

The Reception Process in Ireland and the United Kingdom

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I. Introduction¹

Although they were among the first countries to ratify the European Convention on Human Rights (ECHR), in 1953, the United Kingdom (UK) and Ireland were the last of these to integrate it into their domestic legal orders. With the

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¹ Abbreviations: AC = Appeal Cases; All ER = All England Law Reports; ATCSA = Anti-terrorism, Crime and Security Act 2001; BVerfGE = Entscheidungen des Bundesverfassungsgerichts (decisions of the German Federal Constitutional Court); CA = Criminal Appeal; CAR = Criminal Appeal Reports; CCA = Court of Criminal Appeal; CD = Collection of Decisions of the European Commission of Human Rights 1960–1999; Ch. = Law Reports Chancery Division; Charter = EU Charter of Fundamental Rights; Cm. = Command Papers (1986–...); DPP = Director of Public Prosecutions; ECR = European Court of Justice Reports; ECHR Act = European Convention on Human Rights Act 2003; EHRR = European Human Rights Reports; EHRR CD = European Human Rights Reports, Commission Decisions; EMLR = Entertainment and Media Law Reports; EWCA = England and Wales Court of Appeal; EWCA Civ = England and Wales Court of Appeal Civil Division; EWCA Crim = England and Wales Court of Appeal Criminal Division; EWHC = England and Wales High Court; EWHC (Admin) = England and Wales High Court (Administrative Court); EWHC (Ch) = England and Wales High Court (Chancery Division); EWHC (QB) = England and Wales High Court (Queen's Bench Division); EWHC (Comm) = England and Wales High Court (Commercial Division); EWHC (Admity) = England and Wales High Court (Administrative); EWHC (Fam) = England and Wales High Court (Family Division); EWHC (Pat) = England and Wales High Court (Patents Court); EWHC (TCC) = England and Wales High Court (Technology & Construction Court); HC = House of Commons; HL = House of Lords; HRA = Human Rights Act 1998; ICCPR = International Covenant On Civil and Political Rights (UN); ICR = Industrial Cases Reports; IEHC = High Court of Ireland Decisions; IESC = Supreme Court of Ireland Decisions; ILR = Irish Law Reports; ILRM = Irish Law Reports Monthly; IR = Irish Reports; JCHR = Joint Committee on Human Rights; Jf. = Judges/Justices; SC = Scots Session Cases; SCR = Supreme Court Reports (Canada); UKHL = United Kingdom House of Lords; UKHRR = United

entry into force of the UK Human Rights Act (HRA) in 2000, and of the Irish ECHR Act in 2003, both countries incorporated the Convention, making it an immediate source of individual rights against national authorities and, in cases of violation, a source of remedies before national courts. In doing so, both countries opened their legal orders to the complete reception of the Convention, at least in a passive way, and they are now positioned to play a more active role in the development of the European constitutional order through judicial dialogue. This chapter examines the reception of the ECHR both before and after incorporation.

The UK and Ireland are relatively 'like cases', sharing important geographical, cultural, and linguistic similarities. Most important for our purposes, both countries are dualist, parliamentary democracies with similar approaches to international law. International legal norms are only valid in domestic law, and judicially enforceable by national courts, after incorporation through Parliamentary Statute. Both States joined the EU in 1973, and both had to adapt to the immediate validity, primacy, and direct effect of EU law. From the perspective of internal law, both have a long experience in judge-made, common law.

Despite these similarities, the Convention's role in, and impact on, the respective legal systems have been quite different. One crucial factor accounts for most of this difference: the prior existence of rights review. Ireland has a written, entrenched Constitution with a detailed Bill of Rights and strong judicial review of legislation, whereas the UK has no codified Constitution, no Bill of Rights, and the doctrine of Parliamentary supremacy prohibits judicial review of statutes. In Ireland, the Catholic religion traditionally undergirded an expansive approach to unenumerated rights whose source is natural law. In the UK, one observes a more positivist approach, and hostility to constitutional rights *per se*. Though the common law in the UK is judge-made law, its capacity to develop in a rights-enhancing direction is constrained by statutory sovereignty (statute trumps conflicting common law). As we will see, this combination of structural factors – codified constitution/rights/judicial review – plays a central role at virtually every stage of the analysis presented here.

The application of the ECHR is based on the principle of national jurisdiction, which remains largely territorial (Article 1 ECHR) although jurisdiction is interpreted broadly by the ECtHR.² Ireland is a unitary jurisdiction; thus, the

Kingdom Human Rights Reports; UKPC = United Kingdom Privy Council; V = violation; WLR = Weekly Law Reports.

² See e.g. *Ilascu and Others v. Moldova and Russia* (appl. no. 48787/99), Judgement (Grand Chamber), 8 July 2004, Reports 2004-VII, 179 et seq.; [2005] 40 EHRR 46. See, however, for the limited interpretation of the UK House of Lords, *R. (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Government for Defence* [2006] EWHC Civ 327; *R. (on the application of Mazin Mumaa Galtah Al-Skeini & others) v. Secretary of State for Defence* [2005] EWHC Civ 1609, upheld by the House of Lords in *Al-Skeini and others (Respondents) v. Secretary of State for Defence (Appellants) and Al-Skeini and others (Appellants) v. Secretary of State for Defence (Respondents)* (Consolidated Appeals) [2007] UKHL 26.

territorial scope of Convention rights in Ireland is its whole territory.³ The UK situation is more complicated, for two reasons. A first complexity concerns the application of the ECHR in overseas territories. On 23 October 1953, the UK appended the effect of the Convention, but not Protocol no. 1, to 42 colonies and dependencies. Since 1965, most British colonies have been granted independence, although the Convention still influences law in some of these countries.⁴ A second complexity concerns the UK itself. The UK has four constituent parts, with three legal systems (for England and Wales, Scotland, and Northern Ireland). Recent devolution has entailed new legislative assemblies in Scotland, Wales, and Northern Ireland and different incorporation regimes of the Convention.⁵ This chapter will focus only on the reception of the ECHR in England and Wales.

Although the chapter will discuss the pre-incorporation status and role of the ECHR in each country, its focus is on reception of the ECHR post-incorporation, being six years for the UK, and three for Ireland. Although there have been a few cases of declarations of incompatibility under the HRA since 2000,⁶ there has only been one so far in Ireland, and the ECHR Act has only been applied sporadically by Irish courts since 2003. Thus, it is obviously too soon to offer an authoritative evaluation of the influence of the Convention on the UK and Irish legal orders, particularly for Ireland.⁷

II. Overview of the National Constitutional Orders

A. United Kingdom

The UK does not have a written, entrenched Constitution. It does, however, possess a constitution in the material sense: a system of laws, customs, and principles which sets out the nature, function and limits of the constitutive elements of the State. There are no entrenched fundamental rights. The formal statements

³ Of course, the 1921 partition in the Republic of Ireland and Northern Ireland has been a source not only of political struggle, but also of legal difficulties. Differences in the legal regimes applicable to these two parts of the island of Ireland have regularly led to comparisons and hence to cases being brought to Strasbourg when similar situations were not treated in similar ways. See e.g. pertaining to the discrimination of homosexuals, *Norris v. Attorney General* [1984] IR 36 to be compared to *Dudgeon v. the United Kingdom* (appl. no. 7525/76), Judgement (Plenary), 22 October 1981, Series A, Vol. 45; [1982] 4 EHRR 149.

⁴ See Blackburn (2001), 943–944.

⁵ *Ibid.*, 955–956; Reed and Murdoch (2001). See also Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, 36, http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf (Unless indicated otherwise, all websites in this report were checked on 31 December 2006).

⁶ See tables published by the Department for Constitutional Affairs, <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>.

⁷ See for Ireland, O'Connell et al. (2006); and for the United Kingdom, Klug and Starmar (2005); and Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

of rights worth mentioning in English legal history, such as the Magna Carta of 1215, were designed to limit the arbitrary rule of the monarch. The 1688 Bill of Rights, to take another example, codified a settlement that resulted in the establishment of constitutional monarchy. One also finds important legal principles, such as the writ of *habeas corpus*. For the rest, the English common law is held to guarantee all fundamental rights and freedoms of the individual, although statutory provisions trump conflicting common law.⁸

The Parliamentary system is a British invention. The legislative branch comprises the House of Commons, which is made up of elected Members of Parliament, and the House of Lords, today composed of appointed and hereditary peers.⁹ The Lords' veto is only suspensive nowadays. The legislative agenda of Parliament is directed by the Government, which is, in turn, led by the Prime Minister. The Executive – Government Ministries headed by Members of Parliament who are collectively responsible to the Commons – directs the Civil Service and other parts of the administration.

A Parliament Statute is sovereign in the legal order. Statutory sovereignty means that judges may not invalidate or refuse to apply a Parliamentary Act, and no sitting Parliament can bind a future Parliament through statute. Thus any Parliament may repeal any existing statute. Further, under the doctrine of implied repeal, judges must resolve inconsistency between an earlier and a later statute in favour of the latter. The doctrine of implied repeal is relaxed with respect to the HRA 1998.¹⁰ The HRA binds the Judiciary and the Executive, but it also has been construed by judges as requiring express Parliamentary intention to repeal its provisions in the case of any later, inconsistent statute.¹¹ The only other exception to the rule of implied repeal is that provided by the European Communities Act 1972, under which judges disapply statutes that are incompatible with EU law.

The House of Lords – the Appellate Committee of Law Lords – is the highest appeal jurisdiction in almost all cases in England and Wales. The Law Lords may also sit on the Judicial Committee of the Privy Council, which is the court that hears appeals from beyond England and Wales, including appeals from Scotland and Northern Ireland or the Caribbean. HRA challenges to the devolved assemblies' legislation are heard by the Privy Council. Until 2006, the Lord Chancellor was the most senior judge on the Appellate Committee of the House of Lords, and he also sat in Government, as Minister of Justice. The European Court of Human Rights' (ECtHR) decision in *McGonnell v. UK* (2000)¹² made this over-

⁸ See e.g. *Attorney General v. Guardian Newspapers (Spycatcher)* [1987] 1 WLR 1248 (CA). See also Blackburn (1999), *Bill of Rights*, 169–173.

⁹ See White Paper, *The House of Lords: Reform* (Cm. 7027, February 2007): <http://www.official-documents.gov.uk/document/crm/70/7027/7027.pdf>

¹⁰ For a detailed discussion, see Bamforth (2004).

¹¹ See *infra* Section III. B.

¹² *McGonnell v. the United Kingdom* (appl. no. 28488/95), Judgement (Third Section), 8 February

lap in functions untenable. The Constitutional Reform Act 2000 removed these incompatibilities, and also created the Supreme Court of the UK in lieu of the House of Lords.¹³ The Supreme Court will take over the judicial functions of the Law Lords in the House of Lords in 2009.

The High Court, the Court of Appeal and the House of Lords (including the Supreme Court) supervise the acts of the Executive.¹⁴ They have the power to declare executive decisions and acts unlawful.

Although it does not have any constitutional status, one other public institution deserves mention upfront. The 1998 Belfast ('Good Friday') Agreement between Ireland and the United Kingdom committed the parties to establishing a Human Rights Commission whose remit would be to supervise the enforcement of human rights obligations.¹⁵ The UK initially created a Commission whose competence was limited to the territory of Northern Ireland. In October 2003, the Government announced its intention to establish a single Commission for Equality and Human Rights for the whole of the United Kingdom (except Northern Ireland), and the new Commission became operational in October 2007.¹⁶ Its remit is to promote human rights, but also to bring together disparate bodies which currently have responsibilities in the field of equality, thus making it unlikely it will have the same impact as the Irish Human Rights Commission. According to the Equality Act 2006, the Commission should advise employers and service providers on good practice and the promotion of equality and good relations; conduct inquiries and carry out investigations; provide advice and information on rights and equality laws; campaign on issues affecting the diverse groups in society that can suffer discrimination; make arrangements for conciliation to assist with disputes; assist individuals who believe they have been the victim of unlawful discrimination; and provide grants.

B. Ireland

The Irish Constitution (1937) is entrenched and cannot be easily revised.¹⁷ It contains both written and unenumerated rights, which overlap most of the ECHR's rights provisions. The National Parliament (*Oireachtas*) consists of the President and two Houses: the House of Representatives (*Dáil Éireann*) and the

ry 2000, Reports 2000-II, 107 et seq.; [2000] 30 EHRR 289. See Cornes (2000). See *infra* Section III. D.

¹³ See e.g. Le Sueur (2004).

¹⁴ Please note that the report will focus on higher courts only and on their majority decisions, unless decisions by lower courts and dissenting judgements present a specific interest in a concrete case.

¹⁵ See e.g. O'Connell (2001), 470.

¹⁶ See <http://www.cehr.org.uk>.

¹⁷ This is somewhat counterbalanced by the frequency of constitutional referenda in Ireland, often to undo jurisprudential developments. See Costello (2005).

Senate (*Seanad Éireann*). As in the UK, the work of the Parliament is directed by the Government, which is, in turn, led by the Prime Minister (*Taoiseach*). The Executive consists of Government Ministries which are collectively responsible to the House of Representatives and direct the Civil Service and other parts of the administration.

The Judiciary is a key actor of the Irish human rights scene thanks to its prolific and activist jurisprudence on fundamental rights.¹⁸ The Constitution states that it is the highest law of the land, and it grants the Supreme Court authority to interpret its provisions, and to strike down legislative and executive acts when these are found to be unconstitutional. Outside the United States, the Irish Supreme Court is said to have the longest and most extensive experience of judicial review in the English-speaking world.¹⁹

After the 1998 Belfast Agreement, Ireland adopted the Human Rights Commission Act 2000. The Act confers wide-ranging powers on the Commission to promote and protect human rights, including: monitoring rights protection; examining draft legislation and reporting on its human rights implications; consulting with national or international human rights bodies; making recommendations on measures to strengthen, protect and uphold human rights in the State; promoting understanding and awareness of the importance of human rights in the State; conducting inquiries; appearing before the superior courts as *amicus curiae* in proceedings which concern human rights; instituting legal proceedings; providing legal assistance in certain circumstances; and establishing and participating in the Joint Committee with the Northern Ireland Human Rights Commission.

III. Reception of the ECHR

A. Historical Context: Accession, Ratification and Incorporation

1. United Kingdom

a. Drafting the Convention

Prior to the HRA, it was assumed that Parliament and judges, through the common law, guaranteed the fundamental rights and freedoms of the individual. The distrust of entrenched human rights catalogues was present on 4 November 1950, when the UK signed the ECHR, but international protection of human rights was seen by the British Foreign Office as part of a larger effort to promote a stable Europe.²⁰ Given the UK's dualism, it was easier for the UK to sign and

¹⁸ See e.g. Costello (2005) on the relationship between judicial activism and constitutional referenda in Ireland and on the legitimization of the former in the absence of the latter.

¹⁹ See e.g. Hogan (2004), 14–15.

²⁰ See e.g. Marson (1993); Robertson and Merrills (1993).

ratify the ECHR, than for monist countries, in which the ECHR might be given immediate validity in domestic law.

The UK helped to create the Council of Europe and to negotiate the ECHR, although it was opposed to an international court with the authority to adjudicate human rights matters.²¹ In the end, States reached a compromise to confer compulsory interstate jurisdiction on the Court, but to make the individual right of petition optional. The UK valued precision over vagueness, and it was a British representative who drafted the Articles 2 to 17 ECHR, easing adoption by the UK.²² A compromise was also reached according to which an express declaration by Contracting States was necessary before the Convention could extend to overseas territories. Finally, sensitive rights, such as theright to education, the rights relative to property or democratic rights, were guaranteed in a (first) separate and optional Protocol to the ECHR in 1952. As a result, despite initial scepticism, the UK became one of the first States to sign the Convention.

b. Ratifying the Convention

Since treaties can be ratified in the UK without legislative approval, the Government swiftly ratified the ECHR on 8 March 1951, and it came into force on 3 September 1953. In the first interstate case (*Greece v. UK*)²³ brought under the Convention, the UK found itself the defendant, which helped to discourage the British Government from signing the optional Protocol to confer jurisdiction on the ECtHR in cases brought by individuals. In addition, the UK perceived such jurisdiction as a threat to legislative and administrative autonomy in its colonies and dependencies. After most decolonization was completed, the UK recognized the right of individual petition to the ECtHR on 13 January 1966, recognition which entered into force on 14 July 1966.²⁴

All optional Protocols to the Convention, with the exception of Protocols nos 4, 7, and 12, have now been ratified by the UK. Protocol no. 1, dealing with those rights to property, education and free election which had been made optional by the UK in 1950, entered into force on 18 May 1954. Protocol no. 6 came into force on 1 June 1999 and Protocol no. 13 on 1 February 2004. Protocol no. 14, which has not entered into force yet, was signed on 13 July 2004 and ratified shortly thereafter on 28 January 2005. Protocol no. 6 was signed and ratified as a consequence of debates about the Human Rights Act in 1998 and the inclusion of the prohibition of the death penalty for criminal offences in the Act. The death penalty was largely abolished in 1965 and completely in 1998, whereupon the UK signed and ratified Protocol no. 6 in 1999.

²¹ See on the international and British politics surrounding the adoption of the Convention, Simpson (2001); Blackburn (2001), 936–938.

²² See Hoffman and Rowe (2003), 27.

²³ *Greece v. the United Kingdom* (appl. no. 176/56), Report (Plenary), Commission, 2 June 1956, Report of 26 September 1958.

²⁴ See Lester (1998), *UK Acceptance*.

There are several reasons for non-ratification of Protocols nos 4, 7, and 12. Not all of the rights contained in Protocols no. 4 (freedom of movement for State's nationals within and between countries, prohibition of expulsion of people from their own country, prohibition of the collective exclusion of aliens) and 7 (right of appeal in criminal cases, *ne bis in idem*, procedural safeguards in case of expulsion of non-nationals) are consistent with existing British law. Whereas there is a right of appeal in criminal cases and a right not to be punished twice for the same offence, other rights under Protocol no. 7 are not fully secured. An example is the definition of those to be treated as "lawful residents" under British law and its compatibility with Article 1(1) of Protocol no. 7. This is also the case with provisions in family law concerning the requirement of equality between spouses under Article 5 of Protocol no. 7.²⁵ As to Protocol no. 4 (signed on 16 September 1963), immigration laws in general would need to be harmonized with the rights under that Protocol. The British Government has chosen, however, not to ratify these Protocols until inconsistencies have been removed.²⁶ The UK has not yet signed Protocol no. 12, given the difference in approaches to the concept of discrimination and burden of proof, although developments in EU law may be eroding these differences.²⁷

Regarding reservations, the only reservation lodged by the UK to date is with respect to Article 2 of Protocol no. 1, valid from 18 May 1954, according to which "the principle affirmed in the second sentence of Article 2 is accepted by the UK only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure". The same reservation was also made later on in 1988 and 2001 with respect to different overseas territories where education legislation allows for further exceptions to Article 2. As to derogations, the UK currently has none, although it has registered some in the past. Thus, it made a derogation under Article 15 ECHR to Article 5(3) ECHR on 23 December 1988 and 23 March 1989 (withdrawn on 19 February 2001 with respect to the UK, and on 5 May 2006 pertaining to all other dependencies of the UK). The UK registered another derogation on 18 December 2001 to Article 5(1)(f) ECHR in relation to powers to detain suspected terrorists or illegal immigrants pending deportation under the Anti-terrorism, Crime and Security Act 2001 (ATCSA), which was withdrawn on 16 March 2005 following a House of Lords decision.²⁸ Finally, the UK made numerous declarations regarding the 23 October 1953 extension of the territorial scope of application of the ECHR to 42 overseas territories and dependencies, though decolonization has reduced their importance.

²⁵ See e.g. Blackburn (2001), 940–941.

²⁶ Home Office, White Paper, *Rights Brought Home: The Human Rights Bill* (Cm. 3782, October 1997). See Mr O'Brien, Home Office Minister, HC, vol. 312, col. 1006.

²⁷ See on the convergence between the ECtHR and the ECJ's conceptions of equality and discrimination, Martin (2006).

²⁸ See *A. and Others v. Secretary of State for the Home Department* [2004] UKHL 56.

Table 1: United Kingdom²⁹

Protocol	Signature	Ratification	Entry into force	Declarations/Reservations
Protocol no. 1	20 March 1952	3 Nov. 1952	18 May 1954	6 declarations and reservations concerning Articles 2, 4
Protocol no. 2	6 May 1963	6 May 1963	21 Sept. 1970	–
Protocol no. 3	6 May 1963	6 May 1963	21 Sept. 1970	–
Protocol no. 4	16 Sept. 1963	–	–	–
Protocol no. 5	10 Feb. 1966	24 Oct. 1967	20 Dec. 1971	–
Protocol no. 6	27 Jan. 1999	20 May 1999	1 June 1999	1 declaration
Protocol no. 7	–	–	–	–
Protocol no. 8	19 March 1985	21 April 1986	1 Nov. 1990	–
Protocol no. 9	–	–	–	–
Protocol no. 10	25 March 1992	9 March 1993	–	1 declaration
Protocol no. 11	11 May 1994	9 Dec. 1994	1 Nov. 1998	1 declaration
Protocol no. 12	–	–	–	–
Protocol no. 13	3 May 2002	10 Oct. 2003	1 Feb. 2004	4 declarations concerning Article 4
Protocol no. 14	13 July 2004	28 Jan. 2005	–	1 declaration

c. Applying the Convention Indirectly

Prior to the HRA 1998, the ECHR possessed the status of an international convention without immediate validity in domestic law. Legal subjects in the UK, who felt their rights had been infringed, could bring a legal action in respect of such a breach before the ECtHR only. Incorporation was not envisaged during the first 30 years that followed accession, and only cursory references to the ECHR were made in Parliament in the early years of the ECHR.³⁰

Although the UK has a classic dualist approach to international law, entry into the EU weakened dualist orthodoxies. When the UK became a member of the EU on 1 January 1973, the doctrines of the supremacy and direct effect of EU law were gradually recognized as having been incorporated into national law through the European Communities Act 1972. The supremacy of EU law, further, applies even to conflicting Parliamentary statutes passed later in time; the doctrine of implied repeal, otherwise a core precept of legislative sovereignty in

²⁹ Source: <http://conventions.coe.int/Treaty/Commun/ChercheMembres.asp?CM=3&CL=ENG>.

³⁰ The Attorney General told the House of Commons on 20 November 1950: "(...) it is not contemplated that any legislation will be necessary in order to give effect to the terms of this Convention."

the UK, is not applied in conflicts between EC law and later UK statutes.³¹ The increasingly central place given to human rights and especially Convention rights in EU law, and the stringency of judicial remedies before the ECJ by comparison to the ECtHR,³² have been important, indirect factors in the reception of the ECHR in British law.³³ During the pre-incorporation period (1973–2000), EU fundamental rights, in effect, pre-empted the field, while ensuring a minimal reception of the ECHR in British law. This has been the case, for instance, in the fields of anti-discrimination law, and especially the prohibition of indirect discrimination³⁴ or the protection of pregnancy at work,³⁵ as well as rights of free movement.³⁶ As EU law established itself in national law, appellate judges and legal academics began, with increasing vigour, to worry about the inconsistency of the UK's position on the ECHR.³⁷ Lord Slynn, a former UK judge at the European Court of Justice, stated his views in the House of Lords in 1992 as follows:

"Every time the European Court recognises a principle set out in the Convention as being part of Community law, it must be enforced in the UK courts in relation to Community law matters, but not in domestic law. So the Convention becomes in part a part of our law through the back door because we have to apply the Convention in respect of Community law matters as a part of Community law."³⁸

d. Incorporating the Convention: The Human Rights Act

In the 80's, as the UK began to lose cases before the ECtHR, pressure for incorporation began to build, not least, as British judges came to realise that English common law was not a sufficient means to protect Convention rights.³⁹ If the choice came down to incorporation versus the drafting a Bill of Rights, the former seemed quicker, less complicated, and less politically controversial.⁴⁰ The decisive moment came when the Labour Party entered into Government on 1 May 1997, under the leadership of Tony Blair, who promised renewed attention

to human rights, both domestically⁴¹ and in British foreign policy.⁴² In its White Paper, *Rights Brought Home* (October 1997),⁴³ it emphasized that the UK had been the progenitor of human rights in Europe, and that "bringing rights home" would submit British authorities to legal standards that were, in the end, British, not foreign.

In its case for incorporation,⁴⁴ the Government argued that in the absence of a domestic remedy in case of infringement of the ECHR, individuals would go to Strasbourg, raising costs to everyone involved. Requiring judges to interpret national law in conformity with the Convention would reduce the number of cases brought to and sanctioned in Strasbourg, and the political embarrassment thus generated.⁴⁵ Further, the more the UK Judiciary actively adjudicated Convention rights, the more the UK would build influence on the ECtHR's jurisprudence, thereby reducing discrepancies between national and supra-national methods and findings.

The Human Rights Bill was the subject of wide-ranging and lengthy debates in the House of Commons and the House of Lords during the 1997–98 Parliamentary session,⁴⁶ before being adopted on 9 November 1998. Due to the important amount of official preparation of an administrative and educational nature internal to the Civil Service, the Act only entered into force on 2 October 2000. There is no special procedure provided for in the HRA regarding the means by which it may be amended in the future, although it is not entrenched. Even if repealing of the Act is sometimes called for by the popular press and certain politicians, there is a broad consensus that repeal is not feasible, since it would probably lead to denouncing the ECHR *per se*, thus raising difficulties for the UK's membership of the Council of Europe and the European Union, but also a return to the problems pre-incorporation already mentioned. One may even venture that the level of incorporation of the Convention and the kind of human rights judicial review developed by British courts since 2000 have already become part of the common law and would stay so despite the repeal of the Act. A more commonly considered alternative to complete *disincorporation* might be to adopt a British Bill of Rights on the basis of the HRA.⁴⁷

⁴¹ See e.g. Straw (2000).

⁴² See e.g. Robin Cook, Opening Statement by the Foreign Secretary, Press Conference on the Foreign and Commonwealth Office Mission Statement, 12 May 1997. See also: <http://hrpd.fco.gov.uk>.

⁴³ Home Office, White Paper, *Rights Brought Home: The Human Rights Bill* (Cm. 3782, October 1997).

⁴⁴ See e.g. Hoffman and Rowe (2003), 29. See also Finlay (1999); Steyn (2000).

⁴⁵ See Blackburn (2001), 958–959.

⁴⁶ See on these debates, Blackburn (1999), *Bill of Rights*.

⁴⁷ See Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, 37–39, http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf. See also the discussion paper by Justice, *A Bill of Rights for Britain?* (London, 2007), <http://www.justice.org.uk/images/pdfs/A%20Bill%20of%20Rights%20for%20Britain.pdf>.

³¹ In this sense, the difference between monism and dualism may matter in the ECtHR's reception process much more than it did in the EU (see e.g. Craig (1998)).

³² See e.g. Alston (1999).

³³ See e.g. *Matthews v. the United Kingdom* (appl. no. 24833/94), Judgement (Grand Chamber), 18 February 1999, Reports 1999-I, 251 et seq.; [1999] 28 EHRR 361 and case C-36/02, *Omega Spielballen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR I-9609.

³⁴ See e.g. case C-96/80, *J.P. Jenkins v. Kinggate (Clothing Productions) Ltd* [1981] ECR 911.

³⁵ See e.g. case C-32/93, *Carole Louise Webb v. EMO Air Cargo (UK) Ltd* [1994] ECR I-3567.

³⁶ See e.g. case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279; case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* [1992] ECR I-4265.

³⁷ See e.g. Blackburn (1997), 25–29.

³⁸ House of Lords Debates, 26 November 1992, col. 1095 et seq.

³⁹ See e.g. *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, 379–380.

⁴⁰ See Report of the House of Lords Select Committee on a Bill of Rights, HL Paper 176 Session 1977–1978.

The HRA incorporates – albeit indirectly⁴⁸ – the ECHR and the case law of the ECtHR into the domestic law of the UK. According to its long title, it “gives further effect” to the rights and freedoms guaranteed by the Convention. It requires the courts and other public authorities to apply the ECHR directly within the British legal system; and it empowers individuals to plead the ECHR against public authorities in the courts. Fifty years after its ratification by the UK, the Convention entered British domestic law in 2000.

According to Section 1 para. 1 HRA, the rights brought into British law are those provided for by Articles 2 to 12 and 14 ECHR, together with the rights comprised in the optional Protocols ratified by the UK (Protocols nos 1, 6, and 13). The Act also incorporates Articles 16 to 18 ECHR. Curiously, Articles 1 and 13 are omitted, allegedly because the Act itself is meant to secure the rights of the Convention under Article 1 ECHR, on the one hand, and because incorporating Article 13 would duplicate Section 8 of the Act (which gives the courts authority to provide a remedy), on the other.⁴⁹

Under Section 1 para. 4 HRA, rights can be added to the Act by a statutory instrument, after the UK signs and/or ratifies a new Protocol to the Convention. In the former case, this amendment is conditional on the entry into force of the Protocol itself (Section 1 para. 6 HRA). Thus, when Protocol no. 14 enters into force, a statutory amendment of the HRA will be required to incorporate it into British law. According to Section 1 para. 2 HRA, reservations and derogations to the rights under the Convention and its Protocols extend to the rights incorporated in the Act. The only reservation in force at the current time is a reservation to Article 2 of Protocol no. 1. If a derogation is amended or replaced, it ceases to be a designated derogation under Section 1 para. 2 HRA and a new order is required to designate the new or amended derogation. According to Section 16 HRA, all derogations expire after five years, but may be extended expressly for another five years. Section 17 HRA provides that derogations must be kept under review by the appropriate Minister.

Incorporation proceeds in four main steps. First (Section 6), it is unlawful for a public authority, including courts, to act in a way which is incompatible with a Convention right. Second (Section 8), the courts are authorized to provide remedies for breaches of Convention rights. Third (Section 2), all public authorities must take account of the decisions of the ECtHR in their decisions on Convention rights. As a consequence, judges must interpret all Parliamentary statutes, whenever possible, to be compatible with the Convention (Section 3). Last (Section 4), when this is not possible, a declaration of incompatibility may

⁴⁸ For that reason, some authors do not regard the HRA as an incorporating act *stricto sensu*, but merely as an act that gives effect to an international convention in British law. See e.g. Clayton and Tomlinson (2006). See *infra* Section III. B.

⁴⁹ See e.g. the Lord Chancellor (House of Lords Debates, 18 November 1997, vol. 583, col. 475) and the Home Secretary, Jack Straw (House of Commons Debates, 20 May 1998, vol. 312, col. 981).

be issued by higher courts and addressed to the Parliament, although the latter is not bound by such a finding.

2. Ireland

a. Drafting the Convention

Because Irish courts always had to enforce the Irish Bill of Rights, there was no domestic pressure for the development of a European human rights catalogue and court. Ireland was among the creators of the Council of Europe, however, and one of its first members and, in that context, the Government took the view that supporting the adoption of the ECHR would benefit the country for foreign policy reasons. Unofficial motivations also included anti-British or anti-partition sentiment,⁵⁰ a view seemingly confirmed later by the 1978 *Ireland v. UK* case, the only interstate procedure ever launched by Ireland.⁵¹

b. Ratifying the Convention

The ECHR was signed by the Irish Minister for External Affairs on 4 November 1950, upon adoption by the Council of Europe. Under Article 29(1) and (2) of the Irish Constitution, the power to ratify a treaty rests in most cases solely with the Executive. The Executive thus ratified the ECHR on 25 February 1953, and it entered into force on 3 September 1953.

Ratification of the Convention was relatively unqualified. Ireland ratified all optional clauses right from the beginning in 1953. Along with Sweden, Ireland was the first Contracting State to accept the right of individual petition to the ECtHR, in February 1953 (entry into force on 5 June 1955), and it was involved in the first individual petition ever considered by the ECtHR, in 1961 (*Lawless v. Ireland No. 3*, 1961⁵²). All optional Protocols to the Convention, with the exception of Protocol no. 12, have now been ratified in Ireland. Protocol no. 1 entered into force on 18 May 1954, Protocol no. 4 on 29 October 1968, Protocol no. 6 on 1 July 1994, Protocol no. 7 on 1 November 2001 and Protocol no. 13 on 1 July 2003. Protocol no. 14, which has not yet entered into force, was signed on 13 May 2004 and ratified on 10 October 2004. Although Ireland signed Protocol no. 12 on 4 November 2000, it chose not to ratify it. The most important reason given for non-ratification is the fear that Conventional protection might lead to constitutional conflicts in Ireland, given that equality and non-discrimination are protected by Article 40 para. 1 of the Irish Constitution. It would appear that

⁵⁰ See O’Connell (2001), 423–424; Blake (2002).

⁵¹ *Ireland v. the United Kingdom* (appl. no. 5310/71), Judgement (Plenary), 18 January 1978, Series A, Vol. 25; [1979–1980] 2 EHRR 25.

⁵² *Lawless v. Ireland (No. 3)* (appl. no. 332/57), Judgement (Chamber), 1 July 1961, Series A, Vol. 3; [1979–1980] 1 EHRR 15; See also Doolan (2001).

Irish case law in this area takes a different approach to that taken by Protocol no. 12 on positive duties and the allocation of the burden of proof.⁵³

Ireland's only reservation, dated 25 February 1953, pertains to Article 6 and free legal aid. According to the Government, Ireland will "not interpret Article 6(3)(c) ECHR as requiring the provision of free legal assistance to any wider extent than is now provided in Ireland." In 1976–1977, the Irish Government chose to derogate from some of the provisions in the Convention due to security emergencies, but these derogations were withdrawn on 20 October 1977. Ireland has made only three declarations to date: to Article 2 of Protocol no. 1 on 18 May 1954, Article 3 of Protocol no. 4 on 29 October 1968 and Protocol no. 8 on 1 January 1990.

Table 2: Ireland⁵⁴

Protocol	Signature	Ratification	Entry into force	Declarations/ Reservations
Protocol no. 1	20 March 1952	25 Feb. 1953	18 May 1954	1 declaration concerning Article 2
Protocol no. 2	6 May 1963	12 Sept. 1963	21 Sept. 1970	–
Protocol no. 3	6 May 1963	12 Sept. 1963	21 Sept. 1970	–
Protocol no. 4	16 Sept. 1963	29 Oct. 1968	29 Oct. 1968	1 declaration concerning Article 3
Protocol no. 5	18 Feb. 1966	18 Feb. 1966	20 Dec. 1971	–
Protocol no. 6	24 June 1994	24 June 1994	1 July 1994	–
Protocol no. 7	11 Dec. 1984	3 Aug. 2001	1 Nov. 2001	–
Protocol no. 8	20 March 1985	21 March 1988	1 Jan. 1990	1 declaration
Protocol no. 9	24 June 1994	24 June 1994	1 Oct. 1994	–
Protocol no. 10	24 June 1994	24 June 1994	–	–
Protocol no. 11	11 May 1994	16 Dec. 1996	1 Nov. 1998	–
Protocol no. 12	4 Nov. 2000	–	–	–
Protocol no. 13	3 May 2002	3 May 2002	1 July 2003	–
Protocol no. 14	13 May 2004	10 Nov. 2004	–	–

c. Applying the Convention Indirectly

The ECHR did not form part of domestic law until the Parliament adopted the ECHR Act in 2003, according to Article 29 para. 6 of the Constitution (through which an international agreement can be made part of Irish law by statute).⁵⁵

⁵³ See Mullan (2004), 234–241.

⁵⁴ Source: <http://conventions.coe.int/Treaty/Commun/ChercheMembres.asp?CM=3&CL=ENG>.

⁵⁵ See O'Connell (2004), *Critical Perspective*, 2.

Whether due to the strong constitutional rights tradition in Ireland, fear of a *de facto* levelling-down of human rights protection,⁵⁶ or the very low number of cases brought against Ireland in Strasbourg, Irish authorities did not seriously debate incorporation before the end of the 90's.⁵⁷ Not surprisingly, the Convention attracted very little attention in the years following its entry into force.

Ireland became a member of the EU on 1 January 1973, and like the UK, inherited the *acquis* of supremacy and direct effect of EU law in the absence of formal incorporation. This transfer of a measure of legal sovereignty to the European Court of Justice required a constitutional amendment on 8 June 1972. Prior to incorporation (1973–2003), EU fundamental rights ensured a minimal reception of the Convention in Irish law,⁵⁸ particularly in the context of free movement rights and anti-discrimination guarantees.⁵⁹ The reception of Convention rights *via* EU law proceeded with difficulty in Ireland.⁶⁰ Conflicts between EU fundamental rights and Irish constitutional rights have given rise to the famous dilemma between revolt (against the primacy of EU law) and revolution (in the Irish constitutional order).⁶¹ One example of this dilemma arose in the *SPUC v. Grogan* case, where the European Court of Justice ruled that the ban on publicity in Ireland, for abortion services in the UK, violated the basic freedom of services under EU law.⁶² In reaction, Ireland negotiated a Protocol to the Maastricht Treaty in 1992 stating that the right to life under the Irish Constitution remained untouched by EU law. A similar case brought before the ECtHR led to a judgement under Article 10 ECHR's (freedom of expression) the same year, forcing Ireland to soften its ban on information services on abortion outside Ireland.⁶³ Neither of these judgements has put an end to issues related to abortion information, given the traditional influence of the Catholic tradition and the right to life (of the unborn) found in the Irish Constitution.

d. Incorporating the Convention: The ECHR Act

Following the 1998 Belfast Agreement, it was the UK's incorporation of the Convention in the HRA 1998, that led Ireland to consider incorporation, and

⁵⁶ See e.g. Hogan (2004), 16, by reference to the Supreme Court's decision in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill* [2000] 2 IR 360. For another confirmation, see e.g. *Lobe & Ouyande v. Minister for Justice, Equality and Law Reform* [2003] IESC 1.

⁵⁷ O'Connell (2001), 468.

⁵⁸ See e.g. Costello and Browne (2004).

⁵⁹ See e.g. case C-138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions* [2004] ECR I-02703 and case C-191/03, *North Western Health Board v. Margaret McKenna* [2005] ECR I-7631.

⁶⁰ See e.g. Costello (2002) on case C-63/93, *Duff and Others v. Minister for Agriculture and Food and Attorney General* [1996] ECR I-569.

⁶¹ See e.g. Phelan (1992) and (1997).

⁶² Case C-159/90, *SPUC v. Grogan* [1991] ECR I-4685.

⁶³ *Open Door and Dublin Well Woman v. Ireland* (appl. nos 14234/88; 14235/88), Judgement (Plenary), 29 October 1992, Series A, Vol. 246-A; [1993] 15 EHRR 244.

the HRA served as a model.⁶⁴ On 30 June 2003, the Parliament adopted the ECHR Act, following debates that were surprisingly uncontroversial.⁶⁵ The Bill was defended as a neutral template for sensitive cross-border dealings with Northern Ireland that one could otherwise attain only through a constitutional settlement.⁶⁶ Upon entry into force on 31 December 2003, Ireland became the last dualist country to incorporate the ECHR, after the UK in 1998 and Norway in 1999. In contrast to the UK, no period of general education, official training and judicial reorganization was planned before the Act's entry into force.⁶⁷ It was assumed that Irish human rights traditions were strong enough, and judges knowledgeable enough, to apply the Act straight away. As in the UK, the ECHR Act is not an entrenched statute, but it is unlikely to be overruled.⁶⁸

The ECHR Act 2003 requires public authorities to apply Convention rights directly within the Irish legal system and empowers people to bring domestic legal proceedings against public authorities for breach of their Convention rights. According to Section 1 para. 1 ECHR Act, the Convention rights brought into Irish law are those provided for by Articles 2 to 14 ECHR, together with the rights comprised in the Protocols ratified by Ireland, i.e. Protocols nos 1, 4, 6, 7, and 13. The Act also incorporates Articles 16 to 18 ECHR. In contrast to the HRA, Article 13 ECHR is incorporated into Irish law. As a result, the Act provides for effective remedy in case of infringement of the ECHR, under Irish law.

In contrast to the HRA, litigants may not plead the Convention, under the ECHR Act, against Parliament or the courts, while the equivalent Irish constitutional rights can be invoked against all authorities including the Irish Parliament. A further contrast is that the ECHR Act does not specify the conditions under which rights can be added to the Act through additional Protocols and statute. One presumes that additions will be conditional on the entry into force of the Protocol itself. Thus, when Protocol no. 14 enters into force, a statutory amendment of the ECHR Act will be required to incorporate it into Irish law. Nor is there a Section of the ECHR Act comparable to Section 1 para. 2 HRA. One presumes that Irish reservations and derogations to the rights under the Convention and its Protocols will extend to the rights incorporated in the Act.

Incorporation proceeds in five main steps. First, Section 3 para. 1 ECHR Act provides that every "organ of the State" must perform its functions in a Convention-compliant manner. Second (in case of breach of Section 3 para. 1), Section 3 para. 2 ECHR Act provides that a person who has suffered a loss,

⁶⁴ See on previous models: Report of the Constitution Review Group (Pn 2632, Stationery Office, Dublin 1996) and Hogan (2004), 17 on the Review Group's proposal.

⁶⁵ See O'Connell (2004), *Critical Perspective*, 3. See also Hogan (2004), 18–21 on these debates.

⁶⁶ See Hogan (1999); Hogan (2004), 15; O'Connell et al. (2006), 12. See also Submission of the Human Rights Commission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (2001).

⁶⁷ See *infra* Section III. B.

⁶⁸ See *infra* Section III. G.

injury or damage may, if no other remedy in damages is available, institute proceedings in respect of the loss in either the Circuit Court or the High Court. Third (Section 4), judicial notice shall be taken of the Convention provisions and of any of the case law of the European Court of Human Rights. Fourth, Section 2 para. 1 ECHR Act requires that the courts interpret and apply, in so far as it is possible, statutory provisions or rules of law in a Convention-compatible manner. Fifth, where a Convention-compatible interpretation is not available, Section 5 para. 1 ECHR Act provides that the High Court or Supreme Court may declare that the statutory provision or rule of law is incompatible with the State's obligations under the Convention. Such a declaration of incompatibility does not affect the validity, continuing operation or enforcement of the relevant legal provision (Section 5 para. 2).

3. Comparison and Conclusion

Ireland and the UK incorporated the ECHR into their national legal orders in similar ways; indeed, the 1998 HRA provided the model for the 2003 ECHR Act. Yet, significant underlying differences remain.⁶⁹ Most importantly, incorporation works differently in the UK and in Ireland: the HRA takes on the function of a catalogue of rights, while the ECHR Act in general simply supplements what is arguably the most advanced system of judicial protection of constitutional rights in Europe. This difference helps to explain much of the rest of the variance. In the UK, the indirect incorporation of Convention rights through EU law, in the absence of competing constitutional norms, proceeded more smoothly than in Ireland, where constitutional resistance proved stronger. In the UK, the ECtHR's numerous adverse judgements against it weighed in favour of incorporation, whereas in Ireland, it was not the absence of judicially-enforceable rights at issue, but the peace process in Northern Ireland. Whereas the UK allegedly brought rights home by internalising the Convention, Ireland externalized rights politics, accepting incorporation of the ECHR as the price for peace in Northern Ireland.⁷⁰ Finally, although the HRA provided the template for the ECHR Act, the courts and the legislature are excluded from liability under the latter.

B. Status of the ECHR in National Law

1. United Kingdom

a. Pre-Incorporation Validity and Rank

In the UK, treaties can be ratified without legislative approval, but they acquire the status of judicially-enforceable law only by means of an act of Parliament.

⁶⁹ In addition to differences listed, the UK has registered many derogations under Article 15 ECHR, whereas Ireland only has filed one, and a minor one at that.

⁷⁰ See for a similar critique, O'Connell (2004), *Critical Perspective*, 5.

Prior to incorporation, the ECHR remained an international convention without immediate validity in domestic law,⁷¹ and its status was, at best, a distant standard of interpretation for judges, whose rank in the legal order did not matter as a result. Its impact on British law in the early years was quite limited. At times, lawyers would quote the ECtHR's case law in their submissions, and judges would apply principles analogous to those in the European Court's judgments, but they did so usually to state the conformity of British law with the Convention.⁷² Courts that invoked the ECtHR's case law did so just as they did for comparative law more generally, as they might cite a ruling of the US Supreme Court, for example.

The Convention's impact began to increase in the late 80's.⁷³ Before 1988, for example, the Convention was rarely mentioned in domestic judgements, between nil and fifteen times per year. After 1988, their number exploded. In the 70's, such references were short and passing; by 1990, they became more detailed and systematic in cases where judges worked to interpret uncertain or ambiguous UK norms in conformity with the Convention.

Thus, even before incorporation, judges gained experience using the ECHR as an interpretive aid.⁷⁴ The first reported case of this kind was *R v. Miah* in 1973 in which the court interpreted the Immigration Act 1971 in conformity with Article 7 ECHR and the prohibition of retrospective penal sanctions.⁷⁵ Judicial use of the Convention to clarify ambiguities in the common law was initially more contested, however, since it implied a more active lawmaking posture.⁷⁶ Gradually, however, Convention-compliant interpretation was extended to common law as well, culminating in the *Derbyshire* case.⁷⁷ The Convention was also invoked to assist in the exercise of judicial discretion, most famously so in the *Spycatcher* case where the Convention was referred to at all judicial levels in the litigation of the case.⁷⁸ From the 90's onwards, reference to the ECHR became a regular component of virtually all judgements pertaining to human rights.

The legitimacy of Convention-compliant judicial interpretation rested on

⁷¹ By immediate validity, the present report means validity *qua* national legal norm in the national legal order without transposition into national law. Immediate validity usually also means direct applicability to all authorities, although we will see this should sometimes be nuanced. Direct applicability should be carefully distinguished from direct effect which pertains to the justiciability of the norm and more generally its direct invocability by individuals.

⁷² See e.g. *Zoernsch v. Wallock*, [1964] 1 WLR 675; *Broome v. Cassell & Co* [1972] AC 1027. See more generally on judicial references to the Convention before 2000, Hunt (1997); Bratza (1991); Blackburn (2001), 950 et seq.

⁷³ See e.g. Jacobs and Roberts (1987).

⁷⁴ See e.g. *R. v. Secretary of State for the Home Department ex parte Phansopkar* [1976] 1 QB 606; *Home Secretary, ex parte Brind* [1991] 1 AC 696.

⁷⁵ *R v. Miah*, [1974] 1 WLR 683.

⁷⁶ See *Malone v. Metropolitan Police Commissioner* (supra note 39), 379.

⁷⁷ See e.g. *Derbyshire County Council v. Times Newspapers*, [1992] 1 QB 770, 812–813, Court of Appeal; [1993] AC 534, House of Lords.

⁷⁸ See e.g. *Attorney General v. Guardian Newspapers (Spycatcher)* [1987] 1 WLR 1287, 1296.

identifying some uncertainty or ambiguity in the law to be applied, since the judge would be eschewing the normal, literal approach to, say, statutory interpretation. According to Lord Scarman in *Phansopkar* and to Lord Bridge in *Brind*, however, there was by then a clear duty vested on public authorities administering the law and of courts interpreting and applying the law to have regard to the Convention.⁷⁹ While it was a duty to have regard to the Convention, this did not entail a duty to fully apply the latter. As a result, Convention-compliant interpretation was never extended to the exercise of discretionary powers conferred upon public bodies. The reverse would have involved imputing to Parliament "an intention to import the Convention into domestic law through the back door when it has quite clearly refrained from doing so by the front door", by granting discretionary powers.⁸⁰

References to the ECtHR's case law were rarer. If the British dualist approach to the ECHR prevented courts from considering its provisions as binding, the ECtHR's case law was deemed as even less relevant, especially with respect to decisions involving other countries (although there are important exceptions⁸¹).

Although the ECHR's rank was never really in question before incorporation, judges applied a presumption of compatibility with the ECHR.⁸² What this meant was that certain aspects of British law were presumed to be in conformity with the Convention and hence were to be interpreted in conformity with it.⁸³ The Parliament could not indeed be presumed to have intended violating Convention rights. Of course, if the intention of the Parliament to legislate in contradiction to the Convention was clearly stated, such an interpretation was not possible by respect for Parliamentary sovereignty. Moreover, when a Convention-compliant interpretation was simply not possible without breaching the statute, two cases could arise. First, if the incompatible legislation was primary, it simply remained valid. Second, if it was subordinate legislation that could not be interpreted in conformity with the Convention, it could be quashed and declared invalid.

b. Post-Incorporation Validity and Rank

After incorporation, the Convention gained immediate validity in the British legal order. With the HRA 1998, the ECHR has become the source of statutory rights, and the ECtHR's case law pertaining to them directly binds public

⁷⁹ See *R. v. Secretary of State for the Home Department ex parte Phansopkar* (supra note 74). See also *Home Secretary, ex parte Brind* (supra note 74); [1991] All ER 720, 722–723.

⁸⁰ *Home Secretary, ex parte Brind* (supra note 74), 718.

⁸¹ See e.g. *Malone v. Metropolitan Police Commissioner* (supra note 39), 379, by reference to *Klass and Others v. Germany* (appl. no. 5029/71), Judgement (Plenary), 6 September 1978, Series A, Vol. 28; [1979–1980] 2 EHRR 214. See also *United Kingdom Association of Professional Engineers v. Advisory, Conciliation and Arbitration Service* (HL) [1980] 2 WLR 254; *Attorney General v. Guardian Newspapers Ltd* (No. 2) [1988] 3 All ER 545 (Ch.).

⁸² Blackburn (2001), 950.

⁸³ See *Home Secretary, ex parte Brind* (supra note 74); [1991] All ER 720, 722–723. See also more recently, Lord Hoffmann in *R. v. Home Secretary, ex parte Simms* [2000] 2 AC 115, 131.

authorities, and must be considered in national courts, alone or alongside other sources of law. Two key features characterize the new status and validity of the Convention in British law: the direct applicability of Convention rights to the acts and decisions of "public authorities" including courts; and the indirect applicability of Convention rights to the acts of Parliament. The balance between the eminently interpretive approach to unconventional statutes and the identification of a few cases of Convention-related invalidity explains why one may also refer to the model of incorporation used in the HRA as a semi-direct incorporation.

The meaning of "public authority" (Section 6 paras 3 and 5 HRA) is contested.⁸⁴ The HRA defines courts and tribunals as public authorities, which means that they must apply Convention rights directly when reaching their decisions, and that they can be held accountable if they fail to do so. As a result, convention rights are today used regularly to interpret both legislation and the common law.⁸⁵ Under Section 2 para. 1 HRA, while British courts must take into account the European Court's case law, they are not strictly speaking bound by it. For reasons pertaining to Parliamentary sovereignty, both Houses of Parliament and persons exercising Parliamentary functions are expressly excluded from the notion of "public authorities" (Section 6 para. 3 HRA). As a result, Members of Parliament cannot be held accountable for infringing Convention rights in legislation. Nor can a public authority that implements legislation incompatible with the Convention be said to have acted unlawfully, so long as it could not have acted differently without breaching the statute (Section 6 para. 2 HRA). The only way a judge may prevent or remedy a legislative breach of the Convention is to interpret a statute in conformity with the Convention.

Prior to incorporation, the ECHR's rank in domestic law was never really in question.⁸⁶ Since incorporation, the issue has become more pressing. In a nutshell, the incorporation model used in the HRA is sub-constitutional: the Act is not entrenched, and it does not confer upon Convention rights any degree of constitutional priority over earlier or subsequent domestic legislation. That said, subsequent legislation can only resist a Convention-compliant interpretation if the Parliament's intention was clear and express; even then, a court might issue a declaration of incompatibility, thus placing political pressure on the Parliament to amend the law. As a result, some consider that the HRA has some supra-legislative elements. To emphasize the paradox, the HRA is sometimes referred to as a constitutional statute.⁸⁷

⁸⁴ See *infra* Section III. F.

⁸⁵ See e.g. in the field of privacy: *Campbell v. Mirror Group Newspapers* [2004] 2 WLR 1232.

⁸⁶ The issue of "rank" has traditionally only been addressed as one of "status" in British law; there is indeed strictly speaking no supra-legislative category in British law. All there is is primary and secondary legislation, and the common law. The often used concept of "constitutional statute" is recent; the House of Lords refers to statutes "of constitutional importance", whose construction must be generous and whose repeal may only be done explicitly. In order to ensure consistency with the other reports in the volume, however, the concept of "rank" will be used in what follows.

⁸⁷ See Black-Branch (2002); Elliot (2002).

Two complementary mechanisms capture this mix of sub-constitutional/supra-legislative rank of Convention rights in British law: the courts' duty to interpret legislation in conformity with the Convention and, when the former is not possible, their duty to declare legislation incompatible with the Convention.

The most far-reaching principle in the whole Act is Section 3 HRA, which instructs the courts to read and give effect to legislation in a Convention-compatible way. The rule – when there is more than one interpretation possible, the one that complies most with the Convention should be chosen – replaces the traditional common law practice of ascertaining the true meaning of the statute, or establishing the intention of the Parliament.⁸⁸ According to Section 3 para. 2(a) HRA, the duty of Convention-compliant interpretation applies to all past and present Acts of Parliament. There is one exception to this rule: cases where the Parliament has expressly declared its intention to infringe the Convention and hence where Convention-compliant interpretation is not possible without breaching the statute.

When a Convention-compliant interpretation is not possible, the HRA distinguishes between primary and subordinate legislation. Judges may declare subordinate legislation invalid, if it cannot be interpreted in conformity with the ECHR, unless the source of its incompatibility is primary legislation (Section 3 paras 2(b) and (c) HRA *a contrario*).⁸⁹ But Section 3 does not affect the validity of incompatible primary legislation (Section 3 paras 2(b) and (c)), a concession to Parliamentary sovereignty.⁹⁰ Where a Convention-compliant interpretation of incompatible primary legislation is not possible, Section 4 HRA enables higher courts to make a declaration of incompatibility.⁹¹ For England and Wales, the following courts have power to make such a declaration: the High Court, Court of Appeal, House of Lords, Judicial Committee of the Privy Council, and the Courts-Martial Appeal Court. Where a lesser court or tribunal is faced with such an issue, it must apply the incompatible legislation and the matter will only be addressed again on appeal. The declaration of incompatibility is not *erga omnes*. It merely invites and requires the Parliament to rectify the situation by passing the appropriate repealing legislation.⁹² Although there is no remedy for a Parliamentary breach of the ECHR, decisions of incompatibility have political weight

⁸⁸ See e.g. Marshall (1996) and (1999); Lester (1998), *Interpreting Statutes*; Steyn (1998); Kavanagh (2004); Anderson; *Interpretation and Legislation*, (2005) and (2006).

⁸⁹ See Hoffman and Rowe (2003), 60.

⁹⁰ See e.g. *R. v. Lyons* [2002] WLR 1562, 1580, 1584, 1595. This was confirmed later on by the European Court in *Lyons and Others v. the United Kingdom* (appl. no. 15227/03), Decision (Fourth Section), 8 July 2003, Reports 2003-IX, 405 et seq.; [2003] 37 EHRR CD 183.

⁹¹ The first declaration ever made was issued in *R. v. Secretary of State for the Environment, ex parte Alconbury* [2001] 2 All ER 929.

⁹² See e.g. *Wilson v. First County Trust Limited* [2001] 3 WLR 42. See also the follow-up of other cases like *R. (Anderson) v. Secretary of State for the Home Department* [2002] UKHL 46 [2003] 1 AC 837 (right to life of convicted murderers) or *Bellinger v. Bellinger* [2003] UKHL 21, [2003] 2 AC 467 (rights of post-operative transsexuals).

and are, therefore, "likely to prompt government and Parliament to respond"⁹³. The HRA foresees the introduction of amending legislation by the competent Minister or the Crown,⁹⁴ including under a fast-track procedure (Section 10 and Schedule 2 HRA).⁹⁵

2. Ireland

a. Pre-Incorporation Validity and Rank

The Irish Constitution is strongly dualist: Article 29 para. 6 states that an international agreement can only be made part of Irish law through legislative incorporation. Prior to the ECHR Act in 2003, the Convention was binding *on* Ireland, but not *in* it.⁹⁶ The ECHR had no strict validity in Irish Law. As in the UK, it mostly operated as a standard of interpretation. As a result, the ECHR's rank in the legal order was not a matter of interest either.

The Irish Parliament hardly ever invoked the Convention when passing a law, and judges did not entertain Convention-specific challenges to legislative, executive or judicial measures. Courts might take note of Convention rights and of the ECtHR's case law, but they were not required to. Although the first reference to the Convention occurred in the Supreme Court decision in *Re O Laighleis* in 1960,⁹⁷ judicial references were sporadic until the 80's. It is only after the 80's that High Court judges⁹⁸ began invoking the Convention to bolster their reasoning in relation to a matter of Irish law.⁹⁹ The Supreme Court took pains not to do so, even when the case at bar presented similar facts to a case decided by the ECtHR.¹⁰⁰ Where the Supreme Court did invoke the Convention, it was only to make explicit something which was already implicit in the Irish Constitution.¹⁰¹

Of course, judges were expected to presume that Irish law conformed with

⁹³ Lord Chancellor Lord Irvine, House of Lords Debates, 3 November 1997, vol. 582, col. 1231. This was confirmed by the European Court in *Burden and Burden v. the United Kingdom* (appl. no. 13378/05), Judgement (Fourth Section), 12 December 2006, referred to the Grand Chamber (not yet reported); [2007] 44 EHRR 51.

⁹⁴ The first use of the remedial order procedure took place in 2002 in *R. (H.) v. Mental Health Tribunal North and East London Region* [2002] QB 1 (CA).

⁹⁵ See *infra* Section III. E.

⁹⁶ See Kilkelly (2004), *Introduction*, lvi; Symmons (2005).

⁹⁷ *Re O Laighleis* [1960] IR 93.

⁹⁸ See e.g. *O'Leary v. Attorney General* [1993] 1 IR 102; *Heaney v. Ireland* [1994] 2 IRLM 420. Compare with *O'Leary v. Attorney General* [1995] 1 IR 254, 259; *Heaney v. Ireland* [1996] 1 IR 580. See, however, the dissenting judgements of McGuinness and Fennelly, JJ., in *L & O v. Minister of Justice, Equality and Law Reform* [2003] 1 IR.

⁹⁹ See O'Connell et al. (2006), 11; O'Connell (2001), 427; Flynn (1994); Whyte (1982).

¹⁰⁰ See e.g. *Finnucane v. McMahon*, [1990] IR 165, to be compared to *Soering v. the United Kingdom* (appl. no. 14038/88), Judgement (Plenary), 7 July 1989, Series A, Vol. 161; [1989] 11 EHRR 439. See also *Norris v. Attorney General* (*supra* note 3) to be compared to *Dudgeon v. the United Kingdom* (*supra* note 3).

¹⁰¹ See e.g. *The Irish Times and Others v. His Honour Judge Anthony G. Murphy and Others*, [1982] 2 IRLM 161, 192–193.

the Convention, and to interpret it in conformity with the ECHR.¹⁰² This presumption applied to statutes adopted after 1953, provided there was no contrary intention on the part of the Legislature (it could not be used *contra legem*). Such cases were rare, not least since the presumption was not easily applicable in the context of constitutional rights.¹⁰³ The Irish Supreme Court never mentioned the possibility of interpreting Irish law in conformity with the Convention, as long as there was a concurrent constitutionality challenge.¹⁰⁴

b. Post-Incorporation Validity and Rank

As in the UK, the ECHR Act 2003 incorporates Convention rights into Irish law in an indirect (interpretive) way. The 2003 ECHR Act distinguishes between the direct applicability of the Convention to the acts and decisions of some State organs, with the important exception of courts, and the indirect applicability to the acts of the Irish Parliament.

According to Section 3 ECHR Act, courts do not belong to the listed "organs of the State" and are not therefore directly bound by Convention rights. They are not placed under a duty to apply the Convention directly, a substantial limitation in a legal system based on judicial law-making and which knows of far-reaching constitutional constructions of legislation in court.¹⁰⁵ Though this exclusion may protect judges from suit for breach of statutory duty, they are still subject to applications before the ECtHR, and before the European Court of Justice in EU matters.¹⁰⁶ Although courts must take notice of the relevant case law of the ECtHR, they are not strictly speaking bound by the European Court's case law.¹⁰⁷

Because the Parliament is excluded from the list of "organs of the State" under Section 3 of the Act, remedies cannot be sought directly in cases where legislation is not Convention-compliant. Judges can only interpret legislation in compliance with the Convention under Section 2 of the Act to give it effect in cases at bar. Where a compliant interpretation is not possible, Section 5 para. 1 ECHR Act provides that the High Court or Supreme Court may, where no other legal remedy is adequate or available, declare that the statutory provision is Convention-incompatible.

Since 2003, the ECHR possesses sub-constitutional rank in Irish law. The Convention preempts neither the supremacy of the Irish Constitution nor the primacy of Parliament with respect to the Convention. The transplantation of

¹⁰² See e.g. *The State (DPP) v. Walsh and Conneely* [1981] IR 412, 440. See also *Demond v. Glackin* [1992] IRLM 490, 513.

¹⁰³ See e.g. *O'Donnell v. Merrick* [1984] IR 151, 159, 166.

¹⁰⁴ See e.g. *Norris v. Attorney General* (*supra* note 3), 66.

¹⁰⁵ O'Connell (2004), *Critical Perspective*, 7.

¹⁰⁶ See e.g. *Doran v. Ireland* (appl. no. 50389/99), Judgement (Third Section), 31 July 2003, Reports 2003-X, 1 et seq. (extracts); [2006] 42 EHRR 13. In EU law, see e.g. case C-224/01, *Gerhard Köbler v. Republik Österreich* [2003] ECR I-10239.

¹⁰⁷ See *infra* Section III. F.

the British sub-constitutional mode of incorporation into Ireland appears somewhat incoherent, however, in that it does not match the Irish pre-existing human rights tradition and its judicial review mechanisms.¹⁰⁸ In fact, the Irish mode of incorporation is even more moderate than that of the UK, in that judges may not base the direct invalidation of (subordinate) legislation on Convention rights, but may only interpret the former in favour of the latter, and, when this is not possible, declare the statute incompatible. This is surprising given that Irish courts have long experience with rights review and corresponding invalidation of statute law. Further, the remedies foreseen in case of breach of the ECHR Act are residual, available to higher courts only, and apply only to a more limited list of public authorities. This conservative approach may surprise, given the objective of the ECHR Act to give "further effect" to the Convention in Irish law.

According to Section 2 para. 1 ECHR Act, there is a rebuttable presumption of compatibility of legislation, a kind of 'double construction rule', on the model of what already applies to the control of constitutionality of statutes in Ireland. This rule, which trumps other doctrines of interpretation, requires that courts, when faced with a choice between two constructions of a statute, one constitutional and the other unconstitutional, choose the constitutional construction.¹⁰⁹ Applied to the ECHR, interpretations of legislation which are in conformity with the Convention must be chosen. Contrary to the HRA, Section 2 ECHR Act does not distinguish between subordinate and primary legislation, or between prior and ulterior primary legislation. When a Convention-compliant interpretation is not possible, the validity of the incompatible legislation remains untouched, whether it is subordinate or primary and whether the incompatibility of an ulterior legislative act is intentional or not. This feature of the ECHR Act has been heavily criticized for "placing the courts in a position where they can identify a breach of human rights and not be in a position to give an effective remedy."¹¹⁰ In the absence of remedy, courts are led to construct statutes in the most artificial way or else to declare them unconstitutional,¹¹¹ in order to make sure they do not leave the claimant without relief or remedy.¹¹² The Irish Human

¹⁰⁸ See O'Connell (2004), *Critical Perspective*.

¹⁰⁹ Kelly (2003), 884. See *Re National Irish Bank* [1999] 1 IR 145; *Doyle v. An Taoiseach* [1986] IRLM 693.

¹¹⁰ Irish Human Rights Commission, Submission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (2002), 4.

¹¹¹ Interestingly, two recent appeals to the Supreme Court are about to test its willingness to use the Convention when the Constitution does not provide a clear answer: *M.R. v. T.R. & Others* [2006] IEHC 359 (frozen embryos) and *Zappone and Gilligan v. Revenue Commissioners* [2006] IEHC 404 (gay marriage).

¹¹² See Hogan (2004), 30–31, 21–22, 34: "The Constitution and its declaration of constitutional invalidity mechanism is, so to speak, like a vintage car (which has been constantly overhauled and renovated) with a powerful engine and automatic gears. By comparison, the United Kingdom's Human Rights Act model – with its declaration of incompatibility which ultimately depends on Parliament – resembles a new car with complicated manual gears, albeit one in respect of which the new owners – who never had a car before and who had spent much of the previous generation

Rights Commission argues in this respect that the whole procedure is of "questionable constitutional validity".¹¹³

A declaration of incompatibility – issued against a statutory provision or other rule of law – does not affect the validity, continuing operation, or enforcement of the relevant legal provision (Section 5 para. 2(a) ECHR Act). In contrast to Section 4 HRA, however, the remedy provided is purely residual, since it only applies to cases "where no other legal remedy is adequate or available". Once a court makes a declaration of incompatibility, the Human Rights Commission is notified. The declaration must then be placed before each House of Parliament within 21 days. In contrast to the HRA regime, the Parliament is not required to indicate what remedial action (if any) is to be taken, no fast-track procedures for remedies are provided for, and there is no obligation to pay compensation.¹¹⁴

3. Comparison and Conclusion

Although both countries chose more or less the same mode of incorporation, the validity of Convention rights varies extensively in practice, given pre-existing differences in constitutional rights culture. In the UK, incorporation filled a gap of huge importance in the British legal order, and the HRA grants British courts review powers they did not possess before.¹¹⁵ Public authorities directly bound by the HRA include courts. And, even though they exclude Parliament, the possibility to invalidate subordinate legislation when it is incompatible with the Convention is worth emphasising. In Ireland, by contrast, the incorporation of the Convention looks much less dramatic, even beside the point, in comparison to the force of, and remedies available under, the Constitution. Litigants may plead Convention rights against some public authorities but not against Parliament or the courts, while the equivalent Irish constitutional rights can be invoked against all authorities including the Irish Parliament. Further, given that the Judiciary has continuously expanded the scope and content of constitutional rights, it would seem that Convention rights have been given a residual, almost superfluous status, at least in some areas. Thus, while dualism implies the choice to incorporate or not to incorporate, the importance of incorporation will depend heavily on a state's domestic tradition of rights protection.

With respect to the Convention's rank in national law, the 1998 HRA and protesting that they did not need one – are extremely proud. To continue the metaphor, Ireland, in order to keep up appearances, has now also acquired the same type of car with manual gears and is presently contemplating – having grown up with the automatic models – which of the two models we would prefer to drive and whether, indeed, they can both be safely driven in harmony at the same time. [...] All of this means that, in the end, we will find that we are still driving the 1937 vintage model, albeit that its power and capacity have been boosted by spare parts borrowed from the 1998 and 2003 models."

¹¹³ Irish Human Rights Commission, Submission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (2002), 4.

¹¹⁴ See *infra* Section III. F.

¹¹⁵ See Lord Hope of Craighead, *R v. DPP ex parte Kebilene* [2000] 2 AC 326, 375.

the 2003 ECHR Act follow the same statutory sovereignty model, conferring on Convention rights sub-constitutional rank. This similarity, too, is less important than the fact that both countries have very different approaches to rights and judicial review of legislation. In the UK, where there are no entrenched constitutional rights and the Parliament is supreme, the HRA is gradually becoming a kind of constitutional statute. It has nuanced the implied repeal principle, which was already weakened by developments in EU law. In Ireland, due, somewhat ironically, to the existence of an entrenched Constitution and strong judicial review of legislation, the Convention has had less impact on the legal order. One can state that Convention rights occupy a *de jure* sub-constitutional but nonetheless *de facto* supra-legislative rank in the UK. In Ireland, the ECHR has only an (indirect) legislative rank. Time will tell how effective the Convention will actually be in either country, but there currently appear to be more obstinate structural obstacles to enhancing the ECHR's effectiveness in Ireland, compared to the UK.

C. The European Court's Case Law

1. United Kingdom

a. General Overview

This section focuses on cases brought by individual petition to the ECtHR.¹¹⁶ The ECtHR rendered its first adverse judgement against the UK on 21 February 1975, in the case *Goldier v. UK*.¹¹⁷ In total, 11,994 applications have been registered against the UK before the Court and the Committee of Ministers through 31 December 2006. 255 of these cases were decided by the Court on the merits,¹¹⁸ and the others were struck out of the list for various reasons. From 1953 to 1999, the number of cases decided on the merits increased slowly but steadily (see table), from between nil and three each year during the 1975–85 period, to a high of seven per year in the 80's, a high of twelve per year in the 90's, and a high of 34 per year in the 2000's. In 53 years of membership in the Convention system, fully half of the judgements of the ECtHR pertaining to the UK were rendered between 2000 and 2006. The number of decisions rendered since 2000 averages 22 *per annum*, due undoubtedly to the growing awareness of the Convention in the UK, post-incorporation. Numbers have decreased during the last three years (between fifteen and twenty per year since 2004). This decline

¹¹⁶ Besides individual applications, one should mention numerous interstate applications brought against the United Kingdom, including the first one ever in 1956 (*Greece v. the United Kingdom* (supra note 23)) or the case brought against the United Kingdom by Ireland in 1978 (*Ireland v. the United Kingdom* (supra note 51)).

¹¹⁷ *Goldier v. the United Kingdom* (appl. no. 4451/70), Judgement (Plenary), 21 February 1975, Series A, Vol. 18; [1979–80] 1 EHRR 524.

¹¹⁸ Scope precludes listing them all here. See, however, tables in appendix.

is likely due to a better incorporation of conventional concerns in domestic decisions and to the increasing effectiveness of Convention rights and case law in the legal order more generally.¹¹⁹

Of the 255 judgements that have gone against the UK (see tables), the majority (148 rulings) pertain to Article 6(1) or (3) ECHR, followed, notably, by 75 judgements relative to Article 8 ECHR and 56 to Article 13 ECHR. 198 of these rulings resulted in a judgement in condemnation, leading either to the payment of compensation or to legislative change. In a predictable way, most decisions of non-violation occurred after the increase of cases brought against the UK in Strasbourg after 2000.

A statistical assessment of all cases brought before the ECtHR and decided on the merits, shows that the UK has one of the highest totals among the Council of Europe's original Member States. This high number of cases overall may be explained in several ways. First, the fact that the UK did not incorporate the Convention into British law before 2000 may have led to an initial spike in cases. Second, the lack of entrenched rights and the weakness of rights-based remedies in the UK might have made going to Strasbourg attractive. Third, the UK has experienced serious anti-terrorism difficulties (first in Northern Ireland and then in the rest of the UK as well¹²⁰) and complex immigration problems (due to its former and present overseas territories), and these have provoked a steady flow of cases over decades. Finally, the associative and support network in the field of human rights has grown in the UK, arguably without comparison in Europe; voluntary human rights associations, non-governmental organizations and *pro bono* work in the legal profession are particularly well-organized and common in the UK.¹²¹ These groups have always supported individual litigation in British courts and before the European Court, helping to push up the UK's numbers.

b. Selected Examples

The subjects addressed in the UK cases before the European Court are diverse. They range from telephone-tapping, closed-shop trade union practices, discretionary life sentences, official birching of juvenile offenders, corporal in schools, over-restrictive injunctions on freedom of expression, punishment for non-disclosure of journalistic sources of information, parents' rights of access to children, access to child-care records, prisoners' right of access to a lawyer, oppressive use of incriminatory self-statement at trial, inhumane treatment of terrorist suspects, homosexuality in Northern Ireland, status of frozen embryos, discriminatory im-

¹¹⁹ See e.g. Gearty (2004).

¹²⁰ On the difference, see Gearty (2006), 104–105.

¹²¹ One may mention civil liberties pressure groups, like *Liberty* (the National Council for Civil Liberties), *Amnesty* or *Justice*. For other organizations, see the British Human Rights Institute's website: <http://www.bihir.org/>. See also *infra* Section III. G.

migration rules and inhumane extradition procedures.¹²² Interestingly, landmark decisions were released by the ECtHR in British cases and have had an impact on the development of a European constitutional order. This has been the case of British applications concerning the rights of persons compulsorily detained in psychiatric institutions,¹²³ but also of cases pertaining to euthanasia,¹²⁴ torture and extradition.¹²⁵ The present report concentrates on cases that have had the most impact on British law, namely those based on Articles 3, 6, 8, and 10 ECHR.

aa. The treatment of terrorist suspects. Anti-terrorism legislation and measures have given rise to numerous complaints against the UK since the 70's, first with respect to Northern Ireland and recently with respect to post-9/11 anti-terrorism measures. The first case against the UK on this issue was brought in 1971 by Ireland,¹²⁶ which complained *inter alia* of interrogation techniques introduced in Northern Ireland. The Court declared these techniques to be inhumane and contrary to Article 3 ECHR. In 1988, the Court decided in *Brogan and Others v. UK*¹²⁷ that the UK had violated Article 5(3) ECHR by holding terrorist suspects between four and six days under the Prevention of Terrorism Act 1983, without bringing them before a judge. Following this case, the UK lodged a derogation under Article 15(1) ECHR. Its lawfulness was confirmed by the Court in *Brannigan and McBride v. UK* in 1993.¹²⁸ The derogation was finally withdrawn in 2001. In 1995 *McCann, Farrell and Savage v. UK* case, the Court decided that the UK had violated Article 2 ECHR by allowing the shooting of three terrorist suspects in Gibraltar by UK SAS soldiers.¹²⁹ The ECtHR rendered further rulings relative to security forces' violence in Northern Ireland and in particular

¹²² For detailed accounts of the European case law pertaining to the UK until 2000, see Blackburn (2001), 971–991; Dickson (1997), chapters 3, 4, 5 and 7; Gearty (1997), 84–100; Farran (1996); Bradley (1991), 185–214; Hampson (1990), 121.

¹²³ See e.g. *H.L. v. the United Kingdom* (appl. no. 45508/99), Judgement (Fourth Section), 5 October 2004, Reports 2004-IX, 191 et seq.; [2005] 40 EHRR 32; *Johnson v. the United Kingdom* (appl. no. 22520/93), Judgement (Chamber), 24 October 1997, Reports 1997-VII, 2391 et seq.; [1999] 27 EHRR 296.

¹²⁴ See e.g. *Prety v. the United Kingdom* (appl. no. 2346/02), Judgement (Fourth Section), 29 April 2002, Reports 2002-III, 155 et seq.; [2002] 35 EHRR 1.

¹²⁵ See e.g. *Chahal v. the United Kingdom* (appl. no. 22414/93), Judgement (Grand Chamber), 15 November 1996, Reports 1996-V, 1831 et seq.; [1997] 23 EHRR 413.

¹²⁶ *Ireland v. the United Kingdom* (supra note 51).

¹²⁷ *Brogan, Coyle, McFadden and Tracy v. the United Kingdom* (appl. nos 11209/84; 11266/84; 11386/85), Judgement (Plenary), 29 November 1988, Series A, Vol. 145-B; [1989] 11 EHRR 117.

¹²⁸ *Brannigan and McBride v. the United Kingdom* (appl. nos 14553/89; 14553/89), Judgement (Plenary), 26 May 1993, Series A, Vol. 258-B; [1994] 17 EHRR 559.

¹²⁹ *McCann, Farrell and Savage v. the United Kingdom* (appl. no. 18984/91), Judgement (Grand Chamber), 27 September 1995, Series A, Vol. 324; [1996] 21 EHRR 97.

McKerr v. UK in 2001¹³⁰ and *Finucane v. UK* in 2003.¹³¹ New cases pertaining to Articles 2 and 3 ECHR are likely to arise in the next few years with respect to anti-terrorist measures adopted in the UK since 2005.

bb. The protection of freedom of the press. Another set of landmark decisions of the European Court on UK complaints concerns actions brought by newspapers to protect their freedom of expression. In *Sunday Times v. UK* (1979), the Court decided that, although some limitation on press freedom was necessary to protect the independence and the working of the courts, a number of competing factors had to be taken into account, such as the right to impart but also to receive information of public importance and the level of likelihood of serious prejudice to the trial.¹³² In another famous ruling, *Spycatcher* (1991), the Court decided that an injunction against publication violates Article 10 ECHR when the book that is the object of the injunction has already been published elsewhere.¹³³

cc. The treatment of homosexuals and transsexuals. In *Dudgeon v. UK* (1981), the Court decided that the UK had violated Article 8 ECHR for failing to repeal a Northern Ireland law imposing criminal sanctions upon homosexual activities between consenting male adults. In a long judgement, the European Court argued that most Member States of the Council of Europe did not treat homosexuality as a criminal offence and held that interference with the applicant's right to private life could not be justified on the ground of what was necessary in a democratic society, pressing social need or injury to moral standards.¹³⁴ A more recent 1999 case concerned the armed forces. In *Lustig-Prean and Beckett v. UK*, the Court held that the discharge of four applicants from the armed forces on the ground of their homosexuality violated Article 8 ECHR.¹³⁵ The Court determined that there was a lack of concrete evidence to substantiate the alleged damage to morale and operational effectiveness in cases where homosexuals were admitted to the armed forces. Transsexuals in the UK also benefited from the European Court's interpretation of Article 8 ECHR. After a series of cases brought against the UK pertaining to the rights of transsexuals where no violation was

¹³⁰ *McKerr v. the United Kingdom* (appl. no. 28883/95), Judgement (Third Section), 4 May 2001, Reports 2001-III, 475 et seq.; [2002] 34 EHRR 20.

¹³¹ *Finucane v. the United Kingdom* (appl. no. 29178/95), Judgement (Fourth Section), 1 July 2003, Reports 2003-VIII, 1 et seq.; [2003] 37 EHRR 29.

¹³² *Sunday Times v. the United Kingdom* (appl. no. 6538/74), Judgement (Plenary), 26 April 1979, Series A, Vol. 30; [1979–1980] 2 EHRR 245.

¹³³ *The Observer and The Guardian v. the United Kingdom* (appl. no. 13585/88), Judgement (Plenary), 26 November 1991, Series A, Vol. 216; [1992] 14 EHRR 153.

¹³⁴ *Dudgeon v. the United Kingdom* (supra note 3).

¹³⁵ *Lustig-Prean and Beckett v. the United Kingdom* (appl. nos 31417/96; 32377/96), Judgement (Third Section), 27 September 1999 (not reported); [2000] 29 EHRR 548.

found,¹³⁶ the European Court rendered two judgements in 2002 (*Christine Goodwin v. UK* and *I. v. UK*), in which it held that the Government's failure to alter the birth certificates of transsexual people or to allow them to marry in their new gender role was a breach of Articles 8 and 12 ECHR.¹³⁷ The *Christine Goodwin v. UK* judgement was recently confirmed in 2006 in *Grant v. UK*.¹³⁸

dd. The organization of the State. In *McConnell v. UK* (2000), the European Court decided that the UK had violated the claimant's right to a fair hearing by an independent and impartial tribunal under Article 6 ECHR on the ground that the presiding judge of the Royal Court of Guernsey, the Bailiff, had also been the presiding officer in the Guernsey Parliament, which enacted the legislation restricting the claimant's land use.¹³⁹ The case was very controversial, given similar overlaps existing between Parliamentary and judicial functions in the House of Lords, but also between the executive, Parliamentary and judicial functions of the Lord Chancellor.

ee. The protection of parents' and children's rights. In the case *P, C. and S. v. UK* (2002), the ECtHR ruled that the absence of legal representation for the applicant in the care and adoption proceedings of her own children breached Article 6(1) and Article 8 ECHR, and that the removal of the applicant's child immediately after birth could not be justified under Article 8(2) ECHR, and, therefore, breached the Convention.¹⁴⁰ In another case *E. and Others v. UK* (2002), the Court held in relation to two applicants who, as children, had been subjected to severe physical and sexual abuse in their home, that local authority social services should have known of the abuse, since the mother's partner had a past history of sexual abuse against children in the family. The Court decided that social services had taken insufficient steps to investigate or prevent the abuse, in breach of their positive duty to protect from inhuman or degrading treatment under Article 3 ECHR.¹⁴¹

¹³⁶ See e.g. *Rees v. the United Kingdom* (appl. no. 9532/81), Judgement (Plenary), 17 October 1986, Series A, Vol. 106; [1987] 9 EHRR 56; *Cossey v. the United Kingdom* (appl. no. 10843/84), Judgement (Plenary), 27 September 1990, Series A, Vol. 184; [1991] 13 EHRR 622; *Sheffield and Horsham v. the United Kingdom* (appl. nos 22985/93; 23390/94), Judgement (Grand Chamber), 30 July 1998, Reports 1998-V, 2011 et seq.; [1999] 27 EHRR 163.

¹³⁷ *Christine Goodwin v. the United Kingdom* (appl. no. 28957/95), Judgement (Grand Chamber), 11 July 2002, Reports 2002-VI, 1 et seq.; [2002] 35 EHRR 18; *I. v. the United Kingdom* (appl. no. 25680/94), Judgement (Grand Chamber), 11 July 2002 (not reported); [2003] 36 EHRR 53.

¹³⁸ *Grant v. the United Kingdom* (appl. no. 32570/03), Judgement (Fourth Section), 23 May 2006 (not yet reported); [2007] 44 EHRR 1.

¹³⁹ See e.g. *McConnell v. the United Kingdom* (*supra* note 12). See Cornes (2000).

¹⁴⁰ *P, C. and S. v. the United Kingdom* (appl. no. 56547/00), Judgement (Second Section), 16 July 2002, Reports 2002-VI, 197 et seq.; [2002] 35 EHRR 31.

¹⁴¹ *E. and Others v. the United Kingdom* (appl. no. 33218/96), Judgement (Second Section), 26 November 2002 (not reported); [2003] 36 EHRR 31.

ff. Protection against self-incrimination and the right to silence. In *Allan v. UK* (2002), the Court examined the case of an applicant placed under surveillance whilst held on remand on charges of murder, subject to electronic surveillance in his cell and in the visiting area of the prison, and placed in a cell with a police informant who was instructed to press him for information. The Court ruled that the UK violated Article 6 ECHR and the right to silence and to freedom from self-incrimination in allowing the use of the transcripts of the surveillance, as well as the use of evidence from the police informer in trial.¹⁴² This case followed the 1996 decision in *John Murray v. UK* on the inferences drawn from the silence of the accused.¹⁴³

2. Ireland

a. General Overview

With Sweden, Ireland was among the first Contracting States to accept the right of individual petition to the ECtHR. In total, 524 applications have been registered against Ireland before the Court and the Committee of Ministers through 31 December 2006, of which eighteen were decided on the merits – the others were struck off the list for different reasons. As the tables show, there have never been more than three ECtHR judgements rendered per year. In 53 years of membership in the Convention system, three-fifths of the judgements of the ECtHR pertaining to Ireland were rendered between 2000 and 2005. This increase of cases in recent years can be explained by the growing awareness of the Convention since the entry into force of the ECHR Act in Ireland in 2003. There have been no judgements on the merits against Ireland since December 2005.

Half of the eighteen ECtHR judgements concerning Ireland pertain to Article 6(1) ECHR, closely followed by six judgements relative to Article 8 ECHR. While eighteen cases is a relatively low number, thirteen of these applications were successful and resulted in a judgement in violation, leading either to the payment of compensation or to legislative change. Overall, the numbers place Ireland among the countries with the lowest total of cases filed and of adverse judgements. One might explain this exemplary record primarily by reference to the lively and strong human rights tradition in Ireland.¹⁴⁴ This explanation may also account, however, for the sense of jurisprudential self-sufficiency evidenced in some of the case law discussed in the previous sections.¹⁴⁵ One might even speculate that the lack of interest in going to Strasbourg is also partly due to the

¹⁴² *Allan v. the United Kingdom* (appl. no. 48539/99), Judgement (Fourth Section), 5 November 2002, Reports 2002-IX, 420 et seq.; [2003] 36 EHRR 12.

¹⁴³ *John Murray v. the United Kingdom* (appl. no. 18731/91), Judgement (Grand Chamber), 8 February 1996, Reports 1996-I, 30 et seq.; [1996] 22 EHRR 29.

¹⁴⁴ See Hogan (2004), 14.

¹⁴⁵ See *supra* Section III. A.

relatively weaker remedies available under the ECHR Act, as well as the prospect of lengthy and costly proceedings under the ECHR.¹⁴⁶

b. Selected Examples

Although the number of Irish cases before the ECtHR is relatively limited in comparison to the UK, the areas of law and society concerned reflect important crises in Ireland. Given the high degree of protection granted to fundamental rights by the Irish Constitution, the areas in which an additional conventional protection is needed, one would suppose, are those areas in which the Irish society is traditionally more conservative than the European common denominator, or where political divisions make decisions difficult. One may think, for instance, of cases pertaining to the compulsory acquisition of land by the Land Commission (until it was abolished in 1980), homosexuality, abortion, artificial reproduction and emergency or anti-terrorism measures. In those areas, political divisions are often too important to allow an easy judicial resolution of the issue and recourse to a supra-national jurisdiction is welcome.¹⁴⁷ Thus, the report will concentrate on the cases which concern four of the most problematic provisions for Irish law: Articles 6, 8, and 13 ECHR and Article 1 of Protocol no. 1.¹⁴⁸

aa. The protection of private life. In *Johnston v. Ireland* (1978), the applicants argued that the unequal treatment of children born out of wedlock in Irish law was discriminatory, and the ECtHR agreed that the unequal treatment of the child of unmarried parents by comparison with that of the child of validly married parents constituted a violation of Article 8 ECHR.¹⁴⁹ In the 1988 *Norris v. Ireland* case,¹⁵⁰ the Court followed its judgement in *Dudgeon v. UK*¹⁵¹ and argued that the criminalization of homosexual acts between men in Irish nineteenth-century legislation violated Article 8 ECHR. According to the Court, public shock or disturbance at the commission of private homosexual acts did not in itself warrant their criminalization. In *Keegan v. Ireland* (1994), the Court decided that Irish law permitting the adoption of a child without the consent of its natural father

violated Articles 8 and 6 ECHR, as it interfered with the latter's right to respect for family life and denied his access to a hearing respectively.¹⁵²

bb. Access to courts. In *Airey v. Ireland* (No. 1), the applicant complained that due to the prohibitive cost of civil litigation and the absence of a scheme of legal aid in Ireland, she was effectively denied access to the courts for the purposes of seeking a judicial separation from her husband contrary to Article 6(1) ECHR. According to the Court (1979), Article 6(1) ECHR granted a positive right of access to a judge, and a correlative right not to be faced with prohibitive legal costs in doing so. Moreover, Article 8 ECHR entailed a positive duty for States to ensure respect of private and family life, and Mrs Airey's inability to avail herself of the remedy of judicial separation infringed that right.¹⁵³ In *Quinn v. Ireland* and *Heaney and McGuinness v. Ireland* (2000), three applicants were arrested and charged under Section 52 of the Offences Against the State Act 1939 by the Special Criminal Court on mere suspicion of serious terrorist offence, which the ECtHR judged violated the right to a fair trial under Article 6(1) ECHR and the presumption of innocence under Article 6(2) ECHR.¹⁵⁴ In two cases decided in 2004, *O'Reilly and Others v. Ireland* and *McMullen v. Ireland*, the Court found that Ireland was in breach of Articles 6(1) and 13 ECHR because of unreasonable delays arising in two sets of domestic proceedings for which there was no domestic remedy.¹⁵⁵ In *Barry v. Ireland* (2005), the Court held that criminal proceedings which lasted ten years and four months were excessive and failed to satisfy the reasonable time requirement under Articles 6(1) and 13 ECHR.¹⁵⁶

cc. The protection of property. In the 1991 case *Pine Valley Developments and Others v. Ireland*, the Court decided that there had been discriminatory treatment contrary to Article 14 ECHR combined with Article 1 of Protocol no. 1. The second and third applicants had indeed been treated unequally in the overturning of planning permissions for development property.¹⁵⁷

¹⁵² *Keegan v. Ireland* (appl. no. 16969/90), Judgement (Chamber), 26 May 1994, Series A, Vol. 290; [1994] 18 EHRR 342.

¹⁵³ *Airey v. Ireland* (No. 1) (appl. no. 6289/73), Judgement (Chamber), 9 October 1979, Series A, Vol. 32; [1979–1980] 2 EHRR 305.

¹⁵⁴ *Quinn v. Ireland* (appl. no. 36887/97), Judgement (Fourth Section), 21 December 2000 (not reported); and *Heaney and McGuinness v. Ireland* (appl. no. 34720/97), Judgement (Fourth Section), 21 December 2000, Reports 2000-XII, 419 et seq.; [2001] 33 EHRR 12.

¹⁵⁵ *O'Reilly and Others v. Ireland* (appl. no. 54725/00), Judgement (Third Section), 29 July 2004 (not reported); [2005] 40 EHRR 40; and *McMullen v. Ireland* (appl. no. 42297/98), Judgement (Third Section), 29 July 2004 (not reported).

¹⁵⁶ *Barry v. Ireland* (appl. no. 18273/04), Judgement (Third Section), 15 December 2005 (not yet reported).

¹⁵⁷ *Pine Valley Developments Ltd and Others v. Ireland* (No. 1) (appl. no. 12742/87), Judgement (Chamber), 29 November 1991, Series A, Vol. 222; [1992] 14 EHRR 319.

¹⁴⁶ See Kilkelly (2004), *Introduction*, lvi; O'Connell (2001), 468.

¹⁴⁷ See e.g. the two recent appeals to the Supreme Court that are about to test its willingness to use the Convention when the Constitution does not provide a clear answer: *M.R. v. T.R. & Others*, [2006] IEHC 359 (frozen embryos) and *Zappone and Gilligan v. Revenue Commissioners*, [2006] IEHC 404 (gay marriage).

¹⁴⁸ For a presentation of all Irish cases judged on the merits, see O'Connell et al. (2006), chapter 1.

¹⁴⁹ *Johnston and Others v. Ireland* (appl. no. 9697/82), Judgement (Plenary), 18 December 1986, Series A, Vol. 112; [1987] 9 EHRR 203.

¹⁵⁰ *Norris v. Ireland* (appl. no. 10581/83), Judgement (Plenary), 26 October 1988, Series A, Vol. 142; [1991] 13 EHRR 186.

¹⁵¹ *Dudgeon v. the United Kingdom* (*supra* note 3)

dd. The protection of freedom of information. In 1992, the Court decided in *Open Door and Dublin Well Woman v. Ireland* that the restriction from imparting information to pregnant women concerning abortion facilities outside Ireland was a violation of the freedom of information guaranteed in Article 10 ECHR.¹⁵⁸ Although these last two cases seem relatively isolated, they are the tip of an iceberg in Ireland, where a commentator once stated that "Ireland's sometimes hysterical obsession with abortion is matched only by its historical obsession with land".¹⁵⁹

3. Comparison and Conclusion

While the UK is among the original Contracting States to the Convention with the highest total of cases brought against it, Ireland is among the countries with the lowest total. Several factors may account for this divergence, the most important of which – again – is probably the difference between the countries' respective human rights traditions. Articles 6 and 8 ECHR have been the basis of most of the adverse judgements in both countries. The legal systems share a common historical origin, and the courts are embedded in a common cultural take on the protection of privacy and family life.¹⁶⁰ The conflict over Northern Ireland has also generated cases, with important consequences for detention regimes and anti-terrorist measures on both sides.

D. The European Court's Case Law's Effects in National Law

The previous section presented basic data on the ECtHR's activities with respect to Ireland and the UK. This section assesses their impact on national law in both countries. Of course, the ECtHR's rulings also impact on national legal orders in less visible ways, as when adverse judgements generate new orientations to domestic law principles,¹⁶¹ changes in the criteria governing officials' conduct at international level,¹⁶² or new cultural outlooks and attitudes on the part of officials and administrators *vis-à-vis* the Convention and the European Court.

1. United Kingdom

Primary responsibility for compliance with the Court's judgements rests with the Foreign Secretary. Upon reception of a judgement, a designated legal agent in the

¹⁵⁸ *Open Door and Dublin Well Woman v. Ireland* (supra note 63).

¹⁵⁹ O'Connell (2001), 444.

¹⁶⁰ Compare *Norris v. Attorney General* (supra note 3) to *Dudgeon v. the United Kingdom* (supra note 3).

¹⁶¹ See e.g. *Osman v. the United Kingdom* (appl. no. 23452/94), Judgement (Grand Chamber), 28 October 1998, Reports 1998-VIII, 3124 et seq.; [2000] 29 EHRR 245 in the field of English tort law. See, however, *Z. and Others v. the United Kingdom* (appl. no. 29392/95), Judgement (Grand Chamber), 10 May 2001, Reports 2001-V, 1 et seq.; [2002] 34 EHRR 3.

¹⁶² See e.g. *Soering v. the United Kingdom* (supra note 100). See also (esp. dissenting opinions) *Al-Adsani v. the United Kingdom* (appl. no. 35763/97), Judgement (Grand Chamber), 21 November 2001, Reports 2001-XI, 79 et seq.; [2002] 34 EHRR 11.

Foreign Office communicates it to the relevant department(s) of State concerned, along with a statement of proposed remedy. The following sections will provide examples of remedial action taken in response to being held in violation of the Convention, both by the British Legislature and the Judiciary.

a. Pre-Incorporation Impact

Overall, during the pre-incorporation period, the UK met most of its obligations to amend its laws so as to bring them into conformity with the Court's rulings, though the Thatcher Government lodged a derogation under Article 15 ECHR following one adverse ruling.¹⁶³ That point made, the UK has typically sought to limit adaptation of national law as much as possible. Following the adverse judgement of the Court in *Abdulaziz, Cabales and Balkandali v. UK* (1985),¹⁶⁴ for example, the UK suppressed the discrimination of married women under immigration rules. Rather than raise women's positions to that of men, the new regulations levelled down the position of men, so as to prevent wives from joining resident husbands. Nonetheless, the impact of the Court's judgements against the UK prior to the HRA was profound, giving the UK a body of human rights law, and corresponding principles which it would not otherwise have had.¹⁶⁵ In addition, the scope of judicial authority was gradually enhanced, whereas the scope of Parliamentary sovereignty was eroded.¹⁶⁶

aa. The treatment of terrorist suspects. Before its condemnation in *Ireland v. UK* (1978),¹⁶⁷ the UK Prime Minister had given its solemn undertaking in 1972 that the techniques of interrogation complained of would be abandoned. The European Court decided to adjudicate the application further in order to elucidate the question of principle in any case. Following the ruling in *Brogan and Others v. UK* (1988),¹⁶⁸ the UK Government insisted that the special arrest and detention powers under the Prevention of Terrorism Act 1983 were necessary to combat terrorism connected to Northern Ireland. It then lodged a derogation under Article 15(1) ECHR, which was only withdrawn in 2001, replacing it with a derogation (of 18 December 2001) to Article 5(1) ECHR in relation to powers to detain suspected terrorists or illegal immigrants pending deportation under

¹⁶³ *Brogan, Coyle, McFadden and Tracey v. the United Kingdom* (appl. nos 11209/84; 11234/84; 11266/84; 11386/85), Judgement-(Plenary), 29 November 1988, Series A, Vol. 145-B; [1989] 11 EHRR 117.

¹⁶⁴ *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (appl. nos 9214/80; 9473/81; 9474/81), Judgement (Plenary), 28 May 1985, Series A, Vol. 94; [1985] 7 EHRR 471.

¹⁶⁵ See e.g. Gearty (2006), 66–67 by reference to *R. (Limbuela) v. Secretary of State for the Home Department* [2005] UKHL 66.

¹⁶⁶ An example often given is that of *Lustig-Praan and Beckett v. the United Kingdom* (supra note 135); *Christine Goodwin v. the United Kingdom* (supra note 137); or *Evans v. the United Kingdom* (appl. no. 6339/05), Judgement (Grand Chamber), 10 April 2007 (not yet reported).

¹⁶⁷ *Ireland v. the United Kingdom* (supra note 51).

¹⁶⁸ *Brogan, Coyle, McFadden and Tracey v. the United Kingdom* (supra note 163).

ATCSA. Following a 2004 decision of the House of Lords on its conventionality, this latter derogation was withdrawn on 16 March 2005.¹⁶⁹ Looking ahead, it is obvious that this area remains a fertile field, not only for litigation and intra-judicial interaction, but also for Governmental decision-making on compliance. New derogations might be taken soon, given that the measures under the Prevention of Terrorism Act 2005 (which replaced detention without trial under ATCSA with a regime of "control orders"), and under the Terrorism Act 2006, are likely to be judged Convention-incompatible.¹⁷⁰

bb. The protection of freedom of the press. Following *Sunday Times v. UK* (1979),¹⁷¹ the UK established the Contempt of Court Act 1981, which aligned domestic law with the principles expressed in the decision. Following the *Spycatcher* case,¹⁷² British judges have referred systematically to the Court's reasoning in processing applications for injunctions against the press.

cc. The treatment of homosexuals. Following *Dudgeon v. UK* (1981),¹⁷³ the Government passed the Homosexual Offences (Northern Ireland) Order 1982, which decriminalized homosexual acts conducted in private between consenting male adults. In response to *Lustig-Prean and Beckett v. UK* (1999),¹⁷⁴ and *Smith and Grady v. UK* (1999),¹⁷⁵ the Government introduced The Armed Forces Code of Social Conduct Policy Statement on 12 January 2000 lifting the ban on gays serving in the military.

b. Post-incorporation Impact

The HRA 1998 creates various obligations to monitor and take into account the decisions of the European Court in domestic law, and to provide new domestic remedies in case of violation of Convention rights. These obligations supplement the UK Government's international duties under Article 46 ECHR. Section 10 HRA creates a new legislative process in order to enact fast-track remedial orders to respond to human rights violations in primary legislation. These violations may be identified by a declaration of incompatibility of the High Court or appellate bodies, but also by a judgement in violation of the ECtHR. This fast-track procedure following an adverse judgement of the Court has not been used very often since 2000, however.

At present, a large number of past ECtHR judgements have not yet been fully

¹⁶⁹ See *A. and Others v. Secretary of State for the Home Department* (supra note 28).

¹⁷⁰ See e.g. *Secretary of State for the Home Department v. E* [2007] EWHC 233 (Admin).

¹⁷¹ *Sunday Times v. the United Kingdom* (supra note 132).

¹⁷² *The Observer and The Guardian v. the United Kingdom* (supra note 133).

¹⁷³ *Dudgeon v. the United Kingdom* (supra note 3).

¹⁷⁴ *Lustig-Prean and Beckett v. the United Kingdom* (supra note 135).

¹⁷⁵ *Smith and Grady v. the United Kingdom* (appl. nos 33985/96; 33986/96), Judgement (Third Section), 27 September 1999, Reports 1999-VI, 45 et seq.; [2000] 29 EHRR 493.

implemented, due to delays in the adoption of remedial legislation. Among those mentioned by the Committee on Legal Affairs and the Human Rights' Rapporteur after his 8 March 2006 visit to the UK,¹⁷⁶ one finds the pre-HRA pending reforms: to prohibit the physical punishment of children following *A. v. UK* (1998),¹⁷⁷ to introduce adequate safeguards during detention in mental hospitals following *Stanley Johnson v. UK* (1997);¹⁷⁸ and to ensure that no negative conclusion could be drawn from the accused person's silence during interrogation without legal council following *John Murray v. UK* (1996).¹⁷⁹ With respect to other measures still pending, the UK has been slow to deal with the consequences of several judgements relative to security forces' violence in Northern Ireland, in particular *Finucane v. UK* (2003),¹⁸⁰ or *McKerr v. UK* (2001).¹⁸¹ The controversy surrounding the Inquiries Act 2005 is also not likely to be set at rest by the single inquiry in the *Finucane* case.¹⁸² The Report criticizes the traditional British way of addressing general problems through adopting *ad hoc* practical measures, i.e. by preventing repetition of the Government action which violated the Convention, without at the same time initiating a formal change in legislation or other policy instrument.

aa. The treatment of transsexuals. Following *Christine Goodwin v. UK* (2002),¹⁸³ and *I. v. UK* (2002),¹⁸⁴ the Government immediately committed itself to carrying forward the Court's judgements. It was only after the entry into force of the Gender Recognition Act 2004, however, that transsexuals' rights were fully recognized. Nonetheless, the British Government's slow reception of the *Christine Goodwin* judgement was actually censured again by the Court as a renewed breach of Article 8 ECHR in *Grant v. UK* (2006).¹⁸⁵

bb. The organization of the State. Since the European Court's decision in *McGonnell v. UK* (2000),¹⁸⁶ the overlap between executive, judicial and Parliamentary functions mentioned above was no longer tenable. As a result, the Constitutional Reform Act 2005 removed the Parliamentary and judicial functions of the Lord

¹⁷⁶ See <http://assembly.coe.int/Maint.asp?link=/Documents/WorkingDocs/Doc06/EDOC11020.htm#2>.

¹⁷⁷ *A. v. the United Kingdom* (appl. no. 25599/94), Judgement (Chamber), 23 September 1998, Reports 1998-VI, 2692 et seq.; [1999] 27 EHRR 611.

¹⁷⁸ *Johnson v. the United Kingdom* (supra note 123).

¹⁷⁹ *John Murray v. the United Kingdom* (supra note 143).

¹⁸⁰ *Finucane v. the United Kingdom* (supra note 131).

¹⁸¹ *McKerr v. the United Kingdom* (supra note 130).

¹⁸² See e.g. Amnesty International (2006).

¹⁸³ *Christine Goodwin v. the United Kingdom* (supra note 137).

¹⁸⁴ *I. v. the United Kingdom* (appl. no. 25680/94), Judgement (Grand Chamber), 11 July 2002 (not reported); [2003] 36 EHRR 53.

¹⁸⁵ *Grant v. the United Kingdom* (supra note 138).

¹⁸⁶ *McGonnell v. the United Kingdom* (supra note 12).

Chancellor (as opposed to his role in the administration of the court system), and a Supreme Court will replace the House of Lords in 2009.

cc. The protection of parents' and children's rights. The case *P, C., and S. v. UK* (2002)¹⁸⁷ raised general issues of good practice for social service authorities regarding the circumstances in which children are taken into care. For the courts, it raised issues of how to ensure the provision of legal representation in child care cases, at all stages of the proceedings, and to adjourn proceedings where necessary. In its judgement, the Court demanded broad dissemination of the principles to the Judiciary, and a revision of guidelines applying to local authority social services. In his response, the Lord Chancellor stated that his department were carefully considering the implications of the judgement, together with the senior Judiciary, and that the judgement would be taken into account with respect to implementation of the Adoption and Children Act 2002.

dd. Protection against self-incrimination and the right to silence. Following *Allan v. UK* (2002–03),¹⁸⁸ the Home Office noted that the Association of Chief Police Officers with appropriate Home Office input was preparing a Police and Criminal Evidence Act 1984 Sections 76 and 78 guide designed to ensure police compliance with Article 6 ECHR. Whilst this is welcome, *Allan v. UK* identifies a deeper problem not only with police practice, but also with judicial application of Sections 76 and 78. Consideration should, therefore, be given to legislation to ensure that Sections 76 and 78 are fully in compliance with Article 6 ECHR. This is a very topical issue as the use of suspect evidence, including evidence obtained through torture, has spread since 2001, and even more since 2005 under the Prevention of Terrorism Act 2005. In a December 2005 decision, the House of Lords unanimously confirmed that such evidence is inadmissible.¹⁸⁹ What it also ruled, however, was that such evidence should only be excluded if it is considered by judges that it is more likely than not that the evidence was obtained by torture – a condition difficult to satisfy in ordinary circumstances, and left therefore to judicial appreciation.

Under Section 2 HRA, British courts are required to take into account the ECtHR's case law not only in cases pertaining to the United Kingdom, but in all cases pertaining to the rights incorporated into British law by the Act. As a consequence, British courts and Government authorities are expected to take a closer and more general interest in the Court's decisions in other Contracting States, although they are not, strictly speaking, binding on British courts under the HRA.¹⁹⁰

¹⁸⁷ *P, C. and S. v. the United Kingdom* (supra note 140).

¹⁸⁸ *Allan v. the United Kingdom* (supra note 142).

¹⁸⁹ *A. and Others v. Secretary of State for the Home Department* [2005] UKHL 71.

¹⁹⁰ See *infra* Section III. E.

Even with respect to the European Court's case law involving the United Kingdom, British courts often dissent and decide the next case differently if they think that there are good reasons to do so.¹⁹¹ In such a case, the European Court is of course free to follow the newest British decision rather than its previous decision.¹⁹² This situation may create difficult issues pertaining to judicial hierarchy in the UK. Imagine that the British Court of Appeal decides a case in a certain way, while the European Court decides differently later on. Should a lower court seized on a similar issue subsequently respect the Court of Appeal decision or that of the European Court? It would seem that the lower court should decide as it deems most correct; since it is not strictly speaking bound by the European Court's case law, but deciding without regard to the ECtHR's case law risks another adverse judgement from Strasbourg.¹⁹³ To save time and expense, it is argued, the Court of Appeal should be free to take this step itself.¹⁹⁴ Reaffirming strongly the principle of *stare decisis*, the House of Lords decided otherwise, however, in a recent case argued by reference to the possibilities offered by the fast-track procedure under Section 10 HRA.¹⁹⁵

An interesting issue in this respect is whether it is open to British courts to give Convention rights a more expansive interpretation than the one adopted by the European Court. Given that the Convention is meant as a minimal standard, as confirmed by Article 53 ECHR, national courts have the latitude to go further than the European Court in protecting them. The view expressed in decisions, however, is that British courts cannot adopt an interpretation of the Convention which gives a broader effect to a right than is indicated by existing jurisprudence of the European Court.¹⁹⁶ A recent example of this strict interpretation of Convention rights according to the European Court's case law may be found in the challenge raised against Section 23 of the ATCSA before the House of Lords.¹⁹⁷

¹⁹¹ See e.g. *Z. and Others v. the United Kingdom* (supra note 161) confirming the British Courts' decision (*Barrett v. Enfield LBC*, [2001] 2 AC 550) that had been intentionally decided against the European Court's decision in *Osman v. the United Kingdom* (supra note 161). See on this judicial dialogue, Department for Constitutional Affairs, Review of the Implementation of the Human Rights Act, July 2006, http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

¹⁹² See e.g. *R. v. Lyons* [2002] (supra note 90). This was confirmed later on by the European Court in *Lyons and Others v. the United Kingdom* (supra note 90). See also *Cooper v. the United Kingdom* (appl. no. 48843/99), Judgement (Grand Chamber), 16 December 2003, Reports 2003-XII, 145 et seq.; [2004] 39 EHRR 8, following *R. v. Boyd and Others* [2002] UKHL 31, that was decided against *Findlay v. the United Kingdom* (appl. no. 22107/93), Judgement (Chamber), 25 February 1997, Reports 1997-I, 263 et seq.; [1997] 24 EHRR 221. See Anderson (2004).

¹⁹³ See Hoffman and Rowe (2003), 53.

¹⁹⁴ See Rodger of Earlsferry (2005).

¹⁹⁵ See *Price v. Leeds CC* [2006] UKHL 10.

¹⁹⁶ See e.g. *R. v. Secretary of State for the Home Department ex parte Utley* [2004] UKHL 38. See also *R. v. Special Adjudicator ex parte Ullah* (FC), [2004] UKHL 26.

¹⁹⁷ See *Lord Hoffman in A. and Others v. Secretary of State for the Home Department* (supra note 28).

2. Ireland

The following sections will provide examples of remedial action taken in response to adverse judgements by the ECtHR, both by the Irish Legislature and the Judiciary.¹⁹⁸ Interestingly, some Irish cases have been significant in the evolution of the European constitutional order in general.¹⁹⁹

a. Pre-incorporation Impact

Before the ECHR Act 2003, Ireland typically fulfilled its duties under Article 46 ECHR. One of the major exceptions pertained to *abortion*. Given the sensitivity of the issue in Ireland, many questions remained unresolved. Different constitutional mechanisms at Irish constitutional level and at EU level have only aggravated the situation.²⁰⁰

aa. Protection of private life. Following the *Johnston v. Ireland* (1986) case,²⁰¹ the Minister of Justice introduced the Status of Children Act 1987 abolishing the legal status of illegitimacy of children born out of wedlock, thereby remedying the violation of Article 8 ECHR. Following the *Norris v. Ireland* case (1988),²⁰² the Irish Government failed to respond until, under direct Council of Europe pressure, it decriminalized homosexual activity by adopting the Criminal Law Sexual Offences Act in 1993. The breach of Article 8 ECHR identified in *Keegan v. Ireland* (1994)²⁰³ was remedied by the Adoption Act 1998 which provides for consultation of the natural father in the adoption process.

bb. Access to courts. In response to the 1979 *Airey v. Ireland* judgement,²⁰⁴ the Irish Government introduced a non-statutory scheme of civil legal aid and advice in 1980. As the latter did not fully remedy the breach of Article 6(1) ECHR found by the Court, the scheme was revised and given a statutory basis in the Civil Legal Aid Act 1995. Following *Quinn v. Ireland* and *Heaney and McGuiness v. Ireland* (2001),²⁰⁵ Ireland still needs to revise Section 52 of the Offences Against the State Act 1939 to prevent further violations of Article 6 ECHR by the Special Criminal Court.

¹⁹⁸ For further information, see e.g. Egan (2004) (refugee law); Kilkelly (2004), *Child and Family* (child and family law); Bacik (2004) (criminal law); Austin and McClean (2004) (detention); Mullan (2004) (discrimination law); Dillon-Malone (2004) (privacy and media law); Kenna (2004), *Property* (property, housing and environment).

¹⁹⁹ See e.g. *Lawless v. Ireland* (No. 3) (supra note 52); *Airey v. Ireland* (No. 1) (supra note 153); and *Bosphorus Hava Yolları Turizm Ve Ticaret Anonim Şirketi v. Ireland* (appl. no. 45036/98), Judgement (Grand Chamber), 30 June 2005, Reports 2005-VI, 107; [2006] 42 EHRR 1.

²⁰⁰ See supra Section III. A.

²⁰¹ *Johnston and Others v. Ireland* (supra note 149).

²⁰² *Norris v. Ireland* (supra note 150).

²⁰³ *Keegan v. Ireland* (supra note 152).

²⁰⁴ *Airey v. Ireland* (No. 1) (supra note 153).

²⁰⁵ *Quinn v. Ireland* (appl. no. 36887/97) (supra note 154).

cc. Protection of freedom of information. In response to the judgement in violation of Article 10 ECHR in the *Open Door and Dublin Well Woman v. Ireland* (1992) case,²⁰⁶ the Irish Constitution was amended to allow the imparting of information on abortion services lawfully available in other jurisdictions. Remaining legislative limitations are, however, still in place and in particular penalties for providing information and advice about abortion. The fact that the Supreme Court has upheld this legislation creates difficulties, since it cannot be challenged constitutionally before an Irish court as long as it remains in force.²⁰⁷

b. Post-incorporation Impact

The ECHR Act 2003 creates new remedies in case of violation of Convention rights, and mechanisms of coordination between the ECHR and the Irish legal order. This framework supplements the Irish Government's international duties under Article 46 ECHR. In contrast to Section 10 HRA, however, there are no direct legislative requirements under Section 3 ECHR Act to remedy a breach of the Convention following an adverse judgement of the European Court.²⁰⁸

The Irish Government has been faced with one major difficulty in the implementation of ECtHR's adverse judgements in Irish law: that of the length of criminal proceedings. Following the *Doran v. Ireland* (2003),²⁰⁹ *O'Reilly and Others v. Ireland* (2004),²¹⁰ *McMullen v. Ireland* (2004),²¹¹ and *Barry v. Ireland* (2005)²¹² decisions, the Irish Government has suggested that new violations of the Convention could be avoided in future by informing the authorities concerned of the requirements of the Convention. Even if the deeper structural problem remains in this type of cases, overall the impact of the European Court's judgements post-incorporation has been rather positive.

Under Section 4 ECHR Act, Irish courts are required to take into account the ECtHR's case law not only in cases in which Ireland is a defendant, but in all cases concerning the rights incorporated into Irish law by the Act. Since Irish courts did not respect the European Court's decisions pertaining to other countries too closely before incorporation, one may fear that, in the absence of a domestic duty to do so under the ECHR Act, convergence with the European Court's case law may not occur.²¹³

²⁰⁶ *Open Door and Dublin Well Woman v. Ireland* (supra note 63).

²⁰⁷ See, however, the decision of inadmissibility in *D. v. Ireland* (appl. no. 26499/02), Admissibility Decision (Fourth Section), 28 June 2006 (not reported); [2006] 43 EHRR SE16.

²⁰⁸ See Hogan (2004), 27.

²⁰⁹ *Doran v. Ireland* (supra note 106).

²¹⁰ *O'Reilly and Others v. Ireland* (supra note 155).

²¹¹ *McMullen v. Ireland* (supra note 155).

²¹² *Barry v. Ireland* (supra note 156).

²¹³ See *infra* Section III. E.

3. Comparison and Conclusion

Remedial actions have always been very good in Ireland and remain good, though difficult structural issues have arisen in recent years. In the UK, remedial action was minimalist before incorporation, and the Government has dragged its feet on security issues since 2001. Nonetheless, the UK possesses more effective remedial mechanisms following adverse judgements (e.g. the fast-track procedure) than does Ireland.²¹⁴

As to the ECHR's impact on judicial authorities, both the Irish and the British courts have demonstrated a fierce sense of independence *vis-à-vis* the European Court's case law. Judges do not accept that they are bound by previous decisions of that Court, and neither act of incorporation requires them to apply the ECtHR's reasoning in cases at bar. Where the countries' courts differ is with respect to giving a higher protection to Convention rights than does the ECtHR. UK judges consider Convention rights as both minimal and maximal standards, while Irish judges consider the Convention to state minimal standards for rights protection, in comparison to the higher standards offered under their Constitution. As the new powers and practices associated with HRA are being consolidated, one can expect that UK judges will gradually become more assertive.

E. Mechanisms of Coordination

1. United Kingdom

a. Preventive Compliance

Before incorporation in 2000, the Convention played no formal part in the proceedings of the British Parliament or the Executive, and there existed no Parliamentary committee on human rights until the 90's.²¹⁵ The HRA introduced a system of preventive compliance.²¹⁶

To start with, the HRA has established formal procedures of pre-legislative scrutiny of legislation. Section 19 HRA requires the Minister introducing a Bill in Parliament to state whether it is compatible with the Convention, or to decline to do so, but to indicate that the Government nevertheless wishes to proceed.²¹⁷ The Government chose the latter course with the ATCSA, which contained a number of provisions deemed potentially incompatible with the Convention. A derogation under Article 15 ECHR was made and Parliament adopted the Act. The fact that the Government asserts the compatibility of a Bill before Parliament

²¹⁴ See *infra* Section III. E.

²¹⁵ See e.g. Kinley (1993); Ryle (1994).

²¹⁶ See e.g. Blackburn (2001), 992 et seq.; Blackburn (1998); Justice (1999).

²¹⁷ See also The Human Rights Act 1998 Guidance for Departments (Home Office, 2nd ed., 2000).

does not guarantee that the statement is correct: the Bill, once passed, may be deemed incompatible by a court.²¹⁸

Both Houses of Parliament are also responsible to scrutinize legislative initiatives. Scrutiny typically takes place in various Parliamentary Committees. The most important of these is the Joint Committee on Human Rights, which is composed of twelve members (six from each House) who consider matters relating to human rights, and to the HRA in particular. The Commission for Equality and Human Rights also plays a role in pre-legislative scrutiny of Bills, and may suggest amendments when necessary to put British law in line with the Convention.

With incorporation, mechanisms of preventive compliance of Executive decision-making have also appeared. It is now a mandatory legal requirement for Ministries to examine and draw up a written report on the human rights implications of all legislation that is being prepared. As just discussed, the Government must also include a statement of Convention compatibility with each Bill introduced into Parliament. The Executive's commitment to preventive compliance has clearly weakened since September 2001, however, which has affected the taking and reinforcement of anti-terrorism measures.²¹⁹ The Commission for Equality and Human Rights also has certain functions in the context of executive preventive compliance. It is able to initiate enquiries, which might be concluded by an unlawful act notice in cases where a violation of the Convention is identified. If that notice is not acted upon, the Commission may seek an agreement with those responsible for the violation.

As discussed above, the HRA requires the courts to apply the Convention, and to pay close attention to the ECtHR's case law. In fact, UK judges have been quite attentive to both, if only to avoid a referral to Strasbourg.²²⁰ Typically, judges are careful in the formulation of their reasoning, deliberately explaining their rulings in terms that can be readily understood by the European Court. Incorporation has thus influenced how appeal judgements are framed. Dissenting judgements are encouraged, so as to provide the European Court with a record of serious deliberation and detailed reasoning.²²¹ Still, judges do not go further in protecting Convention rights than the European Court has in its case law, so one can characterize preventive judicial compliance as relatively minimalist.

b. Ex Post Compliance

Prior to the HRA, the UK routinely met its obligations in response to adverse judgements of the European Court, including amending its laws so as to bring them into conformity with the Court's ruling. Since incorporation, *ex post* leg-

²¹⁸ See *A. and Others v. Secretary of State for the Home Department* (*supra* note 28).

²¹⁹ See e.g. Amnesty International (2006) about the debate over the Inquiries Act 2005.

²²⁰ See e.g. the dissent of Lord Steyn in *Roberts v. Parole Board* [2005] UKHL 45.

²²¹ See Rodger of Ealsferry (2005).

isative compliance includes various mechanisms for post-legislative monitoring of legislation, as well as fast-track remedial orders to respond to rights violations in primary legislation. The Joint Human Rights Committee also presents regular progress reports on the implementation of ECtHR's judgements before the House of Lords, a new practice that should improve *ex post* compliance.²²²

As mentioned, the HRA creates a process to enact fast-track remedial orders in response to human rights violations in primary legislation. Once an authorized court issues a declaration of incompatibility, the Executive is to consider whether there exist compelling reasons to amend the censured law, and "may by order make such amendments to the legislation as he considers necessary to remove the incompatibility" (Section 10 para. 2 HRA).²²³ Adverse ECtHR's judgements may also lead to fast-track remedial legislative revision, on the same basis. Remedial orders, that are affirmative statutory instruments, are subject to a simplified procedure: a single stage of approval in each House as opposed to the three readings and committee stages applicable to a normal Bill. Despite this simplified procedure, these orders are authorized to change primary legislation in major respects. To prevent abuses, proposed remedial orders should be scrutinized by the Joint Select Committee on Human Rights. Of course, the making of a remedial order does not deprive the Parliament of the opportunity to consider the matter because the order is still subject to being approved by Parliament before it can become law (Schedule 2 para. 2 HRA). The only exception to this is where the matter is considered urgent (Schedule 2 para. 2(b) HRA); in such cases, the order has to be approved by Parliament within 120 days, or else the order will cease to have effect (Schedule 2 para. 4(4) HRA). A recent report of the Law Commission explores ways to make these post-legislative mechanisms more systematic.²²⁴

With respect to the Judiciary, the situation has also changed dramatically with incorporation. Before 2000, British judges did not always refer or consider adverse judgements of ECtHR in later cases pertaining to the same issue, even when they went against the UK. With the HRA (Section 2 HRA), British courts must, when interpreting and applying Convention provisions, take due account of the principles laid down in the ECtHR's decisions and judgements, whether or not they concern the UK. Nonetheless, the courts are not strictly speaking bound by the European Court's case law, and they often distance themselves from it and justify their position.²²⁵

As to the impact of an ECtHR's decision condemning the United Kingdom on the very judicial proceedings that were deemed contrary to the Convention,

²²² See e.g. Joint Committee on Human Rights, *Implementation of Strasbourg Judgements: First Progress Report*, 8 March 2006, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jt133/133.pdf>.

²²³ See e.g. *R. v. Mental Health Review Tribunal* [2001] 3 WLR 512.

²²⁴ See The Law Commission, *Post-Legislative Scrutiny*, Report October 2006, <http://www.lawcom.gov.uk/docs/lc302.pdf>.

²²⁵ See *supra* Section III. D.

the regime has not changed drastically since incorporation.²²⁶ The conviction or ruling remains valid and cannot be set aside. Some have suggested establishing Review Commissions, on the model of the Criminal Case Review Commission, that would have the power to refer cases on which an adverse judgement has been made to the relevant appeal court for reconsideration as a brand new appeal. Based on the German Federal Constitutional Court's decision in *Görgülü*,²²⁷ one may argue, however, that ordinary civil proceedings provide more opportunity to take account of a ECtHR's decision later on and this without a Review Commission.²²⁸

2. Ireland

a. Preventive Compliance

Before the ECHR Act 2003, the Executive rarely invoked the Convention as a reason for introducing a piece of legislation or amending existing legislation, such as when a case was brought against Ireland in an area, but also when a relevant case had been brought before the ECtHR. The Parliamentary Draftsman's Office had the task of ensuring compatibility with the Convention's provisions,²²⁹ but in Parliamentary proceedings, concern for compatibility was not strict or systematic; after all, the ECHR was not part of Irish law.

Incorporation has done little to change things. The ECHR Act does not create a complete system of Parliamentary scrutiny of legislation for compatibility with Convention rights on the model of the British HRA.²³⁰ In practice, the Irish Human Rights Commission actually performs the most important monitoring role for concerned legislators. Since 2003, the Commission has a statutory duty to review proposed legislation with reference to international human rights obligations, and its activities in this respect have proven to be a vital resource for Parliamentarians. It appears from transcripts of the proceedings of certain Parliamentary Committees that the views of the Commission enjoy significant credibility. The same influence cannot be said to exist on the Executive at the pre-Parliamentary stage, although ministers can refer proposals to the Commission at this stage, and the Minister for Justice has frequently done so.

Before 2003, preventive compliance on the part of Irish judges was also rare.²³¹

²²⁶ Compare *R. v. Lyons* [2003] 1 AC 976 (where facts took place before the HRA came into force) with *In re McKerr*, [2004] 1 WLR 807.

²²⁷ Bundesverfassungsgericht, 14 October 2004, *Görgülü*, BVerfGE, 2 BvR 1481/04.

²²⁸ See e.g. Rodger of Earlsferry (2005).

²²⁹ See e.g. O'Connell (2001), 436–438; Flynn (1994); Donelan (1992).

²³⁰ See O'Connell (2004), *Critical Perspective*, 5.

²³¹ See *supra* Section III. B. Empirical research on the work of the courts is rare in Ireland. Since incorporation, however, all cases in which a declaration of incompatibility under the ECHR Act is sought are being notified to the Irish Human Rights Commission, thus making it possible to monitor this dimension of judicial compliance. See also the Irish Law Society's 2006 report on the cases decided since incorporation: <http://www.lawsociety.ie/documents/committees/hr/ECHR/DecidedCases.pdf>.

Since incorporation, Irish courts have become more attentive to the ECHR and the European Court's case law, mostly in order to avoid an appeal to Strasbourg. Courts now take a relatively strict approach to the ECtHR's rulings.²³² It would seem that the authority, in the Irish legal order, of the latter's case law has been reinforced rather than diminished by the indirect model of incorporation chosen in Ireland. Overall, however, the ECHR Act itself has not provoked decisive changes in the Judiciary's approach to rights.²³³ Instead, Irish judges exhibit a tendency to subsume Convention rights and arguments under domestic constitutional remedies themselves,²³⁴ even when constitutional and conventional guarantees are not entirely congruent.²³⁵ As a result, only one Section 5 declaration of incompatibility has been granted by Irish courts so far.²³⁶

b. *Ex Post Compliance*

Prior to 2003, Ireland proved diligent in meeting its obligation to amend its laws so as to bring them into conformity with adverse rulings of the ECtHR, although decisions in the area of abortion are a major exception. In contrast to the UK HRA, the ECHR Act did not establish formal procedures for monitoring legislative activity after an adverse decision. As discussed, under Section 5 para. 3 ECHR Act, the High Court and other appellate bodies may detect violations of the Convention and declare Irish law Convention incompatible, at which point the Human Rights Commission is automatically notified. Parliament must deal with the declaration within 21 days, but there is no obligation for the Government or the Parliament to indicate what remedial action (if any) is to be taken. Moreover, fast-track procedures are not available. In any case, no court has yet issued a declaration of incompatibility following an adverse judgement by the ECtHR.

The ECtHR's decisions had no measurable impact on the Judiciary prior to incorporation. The ECHR Act does change the legal situation, but only in ways that have already been discussed, namely, that the courts must, when interpreting and applying Convention provisions, take due account of the principles laid down in the ECtHR's decisions and judgements, without being bound by them.²³⁷ As to the impact of an ECtHR's decision condemning Ireland on the very judicial proceedings that are deemed as contrary to the Convention in a specific decision,

²³² See Hogan (2006), Declaration of Incompatibility.

²³³ See O'Connell et al. (2006), 29; Hogan (2006), Declaration of Incompatibility; Hogan (2006), Ireland.

²³⁴ See e.g. Hardiman J. in *J.F. v. DPP* [2005] 2 IR 174. See also *T.H. v. DPP & His Honour Judge Peter Smithwick* [2004] IEHC 76. See *supra* Section III. B.

²³⁵ See e.g. *Gashi & Others v. Minister for Justice, Equality and Law Reform & Others* [2004] IEHC 394; *Margine v. Minister for Justice, Equality and Law Reform & Others* [2004] IEHC 127.

²³⁶ See O'Connell et al. (2006), chapter 3 by reference to the 54 superior court judgements rendered since incorporation in which the ECHR is mentioned.

²³⁷ See e.g. *Spartaria v. Minister of Justice, Equality and Law Reform* [2005] IEHC 104.

the regime has remained the same prior and post-incorporation.²³⁸ The conviction or ruling remains valid and cannot be set aside. There is no obligation under Irish law to re-open the conviction or provide a fresh trial and hence to do other than change the law with prospective effect.²³⁹

3. *Comparison and Conclusion*

Pre-incorporation compliance mechanisms, whether preventive or *ex post*, and whether executive, legislative or judicial, were much the same in both countries. With incorporation, the UK now possesses a better organized and more efficient system of monitoring and responding to compliance problems than does Ireland. In the latter country, pre-existing constitutional mechanisms, unknown in the UK, have either blocked the introduction of monitoring and control mechanisms, or subsumed them into mechanisms of constitutional compliance.

Compliance must be assessed in the long term, however, and against the background of rights protection as a whole. The fact is that Ireland created its Human Rights Commission long before the UK, and has had a better overall record of rights protection as well, at least as measured by ECtHR rulings. It may be that the Irish tendency to integrate conventional and constitutional compliance might in the long run guarantee better protection of Convention rights than in the UK.

F. Remedies and Proportionality Tests

1. *United Kingdom*

a. Remedies

Before the HRA 1998, UK courts could provide no remedies in case of infringement of the ECHR, a situation the HRA reverses. According to Section 7 para. 1 HRA, anyone claiming that a public authority has acted or will act in a way incompatible with Convention rights, and hence unlawfully under Section 6 para. 1, can initiate proceedings against that authority (Section 7 para. 1(a) HRA) on the basis of Convention rights (Section 7 para. 1(b) HRA). The *locus standi* (Section 7(3) HRA) is the same in judicial review proceedings: the claimant must have been a "victim of [an] unlawful act".

Under Section 7 para. 7 HRA, a person is a victim only if they are a victim for the purposes of Article 34 ECHR and under the ECtHR's interpretation of that Article, which includes any person, non-governmental organization or group of individuals who claim that their Convention rights have been infringed by a public authority. A Governmental body cannot, therefore, be regarded as a

²³⁸ See e.g. *E. v. E.* [1982] ILRM 497 in relation to *Airey v. Ireland* (No. 1) (*supra* note 153). See also most recently *W. O'R. v. E.H.* [1996] 2 IR 248 in relation to *Keegan v. Ireland* (*supra* note 152).

²³⁹ See Hogan (2004), 27.

victim under Article 34 ECHR. The congruence between the Convention and the Act is enhanced by the incorporation of the ECtHR's case law on the notion of victim; legal proceedings are generally confined to those who are personally in need of protection by the court whether actually, potentially or indirectly.²⁴⁰ Section 7 para. 7 HRA excludes the *actio popularis* of one or more citizens whose grievance is simply that domestic law might contravene the Convention, and excludes other groups or bodies, even though they are able to challenge acts and decisions of Government and public bodies by ordinary common law judicial review actions.²⁴¹ Under ordinary common law, the test is one of sufficient interest, which is much broader than that of "victim" under Article 34 ECHR. The victim requirement of the HRA has been heavily contested,²⁴² not least since it creates a dichotomy within the UK judicial review system. A way out might be to have recourse to an alternative (Section 7 para. 1(b) HRA), in which a party might seek initial *locus standi* on the basis of a common law right, but in subsequent proceedings argue that this common law right overlaps a Convention right.²⁴³

According to Section 6 para. 1 HRA, "it is unlawful for a public authority to act in a way which is incompatible with a Convention right." As discussed, the notion of "public authority" is controversial. The guiding test is a functional one: liability attaches to those bodies which, at the time in which the Convention rights of the litigant are prejudiced, are carrying out business or are in the act of performing a function of a public nature (as confirmed by Section 6 paras 3 and 5 HRA).²⁴⁴ The test then is material and not formal.²⁴⁵ Other bodies for whose actions the UK Government is answerable before the European Court²⁴⁶ include all those whose functions are public, and in particular executive agencies, local Government, the police, immigration officers, and prisons. Mixed private/public bodies are included only when they exercise a public function, but the latter

²⁴⁰ See *Klass and Others v. Germany* (appl. no. 5029/71), Judgement (Plenary), 6 September 1978, Series A, Vol. 28, § 33; [1979-1980] 2 EHRR 214; *Tatira and Others v. France* (appl. no. 28204/95), Decision (Plenary), Commission, 4 December 1995, Decisions and Reports 83-B, 112, 130.

²⁴¹ Rules of the Supreme Court, order 53; Supreme Court Act 1981, Section 31 (3).

²⁴² See e.g. Blackburn (2001), 966-68; Loveland (1999), 121.

²⁴³ See Loveland (1999), 122.

²⁴⁴ See generally Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Seventh Report*, 3 March 2004, <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtights/39/39.pdf>. See also the most recent report by the Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Ninth Report*, 28 March 2007, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtights/77/77.pdf>.

²⁴⁵ Home Secretary Jack Straw, House of Commons Debates, 17 June 1998, vol. 314, col. 433.

²⁴⁶ Home Secretary Jack Straw, House of Commons Debates, 17 June 1998, vol. 314, col. 406-408, 432-433.

has been interpreted narrowly.²⁴⁷ Thus, a railway company or a water company exercises a public function when it supplies its services and their safety, but not when it is conducting commercial transactions.²⁴⁸

A controversial issue is that of the horizontal effect of the HRA and in particular the possibility to bring proceedings against another private party or group of individuals. Prior to the HRA, British law had no tradition of horizontal effect. The HRA (Section 6 para. 5) expressly excludes the direct horizontal effect of the Act.²⁴⁹ However, it may still be possible to require judges to interpret the applicable law in conformity with the Convention (Section 3 HRA),²⁵⁰ bestowing indirect horizontal effect on ECHR. Moreover, one may also argue that securing indirect effect is a judicial obligation, since courts *qua* public authorities are under a positive duty (Section 6 HRA) to interpret all legal norms in conformity with the Convention.²⁵¹ The courts now make extensive use of this duty, and one can affirm that the ECHR is vested with indirect horizontal effect in the UK legal order.²⁵²

ECHR rights may be invoked in one's own legal action (Section 7 para. 1(a) HRA), as well as in any other existing legal proceedings (Section 7 para. 1(b) HRA), such as in criminal or civil proceedings. According to Section 7 para. 6 HRA, "legal proceedings" applies to a criminal prosecution as well as an appeal of a court or tribunal decision, criminal or civil. The procedure for bringing a civil claim under the Act is generally the same as for any other civil claim, although certain specific provisions may be found in the rules applying to civil and family cases. The main provisions are the following. First, only High Court Judges, Circuit Judges or County Courts Recorders can entertain claims under the HRA.

²⁴⁷ See the most recent report by the Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Ninth Report*, 28 March 2007, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtights/77/77.pdf>. See also the House of Lords' decision in *YL (FC) v. Birmingham City Council and others*, [2007] UKHL 27, confirming the *Leonard Cheshire decision* (*R (Heather) v. Leonard Cheshire Foundation*, [2002] EWCA Civ 366, [2002] 2 All ER 936).

²⁴⁸ Lord Chancellor Lord Irvine, House of Lords Debates, 24 November 1997, vol. 583, col. 796. See e.g. *Poplar Housing Association Ltd v. Donoghue*, [2001] 3 WLR 183; *R (Heather) v. Leonard Cheshire Foundation* [2002] EWCA Civ 366 [2002] 2 All ER 936; *Aston Cantlow Parish Church Council v. Wallbank* [2001] 3 All ER 393.

²⁴⁹ See *R. (Johnson & Others) v. Secretary of State for Constitutional Affairs & Another* [2007] EWCA Civ 26. See e.g. Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Ninth Report*, 28 March 2007, <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtights/77/77.pdf>.

²⁵⁰ See e.g. Hunt (1998); Wade (1998); Leigh (1999); Philippon (1999); Raphael (1999); Beatson et al. (2000); Wade (2000); Bamforth (2001); Brinkrine (2001); Hunt (2001); Young (2002), *Horizontalis*; McDougall (2003); Du Plessis and Ford (2004). See e.g. *X v. Y* [2004] ICR 1634.

²⁵¹ See Lester and Pannick (2004), 31. See also Lord Chancellor Lord Irvine, House of Lords Debates, 24 November 1997, vol. 583, col. 783; the courts "have the duty of acting compatibly with the Convention not only in cases involving other public authorities, but also in developing the common law in deciding cases between individuals".

²⁵² See e.g. *Douglas v. Hello!* [2001] 2 WLR 992, 1027 and *Venables and Thompson News Group Newspapers* [2001] 2 WLR 1038.

Claims under the Act that challenge what other judges have done are to be tried only in the High Court. Second, plaintiffs (Section 4 para. 5 HRA) may only ask the High Court, Court of Appeal, House of Lords and Privy Council to issue declarations of incompatibility. Third, litigants must give proper notice that they will be pleading the HRA in a claim or an appeal, not least, to allow the Government to make representations in defence.

According to the HRA (Section 7 para. 5), proceedings should normally be brought within one year of the act being challenged (a longer period under equity). This limitation is subject to any shorter period applicable to the particular court proceedings being pursued, for example, judicial review applications where there is a three-month limitation period.²⁵³ Under the ECtHR's case law, States enjoy a certain margin of appreciation under Article 6 ECHR's right to a fair trial with respect to the limitation periods,²⁵⁴ though this limitation period does not apply to claims that are not directly made under the Act (Section 7 para. 1(b) HRA).

Claims may only be made with respect to facts taking place after the HRA came into force on 2 October 2000, as confirmed in the case of *In Re McKerr*. In this case, the House of Lords rejected the application for judicial review to compel the Secretary of State for Northern Ireland to hold an investigation into the death of the applicant's son under Article 2 ECHR and this despite the ECtHR's decision in *McKerr v. UK*.²⁵⁵ The only limited exception to the non-retroactivity of the HRA (Section 22 para. 4) occurs when pending appeal proceedings began before that date, provided the claim is brought to defend an appeal in respect of a trial before 2 October 2000 and not to bring that appeal.²⁵⁶ Thus, the Act can be used as a shield to prevent public authorities from instigating proceedings against an individual in relation to public action that took place prior to 2000, but not as a sword to attack a public authority.²⁵⁷

Under the HRA (Section 8), the Court that finds an act of a public authority unlawful may grant appropriate relief or remedy, or, under certain circumstances, damages, as it considers "just and appropriate". Judges possess broad discretion over choice of remedy, including ordering damages, granting an injunction to prevent a threatening or ongoing breach, invalidating a decision or legislation,²⁵⁸ and making a declaration of incompatibility. The principles applicable to damages and injunctions are similar. Injunctions are generally ordered when damages would not be an adequate remedy. Courts have general discretion as to costs,²⁵⁹

²⁵³ Rules of the Supreme Court, order 53; Supreme Court Act 1981, Section 31.

²⁵⁴ See e.g. *Stubbings and Others v. the United Kingdom* (appl. nos 22083/93; 22095/93), Judgment (Chamber), 22 October 1996, Reports 1996-IV, 1487 et seq.; [1997] 23 EHRR 213.

²⁵⁵ Compare *In Re McKerr*, [2004] 1 WLR with *McKerr v. the United Kingdom* (*supra* note 130). See Gordon (2005).

²⁵⁶ See *R. v. Lambert* [2001] 3 WLR 206. Contra: *R. v. DPP ex parte Kebilene* [2000] 2 AC 326.

²⁵⁷ O'Connell et al. (2006), 25–26.

²⁵⁸ See e.g. *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840.

²⁵⁹ Supreme Court Act 1981, Section 51(3) and Prosecution of Offences Act 1985, Sections 16 and 17.

though damages may be awarded only under the conditions specified (Section 8 paras 1, 3 and 4 HRA), by a court that possesses the power to award damages in civil proceedings (Section 8 para. 2 HRA).²⁶⁰

Compensation awarded must be "just and appropriate" which, according to the ECtHR, is to be defined on a case-by-case basis. The fact that a court has found a violation of the Convention may be deemed a sufficient remedy, without the provision of further damages. But compensation may also be "necessary to award just satisfaction" to the persons whose rights have been infringed, bearing in mind other available remedies. Finally, the courts must respect the principles applied by the ECtHR (under Article 41 ECHR), in order to reduce the temptation of plaintiffs going to Strasbourg.²⁶¹ The basic principle is that the injured party should be restored to the position they would have been in had the breach not taken place. When the act being complained of is a judicial decision, the procedure is that of appeal (Section 9 para. 1 HRA). Adequate remedy in those cases will be judicial review, including quashing a criminal conviction, except (Section 9 paras 3 and 4 HRA) in cases of wrongful detention in contravention of Article 5(5) ECHR, wherein compensation may be ordered.

An infringement of a right may be justifiable, but the burden of proof lies with State authorities. In the absence of legitimate justification, claimants bear the burden to prove their losses for purposes of compensation, and to show that losses suffered were caused by the infringement of the rights alleged. The ECtHR traditionally takes a strict approach to causation, and often skips monetary awards because it is not satisfied that the losses in question were caused by the infringement alleged. In fact, these principles are not very distant from those that apply to the remedies available from British courts in case of common law violations.²⁶²

The declaration of incompatibility is not regarded by the European Court as an effective domestic remedy under Article 35 ECHR; the fact that it is non-binding on the parties has been regarded as decisive by the Court.²⁶³ For the ECtHR, to borrow the famous expression by Geoffrey Marshall, "a declaration of incompatibility is not a legal remedy, but a species of booby prize."²⁶⁴ Empirically,

²⁶⁰ See Hoffman and Rowe (2003), 71–73.

²⁶¹ Lord Chancellor, House of Lords Debates, 3 November 1997, vol. 582, col. 1232: "our aim is that people should receive damages equivalent to what they would have obtained had they taken their case to Strasbourg."

²⁶² On the difference between damages awarded in common law and those under the HRA, see *Anufrieva v. Southwark London Borough Council* [2003] EWC Civ 1406, 2204 QB 1124. See also The Law Commission and the Scottish Law Commission, *Damages under the Human Rights Act 1998*, Report October 2000, <http://www.lawcom.gov.uk/docs/lc266.pdf>.

²⁶³ See e.g. *Hobbs, Richard, Walsh and Green v. the United Kingdom* (appl. nos 63684/00, 63475/00, 63484/00; 63468/00), Judgment (Fourth Section), 14 November 2006 (not yet reported); [2007] 44 EHRR 54; *Walker v. the United Kingdom* (appl. no. 37212/02), Judgment (Fourth Section), 22 August 2006 (not yet reported).

²⁶⁴ Marshall (1999), 382.

one finds that decisions on incompatibility are strongly subject-dependent.²⁶⁵ Deference to the legislative branch tends to depend on whether the issue at stake is one of legislative policy or not, one that balances interests or not, one of expertise or not, etc.²⁶⁶ In a series of controversial cases, of which *R. v. A.* and *Ghaidan* are good examples, the House of Lords has stressed that, while there is a limit to what can be done through Convention-compliant interpretation, judicial power is far-reaching.²⁶⁷ As a result, judges are not always required to identify an ambiguity or absurdity in order to rely on the rule of construction of Section 3 HRA, although such interpretive freedom “does not entitle judges to act as legislators”. Because drawing a line between legislating and interpreting is difficult or impossible,²⁶⁸ outcomes are relatively unpredictable.²⁶⁹ In any event, judges have no reason to consider that a declaration of incompatibility will automatically result in a comprehensive law reform, as confirmed by the *Anderson* case,²⁷⁰ and often assume that such a declaration would fail to remedy the injustice in the case at hand.²⁷¹

b. Proportionality Test

The ECtHR has gradually developed the criteria for justification of an interference to a right, whether that interference is foreseen expressly as in Articles 8 to 11(2) ECHR or not. These criteria are (i) legality, (ii) proportionality and (iii) the protection of a public interest or others’ rights. A fourth element that is now added by the case law is the inviolability of a fundamental right’s inner core.²⁷² Proportionality analysis comprises several elements, the most important of which is a least restrictive means test.²⁷³ One obvious effect of the Court’s reliance on proportionality review has been to require national officials to employ proportionality reasoning in their own decisions when assessing justifications of restrictions to the Convention. Proportionality review – especially the ‘least-restrictive means’ prong – is a highly intrusive form of judicial scrutiny of State action. One outcome of the reception of the ECHR has been the reception of proportionality, despite separation of powers doctrines that express hostility to judicial review.

²⁶⁵ Compare *Bellinger v. Bellinger* [2003] 2 AC 467 or *International Transport Roth v. Secretary of State for the Home Department*, [2003] QB 728 with *R. v. A.* [2001] 3 All ER 1 or *Ghaidan v. Godin Mendoza* [2004] 2 AC 557.

²⁶⁶ See the list of criteria in *International Transport Roth v. Secretary of State for the Home Department* [2002] 3 WLR 344.

²⁶⁷ See *R. v. A.* [2001] 3 All ER 1 and *Ghaidan v. Godin Mendoza* [2004] 3 WLR 113. Contra: *R. (Anderson) v. Secretary of State for the Home Department* [2003] 1 AC 837.

²⁶⁸ See *Poplar Housing Association Ltd v. Donoghue* [2001] 3 WLR 183.

²⁶⁹ See e.g. Kavanagh (2004), *Interpretation and Legislation*, Lester (2004); Rose and Weir (2003); Nicol (2004), *Statutory Interpretation*; Gearty (2002), *Reconciling*.

²⁷⁰ See e.g. *R. (Anderson) v. Secretary of State for the Home Department* (*supra* note 92). See Nicol (2004), *Statutory Interpretation*.

²⁷¹ See Jowell (2003).

²⁷² See e.g. *Jaggi v. Switzerland* (appl. no. 58757/00), Judgement (Third Section), 13 July 2006 (not yet reported).

²⁷³ See e.g. *Vögt v. Germany* (appl. no. 17851/91), Judgement (Grand Chamber), 26 September 1995, Series A, Vol. 323; [1996] 21 EHRR 205.

The incorporation of the ECtHR’s case law into British law made proportionality an all but required procedure for the scrutiny of executive action when Convention rights are relied upon. Before 2000, that scrutiny was ensured through the *Wednesbury* unreasonableness test: if a decision was lawful and within the bounds of a reasonable decision, it could not be challenged further.²⁷⁴ Conflicts of rights were usually solved by balancing, or by priority rules, since statutory rights traditionally take priority over English common law rights. Questions pertaining to the absolute inner core of fundamental rights or to absolute rights *tout court* hardly ever arose. EU law had already contributed to acclimating public law to proportionality,²⁷⁵ but only in limited areas. Since incorporation, judicial scrutiny of Government has sharpened and some would call it “anxious scrutiny”.²⁷⁶ British courts are now required to consider cases concerning human rights with a more substantive approach, including through proportionality analysis.²⁷⁷ To quote Lord Steyn in the *Daly* case, in which the differences between the *Wednesbury* test and proportionality were described:

“The intensity of review is somewhat greater under the proportionality approach. [The] doctrine of proportionality may require the reviewing Court to assess the balance which the decision maker has struck [...] and] attention to be directed to the relative weight accorded to interests and considerations.”²⁷⁸

The European Court grants national officials a certain measure of autonomy, under the margin of appreciation doctrine. It is important to emphasize, however, that the margin of appreciation has no preventive application when a case is decided by a national court; national courts cannot anticipate the cases in which the European Court will recognize their margin of appreciation. Of course, there are times when national judges feel obliged to defer to the judgement of the Parliament or Government, for democratic reasons,²⁷⁹ and where, as a consequence, the European Court might subsequently respect the national margin of appreciation. In any case, allowing a margin of appreciation does not suppress the European Court’s overall supervision, and in particular over the requirement of proportionality between the infringement of the right and its justification.²⁸⁰

What might be feared is a national tendency to revert to prior tests in case of difficulties, as these tests are still used in various nuances in other areas of scrutiny of executive action and the presence of Convention rights does not al-

²⁷⁴ See Jowell and Lester (1988) on the similarities and differences between the two principles.

²⁷⁵ See e.g. De Burca (1993).

²⁷⁶ See e.g. Lord Chancellor’s Department’s Study Guide 2002, pt 2.5.

²⁷⁷ See e.g. De Burca (1998); Feldman (1999), *Proportionality*. See e.g. *Campbell v. Mirror Group Newspapers* [2004] UKHL 22.

²⁷⁸ *R. (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532.

²⁷⁹ See e.g. *R. v. DPP ex parte Kebilene* (*supra* note 256), 375.

²⁸⁰ See e.g. *Handyside v. the United Kingdom* (appl. no. 5493/72), Judgement (Plenary), 7 December 1976, Series A, Vol. 24 and, more recently, *Evans v. the United Kingdom* (appl. no. 6339/05), Judgement (Grand Chamber), 10 April 2007 (not reported), § 77.

ways suffice to trigger the application of the proportionality test.²⁸¹ The European Court reemphasized the shortcomings of the *Wednesbury* test in a few decisions against the United Kingdom just before and after incorporation.²⁸² The debate surrounding the weighing of rights against national security interests in the UK and the British Government's intervention in the pending *Ramzy v. the Netherlands* case²⁸³ is a case in point as it is clearly motivated by the Government's wish to see the European Court reverse its decisions in *Chahal v. UK*.²⁸⁴ Moreover, proportionality tests may not always be used in conformity with the standards set by the European Court, as recent decisions of the House of Lords attest.²⁸⁵

2. Ireland

a. Remedies

Before incorporation, no remedies were afforded by Irish courts in case of infringement of Convention rights, though the courts guaranteed extensive remedies in case of infringement of the corresponding constitutional rights. The remedies available range in the latter cases from injunctions and declarations of invalidity to damages. The traditional declaration of constitutional invalidity in Irish law has an *erga omnes* effect; it is often said that such a finding amounts to a "judicial death certificate".²⁸⁶ Further, the discretion of judges pertaining to the award of damages and their extent is broad, and the *locus standi* of potential victims has always been quite generous.

The ECHR Act enables individuals under the Irish jurisdiction to bring legal proceedings directly against public authorities on the ground that their Convention rights have been infringed. Under Section 3 para. 2 of the Act, a person who has "suffered injury, loss or damage" as a result of a contravention of Section 3 para. 1 of the Act may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court or the Circuit Court. The main condition is that the victim has "suffered

²⁸¹ See e.g. Bondy (2003). See *R. (ProLife Alliance) v. British Broadcasting Corporation*, [2003] UKHL 23 [2003] 2 WLR 1403.

²⁸² See e.g. *H.L. v. the United Kingdom* (appl. no. 45508/99), Judgement (Fourth Section), 5 October 2004, Reports 2004-IX, 191 et seq.; [2005] 40 EHRR 32, arising from *Re L* [1999] 1 AC 458 (HL), [1998] 2 WLR 764 (CA); *Lustig-Prean and Beckett v. the United Kingdom* (*supra* note 135); *Smith and Grady v. the United Kingdom* (*supra* note 175). See, after that, Home Office Circular 32/2001, <http://www.homeoffice.gov.uk/documents/cons-2001-communications-data/accessing-communications-da1.pdf?view=Binary>, pt 4.4.

²⁸³ Registry of the European Court of Human Rights, Press Release, Application no. 25424/05 lodged with the Court *Ramzy v. the Netherlands*, 20 October 2005.

²⁸⁴ *Chahal v. the United Kingdom* (*supra* note 125). See, however, the ECtHR's most recent case in *Salah v. the Netherlands* (appl. no. 8196/02), Judgement (Third Section), 8 March 2007 (not yet reported) confirming *Chahal v. the United Kingdom*.

²⁸⁵ See e.g. *Huang (FC) v. Secretary of State for the Home Department*, [2007] UKHL 11, paras 12–13. See also decisions in the context of the Prevention of Terrorism Act 2005, Section 10.

²⁸⁶ See *Murphy v. Attorney General* [1982] IR 241 at 307. See also *Dunne Stores (Ireland) Co Ltd v. Ryan* [2002] 2 IR 60; *Cox v. Ireland* [1992] 2 IR 503.

injury, loss or damage" as a result of the Convention's violation. In contrast to the HRA, the ECHR Act does not expressly foresee that a person is a victim under the ECHR Act only if she can be a victim under Article 34 ECHR. The need for the congruence between the Convention and the Act is confirmed, however, by the incorporation of the ECtHR's case law under Section 4 ECHR Act. Accordingly, there can be no *actio popularis* on the part of one or more citizens whose grievance is simply that domestic law might contravene the Convention. The issue is a sensitive one in Ireland, since the *locus standi* under constitutional law is more liberal than under Article 34 ECHR. It is often suggested, therefore, claimants seek *locus standi* on the basis of a constitutional right in an Irish law proceeding, then in subsequent proceedings argue that the constitutional right mirrors the protection offered by the Convention.

The ECHR Act (Section 3 para. 1) implies that a claim may be brought against every organ of the State that has not performed its functions in a manner compatible with the State's obligations under the Convention. As discussed, the notion of "organ of the State" is controversial. Any body established by law or through which any of the legislative, executive or judicial powers of the State are exercised is included, thus excluding the courts and Parliament. But, in contrast to the HRA, the definition is not founded on public functions, but on the formal delegation of public powers, which has the effect of excluding private or semi-public bodies, even when they exercise public functions. Thus, privately owned hospitals or residences, schools or other regulatory bodies can never be directly bound by Convention rights.

The direct horizontal effect of Convention rights is excluded; this is not surprising since Irish constitutional rights have no direct horizontal effect either. Since courts are precluded from the definition of the public bodies of Section 3 ECHR Act, they cannot be said to have a positive duty to apply the Convention to whatever legal material they are asked to apply. In contrast to what applies under the HRA, this prevents, therefore, courts from giving Convention rights an indirect horizontal effect through a construction of private law norms. This is quite limitative in a legal system based on judicial law-making.²⁸⁷ This is even more surprising, as Irish courts often grant an indirect horizontal effect to constitutional rights through the constitutional interpretation of the common law, for instance.²⁸⁸

Infringements of the ECHR cannot give rise to criminal liability, but only to a civil claim for tortious act (Section 3 para. 4 ECHR Act). The procedure for bringing a civil claim mirrors that of any other civil action, though ECHR claims can only be heard by judges of the High Court and Circuit Court. Further, under Section 5 para. 1 ECHR Act, only the High Court and the Supreme Court may grant a declaration of incompatibility (in any proceedings). Judges must give

²⁸⁷ O'Connell (2004), *Critical Perspective*, 7.

²⁸⁸ See e.g. Binchy (2002), 4.

proper notice to the Attorney General and the Human Rights Commission when a declaration of incompatibility under the Act is under consideration (Section 6 of the Act). Finally, proceedings to recover damages and to obtain declarations of incompatibility may only be granted when there is no other available and adequate remedy (Sections 3 para. 2 and 5 para. 1 ECHR Act). It may seem unreasonable and unduly burdensome to force an applicant to exhaust all normal remedies, such as judicial review, tort or constitutional action, before instituting Section 3 proceedings. However, the sub-constitutional status of the ECHR Act suggests the subsidiarity of remedies, compared to constitutional remedies. Section 3 remedies seem, therefore, to retain a residual quality at the most, and this makes for a suboptimal alternative to traditional remedies.²⁸⁹

According to Section 3 para. 5(a) ECHR Act, proceedings should normally be brought within one year of the act complained of. Under Section 3 para. 5(b), a longer period may be allowed where the court or tribunal considers it appropriate in the interest of justice. By comparison to the time limit applicable to other constitutional remedies under Irish law, this limitation seems anomalously short.²⁹⁰ Litigation may pertain to facts taking place only after the Act came into force on 31 December 2003. In its decision in the *Dublin County Council* case, the court held that the ECHR Act has no retrospective effect and could not be used to judge a District Court hearing that had taken place before 31 December 2003.²⁹¹

In case of breach of Section 3 para. 1 ECHR Act, Section 3 para. 2 provides that a person who has suffered a loss, injury or damage may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the loss in either the Circuit Court or the High Court. Damages appear to be the most commonly sought remedy under Section 3, often together with a declaration of incompatibility under Section 5.²⁹² Note that the first ever declaration of incompatibility was granted by the High Court in the *Foy* case on 19 October 2007 in the case of a transsexual woman where, although (and probably because) Irish law was not unconstitutional, the fact that a post-operative transgendered woman was not entitled to an altered birth certificate under Irish law was regarded as clearly incompatible with the Convention, thus calling upon the Parliament to act.²⁹³

²⁸⁹ Kilkelly (2004), *Introduction*, lviii; O'Connell et al. (2006), 32.

²⁹⁰ See O'Connell (2004), *Critical Perspective*.

²⁹¹ *Dublin County Council v. Fennell*, [2005] 1 IR 604.

²⁹² See O'Connell et al. (2006), 77–79.

²⁹³ See the High Court judgement of 19 October, 2007 *Lydia Foy v. Ireland*, [2007] IEHC. This case actually has a long running history. Back in 2002 in the High Court, McKechnie J. declined relief but, making reference to the ECHR he strongly urged the Oireachtas to legislate in the area (*Foy v. An t-Ard Chláraitheoir & Ors.* (High Court, 9 July 2002) [2002] IEHC 116). By the time the case went to the Supreme Court on appeal, the ECHR Act had been passed and the Supreme Court allowed amendment of the pleadings to include this point, as a result of which the case was sent back to the High Court for decision in November 2005. Meanwhile also the ECHR had made major

In contrast to the HRA, higher courts have no discretion as to what would constitute an appropriate relief or remedy; they are limited to granting *damages*, though they may award such damages as they consider appropriate. Following the ECHR, this notion is to be defined on a case-by-case basis, but the injured party should be restored to the position they would have been in if the breach had not taken place. According to Section 3 para. 3 ECHR Act, the damages recoverable in the Circuit Court should not exceed the amount prescribed as the limit of that court's jurisdiction in tort. Unlike UK courts, higher courts in Ireland can neither grant an injunction to prevent a threatening or ongoing breach nor declare the invalidity of a decision, rule of law, or statute. The exclusion of remedies of an injunctive nature marginalizes the Convention as a human rights litigation instrument in Irish law.

The absence of declaration of invalidity also weakens the effectiveness of remedies provided. As mentioned, this gap may lead judges into constructing artificial interpretations of statutes to bring them in conformity with the Convention.²⁹⁴ To be sure, higher courts may declare legislation incompatible (Section 5 ECHR Act), but this places "courts in a position where they can identify a breach of human rights and not be in a position to give an effective remedy."²⁹⁵ If the same legislation was deemed unconstitutional, it could be declared invalid *erga omnes* by Irish courts rather than merely incompatible. Although there is no obligation to pay compensation where an incompatibility has been established, the declaration of incompatibility entitles the parties to the proceedings to apply to the Attorney General for compensation in respect of an injury, loss or damage suffered as a result of the incompatibility concerned. The Government may then make an *ex gratia* payment of compensation to that party; its amount is related, under the Act, to the typically low amounts awarded by the European Court under Article 41 ECHR.

Overall, the ECHR Act's approach to remedies is difficult to square with Article 13 ECHR. In fact, future claimants are likely to go to Strasbourg and argue that they were not obliged to exhaust remedies under the ECHR Act.²⁹⁶ Providing domestic remedies under the ECHR Act would have ensured that Convention infringements, and potential conflicts between the Irish Constitution and the ECHR, would be addressed by Irish courts, rather than set aside until the claimant goes to Strasbourg. There is a clear need for a radical expansion of the rem-

edies in the area (see Goodwin case, *supra* note 137), just two days after the original High Court case. On 19 October, McKechnie J. declared that Irish law was incompatible with the ECHR. He did not however circulate an approved copy of the judgement, and invited the parties back at a later stage to make submissions on the precise form of order which he should make.

²⁹⁴ Hogan (2004), 30–31. On proposals for reform of the interpretive model, see Hogan (2004); Binchy (2002); and O'Connell (2004), *Critical Perspective*.

²⁹⁵ Irish Human Rights Commission, Submission to the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (2002), 4.

²⁹⁶ See O'Connell (2004), *Critical Perspective*, 5; O'Connell et al. (2006), 119.

edies provided for under the 2003 ECHR Act. In the absence of revision, many hope that conventional control by the Judiciary can gradually be assimilated into Irish traditional constitutional review.²⁹⁷ Indeed, there is hope that conventional guarantees will be *de facto* subsumed in Irish constitutional law, leading to declarations of conventional invalidity, rather than to conventional reconstructions of statutes or, worse, declarations of conventional incompatibility.²⁹⁸

As it stands, the Supreme Court may have the last word on the issue, when it decides an appeal to a High Court's ruling in *Carmody* – holding that the issue of ECHR compatibility must always be considered prior to constitutionality.²⁹⁹ In a more recent case, however, the issue of constitutional compatibility was dealt with first, while the question of compatibility with the ECHR was put aside given that certiorari had already been granted on constitutional grounds.³⁰⁰ The argument for this *sequencing* of constitutional and conventional issues is allegedly supported by the residual character of Section 5 ECHR Act's declaration of incompatibility and by the sub-constitutional nature of the mode of incorporation chosen. The Supreme Court will have to choose, but it might also suggest a middle path whereby conventional and constitutional issues are considered together.³⁰¹ In constitutional cases, the courts already go through an interpretive exercise at the outset, to assess whether the law can be read in a constitutional manner and in accordance with the presumption of constitutionality. Matters may prove complex if the ECHR is not taken into account at all at this early stage and is stored up for a second reading of the statute.

b. Proportionality Test

In the context of Irish judicial review, proportionality has been used as a principle of scrutiny well before incorporation in 2003. Traditionally, most cases of scrutiny went through the reasonableness and equity test, but in the 90's the courts began to use methods more akin to proportionality, albeit not always expressly recognized as such.³⁰²

The first express statement by an Irish court of the principle of proportionality dates back to 1994 in *Heaney v. Ireland*,³⁰³ where the Supreme Court judges borrowed its formulation from a Canadian case. Three years later, in *Rock v. Ireland*,³⁰⁴ a judge noted that the principle of proportionality was a well established tenet of Irish constitutional Law. Of course, the principle has also been

²⁹⁷ O'Connell (2004), *Critical Perspective*, 11.

²⁹⁸ Hogan (2004), 34.

²⁹⁹ *Carmody v. Minister for Justice, Equality and Law Reform* [2005] 2 ILRM 1.

³⁰⁰ See *Law Society v. Competition Authority* [2005] IEHC 455. See also Hogan (2006), *Declaration of Incompatibility*.

³⁰¹ See O'Connell et al. (2006), 32–33.

³⁰² See e.g. Hogan and Whyte (2003), 389–390. See already *Cox v. Ireland*, [1992] 2 LR 503 and *Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305.

³⁰³ *Heaney v. Ireland* [1994] 3 IR 593.

³⁰⁴ *Rock v. Ireland* [1997] 3 IR 484.

progressively reinforced by developments in EU law and their impact on Irish law.³⁰⁵ As a result, the ECtHR's proportionality test was applied without difficulties to restrictions of Convention rights post-incorporation.

3. Comparison and Conclusion

While both countries differed greatly before incorporation – no specific human rights remedies in British law and full-blown constitutional remedies in Ireland – incorporation has led to more convergence, at least *prima facie*. Sections 7 and 8 HRA provided the basis for the drafting of Sections 3 and 5 ECHR Act. The usual concerns may be reiterated, however, pertaining, on the one hand, to the incompatibility between the chosen remedies under the ECHR Act and constitutional remedies under Irish law and, on the other, to the watering-down in the ECHR Act of many of the remedies provided for in the HRA. In sum, incorporation has brought the least effective new human rights remedies into the legal order where there were the most constitutional remedies, i.e. Ireland, and the strongest new remedies in the country which had the least, i.e. the UK.

Under the ECHR Act, remedies are residual, while HRA remedies are central. While the HRA does allow for broad discretion of judges who can choose between injunctions, declarations of invalidity, judicial review and damages, the ECHR Act restricts remedies to damages. Since declarations of incompatibility are not regarded by the European Court as an effective remedy in the sense of Article 13 ECHR, the only solution for Irish judges who insist on applying the ECHR through ECHR Act procedures is Convention-compliant interpretation, which may entail stretching statutory meaning to respect Convention rights. While some authors call for a revision of the ECHR Act in this respect, others argue that the ECHR will be more effective if subsumed under constitutional review by Irish judges, thus progressively extending the benefit of constitutional remedies to Convention rights as it has taken place in other Contracting States.

Finally, judges in both countries have adapted to the requirement of deploying proportionality tests. Diffusion to Ireland has been less problematic, since Irish courts had imported proportionality into constitutional law in 1994. Surprisingly, given the traditional opposition to strong judicial review of public acts in the UK, British judges seemed to have fully adopted the ECHR's proportionality requirement. Recently, however, the British Government has developed hostility towards it, at least in the context of national security measures against terrorism adopted since 2001.

³⁰⁵ See e.g. Fennelly (1998).

G. Knowledge and Practice

In the UK and Ireland, the ECtHR's decisions are usually available in their English translation, shortly after judgement and simultaneously on-line on the HUDOC website.³⁰⁶ Rulings are also reported in the *European Human Rights Reports*, published by Sweet and Maxwell. The system of informing practitioners and the public about national remedial measures, following an adverse judgement by the European Court, could be improved.³⁰⁷

National officials are not the only users and sources of information about the ECHR. This section also examines the important role played by private actors – human rights litigators, law teachers, doctrinal authorities and the media – in the reception process, including the dissemination of knowledge about the Convention.

1. United Kingdom

a. Public Education

The first source of dissemination of the European Court's judgements is the Executive itself. The entry into force of the HRA 1998 was postponed until 2000, in part, to train public officials for new responsibilities. From 1998 onwards, the Government has organized measures aimed at educating a broader public. Today, information and documents are regularly published by the Department for Constitutional Affairs, which has its own separate human rights website.³⁰⁸

Six years after incorporation, however, British residents, including non-specialist lawyers, are not very aware of the European Court, and even less of its judgements. Beyond the activities of Government and the courts, the impact of the ECHR has been less important than expected, post-incorporation. Britons do not identify with the HRA in a way that is comparable, say, to the way Germans identify with the rights provisions of their Basic Law. Since the UK has governed itself successfully without entrenched rights for centuries, it may be that the public will never identify with the HRA in that way without its own Bill of Rights,³⁰⁹ or only over many years.

³⁰⁶ See <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.
³⁰⁷ See in the United Kingdom, Joint Committee on Human Rights, *Implementation of Strasbourg Judgements: First Progress Report*, 8 March 2006, <http://www.publications.parliament.uk/pa/j200506/jselect/jrights/133/133.pdf>, para. 7.

³⁰⁸ <http://www.dca.gov.uk/peoples-rights/human-rights/>.
³⁰⁹ On this proposal, see e.g. Lester (2004). See also the discussion paper by Justice, *A Bill of Rights for Britain?* (London, 2007), <http://www.justice.org.uk/images/pdfs/A%20Bill%20of%20Rights%20for%20Britain.pdf>. See also on the potential content of that Bill, Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf.

b. Judiciary

Judges have been key actors in the reception process. They frame national decisions so as to prevent adverse judgements by the European Court and generally contribute to the judicial dialogue that is the mark of a successful reception. Judges have also contributed to the diffusion of knowledge pertaining not only to the Convention, but to the European Court's judgements. There has been no shortage of conferences and publications involving British judges since 1998, and these have provoked and sustained interest in the HRA and dialogue about its implications.

Judges were carefully prepared to face the expected rise in litigation following incorporation. They received new training and the senior, appellate Judiciary was reorganized to ensure that experienced judges would be in place to deal with cases in which primary legislation would be subject to rights review. At the same time, the UK has made efforts to recruit future judges from a wider social and educational background.³¹⁰

c. Lawyering

Incorporation generated reorganization of certain chambers, as barristers positioned themselves to more specialist work in the human rights field.³¹¹ Some lawyers now work to defend victims' rights against public authorities, while others are engaged by the Government as junior counsels to defend against claims.

Incorporation of the Convention has also strengthened existing human rights protection groups and other non-governmental organizations,³¹² sparked the creation of new groups and associations, and encouraged *pro bono* work among practitioners. Some groups have been extremely active not only in the information process since 1998, but also in the training (conferences and seminars) and the defence of victims of rights violations. The growth in the UK's associational and support network in the field of human rights would seem to be without comparison in Europe. Due to the limited scope of Section 7 HRA, these organi-

³¹⁰ See Report of the Home Affairs Committee on Judicial Appointments Procedures, HC Paper 52 Session 1995–1996.

³¹¹ See e.g. Doughty Street Chambers (http://www.doughtystreet.co.uk/human_rights/), Matrix Chambers (http://www.matrixlaw.co.uk/AreasOfPractice_HumanRightsLaw.aspx) or Blackstone Chambers (<http://www.blackstonechambers.com>).

³¹² One may mention civil liberties pressure groups, like *Liberty* (the National Council for Civil Liberties) (<http://www.liberty-human-rights.org.uk/>) and <http://www.yourrights.org.uk>), *AIRE* (Advice on Individual Rights in Europe), *Legal Action Group* (<http://www.lag.org.uk/>), *Charter 88* (<http://www.charter88.org.uk/>), the *1990 Trust* (<http://www.blink.org.uk/>), *Interights* (<http://www.interights.org/>) or *Justice* (*British Section of the International Commission of Jurists*) (<http://www.justice.org.uk/>), but also *Amnesty* (<http://www.amnesty.org.uk/>) and *Human Rights Watch* (<http://www.hrw.org/europe/uk.php>). See also the *Northern Ireland Human Rights Consortium* (<http://www.billofrightsnir.org/>), the *British Irish Human Rights Watch* (<http://www.bihrw.org/>), *Human Rights Lawyers Association* (<http://www.hrla.co.uk/>) and *Human Rights First* (<http://www.humanrightsfirst.org/>). For other organizations, see the *British Human Rights Institute's* website: <http://www.bihri.org/>.

zations have no *locus standi* under the HRA, although they may participate in common law proceedings pertaining to Convention rights violations. Even under HRA proceedings, they help litigants organize and frame their submissions, and they may represent claimants. They also regularly brief British courts and intervene as third party in pending proceedings,³¹³ and they provide information to the press.

d. Teaching

In addition to training future practitioners, law faculties produce and disseminate knowledge of the ECHR in obvious ways. At Oxford, to take one example, the ECHR, pre-incorporation, constituted part of the undergraduate Public International Law curriculum. There existed no specific human rights course, even within the International Law module. The reading lists in English Constitutional/Administrative Law mentioned human rights, but did not emphasize the ECHR. Most undergraduates might hear about human rights in domestic law through reading EU law, although those courses were not always compulsory. At the graduate level, Oxford offered a Comparative Human Rights class focusing on rights protection in the UK, Ireland, Canada, the United States, South Africa, India, Israel and sometimes countries like France and Germany.³¹⁴ Since 2000, much has changed. The Oxford undergraduate curriculum in English Constitutional/Administrative Law now entails an entire section on the Human Rights Act, and a new graduate class on International Human Rights was added. There are as yet no courses dedicated exclusively to the ECHR, although a new on-line Master's Degree in International Human Rights Law was launched in 2007.³¹⁵

The situation was slightly better elsewhere in the UK, where some Bachelor and Master programmes offered human rights classes since the 90's, some even earlier.³¹⁶ Still, most law programmes developed specialist courses on the ECHR and international human rights after incorporation.³¹⁷ Recent years have seen an acceleration in the creation or strengthening of academy-based Human Rights Institutes and Centres all around the UK.³¹⁸

³¹³ See e.g. Gearty (2006), 90–91; Hannett (2003); Smith (2004).

³¹⁴ See e.g. Gearty (2006), 94–95 on the New Zealand Bill of Rights *qua* model for the HRA 1998 and in particular relative to convention-compatible interpretation. See also Justice, *A Bill of Rights for Britain?* (London, 2007), <http://www.justice.org.uk/images/pdfs/A%20Bill%20of%20Rights%20for%20Britain.pdf>.

³¹⁵ See <http://www.conted.ox.ac.uk/courses/international/mastersdegreeininternationalhumanrightslaw.asp#coursecontent>.

³¹⁶ Note that given the two-years earlier incorporation of the Convention in Scotland through the Scotland Act 1998, Scottish Universities, and the University of Glasgow in particular, were the first to create courses in human rights in the United Kingdom.

³¹⁷ See e.g. Essex (http://www2.essex.ac.uk/law/postgraduates/prospectus/lm_ihr_prospective.html), Nottingham (<http://www.nottingham.ac.uk/law/html/courses/>), London School of Economics (http://www.lse.ac.uk/Depts/human-rights/Teaching/msc_human_rights.htm) and Queen's University Belfast (<http://www.law.qub.ac.uk/prospective/pg/crossc.html>).

³¹⁸ See e.g. Human Rights Centre at Essex (http://www2.essex.ac.uk/human_rights_centre/),

e. Scholarship

In the period just before and after the adoption of the HRA, academic discussions about incorporation were extremely lively. As an academic domain of inquiry, the field of human rights barely existed in domestic law as late as fifteen years ago. It has since exploded into prominence, as scholars produced a rising "torrent"³¹⁹ of books, new specialist journals,³²⁰ and took to organizing practitioners' seminars and academic conferences on human rights.

Recently, human rights scholarship has been mainstreamed; one now finds in generalist legal journals and periodicals articles and even special sections on human rights and the Convention. Such is the case, for example, of the Oxford Journal of Legal Studies and the Modern Law Review, but also of specialized journals like Public Law. Since 2003, the scene has somewhat calmed. The field of human rights is now being institutionalized as a domain of scholarship among others in the UK, just as it has long been in other European states.

f. Media

Media coverage of ECtHR's judgements is irregular. The press usually covers cases pertaining to the UK, albeit with a critical eye and often inaccurately. Cases that relate to issues of interest to the man on the Clapham omnibus are usually more often reported than others. The *Lustig Preen and Beckett v. UK* case,³²¹ for example, was reported in virtually every serious outlet, including The Guardian, The Times, The Independent, The Daily Mail and The Daily Telegraph. Cases involving other European countries are typically not reported, unless they concern issues which might be of relevance to the UK at a later stage. One should, however, mention *The Times Law Reports*, which are an important vector for the dissemination of Convention law to the British general public.

2. Ireland

a. Public Education

In contrast to the UK, Ireland did not develop a structured programme of training in rights protection, for those working as "organ[s] of the State" under Section 3 ECHR Act. Nor did it organize an education scheme for the broader public. It was simply assumed that the Act could not bring much new in terms of protection to victims of human rights violations, given existing constitutional

Nottingham Human Rights Law Centre (<http://www.nottingham.ac.uk/law/hrlc/>), London School of Economics Centre for the Study of Human Rights (<http://www.lse.ac.uk/Depts/human-rights/>) and at Queen's University Belfast (<http://www.law.qub.ac.uk/humanrts/>). See also the British-Irish Human Rights Centres Network (<http://www.law.qub.ac.uk/humanrts/network/index.htm>) and the Transitional Justice Institute (<http://www.transitionaljustice.ulster.ac.uk/index.html>).

³¹⁹ Blackburn (2001), 961.

³²⁰ See e.g. the *Human Rights Law Review* first published in 2001 and the *European Human Rights Law Review* first published in 1995.

³²¹ *Lustig-Preen and Beckett v. the United Kingdom* (*supra* note 135).

protections. Most of the education and information dissemination functions were left to the Irish Human Rights Commission and to the Irish Law Society, whose websites are well-organized and informative.³²²

b. Judiciary

The Irish Judiciary received no additional training either before or after incorporation in 2003,³²³ nor was it regarded as necessary to reorganize the Judiciary and its staff to prevent a rise in ECHR litigation. It comes as no surprise then that Irish judges have never taken an active part in the dissemination of information about the Convention and its case law. Moreover, it has never been a practice for Irish judges to publish on Irish constitutional law, and incorporation did not change the situation with respect to the ECHR.³²⁴

c. Lawyering

No important changes occurred among barristers after the 2003 incorporation.³²⁵ Lawyers simply included practice associated with the ECHR into their constitutional law practice. That said, incorporation does seem to have opened up some new areas of interest, including children's rights *qua* human rights.³²⁶

The Irish Bar Council and (especially) the Irish Law Society did much to provide information about the Convention and the impact of incorporation on Irish law in 2003 and 2004. The Society organized seminars and publications addressed to barristers, especially in the Law Society Gazette and the Bar Review.³²⁷ The Bar itself also organized supplementary training.

It seems that the incorporation of the Convention has neither strengthened existing human rights protection groups and other non-governmental organizations, nor triggered the creation of new groups and associations in the field and *pro bono* work among practitioners.³²⁸ The human rights community has always been very lively and independent in Ireland, an independence regarded as the price of an effective protection of human rights and democracy.³²⁹ The Irish Council for

³²² See <http://www.lawsociety.ie> and <http://www.ihrcl.ie>.

³²³ Note, however, that the British NGO *Justice* organized training seminars based on the British experience shortly before incorporation in Ireland for the Attorney General's office and the State Prosecutor's office. See also the Judicial Studies Institute, <http://www.jsijournal.ie/index.htm>.

³²⁴ See, however, O'Donnell (2007).

³²⁵ See the Irish Bar Council website, <http://www.lawlibrary.ie>.

³²⁶ See e.g. Kilkelly (2004), *Child and Family*.

³²⁷ See the Irish Law Society website, <http://www.lawsociety.ie>.

³²⁸ See e.g. *International Human Rights Network* (<http://www.ihrnetwork.org>) or the *Irish Section of the International Commission of Jurists* (http://www.icj.org/world_pays.php3?id_mot=274&lang=en). See also *Amnesty International Ireland* (<http://www.amnesty.ie/>), *Human Rights Watch Ireland* (<http://hrw.org/doc?europe&c=ireland>) or *Front Line: the International Foundation for the Defenders of Human Rights* (<http://www.frontlinedefenders.org/>).

³²⁹ With respect to the key role played by these groups, one should mention Mary Robinson's *pro-bono* work which allowed cases such as *Airey v. Ireland* (No. 1) (*supra* note 153) or *Norris v. Ireland* (*supra* note 150) 186 to be brought to Strasbourg.

Civil Liberties, for example, was founded in 1976 and quickly became a leading independent non-governmental organization working to defend and promote human rights and civil liberties in Ireland.³³⁰ Due to the limited scope of Section 3(2) ECHR Act, these organizations have no *locus standi* under the ECHR Act, but they may, as discussed, bring Convention claims to bear through constitutional law proceedings. Although rights groups often help litigants pursue their claims, a notable difference with the British associative scene is the little funding available to Irish associations to react to human rights violations.

d. Teaching

Among the seven universities in Ireland, the National University of Ireland in Galway shelters one of the most important centres for human rights studies, the Irish Centre for Human Rights.³³¹ It was also the first university to create a Chair in human rights law, and it offers an LLM in International Human Rights Law as well. Another important centre, albeit not an Irish one strictly speaking, is the University of Ulster Human Rights and Equality Centre,³³² which organizes an LLM in Human Rights and Equality Law. One should also mention the Irish Centre for European Law based in Trinity College, Dublin and founded by Mary Robinson in 1988, whose remit includes European human rights law.³³³

The other universities do not offer specialized graduate courses in human rights as such, but human rights have always had an important place in Irish law school curricula. This applies both at undergraduate and graduate level, where the teaching of Constitutional Law, EU law and Public International Law has long encompassed chapters on Fundamental Rights including the Convention. There usually also offer specialist classes on Human Rights Law.³³⁴

Traditional administrative and constitutional law textbooks have long included an important section on constitutional rights and the Convention, and they now entail a section on the ECHR Act. The standard textbook in the field, J.M. Kelly's *Fundamental Rights in Irish Law and Constitution*, made regular references to the Convention as long ago as 1967. As one may see in the report's bibliography, however, editors did not organize many re-versions of the main textbooks, to adapt them to the ECHR Act, and no specific textbooks on human rights in Ireland have been published since incorporation.

e. Scholarship

In Ireland, too, the move to incorporate the Convention generated a great deal of academic discussion. After a flurry of conferences and publications in 2003 and 2004, interest receded. Scholars publish in generalist journals like the Irish

³³⁰ See <http://www.icli.ie>.

³³¹ See http://www.nuigalway.ie/human_rights/.

³³² See <http://www.ulster.ac.uk/hrec/>.

³³³ See <http://www.icel.ie/>.

³³⁴ See e.g. Trinity College Dublin (<http://www.tcd.ie/Law/Courses.html>).

Journal of European Law or the Dublin University Law Journal, or in specialist journals like the Irish Criminal Law Journal. But the greatest number of articles appears in the Law Society Gazette or the Bar Review, demonstrating the close links existing between practitioners and academia in Ireland generally, specifically on human rights issues.

The only new journal pertaining to human rights specifically is the *Irish Human Rights Law Review*, first published in 2006.³³⁵ A unique feature of the journal is its *Annual Review of Human Rights Law* which summarizes all domestic and international human rights developments of relevance to Ireland, including a survey of cases taken against Ireland before international courts and committees, and analysis of leading cases under the ECHR Act 2003. Human rights scholarship is diverse in Ireland, and often highly politicized, not least when comparing British and Irish incorporation.³³⁶

f. Media

The Irish press has always covered news about adjudicating constitutional and fundamental rights, including news from Strasbourg. As early as the late 50's, for instance, the *Lawless v. Ireland No. 3* case attracted a lot of media attention.³³⁷ Incorporation did not change much in this respect, not least, since the number of cases brought to Strasbourg has not increased dramatically. Generally speaking, and contrary to the attitude of the British (tabloid) press, 'international' standards are well regarded by the Irish media.

3. Comparison and Conclusion

While incorporation heavily impacted the law world in the UK, in Ireland judges, lawyers, scholars, and activists continued with business as usual. As we have seen, again and again, Ireland's pre-existing, domestic system of rights protection, one that enjoys huge support, meant that incorporation did not appear to be a great innovation, whereas in the UK incorporation comprises, in fact, a profound transformation of traditional practices. There is a second, international explanation. In Ireland, international human rights standards have always enjoyed wide support, whereas for the UK public, press, and political and legal elites, such standards can be regarded with scepticism.

IV. Concluding Comments

Although one cannot generalize from two cases, this chapter does tell us something about the reception of the ECHR in dualist States, at least in the negative.

³³⁵ See <http://www.claruspress.ie/ihlr.html>.

³³⁶ See e.g. Hogan (2004); O'Connell (2004). *Critical Perspective*.

³³⁷ See e.g. Doolan (2001), 231.

In the absence of incorporation, both cases show, the Convention's effectiveness in dualist national legal orders may be virtually inexistent. Nearly 50 after signing the ECHR, both countries incorporated it, using roughly the same model. One might have assumed that the mode of incorporation into a dualist legal order would largely determine outcomes. In Ireland and the UK, however, the impact of acts of incorporation has been heavily mediated by pre-existing constitutional structure and practice.

In Ireland, a vibrant tradition of Constitutional rights and creative judicial review possesses far more standing and legitimacy than does the ECHR and the ECtHR. In the UK, given its own constitutional tradition of unrivalled legislative sovereignty, a corollary of which is the prohibition of judicial review of statute, the HRA is far more capable of disturbing the order of things. Indeed, one observes the HRA taking on the features of a quasi-constitutional statute, grounding new practices of rights protection that one commonly observes in legal systems in which rights review is more firmly established. These new practices may, in fact, pave the way to the gradual constitutionalization of an entrenched HRA. In Ireland, given the immense prestige and authority of the Constitution, the mode of incorporation chosen appears so weak that it may operate as little more than a 'legal irritant' for judges and others now required to make use of it.

In both countries, the evolution of EU law has played a significant role in the reception of the ECHR. The Luxembourg Court's doctrines of supremacy and direct effect, premised on a sophisticated monism, required painful adjustment in dualist countries like Ireland and the UK. As a source of enforceable Convention rights during the pre-incorporation period, EU law was actually more important to Irish and UK judges than the ECHR itself. Further, the European Court of Justice developed proportionality tests in various areas of EU law, which it required national judges to use as well. These developments prefigured aspects of the reception process of the ECHR in the UK and Ireland post-incorporation, giving that process a smoother quality than it might have had otherwise.

The comparison of our two cases also shows that late incorporation in dualist countries does not necessarily make for bad reception. Much depends on the rank given to the Convention, compared with other sources of law, and on the various powers given to public authorities, including courts, to tailor remedies for violation of rights guaranteed by the ECHR. If done right, dualist countries may have an advantage in incorporating through legislation, compared with the monist technique of enabling immediate validity and reception through adjudication. In addition to the benefits of enhanced political legitimacy, statutory incorporation can resolve, *ex ante*, many of the basic – but often difficult – questions of validity, applicability, and rank, rather than leaving such problems to judges to deal with on an *ad hoc* but continuous basis.

In the UK, it may be that late incorporation also served to empower the Judiciary more easily, whereas a frontal assault on Parliamentary sovereignty in

the 50's was unimaginable; even in 2000, it would surely have failed. Through use, the HRA has enhanced judicial authority in relation to legislative and executive authority, an outcome that deserves emphasis, given separation of powers dogmas still in place. In Ireland, under different separation of powers arrangements, judges, who were already as powerful as judges anywhere in the world, are actually sheltered from the remedial reach of the ECHR Act. In the UK, statutory incorporation is transforming the reception process, giving it a more constructive, positive dynamic. British judges are now positioned to engage in a more serious dialogue of give-and-take with the ECtHR. The Irish Judiciary seems less interested in the ECHR, for the very reasons stated throughout this chapter.

For the analyst, late incorporation should be taken as a source of anxiety, in that future developments may quickly outpace one's conclusions. Comparing the status and effectiveness of the Convention over six years in one country, and over three years in another, is hazardous at best. In the case of Ireland, it is far too soon to measure the impact of incorporation on the legislative, executive and judicial machinery.

Finally, the United Kingdom and Ireland have been mutually regarding when it comes to human rights policy and protection mechanisms, due largely to their troubled joint history, and their conflict in Northern Ireland. This conflict has produced a dynamic of reaction and counter-reaction, mimicry, and endless comparison of each other's rights records. There is an irony to this dynamic. Over many decades, neither country thought that it needed to adapt its domestic legal system to the ECHR. Yet, in the end, dealing with their conflict has facilitated, at times even driven, the incorporation and reception of the ECHR into their respective legal orders.

Recapitulative comparative table

	United Kingdom	Ireland
National constitutional orders in general	Yes (devolution in Scotland, Northern Ireland and Wales)	No
Decentralization	Anglican (NB: Northern Ireland)	Catholic
Religion (majority)	No	Yes
Codified constitution	No	Yes
Judicial review of legislation	No	Yes
Entrenched human rights	No	Yes
Natural rights	No	Yes
Human rights remedies	No	Yes
Relation to international law	Dualist	Dualist
EU membership	Yes since 1973	Yes since 1973
ECHR signatories	Yes since 1953	Yes since 1953
Historical context: accession, ratification and incorporation	Yes since 1966	Yes since 1953
Individual right of petition	Yes since 2000	Yes since 2003
ECHR incorporated	- All rights except Articles 1 and 13	- All rights except Article 1
ECHR rights incorporated	- All Protocols except Protocols nos 4, 7 and 12	- All Protocols except Protocol no. 12
Reservations and derogations	- Only one reservation to Article 2 P1	- Only one reservation to Article 6 ECHR
	- No more derogations under Article 15 ECHR, but had many	- No more derogations under Article 15 ECHR, but had few
Status and rank of the ECHR in national law	- Sub-constitutional, but supra-legislative (rank)	- Sub-constitutional and legislative (rank)
Type of ECHR incorporation	- Semi-direct (effect)	- Indirect or interpretive (effect)

	United Kingdom	Ireland
Remedies in national law	Horizontal effect of ECHR	Yes (indirect only, no positive duties of courts)
	Courts as ECHR duty-bearers	Yes
	Remedies for ECHR infringement	- Specific remedies besides damages and declaration of incompatibility - No need to exhaust alternative remedies Yes, thanks to EU law and ECHR
	Proportionality test	Yes, expressly since 1994 (Canadian law and EU law)
Overview of the ECtHR's case law	Adverse judgements of the ECtHR	One of the highest numbers among original Contracting States in Europe, with a rise after incorporation (1/2 cases) and until three years after incorporation
	Articles most violated	- Article 6(1) ECHR - Article 8 ECHR
	Legislative remedial action	Average to negligent, both before and after incorporation (NB: fast-track remedial orders)
Impact of the ECtHR's case law	Judicial remedial action in the case	No re-opening of the case (NB: JCHR's report)
	Judicial remedial action in later cases	- No duty to follow case law pertaining to the UK or other countries - ECtHR's case law as maximal standard
		- No duty to follow case law pertaining to IRL or other countries - ECtHR's case law as minimal standard

	United Kingdom	Ireland
Mechanisms of coordination	Preventive legislative compliance	Yes (JCHR, pre-legislative scrutiny)
	Ex post legislative compliance	Yes (JCHR, fast-track remedial procedure)
	Human Rights Commission	Yes, in Northern Ireland since 1998 and in the United Kingdom since 2007 (Commission for Equality and Human Rights)
		Yes, since 2000
Knowledge and practice of the ECHR	Human rights community (NGOs)	Yes (mostly since the 90's)
	Media attitude & coverage	Hostile (euro-scepticism)
		Favourable (peace-process)

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