The Constitution: Human Rights Challenges

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As a Constitution developed eleven years before the Universal Declaration of Human Rights (1948), Bunreacht na hÉireann can be considered as relatively progressive for its era in the protection of human rights. However, the text of the Constitution has not kept up with the developments that have taken place in the international understanding of human rights in the 75 years since it came into force. As the Tánaiste said when he was speaking at our Annual Lecture last year, “it is very much a product of its time”.¹

¹ Invitation lecture by the Tánaiste to the Irish Human Rights Commission, 28 June 2011, available on www.dfa.ie
Over the twelve years of our existence, the Irish Human Rights Commission has raised a range of issues regarding provisions of the Constitution that we consider are not in line with international human rights standards. The proposal for a Constitutional Convention should provide an opportunity to consider these issues, and to review the Constitution from a modern, human rights perspective.

*Non-Incorporation of Treaties*

One of our most frequently raised criticisms is the non-incorporation of international treaties into domestic law.\(^2\) The system provided for at present in the Constitution results in weaker human rights protections in Ireland than might otherwise be the case. The Supreme Court has held that the Irish Constitution “establishes an unmistakable distinction between domestic and international law” and that where the Government wished the terms of an international agreement to have the force of domestic law it could “ask the Oireachtas to pass the necessary legislation”.\(^3\)

\(^2\) Article 29.6 of the Irish Constitution provides that, “[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [Parliament]”.

\(^3\) *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 IR 97.
This means that when the State ratifies an international human rights treaty or convention it does not automatically become justiciable – that is, unlike the situation in other European countries, Ireland’s ratification of an international treaty does not mean that a person in Ireland can bring a case before the Courts on the basis of a violation of a right in that treaty. In addition, the Irish Courts have for the most part chosen not to consider international human rights treaties either as sources of law or as interpretative authorities. The result of this is that we have weaker protections for people in Ireland across a range of human rights than in some other EU countries.

Thus, the position at present is that international human rights treaties to which the State is a party have no force within the domestic legal order until the Oireachtas brings them into domestic law, whether by way of legislation or constitutional amendment. In the absence of an Act of the Oireachtas, the only way those convention rights can find their way into Irish law is indirectly, through interpretation by the Courts. However, the courts are reluctant to read international convention rights into the Constitution for fear of “legislating”. What, you may ask then, is the point of Ireland ratifying a human rights convention and why
do two different legal consequences arise where say, Belgium and Ireland ratify the same convention? This is not something easily understood by our European neighbours.

A key benefit of constitutional incorporation of the rights contained in international treaties would be that it would underpin and guarantee any legislative or policy provisions in relation to these human rights.

The gap created by the non-incorporation of international treaties and conventions is particularly noticeable in relation to Economic, Social and Cultural Rights. The rights contained in the Constitution, and the rights set out in the European Convention on Human Rights have a primarily civil and political rights focus. Even though Ireland has ratified important international instruments that in theory give economic, social and cultural rights to Irish people (such as the International Covenant on Economic, Social and Cultural Rights and the Revised European Social Charter), the reality is that because of the requirements of the Constitution a person cannot go to court claiming these rights have been

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4 See Title 11 of the Belgian Constitution. Under Chapter 11 of the Special Act on the Constitutional Court of Belgium (Special Act of 6 January 1989)(Official Gazette, January 7, 1989) Article 29.2.4 provides: “Where it is invoked before a court of law that a statute, decree or rule referred to in Article 134 of the Constitution infringes a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, said court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Constitutional Court for a preliminary ruling”. 

breached. It is clear that this gap will not be fixed through the courts, as the Courts have expressed considerable doubts as to whether economic, social and cultural rights – apart from limited education rights – can be read into the Constitution.5

*Equality and the Constitution*

Another issue the IHRC has raised is the provisions of the Constitution relating to the position of women. As you will be well aware, Article 41.2 of the Irish Constitution, as it stands today, states that: “...the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.” The Commission, and a range of other actors in Ireland have criticised this provision as based on a stereotypical view of women as homemakers, as being “sexist and male-oriented” and not in keeping with the United Nations Convention on the Elimination of Discrimination Against Women.

In conjunction with this, we have also called for a strengthening of the equality provisions in the Constitution. At present, the Constitution (Article 40.1) provides that “all citizens shall...be held equal before the

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law”. This is qualified however, by allowing the State in legislating to nonetheless have due regard to “differences of capacity, physical and moral, and of social function”. The Commission has called for this provision to be strengthened - at a minimum to guarantee equality in all circumstances, not just in relation to the law, and to prohibit direct or indirect discrimination on non-exhaustive grounds (such as race, sex, language or religion). This type of strengthening would result in greater practical protections for people against all forms of discrimination and reflect the fundamentality of the principle of non-discrimination as a basic principle upon which the State is founded.

*Position of Children*

We have also raised concerns about the position of Children in the Constitution. The Constitution at present says nothing about the rights of children. The Commission considers that the silence of the Constitution in relation to children has had a considerable and negative impact on law-making, on government policy and on the practice of social work and other caring professions. We have recommended that Article 41 of the Constitution – which concerns the protection of the family - should include an express requirement that all decisions
affecting children should have as their paramount consideration the welfare of the child. We also support the view of the Ombudsman for Children that express Constitutional protection should be given to the “best interests” principle and recommended that any proposal to incorporate the principle into the Constitution should also incorporate the principles set out in Article 12 and Article 2 of the Convention on the Rights of the Child. It is welcome therefore that progress appears to be being made on holding a children’s rights referendum.

The Constitutional Convention

These issues that I have briefly mentioned; the non-incorporation of treaties resulting in a lesser protection for human rights in Ireland, the need for improved equality provisions and the need for a stronger position for children in the Constitution are just three examples of where we feel the Constitution requires strengthening. The review of the Constitution under the proposed Convention provides an opportunity that we have not had in generations to enhance the Constitution for a modern Ireland. From our perspective, any such review should consider human rights as a core feature guiding the review.
I would consider that it could be particularly helpful to the Convention process to consider Constitutional reform in other countries, particularly where such reform has been aimed at promoting Constitutions with a human rights basis. We are aware of a number of recent examples and would welcome the opportunity to provide further information for the Convention process. For example, the United Nations (OHCHR) has elaborated constituent elements for the promotion of human rights in national constitutions and while this advice may be more relevant to States without a developed constitutional system such as Ireland’s, the advice may merit reflection. These constituent elements include;

- Internationally recognised human rights and fundamental freedoms;
- Effective and justiciable remedies at law for violations of those rights;
- Empowerment of an independent judiciary consistent with the Basic Principles on the Independence of the Judiciary;
- Provisions of non-discrimination on a broad range of areas and protection for national minorities;
- The establishment of a national human rights institution consistent with the UN Paris Principles;
- Provisions for the applicability of international human rights treaty obligations in domestic law;
- Definitions and limits of the powers of government and its various branches vis-à-vis each other and the people.

While the Constitution reflects some of these principles, there are a number of areas that merit further serious consideration. In particular there are two suggestions which the Convention could consider from a human rights perspective.

The first is whether Article 29.6 should be amended to provide that where the State solemnly signs and ratifies an international convention its provisions should have the force of law in the State.

The second suggestion is a fall-back position in case we decided not to go with the first and it is whether the mere insertion of one clause could ensure that our Constitutional protections are aligned with international standards. What is proposed would be to place an interpretative
provision into the Constitution providing that those fundamental rights guaranteed under Articles 40 to 44 of the Constitution are to be interpreted, insofar as possible, in conformity with the provisions of international conventions ratified by the State. This option could lead both to positive benefits for human rights protection at home and our international reputation.

There has been serious consideration given to human rights in the Irish Constitution by many distinguished people in this country, including through the Constitution Review Group and the reports of the All-Party Oireachtas Committee on the Constitution. I just add these few areas to the list. The Constitutional Convention however is a once in a generation opportunity to modernise, remedy and reflect the principles of modern Ireland. These principles have human rights and equality at their core. Now is the time to use this period of reform to undertake consideration of serious and not mere cosmetic changes to Bunreacht na hÉireann.

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