

# Implementing The European Convention on Human Rights: A Comparative Constitutional Perspective With References to Ireland and France

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## Introduction

The present paper relates to the general theme of Comparative Constitutional Law (although ideas developed also ties in the topic on Contemporary Challenges to Executive Power). One way of comparing the different constitutional traditions and rules is to examine how constitutional orders are influenced and adapt to an external set of rules whether national (i.e. the influence of private law on constitutional law/privatization of public law) or international. In the European context, the influence of European law understood as including, in its broadest sense, the influence of the law of the European Union (EU) and the law of the European Convention on Human Rights (ECHR), has obviously been most significant in transforming national constitutional orders.

The paper will focus on the impact of the ECHR<sup>1</sup> which appears as the most successful achievement of the Council of Europe in the area of the judicial protection of human rights. Signed on 4 November 1950 and in force since 3 September 1953, the ECHR has evolved into a sophisticated legal system welcoming new signatories and adding new rights. Studies in the area have been increasingly focussing on the structural relationship between the ECHR and national legal orders showing the different aspects and processes of Europeanization of domestic law and politics<sup>2</sup>. Reception mechanisms and implementation processes of the ECHR have clarified and enhanced the nature and status of the Convention in the domestic legal order and thus profoundly impacted on national constitutional law and adjudication. The ECHR will serve as a medium to compare constitutional laws which is limited for this purpose to two countries – namely France and Ireland<sup>3</sup>. Both countries were among the founding members of the Council of Europe and first signatories of the ECHR. Some of the main differences and commonalities of the experiences of France and Ireland in implementing the ECHR will be addressed and reveal to what extent this implementation has influenced, or “Europeanized”, their constitutional approach to rights protection. The comparative law methodology is

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<sup>1</sup> Literature analysing the nature and influence of the ECHR identifies important evolutionary trends, the constitutionalization of its regime in particular which is now debated not only among scholars but now largely by judges and politicians.

<sup>2</sup> The literature on Europeanization is extensive in the political science discipline. See i.e. See M Green Cowles, J Caporaso & T Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001), K Featherstone & C M Radaelli (eds), *The Politics of Europeanization* (OUP, 2003), and P Graziano & M P Vink (eds), *Europeanization – New Research Agendas* (Macmillan, 2008). In law, see i.e. F Snyder, *The Europeanisation of Law : The Legal Effects of European Integration* (Hart, 2000).

<sup>3</sup> A more detailed version of some aspects developed in this piece were presented earlier at the inaugural conference of the *Irish Society of Comparative Law* (University of Limerick, 27-28 February 2009). The general research theme on the reception and implementation of the ECHR derives from my PhD (2006) which was about the implementation of the ECHR by the United Kingdom and from a report (2001) submitted to the Academy of European Public Law on a comparison between the UK and Ireland on the same topic. The choice of these two countries can also be explained by my personal status – French national living and working in Ireland!

analytical rather than prescriptive and seeks to understand and explain the similarities and differences between the two legal systems<sup>4</sup>.

After looking at some historical paradoxical aspects concerning these two original signatories, especially the underlying justifications for late ratification by France and late incorporation by Ireland, the study shows that, pre-incorporation, Irish courts were rather ignorant of the Strasbourg system, while the French Constitutional Court (*Conseil constitutionnel*) decided from the start that the ECHR was not part of the *bloc de constitutionnalité*. However, the examination of the current status of the ECHR in the hierarchy of norms shows how the review operated under the ECHR Irish Act 2003, on the one hand, and the review operated by the French *Conseil constitutionnel*, on the other hand, represent interesting challenges as far the complex and ongoing process of “Europeanization” of constitutional law is concerned.

### **Overview of National Constitutional Orders**

A number of preliminary remarks concern the Constitution and its provisions on fundamental rights, the organization of the court system as well as the relationship between domestic and international law. Although bearing different legal cultures – one representative of the civil law tradition and the other of the common law tradition – both countries are unitary Republican States possessing a written constitution and sharing a long standing commitment to fundamental rights protection. Both constitutional texts are important single documents drafted at a key moment of the history of the country and attached to a charismatic person: de Gaulle in the case of the French Constitution (*Constitution de la 5ème République*, 1958) and de Valera in the case of the Irish Constitution (*Bunreacht na hÉireann*, 1937). Despite their original political nature and aim, they both evolved into dynamic and refined legal instruments.

The organization of the courts and the existence of judicial review of legislation are also important elements to take into account. The French legal system is divided into two main orders, the civil order with the Court of Cassation (*Cour de cassation*) at its top, and the administrative order with the Council of State (*Conseil d’Etat*) as its supreme court. The 1958 Constitution did also provide for a non-judicial Constitutional Council (*Conseil constitutionnel*) which has managed not only to transform itself into a body that, at least in some respects, resembles a constitutional court, but also transform the Constitution itself from an instrument primarily concerned with the institutional structure of government to one that also provides substantial protection of fundamental rights. Contrary to France, Irish law recognises a process of judicial review whereby either the High Court or Supreme Court may declare invalid (null and void) legislation, or any part of such legislation, which infringes a provision of the Constitution.

The relationship between domestic and international law determines the reception mode of the ECHR. The constitutional approach in this regard is different between France and Ireland. Formally, France is monist whereas the Irish constitution is resolutely dualist. In terms of rank in the hierarchy of norms, treaty law possesses supra-legislative, but sub-constitutional, status. Despite early involvement of political authorities in both countries, the reception of the ECHR,

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<sup>4</sup> For the numerous possibilities in comparative law research, see i.e. E Özücü & D Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007).

which was to be via the ratification process in France, and through incorporation by Parliamentary statute in Ireland, was not self evident and followed different paths in each jurisdiction

### **Paths to Reception of the ECHR**

Support to the ECHR was quite unproblematic for France and Ireland, despite reserves at drafting and/or signature stage. They were among the Council of Europe's founding States and the first countries to sign the ECHR on 4 November 1950. France took a large part (as did the UK) in the drafting of the Convention which fully justified its prompt signature<sup>5</sup>. The Irish Government supported the adoption of the ECHR because it thought it would benefit the country for foreign policy reasons. Unofficial motivations also included anti-British or anti-partition sentiment, a view seemingly confirmed later by the 1978 *Ireland v. UK* case, the only interstate procedure ever launched by Ireland. However, both States displayed lateness in their full acceptance of the ECHR in the domestic legal order, France with its late ratification in 1974 and Ireland with its belated incorporation in 2003.

France only ratified the ECHR on 3 May 1974, after fifteen European States had already done so, and prior attempts had failed. Several reasons contributed to the delayed ratification<sup>6</sup>. In addition to being late, the French ratification was also qualified. Accession to the ECHR and its various Protocols was marked by reservations and declarations. Lastly, and despite numerous Parliamentary and doctrinal pressures, the individual right to petition was only recognized on 3 October 1981 and only for a limited and renewable period of five years (later renewed). This attitude was not limited to the ECHR system but characterized the French response to other international treaties on human rights<sup>7</sup>. The first judgement in an application against France was delivered by the ECtHR only in 1986<sup>8</sup>.

Intervening soon after the signature and relatively unqualified, ratification by Ireland was comparatively unproblematic. The Executive, who has in most cases sole power to ratify a treaty under Article 29(1) and (2) of the Irish Constitution, ratified the ECHR on 25 February 1953, and it entered into force on 3 September 1953. Ireland ratified all optional clauses right from the beginning in 1953 and, along with Sweden, 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). It was involved in the first individual petition ever considered by the ECtHR, in the *Lawless* case in 1961<sup>9</sup>. All optional Protocols to the Convention, with the exception of Protocol no. 12<sup>10</sup>, have now been ratified by Ireland. However, for the next fifty years, the ECHR did not form part of

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<sup>5</sup>Two eminent French scholars, namely René Cassin and Pierre-Henri Teitgen, who eventually became the first two French judges of the ECtHR, were among the instigators and drafters of the ECHR in the late 1940s. See A. Pellet (1974) 'La ratification par la France de la Convention européenne des droits de l'homme' *Revue du droit public et de la science politique en France et à l'étranger* 1328.

<sup>6</sup>E. Lambert Abdelgawad & A. Weber (2008) 'The Reception Process in France and Germany' in A. Stone Sweet & H. Keller *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford: OUP) at 108.

<sup>7</sup> France denounced the declaration of acceptance of the compulsory jurisdiction of the International Court of Justice in 1974. See also the accession to the CCPR and to the 1965 Convention on the Elimination of Racial Discrimination.

<sup>8</sup> ECtHR *Bozano v. France* 18 December 1986, Series A, Vol. 111.

<sup>9</sup> ECtHR *Lawless v. Ireland* (No. 3) 1 July 1961, Series A, Vol. 3; [1979-1980] 1 EHRR 15.

<sup>10</sup> The most important reason for not ratifying Protocol no. 12 is the fear that Conventional protection might lead to constitutional conflicts in Ireland, given that equality and non-discrimination are protected by Article 40(1) of the Irish Constitution.

Irish domestic law, until the *Oireachtas* adopted the European Convention on Human Rights Act on 30 June 2003 (ECHR Act 2003). It was the UK's incorporation of the Convention in the Human Rights Act of 9 November 1998 (HRA, 1998), following the Belfast Agreement of the same year<sup>11</sup>, that led Ireland to consider incorporation. Modelled on the British HRA, the ECHR Act incorporates Convention rights into Irish law in an indirect (interpretive) way. However (and in contrast to the HRA), important limitations prevent litigants to plead the Convention against the Parliament or the courts, while the equivalent Irish constitutional rights can be invoked against all authorities including the *Oireachtas*. 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 who was not entitled under Irish law to an altered birth certificate – this was found to be incompatible with the Convention, thus calling upon the Parliament to act<sup>12</sup>.

Common features characterize the key moments of reception of the ECHR in the national legal order in both countries: on one hand, the delay in ratification/incorporation was justified by national officials routinely asserting that reception would be superfluous since their domestic legal order was well adapted to the protection of individual fundamental rights; on the other hand, the reception step was envisaged more with external and/or ideological considerations in mind rather than to address a pressing domestic purpose. France undertook ratification to demonstrate faith in the European ideal, while Ireland 'externalized rights politics' by accepting incorporation as the price for peace in Northern Ireland and felt committed after the UK's incorporation. The ECHR Act seems to generally supplement what is arguably the most advanced system of judicial protection of constitutional rights in Europe. This explains the strong constitutional resistance to incorporation on the part of Ireland. Reservations, declarations and non ratification of certain Protocols still reveal a common cautious approach towards the ECHR system especially when important aspects of constitutional law are at stake (e.g. Protocol no. 12 for Ireland).

### **Impact of the ECHR on the national constitutional order: constitutionality and 'conventionality' review**

Data on the activity of the ECtHR *vis-à-vis* France and Ireland and analysis of compliance mechanisms (preventive or post-ECtHR rulings) will be left aside. Suffice is to say that while Ireland ratified the ECHR and accepted the right of individual petition long before France, the number of judgements against Ireland places it among the countries with the lowest total of cases filed and adverse judgements. At the other end of the spectrum, France quickly became a regular litigant before the ECtHR. In both instances, the case law of the ECtHR has had some substantial effects on both national legal orders. Rather emphasis is put here on the role of the constitutional judge whether enhancing effectiveness of the ECHR or resisting its reach. This part gives some account of the impact of the ECHR on the *method of constitutional review* and how has the taking into account of the ECHR and its case law been reconciled with judicial

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<sup>11</sup> The 1998 Belfast ('Good Friday') Agreement was signed between Ireland and the UK in the context of advancing the peace process in Northern Ireland. It committed the parties to establishing a Human Rights Commission whose remit would be to supervise the enforcement of human rights obligations.

<sup>12</sup> *Lydia Foy v. Ireland* 19 October 2007 [2007] IEHC.

review in both systems. It primarily concerns developments within the Irish Supreme Court and the French Constitutional Council.

In both countries, the ECHR has an infra-constitutional rank. The Irish ECHR Act 2003 is not an entrenched statute and the incorporated Convention rights possess sub-constitutional rank in Irish law. However, the ECHR Act is unlikely to be overruled. Also, the courts' structure explains a lot of the attitude towards the ECHR system. In France, there is a duality of courts – ordinary courts (Court of Cassation and the Council of State) on one hand, Constitutional Council on the other hand. In Ireland, there exists a sophisticated, mainstream and seemingly self-sufficient judicial review.

The point of tension in this area has been the reconciliation of constitutional review (compatibility with the Constitution) and 'conventional' review (conformity with the ECHR) in the supreme courts. Concerning the Constitutional Council, it seems not to be influenced by the ECHR and its case law (even when it acts as electoral judge) since it refuses any control of the compatibility of French law with the ECHR. However, the account has to be more subtle than that. If the *Conseil constitutionnel* does not include the ECHR as an operative tool when exercising its constitutional review (including it in the norms of reference), it does not mean that it has totally neglected and ignored it. The French constitutional judge has been more inclined over the years to use the ECHR, as interpreted by the ECtHR, as an aid to the interpretation of rights and liberties protected at domestic level. In recent years, it has come to refer to the ECHR itself and, recently, to its case law within the legal bases (*visas*) of its decision<sup>13</sup>. This is typical of a growing awareness of the constitutional judge towards European norms. These constitutional arrangements and judicial developments produce a particularity that the reception of the ECHR has put to the fore. A law can be judged to be in conformity with the Constitution by the Constitutional Council but later be found in its application before the ordinary civil or administrative judge to be in violation of the ECHR<sup>14</sup>. The review of 'conventionality' by the high courts is arguably said to operate as 'a functional substitute for rights protection under the Constitution'<sup>15</sup>.

In Ireland, Irish judges tend to *subsume* Convention rights and arguments under domestic constitutional remedies themselves, even when constitutional and conventional guarantees are not entirely congruent<sup>16</sup> - in other words they stretch interpretation of incorporated Convention rights to make them correspond to constitutional rights. This might explain why only one section 5 declaration of incompatibility has been granted by Irish courts so far. However, the assimilation of 'conventionality' review into domestic traditional constitutional review must remedy some of the structural deficiencies of the ECHR Act moving from a

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<sup>13</sup> See *Conseil constitutionnel* Decision 2004-505 DC of 19 November 2004 (*Traité établissant une Constitution pour l'Europe*) in which the *Conseil* mentions explicitly a decision of the ECtHR in its *visas*: 'Having regard to decision n° 4774/98 of the ECtHR (*Leyla Sahin v. Turkey*) dated 29 June 2004' (see also below).

<sup>14</sup> See e.g. ECtHR (Grand Chamber), *Zielinski and Pradal and Gonzales and Others v. France*, 28 October 1999, Reports 1999-VII, 95.

<sup>15</sup> E. Lambert Abdelgawad & A. Weber (2008) at 116.

<sup>16</sup> See e.g. Hardiman J. in *J.F. v. DPP* [2005] 2 IR 174, *T.H. v. DPP & His Honour Judge Peter Smithwick* [2004] IEHC 76; see e.g. *Gashi & Others v. Minister for Justice, Equality and Law Reform & Others* [2004] IEHC 394, and *Margine v. Minister for Justice, Equality and Law Reform & Others* [2004] IEHC 127.

declaration of incompatibility to a declaration of *invalidity* – thus extending the benefit of constitutional remedies to Convention rights as in other Contracting States.

### **Conclusion**

Comparing the two systems leads to paradoxical observations. Early membership of the Council of Europe and commitment to the ECHR could have arguably augured a positive attitude towards the Convention system. Yet, France and Ireland have both displayed enduring reluctance in their full acceptance of the Strasbourg system often reasserting the validity of their own model of human rights protection. Whereas the distrust of France vis-à-vis the ECHR postponed ratification of the Convention for more than twenty years, a strong indifference delayed the incorporation of the Convention for more than fifty years in Ireland. As for the implementation of the Convention post-ratification in France and post-incorporation in Ireland, one could have assumed that Ireland, as a dualist country, would have had an advantage in incorporating through legislation, compared with France with the monist technique of enabling immediate validity and reception through adjudication. Indeed, in addition to the benefits of enhanced political legitimacy, statutory incorporation can resolve the difficult issues of validity, applicability, and rank of the incorporated norms, rather than leaving such problems to judges to deal with on an *ad hoc* but continuous basis<sup>17</sup>. However, the model of incorporation chosen by Ireland – and much inspired by the British Human Rights Act 1998 – has been somewhat limited in scope and use.

However, the use of the ECHR, as interpreted by the ECtHR, as part of the national judicial landscape is becoming more commonplace, albeit at different degrees and from different times. It is also important to stress that in both countries awareness of lawyers and jurists has increased as well thereby contributing to increasing the profile of the ECHR.

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<sup>17</sup> S. Besson (2008) 'The Reception Process in Ireland and the United Kingdom' in A. Stone Sweet & H. Keller *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford: OUP) at 97.