WHY THE EUROPEAN CONVENTION ON HUMAN RIGHTS STILL MATTERS

Abstract: The article, which reproduces a speech delivered at Dublin City University in October 2022, on the occasion of a visit of the European Court of Human Rights, sets out why, more than 70 years on, the European Convention still matters, not just to Ireland, but to all States within the Council of Europe legal space, contributing to peace and stability in Europe and to the development of more tolerant, pluralist democracies governed by the rule of law. Three broad illustrations are given relating to access to justice; safeguarding the rule of law and characterisations of the Convention as a living instrument of European public order. As regards access to justice, the article demonstrates how effective rights do not exist without effective remedies and obtaining an effective remedy requires firstly access to court. Hundreds of thousands of litigants, or their relatives, have turned to the Strasbourg Court when their complaints failed or were rejected at national level. Turning to the second illustration, the article addresses recent rule of law backsliding within Europe, giving concrete examples of how the Strasbourg court has responded to rule of law suspension, break down or dysfunction and how it has developed case-law in defence of judicial independence. Finally, the article explains how the judgments of the Strasbourg Court in relation to highly delicate and contested ethical, moral and social questions have shone a light on issues in relation to which applicants may previously have had difficulty gaining traction at their own national level. The evolutive interpretation of the European Convention by the Strasbourg Court has its limits nevertheless, with the margin of appreciation doctrine allowing a balance to be struck between common minimum standards on the one hand and the needs and specificities of different societies and legal systems on the other.

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Introduction

In her 2021 annual report, the Secretary General of the Council of Europe noted that Europe's democratic environment and democratic institutions were in mutually reinforcing decline.[1] Last year, in a speech delivered at UCD, the Chief Justice referred to legislative proposals previously tabled across the Irish Sea in relation to the Human Rights Act, to difficulties at EU level in relation to protection of the rule of law and to what he described as the current 'stresses' facing the European Court in Strasbourg, emphasising that: 'the post-war model of judicial protection of human rights is under more challenge today in more significant ways and in more locations than at any time since 1945'.[2]

Strasbourg judges know only too well the 'stresses' to which both refer. It is not every day that an organisation like the Council of Europe, in existence since 1949, and designed to promote democracy, the protection of human rights and the rule of law, expels a member.[3]

[1] Council of Europe, *State of Democracy, Human Rights and the Rule of Law: A democratic renewal for Europe* (Report by the Secretary General of the Council of Europe 2021) <https://www.coe.int/en/web/secretary-general/report-2021#page-15> Accessed 6 June 2023.

[2] Chief Justice Donal O'Donnell, 'A Court and the World' (The Making (and Re-Making) of Public Law, UCD, 6-8 July 2022).

[3] See Council of Europe, Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe (16 March 2022); European Court of Human Rights, Resolution on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention (22 March 2022); European Court of Human Rights Resolution taking note that the office of the judge in the Court with respect to the Russian Federation would cease to exist on 16 September (5 September 2022).

Yet the post-war model of judicial protection of human rights has never gone unchallenged. Indeed, in some quarters, it has never been fully accepted. The nature of the stresses has simply changed over the decades, whether in relation to certain States, certain regions or certain legal questions. The quality of the 'hope' which inspires so much of what we do in Strasbourg has ebbed and flowed ever since the ink dried on the signature of Séan MacBride, who ratified the Convention almost 70 years ago on behalf of the Irish State.

This article provides three broad illustrations of why, over seven decades later, the European Convention really does still matter. Some illustrations have a particular Irish flavour, others do not.

Access to Justice

I will start with something obvious but essential – effective rights don't exist without effective remedies. To get an effective remedy one must first get to court. In its landmark judgment in *Golder v. the United Kingdom*, decided in 1975, the Strasbourg court held that Article 6 of the Convention guarantees a right of access to court.[4] Although that provision did not *expressly* provide for such a right, the Court held that the rights to fair, public and expeditious proceedings which it does guarantee would have no value if there was no access to courts and therefore no such proceedings to begin with. An Irish audience will know that this landmark judgment led to another, both for the interpretation of the Convention and for Ireland. In *Airey v. Ireland,* the Court held in 1979 that Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for *effective* access to court, either because legal representation is rendered compulsory, as is done by the domestic law of certain States for various types of litigation, or because of the complexity of the procedure or the case.[5] It was not, the Court stressed, Strasbourg's function to indicate, let alone dictate, which measures should be taken to comply with the State's positive obligations. The institution of a legal aid scheme was mentioned as one possibility; but simplification and overhaul of procedure was also mentioned as another. *Airey* is an old case of course; so why mention it? This old case has never lost its relevance. It has been relied on in multiple cases involving different Council of Europe States to find violations of Article 6.[6] And the difficulties which it highlighted in the 1970s continue to resonate in this and other European jurisdictions – covering the whole Council of Europe legal space - to date.

In a judgment delivered in 2018 the former Chief Justice expressed his concern that: 'there are cases where persons or entities have suffered from wrongdoing but where [they] are unable effectively to vindicate their rights because of the cost of going to court.'[7] Across the water, Lord Reed expressed similar concerns in the unanimous judgment delivered by the

[4] (1976) 1 EHRR 524.
[5] App No 6289/73 (ECHR, 9 October 1979).
[6] *Roche v. the United Kingdom* App No 32555/96 (ECHR, 19 December 2005-X) para 116; *Z and Others v. the United Kingdom* App No. 29392/95, (ECHR, 1 May 2001-V) para 91; *Cudak v. Lithuania* App No 15869/02 (ECHR, 23 March 2010) para 54; and *Lupeni Greek Catholic Parish and Others v. Romania* App No 76943/11, (ECHR 29 November 2016) para 84, (extracts)). For more recent examples see *Zubac v. Croatia* App No 40160/12 (ECHR, 5 April 2018) para 76, and *Grzęda v. Poland* App No 43572/18, (ECHR 15 March 2022), paras 342-343.
[7] [2018] IESC 44, [2.5]. See also his comments (albeit in the context of third-party funding) in *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2017] IESC 27.

UKSC in 2017 in *R (UNISON) v. Lord Chancellor*.[8] An extract from that judgment is worth citing for its simple and timeless message:

> Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.
>
> Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance […].
>
> Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established.[9]

Several years on, those simple words have gained, not lost, in strength. In Ireland a complete review of the administration of civil justice was completed in 2020, seeking amongst other things to tackle questions of simplification of procedure and outdated and excessively complex procedural rules. This had been identified by the Strasbourg Court as potentially problematic 41 years previously.[10] The Chief Justice established an access to justice working group in 2021.[11] Problems in relation to access to court thus continue to be of concern, as witnessed by ongoing measures to comply with Article 6 requirements in this jurisdiction or indeed the strike action undertaken recently by criminal barristers in England and Wales.

What the *Airey* case stressed was the positive obligation on High Contracting Parties to provide *effective* access to justice at national level for litigants. Effective access to justice for litigants is also what the Convention seeks to provide to those who consider that national remedies or authorities have failed. Since the amendments introduced by Protocol No. 11, the right to individual application is confirmed as being at the heart of the Convention system. The unconditional character of this right distinguishes the European Convention

[8] [2017] UKSC 51.

[9] *R (on the application of UNISON) (Appellant) v. Lord Chancellor (Respondent)* [2017] UKSC 51 [66] – [69]. The case concerned the payment of fees by claimants in employment tribunals or employment appeals tribunals. The aims of the Fees Order adopted in 2013 was to transfer part of the cost burden of the tribunals from taxpayers to users of their services, to deter unmeritorious claims, and to encourage earlier settlement.

[10] Department of Justice, *Review of the Administration of Civil Justice: Review Group Report* (7 December 2020) <https://www.justice.ie/en/JELR/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf/Files/Review_of_the_Administration_of_Civil_Justice_-_Review_Group_Report.pdf> Accessed 6 June 2023.

[11] Courts Service, 'Launch of Chief Justice's Access to Justice Working Group Conference Report' (22 March 2022) <https://www.courts.ie/ga/node/4733> Accessed June 2023. For an overview of issues relating to access to justice see further Síofra O'Leary, 'The legacy of *Airey v. Ireland* and the potential of European Law in relation to legal aid' (2022) *DULJ*.

from other universal or regional instruments.[12] The individual is the real subject of the system and has access, provided certain conditions are fulfilled, directly to the European Court of Human Rights. Hundreds of thousands of litigants, or their relatives, have turned to the Strasbourg Court when they failed at national level and their names are now associated with the Convention rights and principles of great importance which they sought to defend. To name but a few:

- *McCann* on the duty of States to effectively investigate (Article 2);[13]
- *Selmouni* on torture (Article 3);[14]
- *Siliadin* on the duty to criminalise domestic servitude (Article 4);[15]
- *Ilgar Mammadov* on detention for political motives (Article 5);[16]
- *Salduz* on the right of access to legal assistance or *Kavala* on the right to a fair trial (Article 6);[17]
- *Del Rio Prada* on retroactive application of case-law (Article 7);[18]
- *Christine Goodwin* on the rights of post-operative transsexuals or *Norris* on the open expression of one's sexuality (Article 8);[19]
- *Ebrahimian* on the right to manifest one's religion and the limits thereto (Article 9) or;[20]
- *Navalnyy* on the right to freedom of expression and association (Articles 10 and 11).[21]
- *MacFarlane* on the lack of an effective remedy for delays in criminal proceedings *(Articles 13);*[22]
- *Beeler* on discriminatory treatment of widower, taking care full-time of children *(Articles 8 and 14).*

Safeguarding the Rule of Law

The second illustration of why the Convention still matters centres on the rule of law. The Strasbourg court has consistently held that the rule of law forms part of and inspires the fabric of the whole Convention and is inherent in all its articles.[23] Reference to the rule of law undoubtedly provokes thoughts of some of our EU partners and what is termed rule of law backsliding, the subject of EU infringement actions, numerous preliminary rulings on judicial independence and effective judicial protection and an increasing number of judgments of the Strasbourg court in recent years.[24]

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[12] See further Linos-Alexandre Sicilianos, 'The European Convention on Human Rights at 70: the dynamic of a unique international instrument' (Kristiansand, 5 May 2020).
[13] *McCann and Others v. the United Kingdom* App No 18984/91 (ECHR, 27 September 1995).
[14] *Selmouni v. France* App No 25803/94 (ECHR, 28 July 1999).
[15] *Siliadin v. France* App No 73316/01 (ECHR, 26 July 2005).
[16] *Ilgar Mammadov v. Azerbaijan (no. 2)* App No 919/15 (16 November 2017).
[17] *Salduz v. Turkey* App No 36391/02 (ECHR, 8 August 2008); *Kavala v. Turkey* App No 28749/18 (ECHR, 10 December 2019.
[18] *Del Río Prada v. Spain* App No 42750/09 (ECHR, 21 October 2013).
[19] *Christine Goodwin v. the United Kingdom* App No 28957/95 (ECHR, 11 July 2002); *Norris v. Ireland* App No 10581/83 (ECHR, 26 October 1988).
[20] *Ebrahimian v. France* App No 64846/11 (ECHR, 26 November 2015).
[21] *Navalnyy v. Russia* App Nos 29580/12 and 4 others (15 November 2018).
[22] *McFarlane v. Ireland* App No 31333/06 (10 September 2010).
[23] *Engel and Others v. the Netherlands* App No 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (8 June 1976) para 55; *Amuur v. France* App No 19776/92 (ECHR, 25 June 1996) para 50.
[24] *Reczkowicz v. Poland* App No 43447/19 (ECHR, 22 July 2021); *Grzęda v. Poland* App No 43572/18 (15 March 2022); *Żurek v. Poland* App No 39650/19 (16 June 2022); *Dolińska-Ficek and Ozimek v. Poland* App Nos 49868/19

However, it is worth citing an Icelandic judgment, *Ástráðsson,* decided by the Grand Chamber in December 2020.[25] Even though the then President Spano and I did not agree entirely on all aspects of the case, the judgment is another landmark. It is a reminder that the establishment of independent and impartial tribunals in accordance with law is something which we must seek to protect in all European States, even in those, similar to our own, where the rule of law does not otherwise appear fragile. The Court found that Iceland had violated Article 6 of the Convention due to manifest and grave breaches of national law in the judicial appointment procedure relating to the newly established Court of Appeal. The Minister for Justice had replaced four candidates from a list of fifteen proposed by an Evaluation Committee without carrying out an independent evaluation or providing adequate reasons for her decision. In addition, despite the clear terms of the applicable legislation, the Icelandic Parliament when exercising what was intended as a check and balance had not held a separate vote on each individual candidate but had instead voted for the Minister's replacement list *en bloc*.

Thus, two key facets of the recently established procedure for the appointment of judges in a State where the latter had been the subject of considerable discussion and review had been ignored. The Court made clear that:

> Having regard to its fundamental implications for the proper functioning and the legitimacy of the judiciary in a democratic State governed by the rule of law, … the process of appointing judges necessarily constitutes an inherent element of the concept of 'establishment' of a court or tribunal 'by law'.[26]

The *Ástráðsson* case illustrates that rule of law problems can still arise in established democracies which have, by and large, successfully embedded the Convention into their domestic legal orders. The judgment demonstrates the common thread running through the three institutional requirements of Article 6 § 1 – namely that a tribunal be established by law, independent and impartial – are guided by the aim of upholding the fundamental principles of the rule of law and the separation of powers.[27] *Ástráðsson* also demonstrates, in our interconnected Europe, how national judges, Strasbourg judges and EU judges in Luxembourg, all interact in defence of the common European values which underpin the Constitution, the Convention and the EU Charter. It is essential, now more than ever, that those values are not weakened by any one of those three voices speaking in dissonant tones.[28] In its preliminary reference in *W.O. and J.L. v. Minister for Justice and Equality* on the execution of several EAWs issued by Poland, our Supreme Court relied on *Ástráðsson* in order to ask the CJEU whether the systemic deficiencies in the Polish judiciary amount on their own to a sufficient breach of the essence of the right to a fair trial, requiring an executing authority to refuse the surrender. [29] Ireland's European journey from isolation to integration means

and 57511/19 (8 November 2021); *Broda and Bojara v. Poland* App Nos 26691/18 and 27367/18 (29 June 2021). In July 2022, the ECtHR gave notice to Poland of 37 further applications of this nature.

[25] *Guðmundur Andri Ástráðsson v. Iceland* App No 26374/18 (1 December 2020).

[26] ibid § 227.

[27] Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary' (2021) 27 Eur Law J. 211, 215.

[28] See, for recent examples of ongoing CJEU and ECtHR synergy, Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v. Openbaar Ministerie* (22 February 2022) §§ 79-80 or *Tuleya v. Poland*, App Nos 21181/19 and 51751/20 (6 July 2023).

[29] *W.O., J.L. v Minister for Justice and Equality* (ECHR 12 July 2022).

that we now form part of two wider European communities – the EU and the Council of Europe – and we depend, as such, not only on the robustness of our own judiciary, but also on that of other States and partners.

From the perspective of the Convention and the Strasbourg Court, the importance of the rule of law cannot be reduced to questions relating to the independence of the judiciary. There are other strands to the rule of law under the Convention which are less familiar to the general public but which are nevertheless of fundamental importance to the type of societies in which we aspire to live.[30] Secret rendition cases, for example, provide a window into how the Strasbourg Court uses the rule of law as an interpretative tool for the development of substantive guarantees under rights set forth in other articles of the Convention, such as Articles 2, 3 and 5. I turn to a case called *El-Masri* which demonstrates what happens when an individual is subject to 'extraordinary rendition' and detention 'outside the normal legal system' and which the Strasbourg Court considered, 'by its deliberate circumvention of due process, [was] anathema to the rule of law and the values protected by the Convention?'[31] The following is a detailed summary of the facts to provide a full measure of the case:

- The applicant, a German national, who was travelling in December 2003 on a bus destined for Skopje was questioned at the North Macedonian border about the validity of his passport as well as possible ties with several Islamic organisations.
- Later he was taken to a hotel room where he was held for twenty-three days.
- During his detention, he was watched at all times and interrogated repeatedly. His requests to contact the German embassy were refused and any attempt to leave were met with a gun to the head. At one stage he resorted to a hunger strike.
- On 23 January 2004, handcuffed and blindfolded, he was put in a car, taken to the airport, placed in a room where he was beaten severely, stripped, sodomised with an object, placed in a nappy and dressed in a tracksuit.
- Then, shackled and hooded, and subjected to total sensory deprivation, he was forcibly marched to a CIA aircraft.
- When on the plane, the applicant was chained to the floor, forcibly tranquillised and flown in that position to Kabul where he was held captive for five months.
- In May 2004 the applicant was returned to Germany via Albania.

The Court held that the treatment to which he had been subjected violated Article 3 of the Convention. The latter enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, making no provision for exceptions or derogations. In *El Masri* the Court found it: '[…] wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework […]'.[32]

[30] For a more extensive explanation of the role played by the rule of law in Strasbourg case-law, contrasting it with the recent case-law of the CJEU see Síofra O'Leary, 'Europe and the Rule of Law', (ECB Legal Conference, 6–7 September 2018).
[31] *El-Masri v. the former Yugoslav Republic of Macedonia* App No 39630/09 (ECHR, 13 December 2012).
[32] ibid para 236.

There may be an inadvertent tendency on our part to comfort ourselves that while this case concerned an EU citizen, the events took place outside this jurisdiction, faraway, on the territory of a non-EU, albeit European, State. However, violations of Articles 3, 5 and 6 of the Convention have been found in relation to our partner EU Member States in similar rendition cases. Take, for example, *Al Nashiri v. Poland* involving extraordinary rendition, a secret detention site, 'unauthorised' interrogation methods, including mock executions, prolonged stress positions and threats to detain and abuse family members. [33] The Court found violations of Articles 2, 3, 5 and 6 of the Convention. As regards the latter, it held:

> No legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence irreparably damages that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded in order to protect the integrity of the trial process and, ultimately, the rule of law itself.[34]

Similar stories of abuse can be found in *Al Nashiri v. Romania,*[35] *Abu Zubaydah v. Lithuania,*[36] or *Nasr and Ghali v. Italy*.[37]

These are different but very stark examples of what rule of law suspension, break down or dysfunction looks like in practice. They are a reminder of the daily fare of the Strasbourg Court whose job it is to respond to individual complaints even in the most extreme of circumstances. In 1949, as the post-war framework for the protection of democracy, human rights and the rule of law from which we now all benefit was being constructed, Hersch Lauterpacht, International legal scholar and judge, wrote:

> [E]ven in countries in which the rule of law is an integral part of the national heritage and in which the Courts have been the faithful guardians of the rights of the individual, there is room for a procedure which will put the imprimatur of international law upon the principle that the State is not the final judge of human rights.[38]

Then and now, when defending the rule of law, in all its different dimensions, the European Convention clearly matters.

The Essential and Enduring Value of the Living Instrument

My third illustration of why the Convention still matters is to be found in what is both an explanation and a defence of the enduring value of the Convention, characterised as being both 'a constitutional instrument of European public order',[39] and as 'a living instrument

[33] *Al Nashiri v. Poland* App No 28761/11 (24 July 2014).
[34] ibid 564.
[35] *Al Nashiri v. Romania* App No 33234/12 (31 May 2018).
[36] *Abu Zubaydah v. Lithuania* App No 46454/11 (31 May 2018).
[37] *Nasr and Ghali v. Italy* App No 44883/09 (23 February 2016).
[38] Hersch Lauterpacht and others, 'The Proposed European Court of Human Rights' (1949) (35) Transactions of the Grotius Society, 34.
[39] *Loizidou v. Turkey (preliminary objections)* App No 15318/89 (ECHR, 23 March 1995) para 75; *Al-Skeini and Others v. the United Kingdom* App No 55721/07 (ECHR, 7 July 2011) para 141.

which must be interpreted in the light of present-day conditions'.[40] As judgments like *Airey* emphasised, the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.[41]

The characterisations of the Convention as a living instrument of European public order have of course left it open to criticism. For example, the case made against the Strasbourg Court by a former UK Supreme Court judge, Lord Sumption, in his Reith lectures was that the Court had 'invented rights' and was guilty of 'mission creep'. He argued that we interfered with national political processes in a manner which undermined democracy.[42] However, it is difficult to see the trajectory of the Court's case-law in Sumption's terms when viewed as a whole and given the emphasis in our case-law on the Court's subsidiary role, the margin of appreciation, European consensus and the emphasis placed on the process and reasoning of the domestic courts, who bear the primary responsibility for ensuring compliance with Convention guarantees.[43]

Those who complain about Strasbourg interference with democratic processes also seem to forget judgments like *Animal Defenders* and subsequent judicial iterations, where we have emphasised the importance of the legislative choices underlying measures whose proportionality is being assessed, stating, firstly, that 'the quality of the parliamentary and judicial review of the necessity of the measure is of particular importance' and secondly, that 'there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision'.[44] Looking at the Court's case-law on Article 10 on freedom of expression and Article 3 of Protocol 1, it is difficult to think of a court – national or international - which has done more to protect democracy and its lifeblood, the free flow of accurate and reliable information, and done so more effectively over decades.[45]

The evolutive interpretation which the Court employs has its limits of course. Such interpretation cannot go against the letter of the Convention and must remain in conformity with its object and purpose. The margin of appreciation doctrine, enshrined in the case-law and now in the Convention's Preamble, contributes to striking a balance between common minimum standards on the one hand and the needs and specificities of different societies and legal systems on the other. In Ireland, it also seems important to remember the positive developments to which the Convention has directly or indirectly, slowly or with more urgency, contributed. I agree with the Chief Justice that it is essential when looking at the Strasbourg Court's interaction with Ireland over the decades not to fixate on one or two cases. However, the applicants who made their way to the Strasbourg court in *Norris* (in relation to the decriminalisation of homosexual activity between consenting adults),[46] *Johnston and Others* (in relation to the absence of divorce and the protection of family life and particularly children outside of marriage),[47] *Open Door Counselling* (on access to information on abortion and reproductive services outside the State),[48] or *A, B and C* (on the absence of

[40] *Tyrer v. the United Kingdom* App No 5856/72 (ECHR, 25 April 1978) para 31.
[41] *Loizidou v. Turkey* App No 15318/89 (ECHR, 18 December 1996) para 72.
[42] Jonathan Sumption, *Trials of the State—Law and the Decline of Politics* (London: Profile Books 2019).
[43] See further the defence by Robert Spano, 'The democratic virtues of human rights law - a response to Lord Sumption's Reith Lectures', (2020) E.H.R.L.R. 132-139.
[44] *Animal Defenders International v the United Kingdom* App No 48876/08 (ECHR 22 April 2013), §§ 108 and 111.
[45] See further Síofra O'Leary, "Democracy, Expression and the Law in our Digital Age" (2022) 73 *NILQ* 1-22.
[46] *Norris v Ireland* App No 10581/83 (ECHR 26 October 1988).
[47] *Johnston and Others v. Ireland* App No 9697/82 (ECHR, 18 December 1986).
[48] *Open Door and Dublin Well Woman v. Ireland* App No 14235/88 and 14234/88 (ECHR, 29 October 1992).

legal regulation of instances when the termination of pregnancy would be lawful) ,[49] represent quite vividly the point made by Lauterpacht which I mentioned above. A similar point was made recently by Judge MacMenamin in a Supreme Court case called *O'Callaghan*, a follow-up to recent Strasbourg judgments on unreasonable delay under Article 6: 'There are occasions when an external critique can be useful in creating an insight into the way in which our own legal system can sometimes be perceived'.[50]

The people within the jurisdiction of this State now feel at home with, and expect, the hallmarks of a democratic society, namely pluralism, tolerance and broadmindedness. In cases now pending before our Court, we seek to ensure that those hallmarks of democratic societies are also enjoyed by other applicants from minority groups in other States who continue to seek fair and proper treatment in accordance with their human dignity. On many occasions the Court has emphasised that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.[51]

The judgments of the Strasbourg Court in relation to often highly delicate and contested ethical, moral and social questions have, at times, shone a light on issues in relation to which applicants previously had difficulty gaining traction at their own national level. But when interpretating and applying the living instrument the Court has sought to proceed in a balanced manner. When finding violations in judgments like *Christine Goodwin*, on the lack of legal recognition of her post-operative sex and about the legal status of transsexuals in the United Kingdom, we see the Court responding to a continuing international legal trend.[52] In contrast, when finding no violations in other judgments – think of *Parrillo v. Italy* on the domestic ban of donating cryopreserved embryos to medical research,[53] *Vavřička and Others v. the Czech Republic* on compulsory childhood vaccinations, [54] or *Dubská and Krejzová v. the Czech Republic* on regulating home births,[55] we see the Court stressing the respondent States' wide margin of appreciation in the relevant fields, the absence of a European consensus and the careful balancing of interests performed at parliamentary and judicial level by the competent national authorities. But in many cases where violations have been found, the Court has simply sought to remedy blind spots within national systems; blind spots which it may have been very difficult for national judges to identify or remedy themselves given that their roots are to be found in national, cultural, social or religious heritage. Think of the institutional tolerance of domestic violence on display in cases like *Opuz v. Turkey,*[56] *Talpis v. Italy,*[57] or *Tagayeva v. Russia,*[58] or secondary victimisation of complainants in sexual violence cases such as *J.L. v. Italy.*[59]

[49] *A, B and C v. Ireland* App No 25579/05 (ECHR, 16 December 2010).
[50] *O'Callaghan v. Ireland* [2021] IESC 68 [119].
[51] *Chassagnou and Others v. France* App Nos 25088/94 and 2 others (ECHR, 29 April 1999) para 112; *S.A.S. v. France* App No 43835/11 (ECHR, 1 July 2014) (extracts) para 128.
[52] *Christine Goodwin v. the United Kingdom* App No 28957/95 (11 July 2002).
[53] *Parrillo v. Italy* App No 46470/11 (ECHR, 27 August 2015).
[54] *Vavřička and Others v. the Czech Republic* App Nos 47621/13 and 5 others (ECHR, 8 April 2021).
[55] *Dubská and Krejzová v. the Czech Republic* App Nos 28859/11 and 28473/12 (ECHR, 15 November 2016).
[56] *Opuz v. Turkey* App No 33401/02 (ECHR, 8 June 2009).
[57] *Talpis v. Italy* App No 41237/14 (ECHR, 2 March 2017).
[58] *Tagayeva and Others v. Russia* App Nos 26562/07 and 6 others (ECHR, 13 April 2017).
[59] *J.L. v. Italy* App No 5671/16 (ECHR, 27 May 2021).

Conclusion

The breadth and range of legal questions which gravitate towards the Strasbourg Court is difficult to capture in a few concluding lines. In recent years, the Grand Chamber has examined a wide range of legal questions of considerable societal importance:

- the privacy implications of mass surveillance and reworking the safeguards States are required to guarantee in that regard;
- the compulsory vaccination of children;
- the independence and impartiality of national courts;
- preventative positive obligations to ensure the safety of women and children in situations of domestic violence;
- the situation of mentally disabled persons in the criminal justice system;
- the lack of procedural safeguards related to electoral irregularities;
- the return of migrants after the breaching of fences at the EU's external borders or the repatriation of women and children from Syrian refugee camps;
- the role of a child's religious background in adoption decisions or;
- the provision of survivor's pensions, on an equal basis, to widowers with children;
- the protection which may be afforded by the Convention in climate change litigation.[60]

In all these cases, in the words of two of my colleagues, whether the Court finds violations or no violations of the relevant Convention articles, it seeks 'to define Convention standards with a durable shelf life that can assist national authorities in the future resolution of similar controversies'.[61]

Most of us would agree that the Convention system has, over the last 70 years, made an important contribution to peace and stability in Europe and to the development of more tolerant, pluralist democracies governed by the rule of law. However, as President Higgins reminded us in his *Daniel O'Connell Memorial Lecture* delivered to the Bar some years ago: 'We must guard against any … assumption that the narrative of human rights in Ireland or globally is linear, or that it is a project that is near completion'.[62] That is why it is a good thing that the demands of universal rights and human dignity continue to be tested every day in national courts and in ours.[63]

Given that we see the post-war model of judicial protection of human rights under greater stress than ever before, what, in conclusion, can and should we do to protect it? Firstly, the system is one of shared responsibilities. The Strasbourg Court is a court of last resort and it

[60] *Big Brother Watch and Others v. the United Kingdom* App Nos 58170/13, 62322/14 and 24960/15 2(ECHR, 5 May 2021); *Centrum för rättvisa v. Sweden* App No 35252/0 (ECHR, 25 May 2021); *Vavřička and Others v. the Czech Republic* (n 51); *Guðmundur Andri Ástráðsson v. Iceland* (n 24); *Kurt v. Austria* App No 62903/15 (ECHR, 15 June 2021); *Rooman v. Belgium* App No 18052/11 (ECHR, 31 January 2019); *Mugemangango v. Belgium* App No 310/15 (ECHR, 10 July 2020); *N.D. and N.T. v. Spain* App Nos 8675/15 and 8697/15 (ECHR, 13 February 2020); *H.F. and Others v. France* App Nos 24384/19 and 44234/20 (ECHR, 14 September 2022); *Abdi Ibrahim v. Norway* App No 15379/16 (ECHR, 10 December 2021); *Beeler v. Switzerland* App No 78630/12 (ECHR, 11 October 2022) and *Verein KlimaSeniorinnen v Switzerland* App No 53600/20 and *Carême v. France* App No 7189/21.

[61] See Darian Pavli and Rachael Kondak, 'Beyond the Age of Subsidiarity: Do Established Democracies Still Need the European Court of Human Rights?' *Liber amicorum Robert Spano; Anthemis: Eleven International Publishing, 2022. - p. 559-570*

[62] President Higgins, 'The Challenge of Human Rights for Contemporary Law, Politics, and Economics' (Daniel O'Connell Memorial Lecture, Bar of Ireland, 19 November 2015).

[63] ibid.

falls first and foremost to national judges and national authorities to secure the rights and freedoms enshrined in the Convention. Many of the protections in the Convention are already in place under the Irish Constitution.[64] That does not mean that reference to or engagement with the Convention is misplaced or unnecessary. There are at least two good reasons for so engaging. On the one hand, as pointed out by the former Chief Justice in a case called *Fox v. Minister for Justice and Equality*, and endorsed extra-judicially by the present Chief Justice:

> […] there may be some merit in the future in Irish judgments using similar language and structure to that adopted by the ECtHR in analysing rights guaranteed by both the Constitution and the ECHR.
>
> The appropriate dialogue between a national court and the ECtHR can only be enhanced if judgments are expressed in terms which minimise the risk of misinterpretation by supranational courts where there may be a real possibility that such courts will be required to consider the national judgments in question.[65]

On the other, Ireland is a common law jurisdiction with proud constitutional foundations. It is rightly regarded in the EU and the Council of Europe as a State fortunate to have independent and impartial courts which engage fully and loyally with European law. The Convention, to borrow the words of Judge O'Malley in *AC v. Cork University Hospital*, was not intended as a 'surrogate constitution' or 'to weaken the rights established in national law'.[66] Irish courts are free to provide protection above and beyond it. As party to the Convention for 70 years and as an EU Member State for 50, the Irish courts' constructive, when necessary critical, but above all comfortable engagement with Strasbourg case-law and the Convention is an important signal for other States less inclined to uphold Europe's common values and common constitutional principles.

Secondly, we cannot expect judges, whether in Strasbourg or Ireland, to alone protect the post-war model from which we have benefitted so much. Although now considered passé in some circles to refer to the poetry of Seamus Heaney, my speech at Dublin City University was delivered in a lecture hall named in his honour and discussing a subject he captured magnificently in his poetry and in a lecture entitled, 'Writer and Righter', delivered at the Irish Human Rights Commission in 2009. In the foreword to that lecture, referring to the poem 'The Republic of Conscience', Maurice Manning pointed out that it:

> […] brought home … the sense of responsibility that stirs all of us to act to uphold human rights.
>
> […] once you become aware of your rights, and the rights of others, you cannot but be a representative for them. You cannot [either] sit idly by and let the rights of others be eroded or abused.

[64] *D.F. v. Garda Commissioner (No. 3)* [2014] IEHC 213 (Hogan J).
[65] *Fox v. Minister for Justice and Equality* [2021] IESC 61 [12.15]; Chief Justice Donal O'Donnell, 'The ECHR Act 2003: Ireland and the Post War Human Rights Project' (2022) 6(2) Irish Judicial Studies Journal 1.
[66] [2020] 2 IR 38.

Judges, parliamentarians, public authorities, the press, NGOs, academics, teachers, you and I as private persons - we are all responsible for protecting the good health of our societies and for what Heaney termed 'the immunity of the body politic'.