Through the looking glass? Irish and UK approaches to Strasbourg jurisprudence

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THROUGH THE LOOKING GLASS? IRISH AND UK APPROACHES TO STRASBOURG JURISPRUDENCE

INTRODUCTION

Ireland was in some respects a pioneer with regard to the Council of Europe. It was one of the first signatories to the European Convention on Human Rights (ECHR; the Convention), the first state to recognise the jurisdiction of the European Court of Human Rights (ECtHR; the Strasbourg Court),[1] and the first state to be involved in a complaint before the ECtHR.[2] Yet it subsequently took Ireland some four decades to incorporate the ECHR into domestic law.[3] In 2003, the European Convention on Human Rights Act 2003 (ECHR Act; 2003 Act) was enacted in order for 'further effect to be given, subject to the Constitution, to certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms.'[4] Motivated by a provision in the Good Friday Agreement requiring Ireland to provide an equivalent level of human rights protection as Northern Ireland, the ECHRA 2003 was undoubtedly inspired by the United Kingdom's Human Rights Act 1998 (HRA 1998; 1998 Act).[5]

Yet fundamental differences between the respective states' constitutional structures raise legitimate questions about the appropriateness of such a legal transplant into the Irish legal system. While the UK's HRA 1998 was carefully crafted to avoid judicial encroachment upon parliamentary sovereignty, such concerns are absent in a legal constitutionalist jurisdiction such as Ireland where the judiciary and legislature are comfortable with the power of courts to strike down legislation as unconstitutional. Equally, concerns regarding the relationship between entrenched constitutional rights and international human rights obligations, such as those found in Ireland, are not replicated in a UK-style political constitution.

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[1] Fiona de Londras and Cliona Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall, 2010) 3-4.
[2] *Lawless v Ireland,* Judgment of 1 July 1961, 3 ECHR (ser. A, 1961).
[3] Suzanne Egan, "The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation'' (2003) 31(1) *Dublin University Law Journal*. 230, 231.
[4] ECHRA 2003 long title. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[5] De Londras and Kelly (n. 1) 8.

This article examines the obligation, similar in nature, on Irish and UK courts under their respective legislative regimes to 'take into account' the jurisprudence of the ECtHR when interpreting domestic law so as to be compatible with the Convention. Irish courts were keen to follow the UK courts' pronouncements that domestic courts should do 'no more but certainly no less' than what the ECtHR has decided. However, UK courts have more recently supported a shift away from this rigid approach to a more flexible attitude towards Strasbourg jurisprudence and, additionally, given more recognition to common law rights. The argument advanced by the author is that Ireland should follow suit and adopt a form of judicial interpretation of rights that creates a more synergistic relationship between its Constitution (Bunreacht Na hÉireann) and the ECHR; an approach that would maintain the Convention as a floor, not a ceiling of rights protection, in both Ireland and the UK.

The article commences by focusing on the UK's approach to section 2 of the HRA 1998 and discusses the evolution of the 'Mirror Principle': that UK courts should do 'no more but certainly no less' than what Strasbourg has decided.[6] Recent cases have, however, suggested the adoption of a more flexible interpretation of this Mirror Principle, an approach that is more in keeping with how the operation of the HRA was envisaged during its enactment.[7] Part II compares and contrasts Ireland's approach to section 4 of the ECHRA – the Irish equivalent of section 2 of the HRA 1998 – with that of the UK's. Following this comparison it is noted that Ireland, in effect, mirrors the Mirror Principle.[8] This 'copying and pasting' of the Mirror Principle is then appraised in terms of questioning the appropriateness of transplanting a principle that was, in essence, a British solution to a British problem into Ireland's legal constitutional structure. This evaluation is also directed at the UK and Irish courts and their viewing of the Convention as a foreign encroachment upon the domestic constitutional structure. The UK's break away from the Mirror Principle, while a possibly worrying development from a human rights perspective,

[6] On the use of the term 'the Mirror Principle' see Jonathan Lewis, ''The European Ceiling on Human Rights'' [2007] *Public Law* 720, 720-721.
[7] Text to n. 33 below.
[8] See *Mc D v L* [2007] IESC 81.

has the potential to pave the way for a more synergistic relationship between the common law and the Convention. It is here, however, that the comparison between Ireland and the UK breaks down given that the capacity of the ECHR Act 2003 to function as a tool for constitutional interpretation is limited. Nevertheless, Irish courts still have the capacity to create a more synergistic relationship between the Convention and the Constitution without the necessity to invoke the ECHR Act 2003.

PART I

THE UK APPROACH: THE MIRROR PRINCIPLE

The HRA 1998 is, both practically and symbolically, a hugely significant advancement in respect of judicial rights protection in the UK.[9] The UK's political constitutional structure is sceptical of the judicial protection of rights, particularly where such protection amounts to a challenge to the fundamental constitutional principle of parliamentary sovereignty.[10] Rights, according to political constitutional theory tend to be invoked in the very areas where there is considerable public disagreement as to the correct course of action the state ought to take.[11] Instead, political constitutionalism conceptualises politics, both normatively and practically, as the best sphere within which to resolve these competing claims.[12] The HRA 1998, therefore, while not a bill of rights in the legal constitutional sense of giving courts the power to strike down legislation, nevertheless provides courts with significant capacity to vindicate the rights of individuals against the power of the state.[13] The

[9] Jack Straw and Paul Boateng, ''Bringing Rights Home: Labour's Plans to Incorporate the ECHR into UK Law: A Consultation Paper'' (1997); *Rights Brought Home: The Human Rights Bill*, Cm, 3782 (October 1997).

[10] Thus Mark Elliott argues that any theory of judicial review in the UK must reconcile judicial protection of the rule of law with parliamentary sovereignty. See Mark Elliott, *Constitutional Foundations of Judicial Review* (Hart Publishing, 2001) Ch. 4.

[11] See JAG Griffith ''The Political Constitution'' (1979) 42(1) *Modern Law Review* 1.

[12] See e.g. Jeremy Waldron, *Law and Disagreement* (OUP, 1999); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007); Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005).

[13] See generally Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 1-5. Francesca Klug argues that the HRA 1998 satisfies Philip Alston's three characteristics of a Bill of Rights: that they provide protection to those human rights which are considered, at a given moment in history, to be of particular importance; they are binding on

HRA strikes a balance between competing conceptions of rights by constructing a framework for 'dialogue' between the legislature and the judiciary with the final say resting with the legislature and, as a consequence, preserving the principle of parliamentary sovereignty.[14] UK courts have an obligation, where possible, to interpret statutes so as to be compatible with Convention rights and, where this is not possible, they have the discretion to issue a declaration of incompatibility.[15] This declaration does not, however, invalidate the statutory provision in question. Furthermore, the HRA 1998 also requires public authorities to act in a manner that is compatible with Convention rights and, where they fail to do so, such actions will be unlawful.[16]

When assessing what the Convention entails, section 2(1) of the HRA 1998 delineates the relation between Strasbourg judgments and a domestic court's duty to follow them:

> A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
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> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
>
> (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
>
> (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

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governments and can only be overridden with sufficient difficulty; and that they provide some form of redress in the event that violations occur. See Francesca Klug, 'A Bill of Rights: Do we need one or do we already have one? [2007] *Public Law* 701, 705.

[14] Roger Masterman, ''Interpretations, declarations and dialogue: rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities'' [2009] *Public Law* 112, 114-115.

[15]The interpretative obligation is delineated in HRA 1998, s. 3. Declarations of incompatibility are made under HRA 1998, s. 4. The HRA 1998 makes a distinction between primary and subordinate legislation. Primary legislation is that legislation passed by Parliament in Westminster. Subordinate legislation includes, amongst others, statutory instruments enacted by the Scottish Parliament, and the assemblies in Wales and Northern Ireland; see HRA 1998, s. 21. Unlike primary legislation, subordinate legislation can be invalidated by courts under the HRA 1998; see HRA 1998, s. 6.

[16] Courts are also included in this definition of public authority; HRA 1998, s. 6(3)(a). This duty of courts to act in a manner compatible with Convention rights has led to the Convention having 'indirect horizontal effect' in disputes between private individuals. See Gavin Phillipson and Alex Williams, ''Horizontal Effect and the Constitutional Constraint'' (2011) 74(6) *Modern Law Review* 878.

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.[17]

The key phrase in section 2 is that a court 'must take into account' relevant Strasbourg jurisprudence. The issue raised by this requirement is the extent to which UK courts are actually obliged to follow Strasbourg's previous judgments. The UK's dominant approach regarding the correct interpretation of section 2 of the HRA 1998 was set out by Lord Bingham in *Ullah v Special Adjudicator*[18] in which it was held that the duty of domestic courts is to ''keep pace with Strasbourg jurisprudence as it evolves over time: no more but certainly no less''.[19] The latter element of what has been termed the Mirror Principle[20] – 'certainly no less' – is relatively uncontroversial from a human rights perspective. Although judgments are only binding on the parties in question in a particular case,[21] as Lord Bingham notes, the Convention is a piece of international law which is 'authoritatively expounded upon only by the Strasbourg court.'[22] Strasbourg judgments should, therefore, be followed unless there are good reasons to the contrary. For example, a Strasbourg ruling may carry less weight if it deals with a subject matter under which contracting parties are normally afforded a wide margin of appreciation[23] or if the Strasbourg case law is dated.[24]

What is not on its face clear, however, arising from this apparent supremacy of Strasbourg jurisprudence, is that aspect of Lord Bingham's judgment which states that domestic courts should do 'no more' than what Strasbourg has done to date i.e. they should not advance Convention principles further than Strasbourg has already

[17] HRA 1998, s. 2(1).
[18] [2004] 2 A.C. 323.
[19] Note 18, 350.
[20] Jonathan Lewis ''The European Ceiling on Human Rights' [2007] *Public Law* 720.
[21] Article 46 ECHR.
[22] *Ullah* (n. 18) 350.
[23] *Re P* [2008] UKHL 38.
[24] *R (Quila and another) v SSHD* [2011] UKSC 45.

done. The main basis for supporting this view appears to rest on the need to ensure a harmonious interpretation and implementation of the Convention across contracting states:

> "It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it."[25]

This point is emphasised by Lord Hope in *R (Clift) v Secretary of State for the Home Department*:

> "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time. A measure of self-restraint is needed, lest we stretch our jurisprudence beyond that which is shared by all the States Parties to the Convention."[26]

Aileen Kavanagh further elaborates:

> "If a national court were to depart from a clear and constant line of Strasbourg jurisprudence, not on the grounds of distinguishing it in light of its application in the domestic context, but rather because the national court wished to give a more generous interpretation of Convention rights, then this would weaken and dilute the authority of the Strasbourg court and undermine the duty of judicial comity which exists between the domestic and Strasbourg Courts."[27]

This criticism does not, however, pertain to areas of Convention jurisprudence where there is not a clear and constant line of Strasbourg jurisprudence; areas where the evolutive nature of the Convention indicate that further development of the case law is possible or probable.[28] The very notion of a margin of appreciation is reflective of the fact that protection afforded to human rights in a given member state may be different to that in another.[29] It follows that these differences could also amount to a

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[25] *Ullah* (n. 18) 350.
[26] [2007] 1 A.C. 484, [49].
[27] Kavanagh (n. 13) 157.
[28] See text from n. 36 to n. 39 below.
[29] *Handyside v UK* (1976) 1 EHRR 737, [57]. With regard to the margin of appreciation and appropriate role of the ECtHR as an international court when ruling upon rights obligations in a state, Letsas

higher degree of human rights protection in a state. This being the case Kavanagh contends that Lord Bingham's comments regarding the homogeneity of the Convention across member states is often misunderstood as meaning that there cannot be domestic differences between the manner in which the Convention is accommodated in respective states.[30] Instead, Kavanagh argues that this is fundamentally different from stating that it is within the power of British domestic courts to determine the content of Convention rights which would undermine the interpretive superiority of the Strasbourg Court. Kavanagh notes that this 'no more' limitation of Lord Bingham's statement in *Ullah* subsequently became as important as the 'certainly no less' aspect with Lord Brown in *R (Al-Skeini) v Secretary of State for Defence* suggesting that one could invert Lord Bingham's caveat to read 'no less but certainly no more'.[31]

Regarding the argument that the Convention is a floor and not a ceiling for human rights protection in a state and that courts should be free to go beyond the contemporary limits set by Strasbourg, Lord Bingham, by stating that this should not be done by courts through interpretation of the Convention, appears to suggest that such is, instead, the job of Parliament. Kavanagh also contends that the argument that the Convention is a floor not a ceiling confuses the different roles of the organs of government in giving effect to Convention rights. Rather, such an argument should be viewed as directed towards the legislature. While Parliament should not legislate below the protections afforded by the Convention it is of course free to go beyond them. On this point, it is again important to note that the UK has a political constitution where parliamentary supremacy is the fundamental principle of constitutional law. Whether this interpretation of the 'floor not a ceiling argument' is applicable to a legal constitutional system which may not be so reticent when it comes to judicial innovation will be discussed below in the context of Ireland.[32]

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terms this the 'structural concept' of the margin of appreciation. See George Letsas, ''Two Concepts of the Margin of Appreciation'' (2006) 26(4) *Oxford Journal of Legal Studies* 705, 721-724.

[30] Kavanagh (n. 13) 158.

[31] Note 13, 154.

[32] Note 13; *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 [106] (Lord Brown).

The Mirror Principle, in particular Lord Brown's formulation of 'no less but certainly no more,' presents a highly constrained approach to Strasbourg jurisprudence. While this is laudable from a human rights perspective in preserving the Convention as a floor – preventing rights protection in the UK from dropping below what Strasbourg stipulates - the approach is, nonetheless, disappointing in that it appears to prevent UK courts from giving Strasbourg the lead. In other words, the approach adopted also treats Strasbourg jurisprudence as a ceiling for human rights in the UK. In this regard, the Mirror Principle appears to be at variance with how the working of the HRA 1998 was envisaged when debated in Parliament. Lord Irvine, for example, remarked that UK courts should be free to give the lead to Europe as well as being led.[33]

The approach under discussion is also problematic from a more legal-methodological perspective. Roger Masterman contends that the Mirror Principle is ill-equipped to deal with Strasbourg jurisprudence which is not designed to be followed in a rigid, black-letter precedent style that is the epitome of the common law.[34] The classic common law understanding of judgments handed down by higher courts as binding upon lower courts is inapposite for Strasbourg jurisprudence. Strasbourg judgments often involve the elucidation of broad principles as distinct from focused *ratio decidendi*. It follows that attempting to extrapolate *ratio decedend*i from Strasbourg cases presents difficulties. While such broad principles are indicative of bills of rights everywhere, the margin of appreciation afforded to contracting parties to the ECHR has the effect of limiting its jurisprudence and judgments solely to the party involved.[35]

Through the Looking Glass: A Shift in Direction?

[33] HL Debs 18 November 1997, vol. 583, col. 515; Roger Masterman, ''Aspiration or Foundation? The Status of the Strasbourg jurisprudence and the 'Convention rights' in domestic law'' in Helen Fenwick, Roger Masterman and Gavin Phillipson (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007) 57, 66.
[34]Note 34, 64.
[35] Note 34.

In *Re P* the House of Lords found that article 14 of the Adoption (Northern Ireland) Order 1987, prohibiting an unmarried heterosexual couple from adopting the child of the female partner, violated the right to respect for family life under Article 8 and the right to non-discrimination under Article 14 ECHR.[36] Although the ECtHR had not actually ruled that discriminating on marital status in adoption affairs was a violation of the Convention, the House of Lords relied upon Strasbourg jurisprudence pertaining to adoption by same sex couples to extrapolate that the ECtHR would probably find a violation of the Convention in this instance.[37] *Re P* is, thus, an example of the House of Lords going further than Strasbourg had at that time. At first glance, this appears to be a departure from the 'Mirror Principle's stipulation that UK courts should do 'no more' than what Strasbourg requires. Kavanagh, however, has attempted to reconcile this with the Mirror Principle by arguing that the dictum in *Ullah* was not enunciated in a case which lay within the national margin of appreciation.[38] Where a case is within the margin of appreciation, courts are merely doing what the margin of appreciation requires if they go beyond Strasbourg. In light of *Re P* Kavanagh presents a much more flexible concept of the UK's approach to Strasbourg jurisprudence.[39]

The upper echelons of the UK bench have also signalled additional circumstances where Strasbourg jurisprudence may not be followed. In *Alconbury*, the UK Supreme Court suggested that where a judgment of the ECtHR is plainly wrong, UK courts should decline to follow it; for example, if following a judgment of the ECtHR would result in a conclusion 'fundamentally at odds with the distribution of powers under the British Constitution'.[40] Similarly, in *R v Lyons* Lord Hoffmann suggested that if the ECtHR had misunderstood or been misinformed about certain aspects of English

[36] [2008] UKHL 38.
[37] Aileen Kavanagh, ''Strasbourg, the House of Lords or Elected Politicians: Who decides about rights after *Re P*?'' (2009) 72(5) *Modern Law Review* 828, 829.
[38] Note 38, 833.
[39] Note 38, 834.
[40] *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23, [76] (Lord Hoffmann).

law, the House of Lords could issue a judgment that would invite 'the European Court to reconsider the question…[as] there is room for dialogue on such matters'.[41]

Such a scenario subsequently arose in *R v Horncastle*.[42] There, the UK Supreme Court refused to follow what was arguably a clear and unambiguous line of Strasbourg jurisprudence. In *Horncastle*, the applicants argued that hearsay evidence adduced during their trial should have been excluded and that their resulting conviction amounted to a breach of the right to a fair trial under Article 6. The applicants argued that section 3 of the HRA should have been utilised to 'read down' the relevant provisions of the Criminal Justice Act 2003 and exclude the evidence in question. By way of strengthening their argument, the applicants pointed to a clear line of Strasbourg jurisprudence, in particular the recent case of *Al-Khawaja and Tahery v United Kingdom* in which the ECtHR appeared to declare that a hearsay statement which amounted to the sole or decisive evidence against a defendant would breach Article 6.[43] The Supreme Court, however, unanimously refused to follow this line of jurisprudence on the grounds that the ECtHR failed to accommodate the nuances of the British domestic criminal trial proceedings:

> "The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court. This is such a case."[44]

The Court continued:

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[41] *R v Lyons (No.3)* [2003] 1 A.C. 976 [46].
[42] [2009] UKSC 14.
[43] (2009) 49 EHRR 1; Liz, Heffernan, "Hearsay in Criminal Trials: The Strasbourg Perspective" (2013) 49 *Irish Jurist* 132; Lord Kerr, "The Conversation between Strasbourg and National Courts – Dialogue or Dictation" (2009) 44 *Irish Jurist* 1, 9-11;
[44] Note 43, [11].

> "In these circumstances I have decided that it would not be right for this court to hold that the sole or decisive test should have been applied rather than the provisions of the 2003 Act, interpreted in accordance with their natural meaning. I believe that those provisions strike the right balance between the imperative that a trial must be fair and the interests of victims in particular and society in general that a criminal should not be immune from conviction where a witness, who has given critical evidence in a statement that can be shown to be reliable, dies or cannot be called to give evidence for some other reason. In so concluding I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg Court may also take account of the reasons that have led me not to apply the sole or decisive test in this case."[45]

It is clear from these observations that the emphasis on dialogue between the domestic courts and Strasbourg seeks to preserve the comity between the two courts. UK courts when departing from Strasbourg jurisprudence will seek to engage in a conversation with their Strasbourg counterparts rather than to defy them outright What emerges from these cases is that UK courts are now taking a much more flexible approach to Strasbourg jurisprudence than that suggested by the initial formulation of the Mirror Principle enunciated in *Ullah*.

The Rise of the Common Law

More recently, a further shift in the UK approach to the HRA 1998 is evident in the Supreme Court's emphasis on grounding the protection of rights in the common law. In *Osborn v Parole Board* three prisoners challenged by way of judicial review the decisions of the Parole Board which were reached after refusing the applicants an oral hearing. [46] While the applicants were ultimately successful, Lord Reed held that they had erred in law by basing their claim primarily upon Article 5(4) of the Convention and not upon the UK's rich tapestry of administrative law pertaining to fair procedures. Such an approach did not accurately reflect the relationship between Convention rights and domestic law:

[45] Note 43, [108].
[46] [2013] UKSC 61.

> "The values underlying both the Convention and our own constitution require that Convention right should be protected primarily by a detailed body of domestic law. The Convention taken by itself is too inspecific to provide the guidance which is necessary in a state governed by the rule of law… The Convention cannot therefore be treated as if it were Moses and the prophets. On the contrary, the European court has often referred to "the fundamentally subsidiary role of the Convention"".[47]

The Court continued:

> "The importance of the [Human Rights] Act is unquestionable. It does not however supersede the protection of human rights under the common law or statute, or create a discrete body of law based upon the judgments of the European Court. Human rights continue to be protected by our domestic law, interpreted and developed in accordance with the act when appropriate."[48]

Similar sentiments were echoed by the UK Supreme court in *A v BBC*.[49] There, the BBC sought to challenge an order made by the Court of Upper Session to allow the applicant to amend his application for judicial review by substituting his name with letters of the alphabet. *A* had been convicted of sexual offences against his step-daughter and was challenging his deportation on the grounds that there was a real risk to his life or that he would be subjected to torture or inhuman and degrading treatment in the event that he was deported and that this information was disclosed. The order made to withhold *A*'s name and replace it with letters was, so the BBC contended, made under a common law power. The BBC argued that any common law power which might previously have been exercised in such circumstances were superseded by Convention rights, specifically in this instance the right to freedom of expression contained in Article 10. In examining the relationship between the Convention and the common law, Lord Reed expressly rejected this, noting that the common law principle of open justice remains in vigour even when Convention rights are also applicable. Lord Reed again affirmed *Osborn* and the importance of the continued development of the common law.

[47] Note 46 [56].
[48] Note 46 [57].
[49] [2014] 2 W.L.R. 1243.

Again, in *Kennedy v Information Commissioner*,[50] Lord Mance pronounced upon the relationship between the Convention and the common law specifically regarding the protection of free speech and Article 10 of the Convention:

> "In some areas, the common law may go further than the Convention, and in some contexts it may also be inspired by the Convention rights and jurisprudence (the protection of privacy being a notable example). And in time, of course, a synthesis may emerge. But the natural starting point in any dispute is to start with domestic law, and it is certainly not to focus exclusively on Convention rights, without surveying the wider common law scene."[51]

Lord Justice Laws in the Court of Appeal took further exception to the Mirror Principle in *R (on the application of the Children's Rights Alliance for England) v Secretary of State for Justice* expressing the wish that:

> "…It is with great deference to the House of Lords and the Supreme Court, that I hope the *Ullah* principle may be revisited. There is a great deal to be gained from the development of a municipal jurisprudence of the Convention rights, which the Strasbourg court should respect out of its own doctrine of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases. It is a high priority that the law of human rights should be, and be seen to be, as sure a part of our domestic law as the law of negligence. If the road to such a goal is clear, so much the better."[52]

These recent judicial pronouncements appear to reassert the role of the common law as a source of rights. In this regard, it may be possible that UK courts will begin to expand upon these common law rights faster than Strasbourg expands its equivalent jurisprudence. Such an approach has the potential to reflect Ronald Dworkin's initial conception of how a UK bill of rights might work before the HRA 1998 was enacted:

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[50] Note 49, 808.
[51] Note 49, 835 [46].
[52] [2013] EWCA Civ 34.

> "British judges could certainly adopt… a more generous interpretation, using the rich and special traditions of the British Common Law to develop out of the Convention a particularly British view of the fundamental rights of citizens in a democratic society."[53]

Dworkin, it may be said, envisaged a synergistic relationship between the common law and the Convention, where each could feed into the other producing a distinctly British dimension to the protection of human rights. The above cases, however, cannot be read as giving effect to Dworkin's vision. Instead, these cases appear to view the common law and the ECHR as separate streams of rights protection with the common law to be preferred to the Human Rights Act when this is possible. That conceded, the Supreme Court in *A v BBC* did expressly state that the development of the common law can also be influenced by the ECHR.[54]

A synthesis between the common law and the Convention could as a consequence be facilitated by abandoning the overly constraining Mirror Principle. This would allow UK courts to correctly conceptualise Strasbourg jurisprudence as a floor, not a ceiling, for rights protection. It would free courts from rigidly following the pronouncements of Strasbourg so as to give UK human rights jurisprudence not only a distinctly British flavour but, in addition, the capacity to develop and advance it beyond what Strasbourg has currently grappled with to date. This approach would be more in keeping with how the Convention ideally operates. It views human rights law not as a foreign imposition but as an integral part of a domestic legal system, reflecting pre-existing legal principles and helping with their development.

Challenging the floor?

This recent judicial trend in emphasising the common law as distinct from the Convention cannot be looked at without contextualising it within the political debates taking place in the UK concerning its relationship with Strasbourg. Euro-

[53] Ronald Dworkin, *A Bill of Rights for Britain* (Chatto and Windus, 1990) 22; Masterman (n. 33) 58.
[54] *A v BBC* (n. 49) 1257 [40].

scepticism in the UK is not just reserved for the European Union (EU) and its institutions, but also for the ECHR, which often arises as a result of confusion in treating both the EU and the Council of Europe as one and the same.[55] Campaigning for repeal of the HRA or withdrawal from the ECHR[56] is heightened when the ECtHR issues judgments that are seen to be particularly counter-majoritarian.[57] The election of a Conservative majority in 2015 has placed the future of the HRA in doubt given pre-election promises to scrap the HRA and to replace it with a British Bill of Rights.[58] Emphasising the role of the common law in protecting civil liberties can, then, be seen as the UK courts drawing its battle lines in the event of a repeal of the HRA. So, even if such repeal or withdrawal were to happen, the UK courts will still have recourse to a domestic body of rights protection emanating from the common law.[59]

Extra-judicial comments made by various judges suggest that Euro-scepticism may also be exerting an influence on judicial thinking. In November 2013, shortly after *Osborn* was decided, Lord Sumption expressed dissatisfaction with the ever-

[55] See e.g. Macer Hall, ''MPs' defiance on prison votes "a turning point in our history''' *The Express* (11 February 2011) where the headline story of the newspaper in question that day conflated the ECtHR with the paper's 'crusade to get Britain out of the EU.'

[56] In October 2014, the Conservative Party published its plans for repeal of the HRA 1998 and its replacement with a UK style 'bill of rights' and an express statement that the UK can disregard judgments of the ECtHR:<http://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf> accessed 7 October 2014.

[57] ECtHR judgments on such counter-majoritarian issues may be seen in *Hirst v UK No.2* [2005] ECHR 681 where the ECtHR found that an absolute ban on prisoner voting violated Article 3 of Protocol 1 of the ECHR pertaining to the right to free elections; and *Vinter and others v United Kingdom* App Nos 66069/09, 130/10 and 3896/10, Grand Chamber Judgment of 9 July 2013, where whole life orders committing an individual to prison for life without the possibility of parole violated Article 3 and the absolute prohibition of torture and inhuman and degrading treatment. For an analysis of *Vinter* see Natasa Mavronicola, ''Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution'' (2014) 77(2) *Modern Law Review* 292.

[58] A pledge to introduce a new bill of rights was included in the Queen's Speech made to Parliament on 27 May 2015. See 'Queen's Speech 2015' (27 May 2015) available at: < https://www.gov.uk/government/speeches/queens-speech-2015> accessed 8 September 2015. For a summary of the implications and legal impediments of a repeal of the HRA see Kanstantsin Dzehtsiarou, Tobias Locke, Paul Johnson, Fiona de Londras, Alan Greene and Ed Bates, ''The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights'' (May 12, 2015). Available at SSRN: <http://ssrn.com/abstract=2605487> accessed 1 September 2015.

[59] Roger Masterman and Se-Shauna Wheatle, 'A common law resurgence of rights protection?' [2015] EHRLR 57, 61.

encroaching role of the ECtHR and indeed domestic courts in questions of public policy. In particular, Lord Sumption stressed that:

> "The treatment of the Convention by the European Court of Human Rights as a "living instrument" allows it to make new law in respects which are not foreshadowed by the language of the Convention and which Parliament would not necessarily have anticipated when it passed the Act."[60]

Lord Sumption's arguments are by no means new but are, instead, re-assertions of classic political constitutionalist conceptions of rights as inherently political issues which society disagrees over.[61] In light of Lord Sumption's comments, and the wider political debate over the future of the HRA 1998 and the UK's relation with Strasbourg, to claim that the departure from the Mirror Principle can only be a good thing from a human rights perspective would constitute a rather rose-tinted view of the current debate in the UK.

PART II

THE IRISH APPROACH: MIRRORING THE MIRROR PRINCIPLE

The Irish equivalent of section 2 of the HRA 1998 is section 4 of the ECHRA 2003:

> Judicial notice shall be taken of the Convention provisions and of—
>
> (a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,
>
> (b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,
>
> (c) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,

[60] Lord Sumption ''The Limits of Law'' (27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) < https://www.supremecourt.uk/docs/speech-131120.pdf> accessed, 15 September 2014, 11.
[61] Griffith (n. 11).

> and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

De Londras and Kelly note that the section does not elaborate on whether or not there is a distinction between 'judicial notice' and 'due account' although they suggest that prima facie the latter both incorporates the former and imposes a further, somewhat higher, burden on courts than does judicial notice.[62]

The principal case regarding section 4 of the ECHRA 2003 and the duty to take 'due account' of Strasbourg jurisprudence is *Mc D v L*.[63] That case involved the interpretation of Article 8 of the ECHR and the right to respect for private and family live. PL and BM were a lesbian couple in a committed relationship and PL had conceived through the use of a sperm donor – Mc D, a family friend and gay man. Mc D agreed that he would play the role of a favourite uncle in the child's life but he would not be a father. However, when PL and BM made plans to move to Australia with their child, Mc D then sought to be appointed a guardian of the child with a right of access. PL and BM argued that this would infringe upon their rights as an autonomous family unit. As the two women and their child did not fit the constitutional definition of a family, they sought to rely on Article 8 of the Convention, arguing that they ought to have rights equivalent to that of a family. Hedigan J. in the High Court then proceeded to consider whether PL and BM together with the child constituted 'a family' or, as he put it, a 'de facto family,' so as to benefit from the legal status and rights conferred on a family by Article 8 of the Convention.[64] The ECtHR had not, however, at the time expressly stated that same sex couples could come within the protection afforded to *de facto* families under Article 8 of the Convention. Hedigan J., however, identified a trend in the jurisprudence of the ECtHR which suggested that that the Court's jurisprudence was moving in this direction. The judge, relying on section 4 of the ECHRA 2003, took

[62] De Londras and Kelly (n. 1) 162.
[63] [2009] IESC 81.
[64] Note 62, [39]-[43] (Denham J.).

Strasbourg jurisprudence into account and advanced it beyond the protections that the ECtHR had itself stated it covered at that point in time.

The Supreme Court, however, overturned this determination on two grounds. Firstly, the interpretative duty under section 4 of the ECHRA 2003 necessarily requires a law to interpret. Hedigan J. did not state what law he was interpreting. Rather, he was attempting to fill a lacuna in Irish law by referring directly to Strasbourg jurisprudence. Consequently, Hedigan J. could not invoke section 4 of the ECHRA 2003 as there was no rule of law or legislation to interpret. Instead, what this amounted to was a direct application of the Convention in a manner that was constitutionally prohibited.[65] More relevant to the topic of this article is the second ground on which the Supreme Court overturned the decision of the High Court i.e. the correct approach that is to be taken to section 4 of the ECHRA 2003. In this regard Fennelly J. expressly endorsed the approach taken by Lord Bingham in *Ullah*:

> "…It is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national Courts, since the meaning of the Convention should be uniform throughout the States party to it. The duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".[66]

De Londras and Kelly note that Fennelly J.'s judgment places particular emphasis on the dualist approach Ireland takes to international law.[67]It should be noted that Denham J.'s judgment in the case also stresses Ireland's dualist structure, where she quotes from Maguire C.J.'s judgment in *Re Ó Laighléis* and notes the fact that at the time that case was decided, the Convention, at the choice of the Oireachtas, had not been transposed into domestic law.[68] Thus, when the ECHR Act 2003 was passed, the Act did not give direct effect to the Convention but only permitted courts to:

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[65] *Mc D v L* (n. 63) [87] – [88] (Fennelly J.);.de Londras and Kelly (n. 1) 163.
[66] *Mc D v L* (n. 63) [100] (Fennelly J.).
[67] De Londras and Kelly (n. 1) 180.
[68] [1960] 1 I.R. 93; *Mc D v L* (n 63) [66] (Denham J.).

> "…apply the provisions of the Convention, in the interpretation and application of any statutory provision or rule of law, insofar as it is possible to do so in accordance with the established canons of construction and interpretation."[69]

What Hedigan J. had attempted to do instead was to apply the Convention directly. This was something, according to the Supreme Court, which the Oireachtas had taken the positive step not to permit.

Mc D v L thus 'copies and pastes' the Mirror Principle as enunciated by Lord Bingham into Irish law. However, it does so in a case that, due to the rights involved, ought to lie within Ireland's margin of appreciation.[70] The nuances in Lord Bingham's dicta, clarified by the House of Lords in *Re P* – that UK Courts can go beyond Strasbourg if the issue lies within its margin of appreciation – appear to have been lost on the Irish Supreme Court.[71] Indeed, the similarities with which Hedigan J. constructed his judgment based on Strasbourg jurisprudence, and the manner in which the House of Lords delivered its judgment in *Re P* are striking. A key difference is that *Re P,* involved a norm of positive law whereas, as stated previously, in *Mc D v L,* Hedigan J. was trying to fill a lacuna in Irish law.[72]

The Dangers of outpacing Strasbourg

Ullah was decided in 2004, four years after the entry into force of the HRA 1998. Prior to this, courts and judges were unused to engaging in robust substantive review of the exercise of public functions and, in particular, the notion of striking down legislation as incompatible with a higher system of norms was one that UK courts were unfamiliar with.[73] It is unsurprising that in these circumstances the UK

[69] *Mc D v L* (n. 63) [70], quoting with approval McKechnie J. in *T v O* [2007] IEHC 326 (Denham J.).
[70] However, see text to n. 80 below where it is noted that de Londras and Kelly suggest that the margin of appreciation may actually have played a role in *Mc D v L* in maintaining the status quo of Irish law with respect to 'de facto families'.
[71] It should be noted that as *Re P* was decided after *Mc D v L* the latter cannot be interpreted as an express rejection of the approach taken by the House of Lords in *Re P*.
[72] Text to n. 65.
[73] The closest that UK courts have gotten to this is in relation to where there is an irreconcilable conflict between UK domestic law and EU law. In such instances, courts may disapply acts where they conflict with EU law. See *R v Secretary of State for Transport, ex parte Factortame (No.2)* [1991] 1 A.C. 603.

courts took a precautionary approach to judicial innovation in the early years of the HRA 1998. Applying Strasbourg jurisprudence in a precedent-like manner, as if it were a higher court in a common law structure, as distinct from advancing a novel construction of Convention obligations is potentially symptomatic of this, rather than concerns about the dangers of outpacing Strasbourg. Indeed, once Lord Bingham, the key architect of the Mirror Principle, retired, cracks in this principle began to appear.

What dangers there actually are, however, in out-pacing Strasbourg are limited. No threat to the legitimacy of the Convention or the ECtHR arises when domestic courts or legislatures go beyond what the ECtHR has decided to date. As stated previously, Kavanagh does suggest that domestic courts going beyond where Strasbourg has gone to date may undermine the principle of judicial comity and challenge the legitimacy of the ECtHR. However, this danger can be assuaged if it is done so in a constructive manner through a process of judicial dialogue, rather than through judicial confrontation.[74] In turn, this advancement of Convention rights beyond what Strasbourg has done to date can also assist the ECtHR with the evolutive nature of the Convention through the building of consensus. Consensus acts as a means through which the ECtHR can interpret and advance the Convention in a legitimate manner that can mitigate what Kanstantsin Dzehtsiarou terms the 'surprise effect' of novel ECtHR judgments.[75]

Relatedly, the risk to the legitimacy of the ECtHR through domestic legislatures advancing human rights norms beyond those protected by the Convention is minimal. Kavanagh and Lord Bingham acknowledge as much when stating that it is for Parliament to go beyond the 'irreducible minimum' laid down by Strasbourg. [76] Thus, the issue of doing 'no more' than what Strasbourg has set out is not necessarily one of respecting Strasbourg but, rather, one that pertains to the appropriate

[74] Text to n. 40 above.

[75] See Kanstantsin Dzehtsiarou, ''European Consensus and the Evolutive Interpretation of the European Convention on Human Rights'' (2011) 12 (10*) German Law Journal* 1730; Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015) Ch. 6.

[76] Jack Beatson, Stephen Grosz, Tom Hickman, Rabinder Singh and Stephanie Palmer, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell, 2008) [2-08].

function of the UK judiciary in a political constitution. These concerns, therefore, ought not to arise in a legal constitutionalist system such as Ireland's. None of the Supreme Court judgments in *Mc D v L* address the political constitutional structure of the UK and how this may influence a precautionary approach on the part of UK courts when exercising their authority under the HRA. The Oireachtas can, of course, advance human rights principles beyond the minimum set by Strasbourg and there is no reason from a domestic constitutional perspective why Irish courts could not do so as well. Endorsement of the Mirror Principle in *Mc D v L* rests primarily upon the dualist nature of Ireland's approach to international law and judicial comity between Irish courts and Strasbourg. It is hard to see, however, how Irish courts, by adopting a more adventurous construction of Strasbourg jurisprudence, would somehow infringe upon Ireland's dualist approach to international law. As long as courts are using the ECHRA 2003 to interpret a legal provision rather than attempting to fill a lacuna in Irish law by referring to the Convention, the Convention is not being directly applied. This is so even if Irish courts interpret the Convention in a more generous manner than Strasbourg has to date.

Moreover, judicial comity between Irish courts and Strasbourg would not be undermined as the development of Convention principles by domestic courts beyond what Strasbourg has stated is potentially the desired role that the ECtHR would like national courts to take. The Court has consistently stressed its subsidiary role in protecting Convention rights. The Interlaken Declaration in 2010, for example, reiterated the subsidiary nature of the Court as a supervisory mechanism, emphasising instead that the implementation of the Convention at the domestic level be a priority and the importance of taking Strasbourg jurisprudence into account in areas where the Court's jurisprudence is developing and where the same problem of principle exists within their own legal system. [77] The Brighton Declaration in 2012 again repeated the call for domestic courts to take into account Strasbourg

[77] ''High Level Conference on the Future of the. European Court of Human Rights: Interlaken Declaration'' (19. February 2010) < http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf> accessed 20 September 2014.

jurisprudence and become the main implementation mechanism of the Convention, emphasising that appropriate incorporation of the Convention in domestic law would help reduce the substantial caseload of the ECtHR.[78]

These statements are not calling for the abdication of the Court's functions. Nor must they be seen solely as recognition of the fact that member states may disagree as to what certain rights may entail. Rather, they emphasise that the ECtHR does not have a monopoly on advancing Convention rights. In the case of *Mc D v L* no conflict would have arisen between the domestic court's interpretation of Article 8 and Strasbourg's as the domestic court's interpretation did not contradict or challenge anything Strasbourg had decided. Consequently, while Hedigan J.'s use of section 4 of the ECHRA 2003 was deemed to be incorrect in that there was no law for him to interpret, his approach to Strasbourg jurisprudence was in line with what the ECtHR and the other organs of the Council of Europe have repeatedly suggested is desirable. While the judge's interpretation did go beyond what Strasbourg had decided to date 'going beyond' is distinct from 'going against'. There is a fundamental difference between issuing a ruling that is clearly at variance with Strasbourg jurisprudence, and a ruling which reaches a destination earlier than that which Strasbourg was heading towards. If, for example, the Supreme Court ruled against McD and Mc D had brought his grievance to Strasbourg, he would essentially be required to argue that the Convention provided a lower level of protection than what the domestic court decided it did.[79] Strasbourg would be highly unlikely to make such a finding because of the margin of appreciation which attaches to the protection of privacy and family life, and also because of the evolutive nature of the Convention. De Londras and Kelly acknowledge that *Mc D v L* was a decision in an area of particular sensitivity in both Ireland and the UK and suggest that where the area of law is less contentious, the Irish courts may be

[78] Recent reforms in the Court's structure have also considerably helped to tackle this backlog, .e.g Protocol 14, permitting a single judge to rule on admissibility issues. See Kanstantsin Dzhetsiarou and Alan Greene, ''Restructuring the European Court of Human Rights: preserving the right of individual petition and promoting constitutionalism'' [2013] *Public Law* 710, 711.

[79] Furthermore, states cannot bring cases to Strasbourg against private parties. This being so interpretations of the Convention that are not satisfactory from the state's perspective cannot be appealed.

willing to adopt a more flexible approach to Strasbourg jurisprudence. However this 'remains to be seen'.[80] That conceded, for Irish courts to assert that Strasbourg has a monopoly on Convention interpretation to the extent that domestic courts cannot advance human rights protection beyond what Strasbourg has decided is a striking abdication of national authority.

What is clear from the formulation of the Mirror Principle, the courts' subsequent departure from it, and the debate regarding the future of HRA 1998, is the acute political tightrope the judiciary in the UK must walk when applying Convention principles. While the legitimacy of judicial review and the fine line between interpreting and legislating is one which all legal systems face, the entrenched nature of the judicial role in rights protection in legal constitutional structures, compared to that of the UK courts under the HRA 1998, tends to confer more legitimacy on them. Tensions arising from particularly contentious judicial decisions may result, for example, in 'packing courts' with appointees who are sympathetic to the Government of the day's political outlook with a view to one day over-turning the contentious judicial system in question.[81] Alternatively, in a system like Ireland's, a referendum to amend the Constitution may be called. What is not a realistic prospect, however, is the potential removal of such strike down powers.

Outpacing the Constitution?

Arguably, the only issue with respect to outpacing Strasbourg that would be unique to the Irish, as opposed to the UK constitutional situation, is that human rights protection under the ECHRA 2003 could potentially outpace the Constitution. When courts approach the interpretation of statutes they must, in accordance with section 2 of the 2003 Act, do so in a manner that is compatible with the state's obligations under the provisions of the Convention. It is the case, of course, that they must also construe statues so that they are compatible with the Irish Constitution.[82] If Hedigan

[80] De Londras and Kelly (n. 1) 180.
[81] See GA Calderia, ''Public Opinion and the US Supreme Court: FDR's Court Packing Plan'' (1987) 81(4) *American Political Science Review* 1139.
[82] ECHR Act 2003, s. 2(1).

J.'s approach in *Mc D v L* were followed, the protection afforded to so-called same-sex *de facto* family units would not enjoy constitutional status. While legal norms would have to be interpreted in order to protect such *de facto* families, where this would be impossible, the offending norm would not be struck down as unconstitutional and rendered invalid. Instead only a declaration of incompatibility with the Convention would be possible. Such a victory would be a pyrrhic one as the norm would nevertheless remain valid. The judgment in *Carmody v Minister for Justice* has alleviated this risk somewhat in stating that judges should assess the constitutionality of a statute first before considering whether to issue a declaration of incompatibility pursuant to section 5 of the ECHRA 2003.[83]

There is still a risk, however, that the interpretive obligation under the ECHRA 2003 could potentially hamper the development of Irish constitutional human rights protection. If there are two separate interpretations of a legislative provision, both constitutional but only one compatible with Convention principles, then this Convention compatible interpretation prevails.[84] The material outcome is the same in that Convention principles are given effect to and the standard of Irish human rights protection increased. However, the development of Irish constitutional jurisprudence on human rights has been hampered. The higher degree of human rights protection derives its legal validity from the 2003 Act, rather than from constitutional human rights jurisprudence.

Having acknowledged this concern it should also be noted that it would not have arisen in *Mc D v L* given the nature of Irish constitutional jurisprudence on the protection of family life and that it is highly unlikely that the Irish Constitution as it read at the time could ever be interpreted to give protection to same-sex *de facto* families. Moreover, to avoid this, Irish judges could seek to forge a greater synthesis between the Convention and the Constitution. This would avoid a scenario similar to the as yet under-developed synthesis between the common law and the Convention in the UK.[85]

[83] [2009] IESC 71, [2010] 1 I.R. 635.
[84] *McDonald v Bord na gCon* [1965] I.R. 217.
[85] Note 54.

A synthesis between the Convention and the Irish Constitution?

Gerard Hogan (now Hogan J.) predicted back in 2006 that 'in a manner similar to Germany, ECHR-jurisprudence will simply be grafted on to existing constitutional jurisprudence.'[86] If this were to be the approach taken, then the chances of a domestic stream of rights based on the ECHR out-pacing the Constitution would be mitigated. While Irish courts were initially sceptical of this argument, Suzanne Egan has noted that judicial attitudes towards Strasbourg have softened considerably and is reflected in the routine citing of Convention jurisprudence in the interpretation of constitutional rights.[87]

Germany, however, may not be an ideal comparator as its constitution acknowledges the concept of dignity is at the apex of its hierarchy of norms.[88] This, argues Frank Hoffmeister, in conjunction with the legislative enactment of the ECHR into domestic law in accordance with Article 59(2) of the Basic Law which 'bridges the gap' between domestic and international law explains why the *Bundesverfassungsgericht* (German Federal Constitutional Court) has been so accepting of Strasbourg jurisprudence.[89] As a result German constitutional theory is very comfortable with judicial invalidation of legal norms on human rights issues, arguably even more so than Ireland. Indeed, it has been postulated that certain constitutional norms could also be invalidated if they conflict with the notion of dignity, i.e. unconstitutional constitutional norms are a possibility in Germany.[90] Be that as it may, Christian Tomuschat has observed that the *Bundesverfassungsgericht* has never accepted the notion propounded by certain writers that because of the particular importance which the Basic Law attributes to human rights, the relevant international treaties, in particular the ECHR, should be acknowledged as

[86] Gerard Hogan, ''The Value of Declarations of Incompatibility and the Rule of Avoidance'' (2006) 28 *Dublin University Law Journal* 408, 421.
[87] Suzanne Egan, ''The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation'' (2003) 31 *Dublin University Law Journal* 230, 232.
[88] Article 1(2) of the Constitution of Germany.
[89] Frank Hoffmeister, ''Germany: Status of European Convention on Human Rights in domestic law'' (2006) 4(4) *International Journal of Constitutional Law* 722.
[90] Gottfried Dietze, ''Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany'' (1956) 42(1) *Virginia Law Review* 1, 7-8.

instruments enjoying constitutional authority.[91] Nevertheless, with the Convention enjoying only legislative, not constitutional status in Germany, the *Bundesverfassungsgericht* has not been reluctant in interpreting the Basic Law of Germany in harmony with the ECHR.

This is not the place for a detailed exposition of German constitutional theory. It suffices to say, however, that Irish judges may be reluctant to follow their German counterparts, particularly if the justification for so doing is the transposition of the Convention into domestic law through the ECHR Act 2003. Such an argument does not align with an understanding of the Irish legal system's hierarchy of norms whereby lower order norms such as legislation ought to be interpreted compatibly with higher order constitutional norms and not vice-versa. Mr. Justice John Murray, writing extra-judicially in 2008, suggested that the ECHR could be used in constitutional interpretation in a manner similar to other sources of comparative law such as the jurisprudence of the US Supreme Court.[92] Whereas Hoffmeister suggests that the German legislation incorporating the ECHR 'bridges the gap' between domestic law and international law, paving the way for the *Bundesverfassungsgericht* to interpret the German Basic Law consistently with the Convention,[93]the position in Ireland is that

> "[A]lthough the courts may of course on their own initiative have regard to Convention case law in constitutional cases as they have done prior to the entry into force of the Act, they are under no obligation to do so. Incorporation of the ECHR into Irish law under the 2003 Act therefore precludes the Convention acting, like a 'cuckoo in the nest' to supplant the Constitution in the national legal order."[94]

Murray C. J. thus rejected the argument that section 4 of the ECHR Act affects 'the interpretation of the Constitution (nor could it).'[95] This falls significantly lower than the level of synthesis achieved between the German Basic Law and the Convention. Indeed, it seems to be much lower than the 'grafting on' of Convention principles

[91] Christian Tomuschat, ''The Effects of the Judgments of the European Court of Human Rights According to the German Constitutional Court'' (2010)11(5) *German Law Journal* 513, 518.
[92] John Murray, 'Judicial Cosmopolitanism' [2008] (1) *Judicial Studies Institute Journal* 1.
[93] Hoffmeister (n. 89) 727.
[94] Murray (n. 92) 15.
[95] Note 88, 14.

into the Constitution imagined by Hogan. Murray C.J. appears, then, to suggest that the Convention is no more persuasive as an aid to constitutional law than US Supreme Court judgments; a distinct approach that is different to that taken by Germany.

There is ultimately nothing, however, notwithstanding the weaknesses in the comparison drawn between Germany and Ireland, to prevent the judiciary from developing the interpretive approach envisaged by Hogan J. Indeed, that judge points to the judgment in *The People (Director of Public Prosecutions) v Gormley* to suggest that this may now be happening.[96] There, the Supreme Court held that the 'living nature' of the due process guarantee in Article 28.1 of the Constitution requires that a suspect be entitled to consult a lawyer, at least in advance of questioning. The court found it unnecessary to consult the 2003 Act.[97]

As the Irish Constitution is a 'living and breathing document' that protects both enumerated and unenumerated rights, it is inevitable that the international human rights principles that the state signs up to and gives effect to, and the domestic duties prescribed in the Constitution, come into close proximity with each other. This 'culture of rights' should, like the common law and the HRA 1998, enmesh together in a more synergistic relationship, to impart a uniquely Irish character to human rights jurisprudence. As long as such rights protection does not drop below the floor set by Strasbourg, there is no legal impediment to this synergy.

CONCLUSIONS

De Londras has remarked that the Irish transplantation of the UK-pioneered declaration of incompatibility in the HRA 1998 is an 'awkward fit'.[98] A declaration of incompatibility, she argues, is designed to increase political engagement in areas of rights contestability. It is a measure that is bespoke to a political constitutional system where parliament is sovereign and courts must take a back seat. While the

[96] [2014] IESC 17; Gerard Hogan, "The Constitution and the Convention: Happily Married or a Loveless Co-existence?" in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014) 73, 74.
[97] Note 94.
[98] Fiona de Londras, ''Declarations of Incompatibility under the ECHR Act 2003: A Workable Transplant?'' (2014) 35(1) *Statute Law Review* 50, 60.

declaration of incompatibility power may well be an awkward fit, the transplantation of Lord Bingham's Mirror Principle is even more so.

The method by which Ireland incorporated the ECHR into domestic law leaves a lot to be desired.[99] While closely based on the UK's HRA, the Irish judiciary's uncritical acceptance of Lord Bingham's Mirror Principle was certainly not inevitable. Although the Mirror Principle is more suitable to a political constitution it, too, is not a certainty given the recent judicial shift towards common law protection of human rights. It remains to be seen whether the Irish judiciary will countenance a similar shift away from the Mirror Principle towards a more holistic, synergistic relationship between Constitutional and Convention rights. The ECHR Act 2003 cannot, however, be a source for such a synergistic relationship. Rather, such a shift should be embedded by intertwining the 'evolutive' and subsidiary nature of the Convention with the similarly evolutive enumerated and unenumerated rights in the Irish Constitution.

[99] The author agrees with Suzanne Egan's description of the ECHRA 2003 as a 'missed opportunity for human rights litigation.' Egan (n. 87).