

Declarations of Incompatibility under the ECHR Act 2003: A Workable Transplant?

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Since its introduction in 2003, Ireland's European Convention on Human Rights Act 2003 has had a fairly minimal impact on domestic rights-based litigation and practice. This is, perhaps, not entirely surprising given that the Irish Constitution—*Bunreacht na hÉireann*—includes within it a substantial section on fundamental rights,² which in turn is augmented by unenumerated rights discovered through superior court jurisprudence.³ Given its extensive treatment of rights, the Constitution effectively allows for the resolution of most rights-based disputes in the state without the need for recourse to the Convention as transposed through the European Convention on Human Rights Act 2003. However, there are some cases in which an impugned provision may be entirely satisfactory from a constitutional perspective but unsatisfactory from a Convention perspective. In those cases the ECHR Act 2003 becomes relevant.⁴ The structure of the Act is outlined further below. In this piece I aim to briefly consider the workability of one element of its scheme: the Declaration of Incompatibility, particularly taking into account its transplantation into Irish law from that of our nearest neighbour: the United Kingdom.

Modelled closely on the equivalent remedy in the UK's Human Rights Act 1998, the Declaration of Incompatibility in s. 5 of the European Convention on Human Rights Act 2003 is a remedy of last resort to be granted only when no other remedy is adequate or available.⁵ It is a declaratory remedy and does not disturb the operation or validity of the impugned legislation. In the context of the Irish constitutional system, the Declaration is an unusual and somewhat intriguing instrument. In this paper, I

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² Articles 40-44, *Bunreacht na hÉireann*.

³ The doctrine was first used in *Ryan v Attorney General* [1965] IR 294; for a comprehensive consideration see, e.g., Clarke, "Unenumerated Rights in Constitutional Law" (2011) 34(2) *Dublin University Law Journal* 101; Hogan, "Unenumerated Personal Rights: *Ryan's* Case Re-evaluated" (1990-92) 25(7) *Irish Jurist* 95.

⁴ As considered further below, constitutional matters are considered prior to Convention-related matters pursuant to the sequencing decision outlined in *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71.

⁵ Section 5(1), European Convention on Human Rights Act 2003.

examine whether the Declaration of Incompatibility is a workable transplant from the Human Rights Act 1998 given the vastly different constitutional contexts in which the Convention-related legislation operates in both jurisdictions. Taking that context into account, I conclude that the Irish Declaration of Incompatibility fits awkwardly into the Irish politico-legal culture of rights, so that it really must be a remedy of last resort given its patent inferiority when compared with constitutional remedies for rights infringements and, further, that if it is going to be at all effective even in cases of last resort a fundamental shift in political cultures and structures relative to rights is required.

The Declaration of Incompatibility

As outlined in the introduction, both the Human Rights Act 1998 in the UK and the European Convention on Human Rights Act 2003 in Ireland contain within them a remedy known as the Declaration of Incompatibility.⁶ The history of the development of these two pieces of legislation is such that there is some almost inevitable transplantation from the UK legislation to that in Ireland.⁷ This is because the commitment to incorporate the European Convention on Human Rights by both states is to be found within the Belfast/Good Friday Agreement concluded in 1998.⁸ The United Kingdom had already been in the process of incorporation of the Convention at the time that the Agreement was concluded,⁹ but committed to implement the Convention in Northern Ireland. This included a commitment to allow for legislation passed by the Assembly in Stormont to be struck down by the Courts (which of course is not possible in relation to primary legislation promulgated in Westminster):

The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

⁶ Section 4, Human Rights Act 1998; section 5, European Convention on Human Rights Act 2003.

⁷ de Londras & Kelly, *The European Convention on Human Rights Act : Operation, Impact and Analysis* (2010, Dublin; Round Hall), Chapter 1.

⁸ "Rights, Safeguards and Equality of Opportunity", Good Friday/Belfast Agreement, 10 April 1998.

⁹ See Home Office, "Rights Brought Home: The Human Rights Bill" (Cm 3782, 1997)

Within that Agreement the commitment to incorporation was only a part of a broader rights-related transitional package, which included the establishment of national human rights commissions, consideration of a Charter of Rights for the Island of Ireland, and consideration of a Bill of Rights for Northern Ireland.¹⁰ While some of these commitments have fallen by the wayside,¹¹ the incorporation commitment did not and so the 1998 Human Rights Act 1998 in the UK was followed by the introduction of the European Convention on Human Rights Act in Ireland (with significantly less fanfare) in 2003. The two Acts are not identical but they do have similar structures.

In each case there is an obligation on the Courts to ensure that statutes and other laws are interpreted in a manner consistent with each state's obligations under the Convention to the extent possible.¹² In each case there is also a performative obligation, requiring bodies undertaking state work to do so in a manner that is compatible with each state's Convention-based obligations.¹³ Finally, where a statute cannot be interpreted in a manner that makes it Convention compatible, there is the possibility in both cases of court issuing a Declaration of Incompatibility.¹⁴

The UK declaration is outlined in s.4 of the Human Rights Act. In respect of primary legislation, it provides that "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility".¹⁵ Such a declaration does not impact on the validity of the impugned legislation and is not binding on the parties to the proceedings in which the declaration has been made.¹⁶

¹⁰ "Rights, Safeguards and Equality of Opportunity", Good Friday/Belfast Agreement, 10 April 1998. See also Mageean & O'Brien, "From the Margins to the Mainstream: Human Rights and the Good Friday Agreement" (1998-1999) 22 *Fordham International Law Journal* 1499.

¹¹ There now seems to be no prospect of the Charter of Rights for the Island of Ireland being brought into effect and the Bill of Rights for Northern Ireland has stalled in the face of both political difficulties in Northern Ireland and the broader 'UK Bill of Rights' debate in the UK as a whole. See, for example, Dickson and Harvey, 'Options on the way forward for human rights in Northern Ireland' UK Const. L. Blog (23rd February 2013) (available at <http://ukconstitutionallaw.org>).

¹² Section 2 Human Rights Act 1998; section 2 European Convention on Human Rights Act 2003.

¹³ Section 6, Human Rights Act 1998; section 3, European Convention on Human Rights Act 2003. The UK Act uses the language of "public authorities" which can include private entities undertaking public work (so-called hybrid public authorities), whereas the Irish Act focuses instead on organs of the State.

¹⁴ Section 4, Human Rights Act 1998; section 5, European Convention on Human Rights Act 2003.

¹⁵ Section 4(2), Human Rights Act 1998.

¹⁶ Section 4(6), Human Rights Act 1998.

The Irish Declaration of Incompatibility is contained in s. 5 of the ECHR Act 2003, which provides in sub-section 1 that

In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2...and where no other legal remedy is adequate and available, make a declaration...that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

As in the UK, the Irish Declaration does not impact on the validity of the impugned legislation.¹⁷

In both jurisdictions, then, the Declaration of Incompatibility has a number of essential characteristics. The first is that the remedy is purely declaratory; it does not give rise to any entitlements (although in Ireland it does open up the possibility of an *ex gratia* payment¹⁸) and it does not resolve the rights violation suffered by the litigant herself as the incompatible provision continues to operate upon her. This reflects the second characteristic: that a Declaration of Incompatibility leaves the impugned primary legislation operative and does not impact upon its validity. This has a number of important implications beyond the individual case at Bar: it means that the court does not resolve incompatibility with the Convention but merely identifies it, that any other potential litigants who are adversely impacted by the impugned legislation will have to go through with bringing and arguing their case to secure a Declaration of Incompatibility in relation to it (even though the incompatibility identified is systemic and may not be fact-specific), and that the broader and more systematic rights violation that the incompatibility may indicate remains unresolved.

This is primarily because there is an underlying commitment within the Declaration of Incompatibility to political resolution of these broader, systemic difficulties of incompatibility, rather than their legal resolution. In both cases, the courts' role is simply to determine that an incompatibility with the Convention exists which cannot

¹⁷ Section 5(2), European Convention on Human Rights Act 2003.

¹⁸ Section 5 (3), European Convention on Human Rights Act 2003.

be resolved within the bounds of the court's interpretive capacities. After that, the political branches are seised with the role of deciding how—or even whether—to resolve the identified incompatibility. Thus, the Declaration of Incompatibility is designed to allow for a *legal* determination of the fact of incompatibility and a *political* determination of the desirability and, if appropriate, the mechanism of remedying that incompatibility. The Declaration does not create any legal obligation for such remedial action to be taken; rather it leaves the matter squarely in the hands of the political branches of state to be determined through contestation and debate. This may seem alien within the Irish context of legally determinable, constitutionally-entrenched but it accords well with the constitutional context in which it was conceived, i.e. the UK constitution.

The Declaration of Incompatibility under the Human Rights Act 1998

The UK has what is conventionally termed a political constitution. In its classical exposition by Griffith,¹⁹ this means essentially that rights are politically determined, with democratic parliamentary processes being considered more appropriate to such determination than any kind of judicially 'imposed' determinations of the existence or content of rights. This is not to say that the UK constitution is not without its normative bedrocks: the rule of law and parliamentary sovereignty are, simply, conceptualised as compatible²⁰ in a manner not dissimilar to how the rule of law and constitutional supremacy are aligned within the Irish Constitution. Although Griffiths' classical articulation has been modified and challenged since the 1970s,²¹ and although judicial review expanded significantly in the 1980s to produce what Feldman famously described as mechanisms of directing, limiting and structuring government,²² there remained a significant constitutional commitment to parliamentary sovereignty that had to be negotiated at the time of the drafting of the Human Rights Act 1998. While constitutional structures might tolerate some

¹⁹“The Political Constitution” (1979) 42(1) *Modern Law Review* 1.

²⁰ See generally Dicey, *An Introduction to the Study of the Law of the Constitution*, 3rd Edition, (1889, MacMillan, London & New York), p.p. 182-187.

²¹ See for example, Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (2007, Cambridge, Cambridge University Press) and Tomkins, “In Defence of the Political Constitution” (2002) 22(1) *Oxford Journal of Legal Studies* 157.

²² Feldman, “Judicial Review: A Way of Controlling Government?” (1988) 66(1) *Public Administration* 21.

juridification,²³ the prospect of embracing so-called judicial supremacy was never seriously contemplated, for to do so would be to turn more or less on its head the constitutional structure as it existed within the UK. Thus some kind of middle ground had to be found whereby rights infringements could be identified by courts, but political decisions as to the content and desirability of giving effect to the right in question would remain within the political realm.²⁴ The approach taken in accommodating this was to combine a strong interpretive mandate on the part of the courts in s. 3 (to try to interpret up or down legislation to allow for it to be compatible with Convention rights), with a limited strike down power for subordinate legislation in s. 4 combined with s. 21 and—critically—a declaratory remedy where interpretation or strike down was not possible. That was the Declaration of Incompatibility.

The idea behind the Declaration then is, quite clearly, to put the matter back into the hands of parliament; to allow for the political constitution to do its work. The UK's Declaration of Incompatibility is, thus, an instrument designed to trigger and facilitate contestation around rights of a kind that is entirely appropriate to the constitutional super structure for which it was designed. Indeed, the use of declaratory relief of this kind, which gives courts a role in adjudicating on compliance with a statutory bill of rights but leaves the so-called “last word” to Parliament, is not uncommon within political constitutions or constitutions without clearly entrenched constitutional rights.²⁵ This is part of what Gardbaum has characterised as the new commonwealth model of constitutionalism which he proposes is a compromise model between parliamentary supremacy and judicial supremacy.²⁶ This new commonwealth constitutionalism has three core elements: a statutory bill of rights, a ‘weak form’²⁷ of judicial review relating to rights, and the maintenance of the ‘last word’ on rights with

²³ On juridification in the UK constitution see generally Masterman, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2010, Cambridge; Cambridge University Press).

²⁴ Klug, “The Human Rights Act 10 years on: origins, impact and destination” (2010). *Scottish human rights journal* 51

²⁵ See generally Sathanpally, *Beyond Agreement: Open Remedies in Human Rights Adjudication* (2012, Oxford; Oxford University Press).

²⁶ Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013, Cambridge; Cambridge University Press); Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 29 *American Journal of Comparative Law* 707.

²⁷ The characterisation of judicial review as ‘weak’ and ‘strong’, taken to mean ‘capable of rights-based strike down’ and ‘incapable of rights-based strike down’ is problematic and, to some extent, a caricature. The terms are used as shorthand here, bearing this in mind.

parliament. This model is not unproblematic, but it does characterise quite nicely the school or trend of rights-based constitutionalist innovation of which the Human Rights Act 1998 and its Declaration of Incompatibility is part. This model, it must be emphasised, is designed entirely around the objective of wanting to find a way to juridify—and thereby to strengthen and promote the protection of—rights within constitutional systems that, unlike Ireland, do not have a tradition of ‘strong’ rights-based judicial review.

There are some who criticise the Human Rights Act 1998 as having introduced judicial supremacy under the veil of maintaining parliamentary sovereignty,²⁸ but those claims look weak indeed when compared with a system of constitutional sovereignty and ‘strong form’ judicial review. In essence, these critics argue that courts are overly active in respect of the interpretive obligation under s.3 of the Human Rights Act (i.e. that they contort legislation to be rights compliant well beyond the bounds of appropriateness or institutionally-sensitive possibility, fundamentally changing the meaning of the legislation²⁹). This claim, however, bears out only on a selective reading of the jurisprudence; while there have been some cases where very extensive interpretive work has been done to bring legislation into line with the Convention,³⁰ those are relatively rare and, in any case, seem to be mandated by a combination of the interpretive obligation itself and the express inclusion of courts within the performative obligation (meaning that in undertaking their work, courts must themselves act in a manner compliant with the Convention). Furthermore, a more limited judicial embrace of interpretation under s. 3 of the Human Rights Act 1998 would succeed in preserving parliamentary sovereignty only if courts were to grant Declarations of Incompatibility instead (which do not remedy the litigant’s situation) *and* those Declarations were to be treated as instruments of contestation by parliament so that the political constitution was *meaningfully* maintained.

²⁸ For debates on this see, for example, Kavanagh, “Statutory interpretation and human rights after *Anderson*: a more contextual approach” [2004] *Public Law* 273; Phillipson “(Mis)Reading Section 3(1) of the Human Rights Act” (2003) *Law Quarterly Review* 183; Kavanagh, “Unlocking the Human Rights Act: the “radical approach” to section 3(1) revisited” [2005] 3 *European Human Rights Law Review* 259.

²⁹ On interpretation under s. 3 generally see Kavanagh, “Unlocking the Human Rights Act: The ‘Radical’ Approach to Section 3(1) Revisited” (2005) *European Human Rights Law Review* 259

³⁰ See particularly *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

The fact is that rather than be contested, most final Declarations of Incompatibility have been treated by Parliament as if they were binding upon them,³¹ even to the extent of Home Secretaries sometimes claiming that they are *compelled* to change a law to be rights compliant even where they have no desire to do so.³² Of course, as the previous section illustrates, that is an entirely inaccurate reading of the Declaration of Incompatibility as a legal matter; these Declarations are designed specifically not to be binding on Parliament. It may well be that the sorry saga of prisoner voting will be the turning point at which the contestability of rights under the Human Rights Act as illustrated by the Declaration of Incompatibility is accepted and embraced by the political branches.³³ Even if that does not happen, however, it remains the case that the design imperatives of the Declaration were to empower the courts from an adjudicatory perspective *but* balance that against the maintenance of political power relative to rights. In other words, it was designed to maintain the fundamentals of the constitutional structure; a structure that stands in sharp contrast to that which we find in Ireland.

The Irish Constitutional Culture of Rights

As already mentioned, the Constitution of Ireland includes a substantial section on fundamental rights. As well as those rights which are expressly enumerated in the Constitution itself, there is a significant body of jurisprudence outlining the doctrine of unenumerated rights, all of which have the same constitutional status as those which are express within the constitutional text. Irish constitutional rights are legally

³¹ On this see Phillipson, “The Human Rights Act, Dialogue and Constitutional Principles” in Masterman & Leigh, *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (2013, Oxford; Oxford University Press).

³² See for example the speech of Home Secretary, Teresa May, in the House of Commons in the aftermath of a UK Supreme Court decision on the sex offenders register where she said “I can tell the House that the Deputy Prime Minister and the Justice Secretary will shortly announce the establishment of a commission to investigate the creation of a British Bill of rights. It is time to assert that it is Parliament that makes our laws, not the courts; that the rights of the public come before the rights of criminals; and, above all, that we have a legal framework that brings sanity to cases such as these” (*Hansard*, 16 February 2011, Column 960). In response, Jack Straw MP noted “I support the Home Secretary's views on the merits of the existing sex offenders register and her concern about the Court's decision, but will she confirm that under section 4 of the Human Rights Act 1998 there is absolutely no obligation on her or the House to change the law one bit? All the Court did was to issue a declaration of incompatibility and section 4 makes it absolutely clear that any decision following that is a matter for the sovereign Parliament. It would be entirely lawful for the House and her to say that the existing regime will continue without any amendment” (*Hansard*, 16 February 2011, Column 963).

³³ On the ongoing dispute as to prisoner voting see Murray, “A Perfect Storm: Parliament and Prisoner Disenfranchisement” *Parliamentary Affairs*, Advance Access, doi: 10.1093/pa/gsr071

powerful things. Article 15(4) of the Constitution provides that unconstitutional laws, or laws that are “repugnant” to the Constitution, are invalid and Article 34 makes it clear that the decision as to repugnancy resides with the superior courts. Thus, unlike in political constitutional systems, even primary legislation can be struck down by the successful assertion of a violated constitutional right. In this context, constitutional rights act not as contestable principles but rather as absolute limits to the extent of state action. Thus, rights themselves delineate governmental possibilities, rather than governmental priorities, policies or positions determining the existence or exercisability of rights.

This is not to suggest that there is *no* engagement between the judiciary and the political branches as regards rights. Rather, such an engagement happens in a number of ways. The first is that where rights-related questions have not been determined conclusively by judicial pronouncement the government will tend to be guided by its—or more accurately, its Attorney General’s—best judgement as to whether anything is permitted or precluded by the Constitution. So, for example, the right to marry is clearly protected by the Constitution³⁴ but the Supreme Court has not settled through a direct adjudication whether the limitation of marriage to opposite sex couples is a violation of that constitutional right as enjoyed by those who are in same sex relationships and who wish to marry. The Attorney General’s assessment (and that of her predecessor) is that the Constitution does not permit same sex marriage and, so, the government claims a constitutional barrier to introducing this measure. Governments will not introduce law that they believe to be unconstitutional, or indeed that is clearly unconstitutional, not only because of the constitutional prohibition on doing so³⁵ but also because to do so would be perverse in the face of the important presumption of constitutionality within Irish legal doctrine. This is the presumption that legislation as passed by the Oireachtas is consistent with the Constitution so that the burden of establishing unconstitutionality lies with the party impugning the measure. Secondly, where the Supreme Court determines that a certain right exists or is infringed, or outlines the content or boundaries of a constitutional right, it does not conventionally direct the state as to how to give effect to it. Rather that is a matter of policy, often implicating major economic and resource allocation priorities; that is

³⁴ Article 41, Bunreacht na hÉireann

³⁵ Article 15.4.1, Bunreacht na hÉireann.

properly left to the political branch. Thus, while there can be no contestation about *whether* to give effect to the right, there can be contestation about *how* to do so through what Carolan has termed “collaborative constitutionalism”.³⁶ Finally, a particularly firm sort of political intervention into constitutional rights occurs by means of what might be called a corrective referendum. The Irish Constitution can only be formally amended by referendum of the People,³⁷ but judicial interpretation of the Constitution can act as a kind of informal or *quasi* amendment,³⁸ sometimes with results that the political branches are averse to. In these cases, there is nothing stopping the Government from proposing a referendum to the People to reverse or adjust the finding of the Court. Indeed, both successful and unsuccessful referenda have been held in the attempt to undo a judicial finding relative to constitutional rights.³⁹ Two examples illustrate this: on two occasions unsuccessful referenda were held to try to make it clear that a risk to the life of a pregnant woman permitting of abortion in Ireland would *not* include a risk emanating from suicide⁴⁰ in contradistinction to the finding of the Supreme Court in *Attorney General v X*,⁴¹ and in October of 2011 a referendum⁴² was held to try to reverse the so-called *Abbeylara* judgment⁴³ which limited the capacities of Oireachtas enquiries on the basis of the constitutional right to a reputation. Again, that was unsuccessful.

In Ireland then, unlike in political constitutional systems, the contestation that occurs in relation to the *existence* and *content* of a right takes place within clearly constrained pathways and the referendum is the primary political mechanism of such contestation. Beyond that, constitutional rights as interpreted by the Supreme Court act as, and are

³⁶ Carolan, “The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity” (2011) 46 *Irish Jurist* 180. One might argue that the twenty years of political inaction on abortion following *X v Attorney General* [1991] 1 IR 1 comes close to being a contestation as to whether to give effect to a judicial pronouncement as to a constitutional right, however while the Oireachtas did not put structures to ease the exercise of that right in place neither did it put barriers to same in place. Rather it failed to act at all, seeming to stop short of a refusal to accept the judicial interpretation of the Constitution even if there was no real embrace of same.

³⁷ Article 46, Bunreacht na hÉireann.

³⁸ On this see de Londras & Gwynn Morgan “Constitutional Amendment in Ireland” in Contiades (ed) *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* (2012, London: Routledge)

³⁹ *Ibid*

⁴⁰ Referendum on the proposed 12th Amendment to the Constitution, 1992; Referendum on the Proposed 25th Amendment to the Constitution, 2002.

⁴¹ [1992] 1 IR 1.

⁴² Referendum on the proposed 30th Amendment to the Constitution, 2011.

⁴³ *Maguire and Ors v Ardagh and Ors* [2002] 1 IR 385

treated as, trumps, constraining political choice and absolutely bounding possible legislative and executive actions. Unlike in the UK, then, domestic rights are considered to be constitutionally enshrined rather than politically contestable.

In this context, rights that flow from the European Convention on Human Rights have always played second fiddle to constitutionally enshrined rights. Of course, given the immense power of the constitutional right and the capacity of the constitutional remedy to resolve both the individual case and any systemic problem emanating from the impugned legislation, this is entirely understandable.⁴⁴ International human rights law has always tended to play a supplementary role to the constitutional *acquis*, stepping in to identify rights breaches where domestic constitutional litigation had been unsuccessful. Thus, for example, *Norris*⁴⁵ identified a Convention-based right that the criminalisation of male homosexual sexual activity violated even where there had been no constitutional violation⁴⁶; and *Airey*⁴⁷ provided for a Convention-based right to access free legal aid where Mrs Airey had enjoyed no domestic relief. Both of these cases led to domestic change, but often that change was sometimes minimal and delayed. So, by means of s. 2 of the Criminal Justice (Sexual Offences) Act 1993 “any rule of law by virtue of which buggery between persons is an offence is hereby abolished”. This followed, with some delay, the *Norris* case but also a long campaign for decriminalisation on which see, for example.⁴⁸ In the wake of *Airey* an extremely limited system of free civil legal aid but attempts to extend the scheme by means of referring to the Convention were unsuccessful in *E v E*.⁴⁹ The extension was not secured until the Civil Legal Aid Act 1995, which followed a prolonged period of advocacy by, among others, FLAC.⁵⁰

⁴⁴ It should be noted that where there is no legislation but rather a policy or a course of action that is being challenged, the Constitution does not necessarily allow for an ultimate resolution of the case. This is illustrated by the jurisprudence on children in detention, especially *TD v Minister for Education* [2001] 4 IR 259. However, as the Declaration of Incompatibility is expressly oriented towards considering the compatibility of *law* with the Convention this does not undo the claims made here contrasting constitutional and ECHR Act remedies.

⁴⁵ [1988] ECHR 22

⁴⁶ *Norris v Attorney General* [1984] IR 36 (in which the Supreme Court found no violation of the Constitution and refused to follow *Dudgeon v United Kingdom* (1981) 4 EHRR 149 in which the European Court of Human Rights had held that the same provision of the Offences against the Person Act 1861 violated Article 8).

⁴⁷ *Airey v Ireland* (1979-80) 2 EHRR 305

⁴⁸ Rose, *Diverse Communities: The Evolution of Lesbian and Gay Politics in Ireland* (1994, Cork; Cork University Press).

⁴⁹ [1982] ILRM 497.

⁵⁰ See FLAC, *Civil Legal Aid in Ireland: Forty Years On* (2009, Dublin; FLAC).

In other ways Convention-based rights have been used as a lever to try to ensure that clear frameworks around pre-existing constitutional rights are put in place, as was the case in the aftermath of *A, B & C v Ireland*.⁵¹ In this case the European Court of Human Rights held that the Irish state enjoyed a margin of appreciation to limit abortion so that the extremely limited availability of abortion under Article 40.3.3 of the Constitution did not violate the Convention. However, where there was a limited permission to access abortion in Ireland, as there is under Article 40.3.3 and its interpretation in *Attorney General v X*,⁵² it had to be possible for women and medics to tell with clarity whether an abortion was permitted in any particular case. The lack of any legal regulation pursuant to Article 40.3.3 meant that this clarity was not provided and so Article 8 was violated. In response, and after a delay of only two and a half years from the Strasbourg Court's decision, the Protection of Life During Pregnancy Act was introduced regulating how and when abortion could be accessed in approved Irish hospitals.⁵³

However, beyond situations where there is a judgment from the European Court of Human Rights against Ireland identifying a violation, which is binding on Ireland under Article 46 of the Convention, there has been little willingness to pay substantive political attention to Convention-based rights, even if a decision in Strasbourg on materially the same matter has been handed down against another state.⁵⁴ This is not unique to the European Convention; it is rare indeed to see substantive analysis within the parliamentary debates of compliance of government policy or proposed legislative provisions with Ireland's other international human rights obligations.⁵⁵ This is at least partially because Ireland has a dualist approach to international law, reflected in Article 29 of the Constitution, which appears to have perpetuated a political

⁵¹ [2010] ECHR 2032.

⁵² [1992] 1 IR 1.

⁵³ A further element in the introduction of this Act was the death, in November 2012, of Savita Halappanavar in a Galway hospital having been allegedly denied an abortion. While this may have provided some political impetus towards legislating, the Minister for Health had established a working group to recommend how to implement *A, B & C v Ireland* long before this and there is nothing to suggest that the governing coalition intended to ignore these recommendations or to avoid legislation.

⁵⁴ This is particularly clear in the context of expedited removal from public authority housing under s 62 of the Housing Act 1966 discussed in detail below.

⁵⁵ It should be noted that, when requested to do so, the Irish Human Rights Commission undertakes an assessment of proposed legislation as against both domestic and international human rights standards. See s. 9, Human Rights Commission Act 2000.

conception of non-constitutional rights as matters belonging properly in the realm of foreign affairs rather than domestic politics. Thus, even in this area where more contestability might be said to be possible, little has been in evidence. While international human rights law is *not* seen as a clear limitation on governmental action in the way that constitutional rights are, neither is it then seen as a field of contestation; rather, it seems to be conceived of as something of only occasional domestic relevance; a fact that did not bode particularly well for the fate of the European Convention on Human Rights Act 2003.

The ‘Awkward Fit’ of the ECHR Act 2003

Within this constitutional structure the Irish government committed itself to incorporation of the European Convention on Human Rights. While there had been some discussion of incorporation for decades prior to this,⁵⁶ the exact mechanics of incorporation had never been clearly worked out. And, indeed, it was a complex matter to determine. If incorporated on a constitutional basis how would, for example, apparent duplications of rights be resolved or the relationship between the Irish Supreme Court and the European Court of Human Rights be regulated? If incorporated on a sub-constitutional level, how could meaningful incorporation be achieved in the light of the clearly superior constitutional rights protections and remedies? By the time the Irish government came to incorporate the Convention the only other common law state within the Convention membership, the UK, offered a model. As mentioned above, the European Convention on Human Rights Act 2003 does not replicate the UK’s provisions in their entirety. That said, the basic structure of the ECHR Act 2003 owes more than a little to the Human Right Act 1998.

As in the UK, the core method of incorporation is interpretive. Under s. 2 of the European Convention on Human Rights Act 2003 “In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions”. There are two interesting differences between this and the equivalent provision in the Human

⁵⁶ See generally de Londras & Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (2010. Dublin; Round Hall), Chapter 1.

Rights Act 1998 (s. 3), namely the express inclusion of common law within the laws to be thus interpreted⁵⁷ and the articulation of a broader limitation clause on the interpretive duty (“subject to the rules of law relating to such interpretation and application”).⁵⁸ Leaving these differences to a side for the purposes of this paper, we can see that the starting point in both jurisdictions is to consider whether any impugned law can be interpreted in a Convention compliant manner and, if so, to ensure that it is thus interpreted. Secondly, the ECHR Act 2003 imposes an obligation on all organs of the state to “perform its functions in a manner compatible with the State's obligations under the Convention provisions”, albeit “[s]ubject to any statutory provision”.⁵⁹ Unlike in the United Kingdom, courts are expressly excluded from being an organ of the State for the purposes of the performative obligation,⁶⁰ although the impact of this is somewhat limited by the inclusion of common law in the s. 2 interpretive obligation.⁶¹ Finally, where there is no way to interpret a piece of legislation otherwise incompatible with the Convention in a compatible manner, s. 5 provides for the Declaration of Incompatibility. Thus we can see that the key three-part structure of the Human Rights Act 1998—interpretation, performance and declaration—are recreated within the ECHR Act 2003.

Within this structure Declarations of Incompatibility are *clearly* remedies of last resort, preceded at the very least by constitutional analysis (including the possibility of constitutional strike down),⁶² and an interpretation that brings the impugned measure in line with the Convention if possible. Thus, the Declaration of Incompatibility is the relief provided when no other legal remedy is available, in spite of there being a recognised infringement of Convention rights.

Far from this being an indication of normative insignificance, the ‘last resort’ status of the Declaration of Incompatibility implies a particularly serious situation from a rights-based perspective: one in which a human right is violated but the domestic

⁵⁷ Section 1, European Convention on Human Rights Act 2003.

⁵⁸ In contrast, s. 3 of the Human Rights Act 1998 provides for Convention-compliant interpretation “So far as it is possible to do so”.

⁵⁹ Section 3, European Convention on Human Rights Act 2003.

⁶⁰ Contrast s. 1, European Convention on Human Rights Act 2003 with s. 6(3), Human Rights Act 1998.

⁶¹ Section 1, European Convention on Human Rights Act 2003 defines “rule of law” under s. 2 as including common law.

⁶² *Carmody v Minister for Justice, Equality and Law Reform* [2009] IESC 71.

legal system is unable to bring about a remedy. However, the gravity with which this is perceived is heavily dependent on how seriously non-constitutional rights are taken within the political culture. In other words, whether or not one believes that a right *other than a constitutional right* being breached without there being any available remedy in law is serious, depends on whether one values those rights that derive from non-constitutional instruments, such as international human rights law. As outlined above, the constitutional structure of rights protection in Ireland is such that rights with non-constitutional bases do not occupy as significant a position on the Irish politico-legal landscape as they might. This must explain to some extent the emergence in relation to Declarations of Incompatibility not of a culture of compliance, as in the UK, but rather a culture of apathy. This is well demonstrated by a short consideration of the first declaration of incompatibility: that handed down in *Foy v An t-Árd Chláraitheoir*.⁶³

Foy concerned a post-operative male to female transgendered person who sought recognition of her reassigned gender on the birth register. The Civil Registration Act 2004, did not allow for any mechanism to amend the birth register pursuant to gender reassignment. This is notwithstanding the fact that, at the time the 2004 Act was introduced repealing all previous primary and secondary legislation in the area, the case of *Goodwin v. United Kingdom*⁶⁴ had already been concluded, finding quite firmly that refusing to recognise reassigned gender in official documentation was no longer with a state's margin of appreciation under Article 8. Thus, as a first matter, it is notable that the 2004 Act was introduced without giving effect to the clear Article 8 principle outlined in *Goodwin*. The law in place prior to the Civil Registration Act 2004 (the Registration of Births and Deaths (Ireland) Act, 1863 as amended by the Registration of Births Act, 1996) also did not permit of any such adjustment to the birth register. In the High Court, McKechnie J. held that he could not interpret the relevant legislation to permit of adjustment as to do so would be to go beyond that which is possible, a critical limiting phase in s. 2. Nor could the Constitution come to Ms Foy's aid; the inability to have the birth register adjusted on the basis of gender reassignment did not infringe on any constitutional rights. However, it was clearly incompatible with Article 8 of the European Convention on Human Rights (the Court

⁶³ [2007] IEHC 470

⁶⁴ [2002] 35 EHRR 447

declined to decide on whether there was a compatibility with Article 12) and, as no other remedy was available to her, a Declaration of Incompatibility was issued on 19 October 2007.

The Government quickly made it clear that it would appeal the decision to the Supreme Court, but this position changed in June 2010, just a month after the government established the Gender Recognition Advisory Group (GRAG). The GRAG did not report until June 2011—more than a year after its establishment—and even then legislative proposals were not forthcoming from the government. In fact, the government did not publish the general scheme of its Gender Recognition Bill until 17 July 2013, shortly after independent senator, Senator Katherine Zappone, published her proposed Gender Recognition Bill. Thus, even discounting the time when an appeal was contemplated, more than three years passed (and more than five years from the Declaration itself) before a simple general scheme of proposed legislation was published. One simply cannot envisage any such situation arising in the context of a finding of unconstitutionality. This becomes clear if we imagine, for a moment, that the 2004 Act had been found unconstitutional and part or all of it struck down. In such a case, a gap in legal regulation would have arisen that would have to be filled unless the state decided that for some reason there was no need to record births within the state. In designing the replacement scheme, the Executive and Legislature would need to give effect to the constitutional right as articulated by the Court (unless a referendum was run to reverse the Court's decision) and so—very quickly, given the nature of the process in question—a solution not only to Ms Foy's case but to the case of every person who has a reassigned gender would be put in place. No such speedy solution came about as a result of the Declaration of Incompatibility, perhaps because of a lack of political will but also perhaps because a Declaration does not provide the kind of violent nudge towards rights compliance that a finding of unconstitutionality brings about.

It is difficult to claim that this is an isolated example; in the only other field where there has been significant activity under the ECHR Act 2003 so far, i.e. expedited removal from public authority housing under s. 62 of the Housing Act 1966, no substantial activity has been undertaken to remedy a clear incompatibility with the

Convention.⁶⁵ This is notwithstanding the fact that the *status quo* leaves local authorities in a difficult position of being entitled to proceed under s. 62 (because it remains in force), with such actions potentially violating Convention rights. In such cases, many of the individuals who are removed from their public authority housing with clearly deficient processes are already vulnerable, and the removal leaves them more so by rendering them effectively homeless and potentially ineligible for future public housing. However, s 62 has been deemed constitutional⁶⁶ and even as Declarations of Incompatibility continue to be issued in relation to that provision there is no clear imperative to legislate that is analogous to that which would arise in the case of unconstitutionality. Although there is some evidence that this is on the political agenda,⁶⁷ there does not appear to be any great haste in relation to it especially considering the fact that Declarations of Incompatibility were being issued in relation to this provision as long ago as 2008⁶⁸ (although the Supreme Court made its first such Declaration on the provision in February 2012⁶⁹).

Conclusions

While it is clear that Declarations of Incompatibility will be rare in Ireland given their ‘remedy of last resort’ status, there is no question but that such Declarations are and will be issued. The question remains, however, whether they are at all worthwhile from the perspective of the litigant and, more importantly perhaps, of a culture of rights compliance. There does not seem to be any clear evidence to suggest that they speed up the process of bringing Irish law into greater compliance with the Convention, or even that they cause any kind of significant political difficulties for governments. Rather they are largely ignored with the political process outside of situations of advocacy and NGO engagement. It is difficult to identify with any kind of precision why this might be, but it seems at least arguable that it is attributable to

⁶⁵ The Supreme Court found this provision to be incompatible in *Donegan v. Dublin City Council* [2012] IESC 18.

⁶⁶ *State (O'Rourke) v. Kelly* [1983] IR 58; *Dublin Corporation v. Hamilton* [1999] 2 IR 48.

⁶⁷ For example, on 27 June 2013 the Junior Minister, Jan O'Sullivan, provided a written answer claiming that “a course of action is being prepared which will involve changes in the way in which eviction procedures are carried out but which will require changes to legislation” in order to respond to these Declarations. *Dáil Debates*, Written Answers, 27 June 2013.

⁶⁸ *Donegan v Dublin City Council* [2008] IEHC 288

⁶⁹ *Donegan v Dublin City Council* [2012] IESC 18.

the awkward fit of a Declaration of Incompatibility designed to instigate political contestation as to rights in a structure of constitutional supremacy in which rights—or at least ‘rights that matter’ from a political perspective—are legally determined and minimally contestable. In order for the Declaration of Incompatibility to be meaningful in the Irish context it is vital that it not be treated as a non-remedy. Certainly, as outlined above, the Declaration of Incompatibility is a different kind of remedy to the rights-related remedies that are customary within the Irish legal system inasmuch as it is an essentially *political* remedy, however this need not rid it of its remedial capacities. Rather, these capacities might best be captured and capitalised on through some adjustments in both expectations and in structures.

As to expectations, litigants under the Act should be aware, and be made aware by their legal representatives, that if a Declaration of Incompatibility is acquired its power is political and not legal and, as a result, that the decision of the Court is not the end of the story. Rather, concerted lobbying and engagement with the political process will be required to try to trigger the political attention required for Declarations of Incompatibility to be at all effective. As to structure, adjustments to the politico-legal environment are required to reshape political conceptions of rights and put Convention rights firmly on the agenda. Two straightforward starting points would be to establish an Oireachtas Committee on Human Rights not dissimilar to the enormously important Joint Committee on Human Rights in Westminster, and to insert a requirement that all Bills proposed to the Oireachtas would include a statement that, in the estimation of the moving Minister, it is (or is not) compliant with the Convention. The proposed joint committee should have all Declarations of Incompatibility notified to it at the time that they are laid under s. 5, and could conceivably develop a practice of holding hearings on these Declarations, taking evidence from relevant experts, Departments and stakeholders and making proposals to the Government and to the Oireachtas as to options for amending the law (or choosing not to amend the law) pursuant to the Declarations. A statement as to (non)compliance of proposed legislation with the Convention would mirror the s. 19 certification requirement in the Human Rights Act 1998. While it would not preclude the introduction of non-compliant legislation, it would place the issue of Convention-compliance firmly on the agenda and further acculturate contestation and debate about Convention-compatibility as a general matter within the Oireachtas.

As a remedy, the Declaration of Incompatibility is an admittedly awkward fit within the Irish legal system. It is a remedy designed for a particular constitutional system—the political constitution—that inculcates a vastly different culture of rights than that extant within Ireland’s ‘legal’ constitution. This does not, however, suggest that Declarations of Incompatibility can have no role to play in Ireland. That role is, however, limited in scope and contingent on a realignment of political structures and cultures of rights. Not having been accompanied by any mechanisms of achieving such realignment (such as training, new parliamentary committees, systemic incorporation of the ECHR Act 2003 into professional or undergraduate curricula within law schools), the Declaration of Incompatibility had, perhaps, limited prospects of success. If we do not want to write it off as an effective rights-related remedy, adjustment seems urgently required.