

OUR COLLECTIVE COMMITMENT: IRELAND AND ITS RELATIONSHIP WITH THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS¹

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President Keogh, Minister O'Gorman, President Spano and Vice-president and President-elect O'Leary, colleagues and friends.

It is a great moment for me to be able to welcome, in public, the President and President-elect and all section presidents of the Council of the European Court of Human Rights ('the ECtHR') to Ireland. This is a historic visit of the senior members of the ECtHR to Ireland and is its own illustration of the long and respectful relationship between the Irish State (in particular, the Irish courts) and the Court of Human Rights. Yesterday, members of the Supreme Court and the Court of Appeal had a day-long bilateral exchange with our guests on a number of topics of common interest, such as the intersection between criminal law, evidence, and Convention rights, privacy and data protection, and the procedure introduced for the provision of advisory opinions by the ECtHR.

I am particularly pleased that we have been able to include this public conference in the schedule for this visit, and furthermore, that it is being held on the campus of Dublin City University and involves contributions from the Irish judiciary, senior members of the ECtHR, a distinguished academic lawyer and a Government minister. Not only is this indicative of the importance of the topic, and of the value of the Court and the European Convention of Human Rights ('ECHR') at this time but it also illustrates the fact that the task of the protection of the rights, to which the contracting states dedicated themselves more than 70 years ago, is a task for all of us: judges, practising lawyers, academic lawyers, members of the government, members of parliament, and, indeed, members of the public. In opening today's conference, I want to touch on three themes.

First, it is useful on an occasion like this to have the opportunity of looking back on the development of the jurisprudence of the ECtHR and the manner in which that has interacted with the law of Ireland. My colleague, Ms. Justice O'Malley, will address this subject in more detail, but in my view, it is a relationship which has been productive and something upon which both sides can reflect on with an element of pride.

It would be, I think, incorrect to view the relationship between Ireland, and the Irish courts on one side, and the ECHR and the ECtHR on the other, through the prism of the occasional high-profile case when there have been decisions giving rise to some controversy, or disagreements. There are times in any functioning relationship when voices can sometimes

¹ This article is based on a speech delivered at the 'Human Rights in a Time of Change: Perspectives from Ireland and from Strasbourg' conference in Dublin City University, 21 October, 2022.

be raised. However, what is more important, in my view, are the long periods of contented silence, and moreover, the ability to communicate, to discuss, and to keep the relationship going. That is, perhaps, a particularly appropriate image in this context, because at one time, the most contentious issues which arose under the ECHR related to private life and the law regulating personal relationships. However, despite what could be perceived as tension in the relationship, there has never been a time when, to extend the metaphor, there was a discussion about divorce, or obtaining a barring order. That is not a small achievement; we need only look at events in the recent past, and beyond, to understand that this in itself is something to celebrate. But the fact is that we have done more than simply muddle along. It is possible of course, to pick out points where the ECtHR did not perform as vigorously as some might have liked, or in other cases, perhaps performed too vigorously. Equally, there have been points where the Irish State was slow to respond to decisions of the Court or where the Irish courts made decisions which can be criticised. But that friction is to some extent unavoidable. It is worth standing back and remembering that adherence to the ECHR meant agreeing to external supervision of matters that previously would have been regarded within the exclusive jurisdiction of a sovereign state. It is not surprising – indeed, it is perhaps inevitable – that the operation of that process will have points of friction. But I think it is fair to say today, that we have not just muddled through to a more contented and mature relationship. I think we can say that the relationship between the State and the Council of Europe, and the Irish courts and the Court of Human Rights, is one which is characterised by a high degree of mutual respect and understanding, which is only deepened by exchange and communication that has evolved in events such as this.

To turn to the second theme, looking back on the events leading to the establishment of the Council of Europe and the ratification of the ECHR, it carries a different resonance today than it did 10 or 20 years ago. It is impossible to look at the establishment of the ECHR and the agreement of the contracting parties to the supervision of a supra national court without understanding that it was driven by a reaction to the slide into totalitarianism of a number of countries in the 1930s. It was in the United Nations Declaration of Human Rights, and in the ECHR and in other important instruments, there was an attempt to identify those fundamental rights which no government, however temporarily popular, and no state, however powerful, could breach.

For much of my lifetime, these ideas seemed a little old fashioned. They were like some ancient fortifications that you come across and wonder what exactly was the threat that led people to construct such an elaborate defensive edifice. Inevitably, during that period, there was a feeling that protection of rights such as liberty, free speech, association and freedom from torture, and an independent judiciary were taken as given or, if you like, battles that had been won, and that the only interesting issue was how those rights could be expanded upon and developed into new areas.

But over the last decade with every passing year, we have come to realise, that just like those times when our parents told us to wear sensible shoes and wellington boots going out in the bad weather that our forebears were right, and we are facing in ways some of us thought unimaginable, threats and challenges that have more an echo of the mid-20th century, than the bright modern future we imagined.

It is commonplace to hear people to say that Convention rights were being tested in ways which the drafters might not have imagined. But what is perhaps telling about today's world, is that in many ways the rights sought to be protected in 1953 and 1958 are being challenged,

and are being tested, just as the drafters foresaw, although perhaps not necessarily from the parties or the direction they might have predicted. That realisation may bring with it a renewed appreciation of the work of the drafters and the wisdom of those who encouraged the adoption of the Convention, but it is a sobering thought that we are confronting challenges, not just to the Convention, but also to the idea of fundamental, basic rights that each state must respect.

That is of course, a challenge, and it is a challenge for all of us, but it is also at some level exciting, because the idea that underpins the ECHR is the idea that basic rights must be defended, that it is a court's job to do so, and that the tools are those tools which should be nurtured in educational institutions like this; the capacity to use our minds, the capacity to reason, to discuss, to think, to communicate and ultimately to decide and justify our decisions by nothing more than the robustness and rigour of their reasoning.

That is something we should celebrate, and we should take this opportunity to renew our collective commitment to the ideal of protection of fundamental rights by courts.

Finally, I would like to say it is a particular pleasure for me to be here in the Seamus Heaney Auditorium. He was a personal hero of mine from the time I first encountered him as a primary schoolboy and Ireland is a poorer place without his gentle, thoughtful and humane presence. He was a man who, at one level, never left rural Tyrone, but on another level was a citizen of the world, and his last words were appropriately in a universal language: *noli timere* – be not afraid. Seamus Heaney was from Northern Ireland. As one commentator put it, Northern Ireland has been a severe testing ground for the Convention. But it was after all, the location which gave rise to the first interstate case, *Ireland v. The United Kingdom* [1978] ECHR 1, relating to the treatment of persons who had been interned and has given rise to a number of important cases, most notably on the obligation to investigate deaths particularly those which occur at the hands of the forces of law within a state. Northern Ireland has always had a close connection to the ECHR. I think not just of the jurisprudence, but of the people, such as Michael O'Boyle, the long-time Registrar of the Court, and the co-author of the first and leading textbook on the ECHR.

I also think of Kevin Boyle from Newry who was heavily involved in the civil rights movement, later established the department and, indeed, law faculty in University College Galway, and who was one of the early proponents of the ECHR. Kevin Boyle understood that the Convention was not a weapon to be used in a political battle and associated with one side, in polarised political debates. It had to be applied in an even-handed way, and as a result was willing to take any and every case. It is perhaps forgotten that he was the lawyer who initiated the complaint and succeeded before the Commission in *Dudgeon v. United Kingdom* [1981] ECHR 5, which was the start of a ball rolling that eventually led to the repeal of the provisions of the 1861 Offences Against the Person Act, and the 1885 Criminal Law Amendment Act, in this jurisdiction, which had criminalised male homosexual conduct.

Furthermore, the ECHR formed a part of the discussions and the negotiations that resulted in the Good Friday Agreement and in particular led to the obligation under paragraph 9 on this state, to offer equivalent protection in the field of human rights to that which was available in Northern Ireland, which in turn led to the incorporation of the ECHR in domestic law under the European Convention on Human Rights Act, 2003. It has been noted that this provision is a curious one way valve in the agreement: the obligation is on the

Republic of Ireland to keep pace with developments in Northern Ireland and while it might seem fanciful at this remove, if Northern Ireland were gripped by an evangelical fervour for the advancement of human rights, then those developments would, it seems, have to be mirrored here.

The first Irish judge appointed to the Court of Human Rights was Richard or Dick McGonigal, SC, one of the most distinguished barristers of his time. His biography describes him as born in Dublin but in fact he has a strong cross-border connection. His father John McGonigal was a county court judge for Tyrone not far from Seamus Heaney's home place. The family lived in Belfast after 1922 and Dick McGonigal's brother Ambrose McGonigal went to the Northern Ireland Bar, and ultimately became a Lord Justice of Appeal in Northern Ireland. And I am really pleased to welcome today one of Ambrose McGonigal's successors, Lord Justice Seamus Treacy of the Northern Ireland Court of Appeal and to acknowledge, when our courts have to consider the interpretation of the Convention, the invaluable assistance that is provided by the judgments of the Northern Ireland courts, which constitute a rich resource, and where provisions from a legal system very similar to our own, are subjected to very close scrutiny by reference to the Convention.

So, for me, this conference and this visit has resonances on many levels. And it is worth remembering that the communication channel is not merely a connection between the Republic of Ireland and Strasbourg with occasional sidelong glances to London, it also provides an important channel for communication, between families and friends, and sometimes just suspicious acquaintances, on this island.