgment of the Supreme Court of Canada,[25] Costello J. noted that a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society was frequently adopted by the European Court of Human Rights. He cited *Times*

[20] *State (Healy) v Donoghue* [1976] IR 325 [347].
[21] *Tyrer v United Kingdom* App No 5856/72 (ECHR, 25 April 1978).
[22] ibid para 31.
[23] James O'Reilly, *Human Rights and Constitutional Law – Essays in Honour of Brian Walsh* (O'Reilly edn, Round Hall Press 1992) page 10.
[24] *Heaney v Ireland* [1994] 3 IR 593.
[25] *R v Chaulk* [1990] 3 SCR 1303.

Newspapers Ltd v United Kingdom (1979) in this regard.[26] The voice of Strasbourg was being heard, even when domestic law did not oblige Irish judges to listen.

For its part, the ECtHR enables a continuing conversation by the application of the principles of consensus and the 'margin of appreciation', which have assisted in avoiding head-on clashes between the Convention and the Irish Constitution on particularly sensitive issues. The operation of these principles obliges the Court to listen to not just the lawyers in the case, but the voices of the people of the defendant State and of the peoples of other States. The margin of appreciation has been defined as 'the space for manoeuvre that the Strasbourg organs are willing to grant national authorities'.[27] The presence or absence of a consensus among member States on a particular issue is relevant to, but not determinative of, the breadth of that margin. One example of how the principles work (although it may not be typical) is provided in the judgment in *A, B, and C v. Ireland*,[28] a 2010 case involving complaints about the failure of the Irish State to legislate for abortion in line with the judgment of the Supreme Court in the 1992 *X* case.[29] (Obviously, the case predates the repeal of the 8th Amendment and the introduction of the current statutory regime.) Each of the three plaintiffs had travelled abroad for an abortion, and their complaint was that their rights under Article 8 ECHR had been violated because there was no legal provision for the procedure in Ireland. The ECtHR agreed that there was a European consensus in favour of broader abortion rights than those available under Irish law, to the extent that each of the women could have obtained an abortion in most of the other Member States. However, it accepted that the majority of the Irish people had taken a stance against abortion during the 1983 referendum. There could be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation was, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest and the conflicting rights to respect for private lives under Article 8 of the Convention. Accordingly, the State was entitled not to provide abortions sought for reasons of health and well-being. Two of the complainants were found to be within this category and their claims accordingly failed. The third, however, succeeded, because she had a medical condition that could have brought her within the *X* case criteria relating to a risk to her life, but there was no adequate process by which she could establish her legal right to an abortion in Ireland.

The commitment that States give is to protect the substance of Convention rights, but the remedies and protection mechanisms are not prescribed. The ECtHR has never required direct incorporation of the Convention into domestic law, or attempted to lay down rules to be applied uniformly in the contracting States. However, it does frequently have to determine whether domestic law provides an adequate remedy for a breach of rights, and whether a litigant has exhausted those remedies. In the *A, B and C* case,[30] it ruled that a declaration of incompatibility under s. 5 of the European Convention on Human Rights Act 2003 (in respect of the 1861 legislation outlawing abortion) would not have been an adequate remedy. It noted that the rights guaranteed by the 2003 Act would not prevail over provisions of the Constitution. Further, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant

[26] *Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom* App No 6538/74 (ECHR, April 26, 1979).
[27] The Council of Europe/Lisbon Network of national judicial training institutions
[28] *A, B and C v Ireland* App No 25579/05 (ECHR, 16 December 2010).
[29] *Attorney General v X* [1992] 1 IR 1.
[30] *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010).

proceedings, it could not form the basis of an obligatory award of monetary compensation. I would tentatively suggest that, while it is certainly correct to say that the legislature cannot confer power on a court to override the Constitution, the declaration of incompatibility has perhaps been underrated. It certainly does not have the same legal effect as invalidation of a statute by reason of inconsistency with the Constitution. However, ours is a system that quite frequently utilises the declaratory remedy in litigation against the State. The basis for this is that the separation of powers requires each organ of State to respect the role of the other organs, and that involves respecting the outcomes of their processes. The courts have the role of interpreting and upholding the Constitution and the laws. It is generally to be assumed, for example, that if the court declares that a person's rights have been violated by the executive, the executive will take remedial action accordingly. In that context, a declaration by an Irish court that Ireland is in breach of its international treaty obligations must be seen as having some significant weight. However, s. 5 declarations should, ideally, be rare. Apart from any other consideration, they are to be granted only where no other legal remedy is adequate and available. It is, after all, to be hoped that constitutional and common law principles will in general provide a remedy for an identified breach of rights. The ECtHR confirmed, in a judgment delivered in *P.C. v. Ireland*, that the domestic authorities have a margin of appreciation in conforming with their obligations under Article 13. [31] Where a domestic court is competent to determine constitutional issues alongside Convention issues, the margin is taken as encompassing the discretion of that court to uphold a challenge to legislation on some but not all of the grounds raised by litigants before it. Taking such an approach in a case is not inconsistent with the duty of the respondent State to ensure the availability of a remedy for alleged violations of Convention rights. The Supreme Court had been entitled, therefore, to grant a remedy under the terms of the Constitution without having to go on to determine the Convention claim.

In short, the Constitution and the Convention remain separate legal orders. Provided rights are in fact protected and vindicated by the law, there should be no need to attempt to import the Convention into the place of the Constitution. The most useful provisions of the 2003 Act, so far as most litigation is concerned, may perhaps lie in the interpretative obligation in s. 2, the performance obligation in s. 3 and the judicial notice obligation on the courts set out in s. 4. The enactment of the 2003 Act has, of course, meant a great expansion of the significance of Convention jurisprudence in disputes in the Irish domestic courts and there are now few cases concerning human rights where Strasbourg case law is not cited. However, it should perhaps be emphasised that the tendency on the part of some practitioners to plead and argue cases as if the Convention applied directly, rather than as mediated through the Act, is not only to ignore the most important feature of the Irish legal landscape but is to under-appreciate the reach of the Act itself. For example, the matters listed in s. 4 go beyond the provisions of the Convention itself, and the judgments of the ECtHR – they extend to declarations, decisions and advisory opinions of the Court, decisions and opinions of the Commission, and decisions of the Committee of Ministers. The conversation is not always just between lawyers.

Conclusion

When President Ryssdal was writing his essay in 1991, he was anticipating a progressively greater workload for the ECtHR, with greater responsibility, due to the accession of the newly independent and democratic countries of central and eastern Europe. Those were optimistic days, after the fall of the Berlin Wall, and it is obvious now that the judges of the

[31] *P.C. v. Ireland* App no 26922/22 (ECtHR, 1 September 2022).

Court face different and perhaps greater challenges in the coming years. A member State of the Council of Europe is defending itself against a war of aggression. In some parts of Europe and the wider world there is a movement towards a form of strongman authoritarianism that would deny the legitimacy of democratically established institutions, respect for rights and the rule of law. In others, there may be a tendency towards isolationism. It is good to know that the work of the Court will continue to be sustained by a judge of the integrity, intelligence and clear-mindedness of Síofra O'Leary. We hope that the conversation will go on, and that, like the best conversations, it will convey not just information and enlightenment but also solidarity and friendship.