Law Society/Human Rights Commission Conference on New Human Rights Legislation.

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Speech by Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, T.D.

"The European Convention on Human Rights Act, 2003: What the Act will Mean"

Good morning Madam President, distinguished guests, ladies and gentlemen.

I am delighted to be here with you this morning to speak on the theme of the European Convention on Human Rights Act, 2003 and to indulge in some crystal ball gazing on what the likely effects of the Act will be on our domestic law and practice.

Introduction

At the outset, I want to emphasise that there is only one "human rights community" in this State – that community is, and should be, our entire society. Human rights are not the exclusive preserve of activists or specialists. They concern us all as citizens of a republic. A false conception of a self-ordained "human rights community" consisting of "activists" and smaller NGOs has been propagated by some– suggesting that those who form part of wider society are mere lay people in the eyes of the hierarchy of a new "civic religion".

No human right has meaning without the existence and potential enforcement of a corresponding public and/or private duty or responsibility. The establishment and vindication of human rights is, therefore, everyone's business – not solely the business of an "activist or specialist few". In that context, we should remember that political parties (which are after all the largest NGOs) and the democratic institutions – including now the Human Rights Commission -are the principal means by which non-constitutional rights and duties are identified, vindicated and reconciled. Dressing up one particular political agenda as "the human rights agenda" is arguably an unfair arrogation of both language and ideas that are the common property of all in our republic.

Today's conference, as they say, is "special". Previous Conferences discussed either "proposals" for legislation or the terms of the Bill as published. Now the Act is in place and about to be commenced and we will hear important contributions throughout the rest of this morning's session of the Conference on practical issues following its enactment. It has taken quite some time to get to this stage, including frustrating procedural delay brought about by a change of Government. The Bill

completed its second stage in the Dáil on 14 June, 2001, but it took just over two more years for it to complete its passage through the Oireachtas on 24 June, 2003.

The Commencement Order

I know that practitioners among you will be keen to know when precisely the Act will come into force. You will be interested to know that I have made the relevant Order specifying 31st December, 2003 as the operative date.

Retrospection

Before I go on to look at the possible effects of the Act, may I for the moment indulge in a bit of retrospection. I think we would all agree that right from the start the Government's proposals as reflected in the Act did not meet with universal approbation. The particular model of incorporation, which is similar in many respects to that adopted in the United Kingdom by means of the 1998 Human Rights Act, was seen by many of its critics as "tame stuff", that it just didn't go far enough. There was a kind of dampener put about that the Government was engaging in a less than full and adequate incorporation of the Convention into Irish law. The absolute minimum acceptable threshold was said to be the "force of law" model, and the proposals in the Bill were said to be falling far short of that standard.

I believe that what we have achieved in the Act is full-blooded, thoroughgoing and workable in terms of court procedures, and comprehensive to the fullest extent permissible under the Constitution. I presume that in the present company I don't have to labour the point that we did not start from the same constitutional position as the neighbouring jurisdictions in this whole matter. I merely wish to underscore the fact that their claimed constraints relating to parliamentary sovereignty have different, but no less fundamental, echoes in the context of popular sovereignty and the sole and exclusive law-making role of Parliament as reflected in the relevant provisions in the Irish Constitution.

I believe that the Act's sterner critics have, by and large, failed to stand up their criticisms and failed to demonstrate that their proffered alternatives would be constitutionally sound, or more efficacious. I do not for a moment question the good faith of the Acts's critics and I have welcomed the critical and sometimes sceptical scrutiny that they offered.

For my part, I strongly suggest that the Act does what it set out to do, namely

- to enhance citizens' access to ECHR-type remedies
- to reduce the exposure of the State to ECHR litigation in Strasbourg by domesticating ECHR values, and
- to bring about, as much as the Constitution allows, a close approximation of the laws relating to convention matters – North and South.

Let us not forget either that the Convention was never intended to have effect as a shadow constitution for any member State of the Council of Europe; nor was it designed to be incorporated as a Constitution in the member States. Giving the Convention the "force of law" would have attempted that precise result and it would mean a continual, rolling and uncertain amendment of every law in the State depending upon the interpretation of the Irish courts at any given point. Furthermore, it is simply not possible for the legislature to mandate or authorise an

Irish court in the future to disregard the clear meaning of an Irish law by reference to a prior instruction to disregard anything which happens to be inconsistent with developing and changing Strasbourg jurisprudence.

As I said earlier, I am convinced that the approach which we have adopted in the Act represents the outer limit of what we can do within our Constitutional scheme of things. I firmly believe that its provisions have exploited, to the utmost sinew and limit, the capacity of our legal system in order to achieve the most we can in respect of the commitment in the 1998 Good Friday Agreement.

Section 2
Section 2, which obliges a Court in interpreting any statutory provision or rule of law to do so in a manner compatible with the State's obligations under the Convention, is of enormous significance. Consider for a moment the terms "statutory provision" and "rule of law". "Statutory provision" is defined in the previous section to mean any provision of an Act of the Oireachtas or of any order, regulation, rule, licence, bye-law, or any other like document issued or other wise created under a statute continued in force by Article 50 of the Constitution. That includes every statute establishing the courts and every statutory provision providing for court procedure.

The section also applies to "rules of common law", such as the rule against hearsay, or any other rule of that kind which is not found in statute. The provision also applies to such laws and rules both before and after the coming into force of the Act on 31 October next. Thus it is both prospective and retrospective, and is a thorough interpretative provision because it applies to <u>all</u> courts, at <u>all</u> times and in <u>every</u> circumstance.

Section 3
Section 3 was criticised on the basis that on the face of it, the section only provides for one type of remedy. Before I get into that, I want to stress that this is a very far reaching section. It gives the High Court and the Circuit Court jurisdiction in accordance with the levels of damages that those two Courts have at present for torts. They can award compensation to anybody who claims against an organ of the State that it has infringed their rights under the Convention. It provides in effect for a new supplementary tort and, most significantly, the level of compensation envisaged is not what I would term "convention" compensation; rather it is compensatory damages in line with the Irish model of compensation which, generally and conventionally speaking, is generous. There is no limit, other than the jurisdictional limit, and in this respect it differs from the position in the United Kingdom where

- no award of damages is to be made unless the court is satisfied that the award is necessary to afford " just satisfaction", and
- the court is also bound to take account of the restraining principles of Article 41 of the Convention in determining the amount.

The new cause of action is not available in the District Court simply because that Court is charged primarily with summary criminal and civil jurisdiction, including family law actions and is under considerable pressure.
By definition, the cases under which these kinds of damages will be awarded are complex. It is also for these reasons, for example, that the District Court does not at

present have equity or defamation jurisdiction. It may be that in the future, circumstances would justify adding such a potential caseload of complex law to the District Court but now is certainly not the time to do so in my judgment.

As to remedies other than damages, it is not necessary to provide them explicitly in this Act. If a person wants to injunct an organ of the State from carrying out a function of one kind or another, one does that in the High Court by means of judicial review and through injunctions. There is no need to duplicate separately those remedies for Convention - based cases. Convention issues will be melded into existing judicial review law. In exercising its judicial review function over State bodies in public law matters, the High Court will, by virtue of section 2, incorporate Convention values into all of its decision-making processes. What some critics seem to have forgotten is that when you marry our existing law of judicial review to section 2 of the Act, you will have a complex system of enforcement and protection of what some term "convention-based rights". In fact, sections 2 and 3 of the Act, when taken together, will have a direct effect on judicial review. They will be relevant to declarations, injunctions, and other remedial orders.

The Government's approach was to maximise the remedies available within our Constitutional framework, and I believe we have achieved the substance of that objective. All the more so when, in addition to the award of damages as of right under section 3, one considers the novel compensatory provisions of section 5 dealing with the *ex-gratia* compensation scheme in cases where a declaration of incompatibility is made.

Possible developments - A new chapter

The Act creates the possibility of new actions for breaches of civil and political rights. It has to be anticipated that the opening up of any new grounds for litigation will, to use a neutral term, be *explored* to the full by both branches of the profession. However, we have the benefit of the various analyses carried out after about three years experience of the Human Rights Act throughout the United Kingdom, slightly longer in the case of Scotland, since the Act came into effect there ahead of everywhere else. I think they are all in agreement that despite the predictions of an explosion in litigation, the outcome has been measured and restrained. That is not to say that there have not been headline cases and some very important decisions in the area of human rights, particularly in the area of the civil law and administrative practices. The Act seems to have had little direct impact on English rules of substantive criminal law. I am merely making the point here that, contrary to what was widely predicted, the sky did not fall after all.

One also has to take into account that the position as regards the Strasbourg score sheet, if I can put it that way, in both jurisdictions was never really directly comparable. Concern had been expressed in the United Kingdom as far back as 1974 about the absence of a Bill of Rights and that led to moves in the early 1990's to propose incorporation of the Convention as a means of improving the human rights record before the Court of Human Rights. The phrase used was, I think, "Bringing rights home".

John Wadham and Helen Mountfield in their "Guide to the 1998 Human Rights Act" put it well when they say that

"Part of the reason for this is the British political and constitutional tradition.

"Freedom" as it has emerged in this tradition rests largely on the (negative) freedom from government interference rather than positive human rights guarantees, enshrined in a written constitution or human rights instrument".

For a concise dissertation on the impact of the Human Rights Act on the law of the United Kingdom, I would direct your attention to the opinion delivered to the Court of Human Rights on 23 January this year by Lord Woolf of Barnes, the Lord Chief Justice of England and Wales, as published in the European Human Rights Law Review 2003, Issue 3. Lord Woolf underlined the change in culture which he perceived as the most important aspect of the introduction of the Act. He also referred to the fact that the Act in making Convention rights enforceable in its own courts did create a tension insofar as the doctrine of Parliamentary Sovereignty is concerned.

Significantly, however, he noticed that, in practice, the situations in which the courts had to resort to the making of a declaration of incompatibility could "*be comfortably accommodated by the fingers on one hand".* This, he believed was due to the provision in the Human Rights Act which requires the courts, "so far as it is possible to do so" to read and give effect to legislation "in a way which is compatible with the Convention rights". This approach has had significant implications for the former Wednesbury test of reasonableness, in favour of one based on proportionality. Our provision in Section 2, which I referred to a few moments ago is similar. Whether it will have a similar effect in relation to any section 5 applications here remains to be seen.

In Ireland's case, the question of declarations of incompatibility will arise only in cases where the superior courts find a significant divergence between our constitution and the ECHR.

As I said a moment ago, in terms of the policy underlying the Government's consideration of the incorporation issue, the situation in Ireland was markedly different in terms of context and content. We have a written Bill of Rights in the 1937 Constitution. Most of you here will know that I have strong views on the guarantees and protections afforded by our republican Constitution, and I need not rehearse them here before you. It suffices for me to say that our record before the Court of Human Rights is an enviable one, probably one of the best, if not <u>the</u> best, in terms of Convention compatibility and compliance among the States of the Council of Europe.

Since the Convention came into force in 1956, we have been held to have breached its provisions in under ten instances, though have to remind you that two of them, the Heaney and McGuinness case and that of Quinn dealt with the same issue - section 52 of the Offences Against the State Act, 1939.

Another positive indicator is that in the assessments carried out by legal commentators here, overall, the prognosis has been favourable.

However, I for one, will not rush to judgement. Convention - based issues have a tendency to arise where they are least expected. At this point I am reminded that, as Ralph Waldo Emerson said, “The mind, when stretched by a new idea, seldom returns to its original shape”.

I am in no way apprehensive about new ideas, particularly insofar as the substantive criminal law is concerned, though as Minister for Justice, Equality and Law Reform, I have to be circumspect. By and large, I think that our Constitutional guarantees and protections have served us well and will continue to do so.

One area in particular where there could be interesting developments on a number of issues is personal privacy and the possible liability of State agencies to actions for invasion of privacy in breach of Article 8 of the Convention. Obviously, this could give rise to a new area of exposure to civil liability on the part of the State.

Some of you may be familiar with two recent noteworthy cases in this area in the United Kingdom - *Douglas, Zeta-Jones and Northern and Shell plc v. Hello! Ltd [2001] 2 W.L.R. 992* and *Venables and Thompson v. News Group Newspapers Ltd. [2001] 2 W.L.R. 1038*. Both were concerned with privacy rights and they suggest, I think, a willingness on the parts of the courts in the United Kingdom to allow for at least some degree of horizontal application of Convention rights.
Although in neither case did the courts go so far as to create a new cause of action for a breach of privacy rights, they did not rule out the development of such an action..

Clearly, there are issues for us to consider here. For example, could the Act lead to the Convention which, after all is primarily a vertically effective instrument to allow actions by individuals against States, having an indirect horizontal effect? This might arise, for example, as we have seen in the case of an action between two private citizens or between a citizen and a private entity for a failure by the State to protect adequately a personal right to privacy.

A very interesting additional element in all of this is the possible role of the media and the publication of information obtained by other parties in breach of a right to privacy. Could the media really make the case that it should be immune from suit, for example, in a case where the State itself might be found to have failed in its duty under the Convention by not providing adequate protections and safeguards to prevent publication. If so, would the State in order to protect itself have no option but to establish some general right to privacy?

Perhaps a new jurisprudence on privacy will emerge. However, the difficult question is whether any developments in this area should be left to the Courts, or whether the State itself has a duty to act in a pre - emptive way by forging ahead with privacy protection tort reform.

Conclusion

I hope I have given you some food for thought. I also hope that you will see the European Convention on Human Rights Act, 2003 as a very robust and ground breaking development in furtherance of the Government’s wish to further

complement, strengthen and underpin the protection of human rights in this jurisdiction in accordance with our obligations under the Good Friday Agreement.

It is very far indeed from being, as some of its critics have claimed, a modest measure. It may appear understated but its effects will, I think, be far-reaching and positive.