

Fordham International Law Journal

Volume 26, Issue 2

2002

Article 8

Bringing Ireland Up To Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms

Katherine Lesch Bodnick*

*

Copyright ©2002 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

Bringing Ireland Up To Par: Incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms

Katherine Lesch Bodnick

Abstract

In the Good Friday Agreement of 1998, the Irish government committed to incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) into Ireland’s domestic law. Ireland’s promise to promote human rights is consistent with the Good Friday Agreement. Although the government agreed to incorporate the ECHR by October 1999, it has yet to be incorporated because Attorney-General Michael McDowell and Minister of Justice John O’Donoghue could not decide how to do so. This Note examines the manner in which Ireland should incorporate the ECHR into Irish domestic law. Part I of this Note discusses background material related to the ECHR and the Irish Constitution of 1937. Part II evaluates disputed rights under the ECHR and the Irish Constitution and examines different methods of incorporation. Finally, Part III recommends constitutional incorporation of the ECHR, and concludes that incorporation would increase human rights protection in Ireland and would provide an objective source of unenumerated rights, subject to judicial review. In the Good Friday Agreement of 1998, the Irish government committed to incorporating the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) into Ireland’s domestic law. Ireland’s promise to promote human rights is consistent with the Good Friday Agreement. Although the government agreed to incorporate the ECHR by October 1999, it has yet to be incorporated because Attorney-General Michael McDowell and Minister of Justice John O’Donoghue could not decide how to do so. This Note examines the manner in which Ireland should incorporate the ECHR into Irish domestic law. Part I of this Note discusses background material related to the ECHR and the Irish Constitution of 1937. Part II evaluates disputed rights under the ECHR and the Irish Constitution and examines different methods of incorporation. Finally, Part III recommends constitutional incorporation of the ECHR, and concludes that incorporation would increase human rights protection in Ireland and would provide an objective source of unenumerated rights, subject to judicial review.

COMMENT

BRINGING IRELAND UP TO PAR: INCORPORATING THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

*Katherine Lesch Bodnick**

INTRODUCTION

On March 5, 1961, Maura Merrick's automobile struck three-year-old Ide Maire O'Domhnaill.¹ As a result, Ide sustained severe injuries.² Immediately after the accident, Ide's father retained a solicitor, who failed to bring an action on Ide's behalf within three years after the accident.³ Consequently, by the time Ide's father consulted a different solicitor in 1965, the statute of limitations, under the Statute of Limitations Act (1957), had expired.⁴

In 1972, the Irish judiciary extended the statute of limitations for such claims so that Ide could bring her claim within three years after the date on which she reached the age of majority.⁵ Accordingly, she brought her claim in 1977, two years after

* J.D. Candidate, 2003, Fordham University; B.A., 1997, Brown University. Thanks to David Bodnick, Professor Martin Flaherty, and the editors and staff at the Fordham International Law Journal.

1. See *O'Domhnaill v. Merrick*, [1984] I.R. 151, 154 (explaining that defendant's automobile collided with three-year-old plaintiff). The *O'Domhnaill* court held that the plaintiff's claim, brought sixteen years after the car accident, was unfair to the defendant. *Id.* at 151. The plaintiff, however, brought her claim within the revised statute of limitations. *Id.*

2. See *id.* (explaining that plaintiff suffered very serious personal injuries).

3. See *id.* at 155 (noting that statute of limitations in force at time of plaintiff's accident required that plaintiff's solicitor bring action in court within three years after cause of action arose). In this case, the cause of action was the accident in 1961, yet Ide's solicitor failed to bring an action on her behalf by 1964. *Id.*

4. Statute of Limitations, s. 49, sub-5, 2(a)(ii), 1957 (Ir.). See *O'Domhnaill*, [1984] I.R. at 155 (describing how plaintiff's second solicitor issued summons in 1965 claiming damages against Samuel Young, owner of automobile that collided with plaintiff). In 1968, Samuel Young applied to the court for an order dismissing the case for lack of prosecution. *Id.* The court granted the order because it deemed the 1965 summons "out of time." *Id.*

5. See *O'Brien v. Keogh*, [1972] I.R. 144, 144-145 (challenging constitutionality of Statute of Limitations Act, 1957). The *O'Brien* court held that the Statute of Limitations Act, 1957 was unconstitutional. *Id.* Thus, the *O'Brien* court extended the statute of limitations under the Limitations Act. The action may be brought at any time before

she turned twenty-one.⁶ Although Ide brought her claim before the statute of limitations expired, the court held that her claim was unfair to the defendant.⁷ Ide argued that she deserved a fair hearing based upon the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").⁸ The court, however, rejected her argument on the grounds that Ireland had not yet incorporated the ECHR into Irish domestic law.⁹

In the Good Friday Agreement of 1998,¹⁰ the Irish government committed to incorporating the ECHR into Ireland's domestic law.¹¹ Ireland's promise to promote human rights is con-

the expiration of three years from the date the plaintiff ceases to be an infant, which is the age of twenty-one in Ireland. *Id.*; see also *O'Domhnaill*, [1984] I.R. at 155 (discussing how *O'Brien* court extended statute of limitations under Statute of Limitations Act, 1957).

6. See *O'Domhnaill*, [1984] I.R. at 155 (noting that Ide could have brought her claim until November 29, 1981). Thus, her action fell within the current statute of limitations. *Id.*

7. See *id.* at 159 (holding that although statute of limitations did not bar Ide's claim, her appeal was dismissed because it was grossly unfair to defendant).

8. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> [hereinafter ECHR]; see generally Alpha Connelly, *Ireland and the European Convention on Human Rights: An Overview*, in HUMAN RIGHTS—A EUROPEAN PERSPECTIVE 34, 46 (Liz Heffernan & James Kingston eds., 1994) (describing ECHR as highly innovative at time of its creation). The concept of an international court, empowered to adjudicate individual complaints of human rights violations, was new to international law. *Id.*

9. See *O'Domhnaill*, [1984] I.R. at 159 (noting that ECHR is not part of domestic law of Ireland and thus lacks binding force in Irish tribunals).

10. See Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998, at 17-18 [hereinafter Good Friday Agreement] (establishing that Ireland will promote human rights protection and investigate incorporation of ECHR); Seamus Dunn & Jacqueline Nolan-Haley, *Conflict in Northern Ireland After the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1372, 1374 (1999) (mentioning that Good Friday Agreement expresses commitment to incorporate ECHR); Paul Mageean & Martin O'Brien, *From the Margins to the Mainstream: Human Rights and the Good Friday Agreement*, 22 FORDHAM INT'L L.J. 1499, 1520-21 (1999) (noting that Good Friday Agreement refers specifically to incorporation of ECHR as safeguard of human rights).

11. See Roisin De Rosa, *Dublin Government Fails to Meet Obligations Under Good Friday Agreement*, AN PHOBLACHT/REPUBLICAN NEWS, Oct. 5, 1999 (commenting that under Good Friday Agreement, Dublin government promised to incorporate ECHR so as to ensure human rights protection throughout Ireland); see also Donncha O'Connell, *The Irish Constitution and the ECHR: Belt and Braces or Blinkers?*, IRISH HUM. RTS. REV. 2000 82, 98 (2000) (revealing that United Kingdom is currently in process of incorporating ECHR). Ireland has not yet initiated a parallel process. *Id.* Both the Irish and British governments, however, committed to establishing Human Rights Commissions in Ireland and Northern Ireland. *Id.* The Human Rights Commissions would supervise the

sistent with the Good Friday Agreement.¹² Although the government agreed to incorporate the ECHR by October 1999, it has yet to be incorporated because Attorney-General Michael McDowell and Minister of Justice John O'Donoghue could not decide how to do so.¹³

This Note examines the manner in which Ireland should incorporate the ECHR into Irish domestic law. Part I of this Note discusses background material related to the ECHR and the Irish Constitution of 1937. Part II evaluates disputed rights under the ECHR and the Irish Constitution and examines different methods of incorporation. Finally, Part III recommends constitutional incorporation of the ECHR, and concludes that incorporation would increase human rights protection in Ireland and would provide an objective source of unenumerated rights, subject to judicial review.

I. SURVEYING THE LINKS: THE ECHR AND THE IRISH CONSTITUTION

In 1950, the Council of Europe signed the ECHR.¹⁴ The ECHR was intended to promote and protect the rights expressed in the Universal Declaration of Human Rights ("UDHR").¹⁵ Al-

enforcement of Ireland's and Northern Ireland's human rights obligations. *Id.*; Fionnuala Ni Aolain, *Legal Developments: The Fortification of a Legal Regime*, 59 ALB. L. REV. 1353, 1376-77 (1996) (discussing Standing Advisory Commission on Human Rights in Northern Ireland). This Commission funded substantial research on human rights issues. *Id.*

12. See Good Friday Agreement, *supra* n.10 (stating commitment to partnership, equality, and mutual respect as foundation of relationships within Northern Ireland and between Northern Ireland and Republic of Ireland).

13. See De Rosa, *supra* n.11 (mentioning Ireland's failure to incorporate ECHR as result of dispute between Attorney-General and Minister of Justice). Indeed, the United Nations ("U.N.") Human Rights Committee in Geneva reprimanded the Attorney-General for Ireland's failure to incorporate the ECHR into domestic law. *Id.*

14. See RAYMOND BYRNE & J. PAUL MCCUTCHEON, *THE IRISH LEGAL SYSTEM* 17.06 (1996) (discussing origin of ECHR); see also Michael O'Boyle, *Practice and Procedure Under the European Convention on Human Rights*, 20 SANTA CLARA L. REV. 697, 698 (1980) (describing ECHR's beginnings); Joseph Jaconelli, *The European Convention on Human Rights as Irish Municipal Law*, 22 IRISH JURIST 13, 13 (1987) (mentioning that Ireland ratified ECHR in 1953).

15. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. 1, Resolutions, at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR]. The Preamble to the UDHR provides in pertinent part:

The General Assembly proclaims this Universal Declaration of Human Rights . . . to promote respect for these rights and freedoms and . . . to secure their universal and effective recognition and observance.

though Ireland signed the ECHR, the Irish government has not yet incorporated the ECHR into Irish domestic law.¹⁶

A. *The ECHR*

The concept of human rights dates back at least to 1690.¹⁷ After World War II, the United Nations General Assembly ("UNGA") adopted the UDHR to promote human rights protection.¹⁸ UDHR-protected rights include negative rights, such as prohibiting the government from torturing individuals, and positive rights, such as requiring the government to ensure every individual's right to privacy.¹⁹ The ECHR was designed to en-

Id.; see Louis Henkin, *The Age of Rights*, in HUMAN RIGHTS 2 (1999) (stating that in World War II, Allied powers sought respect for human rights); see also BYRNE & McCUTCHEON, *supra* n.14, at 17.07 (commenting that many provisions of ECHR reflect drafters' intention to prevent reoccurrence of human rights abuses seen during World War II).

16. See G.F. Whyte, *The Application of the European Convention on Human Rights Before the Irish Courts*, 31 INT'L & COMP. L.Q. 856, 857 (1982) (commenting that Ireland has not incorporated ECHR); see also O'Connell, *supra* n. 11, at 85 (pointing out that Ireland has not yet incorporated ECHR); ANDREW DRZEMCZEWSKI, THE EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW—A COMPARATIVE STUDY 170, 211, 306 (1983) (noting that Ireland has not incorporated ECHR into Irish domestic law).

17. See EUROPEAN HUMAN RIGHTS LAW 1 (Mark W. Janis & Richard S. Kay eds., 1990) (tracing history of human rights concept back to John Locke's *Two Treatises of Government* of 1690); see also Henkin, *supra* n.15, at 2 (linking modern idea of individual human rights to John Locke, American Declaration of Independence, and French *Declaration of Rights of Man and of Citizen*); James T. McHugh, *A Liberal Theocracy: Philosophy, Theology, and Utah Constitutional Law*, 60 ALB. L. REV. 1515, 1531 (1997) (citing John Locke's emphasis on individual human rights); James E. Macdonald & Caryn L. Beck-Dudley, *A Natural Law Defense to the Employment Law Question: A Response to Richard Epstein*, 38 AM. BUS. L.J. 363, 375 n.65 (2001) (attributing American interest in human rights to John Locke's legacy).

18. See UDHR, *supra* n.15, at 71. The Preamble provides in pertinent part:
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . . Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights . . . to the end that every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and . . . to secure their universal and effective recognition and observance.

Id.; see also Henkin, *supra* n.15, at 2 (stating that during World War II, Allied powers' goal was to promote respect for human rights); BYRNE & McCUTCHEON, *supra* n.14, at 17.07 (noting that many provisions of ECHR, especially those regarding torture and forced labor, reflect drafters' intention to prevent future repetitions of Holocaust and concentration camps of World War II).

19. UDHR, *supra* n.15, art. 5. Article 5 states: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* Article 12 provides: "Everyone has the right to the protection of the law against such interference or attacks [on his privacy, family, home or correspondence]." *Id.* art. 12; see Tyll van

sure enforcement of UDHR-protected rights.²⁰

1. Background of the ECHR

On November 4, 1950, the Council of Europe met in Rome to sign the ECHR.²¹ The ECHR entered into force on September 3, 1953.²² At that time, the Council of Europe consisted of twenty-one Member States.²³ After the Cold War, the Council of Europe's membership expanded to include most of the previous Soviet bloc States.²⁴ By June 1999, each of the forty-one Mem-

Geel, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 AKRON L. REV. 293, 367 (2000) (describing political freedom as negative right); *see also* Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U.L. REV. 1027, 1055-56 (1996) (recognizing freedom from discrimination as negative right and bilingual education as positive right); Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U.L. REV. 975, 992 (1995) (noting that usually, negative rights only require that States refrain from interference with individuals' privacy, whereas positive rights require States to take steps to protect human rights).

20. ECHR, *supra* n.8, Preamble. The Preamble to the ECHR provides in pertinent part:

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration . . .

Id. (emphasis added); *see* Liz Heffernan, *Introduction to Chapter 2: The European Convention of Human Rights*, in HUMAN RIGHTS—A EUROPEAN PERSPECTIVE, *supra* n.8, at 31 (noting that Council of Europe created ECHR with intent of enforcing rights under UDHR).

21. *See* BYRNE & McCUTCHEON, *supra* n.14, at 17.06 (explaining that Council of Europe was one of first institutions established after World War II to prevent future mass violations of human rights). The Council of Europe's first major initiative was the drafting of the ECHR. *Id.*; *see also* O'Boyle, *supra* n.14, at 697 (describing ECHR as regional treaty for protection of civil and political rights under Council of Europe's auspices); Jaconelli, *supra* n.14, at 13 (noting that Ireland ratified ECHR in 1953). Additionally, Ireland granted its citizens the right of individual petition and accepted the European Court's jurisdiction for an indefinite period of time. *Id.*

22. *See* Heffernan, *supra* n.20, at 31 (mentioning Council of Europe's resolve to enforce certain UDHR rights); *see also* Janette Amer, *Survey of the European Convention on Human Rights and Its Impact on National and International Institutions*, 12 ILSA J. INT'L & COMP. L. 1, 1 (1988) (describing ECHR's purpose as providing protection for individuals' civil and political rights under jurisdiction of ECHR State Parties).

23. *See* Amer, *supra* n.22, at 1 n.2 (listing Council of Europe Member States as of September 1953: Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and United Kingdom).

24. *See* Henkin, *supra* n.15, at 551 (noting that former Soviet bloc States joined Council of Europe, thus increasing membership to forty-one States). As of June 1999, the Council of Europe included the following Member States: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland,

bers of the Council of Europe signed the ECHR.²⁵ Until November 1998, the ECHR's regulatory regime consisted of three organizations: the European Commission of Human Rights²⁶ ("European Commission"), the European Court²⁷ ("European Court"), and the Committee of Ministers of the Council of Europe²⁸ ("Committee of Ministers"). After November 1998, the European Commission and European Court merged into a sin-

France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, and the United Kingdom of Great Britain and Northern Ireland. *Id.*

25. *See id.* (noting when Council of Europe Members signed ECHR).

26. *See* O'Boyle, *supra* n.14, at 700 (explaining European Commission of Human Rights ("European Commission") procedure). The European Commission conducted preliminary examination of individual complaints to ensure that complainants exhausted all domestic remedies. *Id.* The European Commission also determined whether the complaint was ill-founded or abused the right of petition. *Id.* Additionally, the European Commission ascertained whether the complaint was substantially similar to matters the European Commission had already examined or matters previously submitted to different international bodies for investigation or settlement. *Id.* Furthermore, the European Commission determined whether the complaint was anonymous and whether the complaint was lodged within six months from the date of the final decision of the domestic tribunal. *Id.*; *see also* Amer, *supra* n.22, at 3 (describing European Commission's first duty as deciding admissibility of complaints). Once the European Commission admitted a complaint, it had to determine the facts by conducting discovery and attempt to facilitate a settlement between the parties. *Id.*

27. *See* O'Boyle, *supra* n.14, at 724 (describing how European Court handled cases only after Commission acknowledged parties' failure to reach settlement). Additionally, the European Court only had jurisdiction over States that had filed a declaration to this effect with the Secretary-General of the Council of Europe. *Id.* The European Court's jurisdiction encompassed all cases regarding the interpretation and application of the ECHR. *Id.* The European Court's judgments were final. *Id.* at 727; *see also* Amer, *supra* n.22, at 4 (noting that European Court had power to award damages to injured plaintiffs).

28. ECHR, *supra* n.8, art. 46(2). Article 46(2) states: "[t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." *Id.* Article 47 provides:

The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto . . . Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Id.; *see* O'Boyle, *supra* n.14, at 727 (describing Committee of Ministers as executive decision-making body of Council of Europe). The Committee of Ministers has the duty of supervising the execution of European Court judgments. *Id.* at 701. The Committee of Ministers' power to supervise execution of judgments does not, however, provide for enforcement sanctions against non-compliant State Parties. *Id.* Nevertheless, in rare cases, the Committee of Ministers may suspend or expel the non-compliant State from the Council of Europe. *Id.* In addition, a Contracting State may denounce the ECHR,

gle European Court.²⁹

2. The Operation of The ECHR

Before November 1998, the European Court, European Commission, and Committee of Ministers worked together to monitor compliance with the European Court's decisions.³⁰ The European Court accepts complaints from individuals, non-governmental organizations ("NGOs"), and State Parties who allege

which releases the State from its obligations under the ECHR. *Id.* Article 58 of the ECHR states:

A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it . . . Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

Id.

29. See ECHR, *supra* n.8, Protocol 11 (effecting merger of European Commission and European Court in November 1998); Henkin, *supra* n.15, at 553 (commenting that although European Commission and European Court merged into single European Court at Strasbourg in November 1998, understanding their functions provides necessary foundation for studying ECHR's jurisprudence). The merger destroyed neither the European Commission nor the European Court. *Id.* at 555-56. Instead, the European Commission and the European Court merged identities to form a single European Court, thus combining the European Commission's quasi-judicial skill of determining admissibility with the European Court's ability to write reasoned judgments in both official languages. *Id.*; see also Amer, *supra* n.22, at 6 (contending that full-time European Court would ensure respect for applicants' right to fair trial and access to courts); Henry H. Perritt, Jr., *Symposium on the Internet and Legal Theory: The Internet is Changing International Law*, 73 CHI-KENT L. REV. 997, 1023 n.121 (1998) (remarking that Protocol 11 of ECHR merged European Court and European Commission); see generally Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145, 145 (1995) (noting that Protocol 11 combined European Commission and European Court into one permanent tribunal); Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 315 n.15 (2001) (addressing 1998 merger).

30. See Henkin, *supra* n.15, at 553 (explaining that prior to November 1998, European Commission, European Court, and Committee of Ministers oversaw Contracting States' observance of European Court judgments). In November 1998, however, the European Commission and the European Court merged into a single European Court at Strasbourg in November 1998. *Id.* Thus, the European Commission's functions were transferred to the single European Court. *Id.*; see also Amer, *supra* n.22, at 2 (describing European Commission as quasi-judicial body); O'Boyle, *supra* n.14, at 701 (noting frequency of European Commission meetings prior to November 1998).

that other State Parties have violated the ECHR.³¹ The European Court may declare an application inadmissible on various grounds, including the exhaustion of remedies rule, which requires plaintiffs to exhaust all domestic remedies before applying to the European Court.³²

Prior to November 1998, the European Commission determined the admissibility of applications.³³ After admitting an application, the European Commission gathered facts regarding the case and facilitated settlements between the parties.³⁴ The European Commission convened five times annually.³⁵

a. The Role of the European Commission

Before November 1998, the European Commission met five times a year for two-week sessions to decide which applications to admit.³⁶ After admitting an application, the European Com-

31. ECHR, *supra* n.8, art. 34. "The Court may receive applications from any person, non-governmental organization ("NGO"), or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." *Id.* Article 33 of the ECHR provides: "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party." *Id.* art. 33; *see Connelly, supra* n.8, at 36 (describing two methods for filing complaint under ECHR: as inter-State complaint procedure and individual complaint procedure). Regardless of the route taken, the application is heard in the first instance by the European Commission of Human Rights. *Id.* State Parties have seldom used the inter-State complaints procedure and the use of this procedure is not likely to increase. *Id.* at 46. No State Party has brought an action against Ireland for breach of the ECHR. *Id.* at 36. Most applications to the European Court are individual complaints. *Id.* at 46; *see also* John Gleeson, *The European Convention on Human Rights: Its Practical Relevance*, 2 IRISH J. EUR. L. 248, 249 (1993) (noting that European Court adjudicated only one inter-State complaint, *Ireland v. United Kingdom*, Eur. Ct. HR, Jan. 18, 1978, Ser. A, No. 25, which Ireland brought).

32. ECHR, *supra* n.8, art. 35(1). Article 35(1) states: "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken." *Id.*

33. *See* O'Boyle, *supra* n.14, at 708-15 (exploring European Commission's admissibility procedures); *see also* Amer, *supra* n.22, at 3 (explaining that European Commission's first duty was to determine admissibility of applications).

34. *See* O'Boyle, *supra* n.14, at 718 (remarking that European Commission tried to promote settlements between parties); *see also* Amer, *supra* n.22, at 3 (commenting that after declaring admissibility, European Commission endeavored to facilitate settlements).

35. *See* O'Boyle, *supra* n.14, at 701 (remarking how often European Commission convened); *see also* Amer, *supra* n.22, at 2 (describing European Commission as "part-time quasi-judicial body").

36. *See* O'Boyle, *supra* n.14, at 701 (revealing frequency of European Commission

mission had the two-fold duty of gathering facts and securing settlements between adverse parties.³⁷ The European Commission designated English and French as its official languages.³⁸

As for its composition, the European Commission included only one national per ECHR State Party.³⁹ The Committee of Ministers elected European Commission members from a list of names compiled by the Council of Europe.⁴⁰ The ECHR indicated, before November 1998, that European Commission members should sit in their individual capacity, but did not explicitly require any specific qualifications for members.⁴¹ The European Commission also elected a President to oversee meetings and direct the European Commission's work, and two Vice Presidents to overtake these functions if necessary.⁴² The quorum of the European Commission consisted of ten members.⁴³

b. Complaints Under the ECHR

A complaint under the ECHR must allege the violation of an ECHR-protected right arising from an ECHR State Party's action or inaction.⁴⁴ ECHR-protected rights include basic human

meetings); *see also* Amer, *supra* n.22, at 2 (explaining that European Commission's general functions approximated judicial duties).

37. *See* O'Boyle, *supra* n.14, at 718 (explaining that European Commission sought to secure friendly settlements); *see also* Amer, *supra* n.22, at 3 (mentioning that European Commission strived to achieve settlements).

38. *See* O'Boyle, *supra* n.14, at 702 (noting that European Commission would sometimes handle applications in other languages as well).

39. *See* O'Boyle, *supra* n.14, at 701-02 (describing limitation on representation of nationals from same State in European Commission). In practice, national delegations to the Assembly provided lists of their recommended candidates, including at least two nationals. *Id.* at 702.

40. *See id.* at 702 (noting that Committee of Ministers elected European Commission members by absolute majority of votes every six years).

41. *See id.* (interpreting ECHR's stance toward Commission member qualifications). The President of the Assembly suggested to national delegations that their candidates should manifest integrity, competence in human rights matters, and significant legal or judicial experience. *Id.*

42. *See id.* (describing President's function as presiding at meetings and directing Commission's work). If the President can no longer execute these duties, either Vice President may assume these duties. *Id.*

43. *See id.* (revealing European Commission's ten-member quorum). However, seven members sufficed to declare an application inadmissible or remove it from the list of cases. *Id.* Additionally, seven members sufficed to decide whether to describe an application to an ECHR State Party, such as Ireland, in order to discuss the application's admissibility with the Irish government or to obtain relevant information from the Irish government. *Id.*

44. *See* Amer, *supra* n.22, at 2 (explaining that applicants to European Court are

rights,⁴⁵ rights to fair civil or criminal trials,⁴⁶ family/privacy rights,⁴⁷ political rights,⁴⁸ and social rights.⁴⁹ With several excep-

required to allege that Contracting State committed act or failed to commit act in violation of ECHR human rights provisions).

45. ECHR, *supra* n.8, arts. 2-5. The ECHR provides in Articles 2-5:

Article 2: Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4: No one shall be held in slavery or servitude. No one shall be required to perform forced or compulsory labor.

Article 5: Everyone has the right to liberty and security of person.

Id.

46. *Id.* arts. 6-7, Fourth Protocol, art. 2. The ECHR provides in Articles 6-7 & Fourth Protocol, art. 2:

Article 6: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 7: No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed.

Fourth Protocol, art. 2: Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own.

Id.

47. *Id.* arts. 8, 12. The ECHR provides in Articles 8 and 12:

Article 8: Everyone has the right to respect for his private and family life, his home, and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12: Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Id.

48. *Id.* arts. 9-11, First Protocol, art. 3. The ECHR provides in Articles 9-11 and First Protocol, Article 3:

Article 9: Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 10: Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 11: Everyone has the right to freedom of peaceful assembly and to

tions,⁵⁰ ECHR State Parties may derogate from ECHR Articles in times of war or other public emergencies.⁵¹

c. Inadmissibility

The European Court will only accept an application within six months of the date of the domestic court's final decision.⁵² The European Court may declare an application inadmissible based on several factors.⁵³ These include situations where the applicant's domestic remedies are not exhausted,⁵⁴ more than six months elapsed since the final judgment of the applicant's

freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

First Protocol, Article 3: The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Id.

49. *Id.* First Protocol, art. 2. The ECHR provides in First Protocol, Article 2: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Id.

50. *See* ECHR, *supra* n.8, art. 2 (protecting right to life); *see also id.* art. 3 (prohibiting torture), art. 4 (forbidding slavery), art. 7 (preventing punishment without law); O'Boyle, *supra* n.14, at 699 (noting that State Parties are not permitted to derogate from right to life, freedom from torture, freedom from slavery, or freedom from *ex post facto* criminal laws). Additionally, Article 18 of the ECHR requires that derogations permitted under the ECHR shall not be applied for any purpose other than protecting State interest. *Id.*

51. ECHR, *supra* n.8, art. 15. Article 15 provides:

In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Id.; *see* O'Boyle, *supra* n.14, at 699 (describing derogation as limitation of certain rights when required to protect State interest, such as national security or public health); *see also* Connelly, *supra* n.8, at 37 (stating that Article 15 of ECHR permits States to derogate from some of its ECHR obligations in "times of public emergency threatening the life of a nation, to the extent strictly required by the exigencies of the situation").

52. ECHR, *supra* n.8, art. 35(1). Article 35(1) provides: "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken." *Id.*

53. *See generally id.* art. 35 (containing admissibility criteria).

54. *Id.* art. 35(1).

domestic tribunal;⁵⁵ an applicant submitted a complaint anonymously;⁵⁶ an application conveyed no new information and substantially duplicated a matter that the European Court had previously adjudicated or released to another procedure, settlement, or transnational investigation;⁵⁷ an application was manifestly ill-founded;⁵⁸ an applicant abused the right of petition;⁵⁹ or an application addressed events that preceded the ECHR's entry into force, unless the events constitute a continuing breach of the ECHR.⁶⁰

Under the ECHR, the exhaustion of remedies rule applies to both individual and inter-State applications.⁶¹ Accordingly, the individual must prove that she has exhausted each available remedy. In the absence of proof, the European Court will examine the issue.⁶² The European Court requires that the applicant exhaust only the specific remedies that have the power to provide redress for her complaint.⁶³ Also, the European Court

55. *See id.* art. 35(1) (containing six months rule).

56. *See id.* art. 35(2)(a) (providing that European Court "shall not deal with any application submitted under Article 34 that is anonymous").

57. *Id.* art. 35(2)(b). Article 35(2)(b) provides: "[t]he Court shall not deal with any application submitted under Article 34 that is . . . substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information." *Id.*

58. *Id.* art. 35(3). Article 35(3) provides: "[t]he Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application." *Id.*; *see* Patrick Dillon-Malone, *Individual Remedies and the Strasbourg System in an Irish Context*, in HUMAN RIGHTS—A EUROPEAN PERSPECTIVE, 48, 61 (Liz Heffernan & James Kingston eds., 1994) (indicating that Commission will reject complaints as manifestly ill-founded when no *prima facie* case exists).

59. *See* ECHR, *supra* n.8, art. 35(1) (stating exhaustion of remedies rule).

60. *See id.* art. 35(1) (containing exhaustion of remedies rule); *see also* O'Boyle, *supra* n.14, at 711 (explaining that ECHR does not have retroactive power).

61. *See* O'Boyle, *supra* n.14, at 712 (noting that State Parties are permitted to waive exhaustion of remedies rule).

62. *See id.* at 713 (stating that applicant must prove that she has exhausted State remedy or that State remedy does not provide adequate relief). When the accused State argues that the applicant has not exhausted all existent remedies, the State bears the burden of proving its claim. *Id.* If the State proves that an untried remedy exists, the applicant must then demonstrate that she exhausted the remedy or that it was inadequate. *Id.*; *see generally* Vincent P. Pace, *Partial Entrenchment of a Bill of Rights: The Canadian Model Offers a Viable Solution to the United Kingdom's Bill of Rights Debate*, 13 CONN. J. INT'L L. 149, 157 (1998) (mentioning exhaustion of remedies).

63. *See* O'Boyle, *supra* n.14, at 712-13 (detailing Court's approach to exhaustion of remedies); *see, e.g.,* *Belgian Vagrancy Cases* (1971), Y.B. EUR. CONV. ON HUMAN RIGHTS 788 (Eur. Comm. on Human Rights), Judgment of June 18, 1971, Ser. A at 29 (holding

does not view an applicant's petition to the Queen of England as an effective remedy, since these petitions are measures of grace.⁶⁴ One commentator noted that the effectiveness or adequacy of a remedy usually depends upon the particular facts stated in the complaint.⁶⁵

Furthermore, a complainant must raise the same substantive complaint before the European Court that she raised before the domestic court.⁶⁶ The European Court, however, does not limit its definition of remedies to courtroom recovery.⁶⁷ Finally, under the six months rule, the limitations period is initiated upon the European Court's receipt of the applicant's first communication establishing the application's purpose.⁶⁸

d. Adjudication Under the ECHR

Experts explain that, on average, the European Court takes six years to decide an application.⁶⁹ After admitting an application alleging a violation of the ECHR, the European Court has the two-fold duty of evaluating the facts and facilitating an amicable settlement between the parties.⁷⁰ The European Court may dispense free legal aid from the Council of Europe's gen-

that applicants were not required to exhaust remedy that would not have provided redress for applicants' complaint, according to legal precedent in Belgium).

64. See O'Boyle, *supra* n.14, at 713 (noting remedies that applicant need not exhaust). The phrase "measures of grace" refers to the Queen's discretionary power to grant or deny an applicant's petition. *Id.*

65. See *id.* at 714 (explaining that remedy may be considered ineffective if activity complained of could not be challenged successfully in court). Additionally, a remedy may be considered ineffective because of a lengthy delay or because it is inaccessible. *Id.*; see also Dillon-Malone, *supra* n.58, at 51 (noting that what constitutes effective remedy varies according to substantive right being invoked). Generally, an applicant has no right to compensation for an adjudicated breach of her rights under the ECHR. *Id.*

66. See O'Boyle, *supra* n.14, at 714 (describing substantial similarity requirement).

67. See *id.* (elucidating European Court's definition of remedies). For example, if a prisoner is awarded review of lower prison authorities' acts and decisions, the European Court would hold that the prisoner had received a remedy. *Id.*

68. See *id.* at 705 (conveying how to calculate limitations period).

69. See Dillon-Malone, *supra* n.58, at 59 (explaining how average six-year delays in Strasbourg system often render European Court's decisions moot); see also Amer, *supra* n.22, at 6 (discussing criticism of five and six-year delays at European Court); Heffernan, *supra* n.20, at 32 (opining that delays commonly exceeding five years would dissuade most applicants); O'Boyle, *supra* n.14, at 732 (describing European Court's procedures as cumbersome and creating delay).

70. See Amer, *supra* n.22, at 3 (describing European Court's functions after admitting applications).

eral funds in conjunction with any case's representation.⁷¹ In addition to determination of the facts, the European Court is also authorized to encourage friendly settlement of disputes.⁷²

The European Court consists of a number of judges equal to the number of Contracting Parties; the Parliamentary Assembly chooses the candidates for European Court judgeships from a list of three candidates nominated by each Contracting Party and elects the judges by a simple majority of votes.⁷³ To ascer-

71. *See id.* (noting that European Commission could grant free legal aid to applicants). This legal aid scheme is an important innovation of the ECHR. *Id.* After the European Commission and the European Court merged into a single European Court in November 1998, the European Court assumed the function of granting free legal aid to applicants. *Id.* *See generally* Margot Penfield Schoenborn, *The Access to Justice Bill and Human Rights Act of 1998: Britain's Legislative Overhaul Leaves the System Scrambling to Mend the Safety Net*, 6 *BUFF. HUM. RTS. L. REV.* 183, 185-86, 190-91 (2000) (exploring legal aid in context of ECHR); David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks*, 8 *CONN. J. INT'L L.* 243, 253-54 (1993) (examining legal aid *vis-à-vis* ECHR).

72. *See* O'Boyle, *supra* n.14, at 718 (discussing attempts at settlement). The small number of cases that reach settlement does not accurately convey the importance of conciliation under the ECHR. *Id.* at 719. One reason that few cases reach settlement is that parties sometimes make unofficial arrangements that lead applicants to withdraw their applications. *Id.*; *see also* Dillon-Malone, *supra* n. 58, at 58 (claiming that importance of settlement under ECHR cannot be overstated). For the European Court, resolving a dispute by settlement is often the most effective and fastest way to guarantee that State Parties will alter their offending laws and administrative practices. *Id.* *See generally* Roberta M. Harding, *In the Belly of the Beast: a Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 *GA. J. INT'L & COMP. L.* 1, 24 (1998) (mentioning friendly settlement in context of ECHR); Pace, *supra* n.62, at 157-58 (addressing settlement under ECHR); Tara C. Stever, *Protecting Human Rights in the European Union: An Argument for Treaty Reform*, 20 *FORDHAM INT'L L.J.* 919, 951 (1997) (alluding to topic of settlement under ECHR).

73. ECHR, *supra* n.8, arts. 20-22. The ECHR provides in Articles 20-22:

Article 20: Number of judges. The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21: Criteria for office. 1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence. 2. The judges shall sit on the Court in their individual capacity. 3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22: Election of judges. 1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party. 2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

tain the facts of the case, the European Court conducts an oral hearing where no formal evidentiary rules apply.⁷⁴ Indeed, the European Court lacks set rules of evidence.⁷⁵ At these hearings, the European Court typically admits all relevant evidence.⁷⁶

Commentators explain that although the European Court officially begins establishing facts after formally admitting an application, the European Court often starts gathering and verifying facts immediately after receiving the applicant's first letter of complaint.⁷⁷ During this process, the European Court is permitted to gather affidavits and official documents, hear expert witnesses and the statements of both parties' observations, and send delegations to the States involved in the case in order to investigate the situation and question the parties.⁷⁸ Although the European Court has occasionally sent delegations during individual applications, particularly those related to treatment in prison, the European Court generally only employs investigative delegations while trying inter-State cases.⁷⁹ At least one commentator notes that the ECHR does not give the European Court the power to compel document production or witnesses' attendance.⁸⁰

If the parties are able to agree, the European Court must establish that the terms of the settlement take into account the

Id.

74. See Amer, *supra* n.22, at 3 (mentioning that European Commission usually admitted all relevant evidence at oral hearing).

75. See O'Boyle, *supra* n.14, at 717 (noting that European Court lacks codified rules addressing problems of burden of proof, illegally acquired evidence, privileged documents, and perjury).

76. See *id.* (describing European Court's admission of evidence after receiving applicant's first letter of complaint).

77. See *id.* at 715 (explaining that process of gathering and verifying facts may involve reviewing affidavits and official documents, hearing expert witnesses, investigations by European Commission delegations, and questioning of parties during hearings).

78. See *id.* (providing further details of discovery). Because the European Court lacks pre-established rules of evidence, the European Court takes a flexible approach to the problems of illegally acquired evidence, privileged documents, perjury, and burden of proof. *Id.* at 717.

79. See *id.* at 716 (noting when European Court uses its powers of investigation); see also Amer, *supra* n.22, at 4 (noting that European Court also possesses limited power to give advisory opinions on legal questions regarding ECHR and its Protocols).

80. See O'Boyle, *supra* n.14, at 717 (revealing limitations regarding European Court's discovery power). The European Commission, however, noted that plaintiff must prove her allegations beyond a reasonable doubt—a doubt based on the facts presented. *Id.*

parties' human rights.⁸¹ Commentators, therefore, opine that when an individual alleges violations regarding an administrative practice or legislative act that affects numerous individuals, the European Court will recommend altering the law or practice.⁸² At least one scholar asserts that typically, in a settlement, a complainant secures an alteration in the law and receives compensation in exchange for withdrawal of her complaint and an agreement not to initiate future lawsuits before national or international courts.⁸³ The same commentator further notes that the European Court's attention to society's interest upholds ECHR rights and also encourages parties to settle, thus curtailing disputes.⁸⁴ If the European Court successfully facilitates a settlement, the European Court will remove the case from its docket and issue a brief statement of the facts and the solution reached.⁸⁵

Experts recognize that the ECHR does not establish any method of ensuring the implementation of ECHR provisions or the enforcement of ECHR decisions within the Contracting States' domestic law.⁸⁶ Consequently, the European Court's de-

81. *See id.* at 718 (explaining that settlements must address parties' human rights). Experts opine that the European Commission's belief that settlements must serve the State Parties' interest maintained the integrity of ECHR rights and gave State Parties an incentive to reach settlement, rather than engaging in prolonged disputes. *Id.* at 718-19; *see also* Dillon-Malone, *supra* n.58, at 59 (adding that when settlements do not propose amendment or removal of offending law, European Court may refuse to remove case from its docket). In practice, the European Court has never carried out this threat. *Id.*

82. *See* O'Boyle, *supra* n.14, at 718-19 (illustrating how European Court attempts to serve society's interest through resolution of disputes).

83. *See id.* (noting usual settlement results); *see also* Dillon-Malone, *supra* n.58, at 59 (explaining that after European Court approves of friendly settlements, Committee of Ministers has duty of supervising execution of settlement terms). In practice, supervising friendly settlements is unnecessary because the State Party would not agree to terms that the State did not wish to implement. *Id.*

84. *See* O'Boyle, *supra* n.14, at 718-19 (cataloguing effects of European Court's attention to society's interest). Before November 1998, the European Commission acted as an intermediary between the parties. *Id.* at 719. The European Commission told the parties whether or not the proposed settlement would promote the general interest. *Id.*

85. ECHR, *supra* n.8, art. 39. Article 39 states: "[i]f a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached." *Id.*

86. *See* Dillon-Malone, *supra* n.58, at 50 (concluding that ECHR does not provide system of implementation or enforcement of European Court decisions by States Parties); *see also* BYRNE & McCUTCHEON, *supra* n.14, at 17.24 (remarking that international agreements to which State is party do not operate at domestic level unless they are incorporated); Doina Micu, *The Practice of the Constitutional Court of Romania as Compared*

decisions are not binding on Irish courts.⁸⁷ Scholars note that a generally recognized principle of international law holds that States must uphold their obligations under all international agreements.⁸⁸ At least one expert explains that accordingly, the European Court's finding of a violation creates only obligations of result, which means that the respondent State has the sole responsibility to discontinue the wrongful act, make reparations for damages, and prevent the violation's recurrence.⁸⁹

e. Enforcing the ECHR

The European Court does not have the authority to enforce its judgments.⁹⁰ Additionally, Irish domestic courts have no duty to follow European Court judgments as binding precedent.⁹¹ Indeed, Article 46 of the ECHR, entitled "Binding Force and Execution of Judgments," provides only that the Contracting States

with the Practice of the European Court for Human Rights, 8 MSU-DCL J. INT'L L. 781, 785 (1999) (commenting on unenforceability); Schoenborn, *supra* n.71, at 190-91 (noting that ECHR is unenforceable in Britain until it is incorporated).

87. See BYRNE & McCUTCHEON, *supra* n.14, at 17.18 (noting that European Court decisions do not bind Irish courts or other domestic courts that have not incorporated ECHR); see also Gleeson, *supra* n.31, at 249 (explaining that ECHR gives Contracting States discretion regarding implementation of European Court judgments).

88. IR. CONST. art. 29.3. Article 29.3 of the Irish Constitution states: "Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States." *Id.*; see Charles Lysaght, *The Status of International Agreements in Irish Domestic Law*, 12 IRISH L. TIMES 171 (1994) (explaining States Parties' obligation to comply with international agreements under customary international law); see also Dillon-Malone, *supra* n.58, at 50 (noting that in accordance with customary international law, European Court's finding of violation of ECHR gives State Parties responsibility to enforce decision).

89. See Dillon-Malone, *supra* n.58, at 50 (noting inconsistency between obligations of result, which State has sole responsibility of upholding and may neglect, and ECHR's Article 13 promise of effective remedies before domestic authorities).

90. See Amer, *supra* n.22, at 2 (explaining that European Court relies primarily on voluntary compliance of Member States with European Court judgments); see also BYRNE & McCUTCHEON, *supra* n.14, at 17.15 (noting that ECHR creates obligations between States Parties, but does not confer enforceable legal rights on Irish citizens until Ireland incorporates ECHR into Irish domestic law); Micu, *supra* n. 86, at 785 (recognizing that ECHR decisions are not enforceable without incorporation); Schoenborn, *supra* n.71, at 190-91 (commenting that until incorporation process is complete, ECHR is unenforceable in British domestic courts).

91. See Gleeson, *supra* n.31, at 265 (mentioning domestic courts' lack of obligation to accord precedential value to ECHR judgments); see also Micu, *supra* n.86, at 785 (explaining that enforcement of ECHR rulings depends on each State); BYRNE & McCUTCHEON, *supra* n.14, at 17.10 (noting that European Court decisions are not binding on Irish tribunals); see e.g., *Norris v. Attorney-General*, [1984] I.R. 36, 66 (declaring that ECHR decisions have no effect on Irish law).

should abide by the European Court's final judgment in cases where the States are parties.⁹² Such judgments bind the Contracting States that were parties to the action only insofar as the Committee of Ministers can punish a Contracting State for non-compliance.⁹³ Consequently, experts agree that ECHR judgments have little impact on domestic case law.⁹⁴

B. *Human Rights Law in Ireland*

The Irish government ratified the ECHR on February 25, 1953, and decided concurrently to grant to its nationals the right of individual petition to the European Court and to accept the jurisdiction of the European Court.⁹⁵ Scholars note, however, that the Irish government considered Articles 40 through 44 of

92. ECHR, *supra* n.8, art. 46. Article 46 states: "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." *Id.*

93. *See Amer, supra* n.22, at 5 (describing Committee of Ministers' possible sanctions). In extreme cases, the Committee of Ministers may suspend or expel the offending State from the Council of Europe. *Id.*

94. *See id.* (noting ECHR judgments' lack of influence on domestic plane); *see also* Lysaght, *supra* n.88, at 171 (explaining that Irish courts cannot enforce ECHR provisions until Ireland incorporates ECHR into Irish domestic law, although Irish courts occasionally consider ECHR provisions regarding freedom of expression in determining scope of right to freedom of expression under Irish Constitution); Whyte, *supra* n.16, at 860-61 (stating that Ireland has failed to incorporate ECHR into Irish domestic law and consequently Irish courts do not have to apply ECHR provisions in domestic cases). Article 29.3 of the Irish Constitution, which states that "Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States," may support the proposition that the ECHR is part of domestic Irish law. IR. CONST. art. 29.3; Whyte, *supra* n.16, at 858. This argument fails, however, because the Irish judiciary has traditionally construed Article 29.3 as applying solely to inter-State relations and not conferring rights on individuals, since the language of Article 29.3 does not refer to "citizens," "persons," or "individuals." Whyte, *supra* n.16, at 859; O'Connell, *supra* n.11, at 82 (commenting that ECHR provisions and European Court decisions do not bind domestic courts, though Irish judges sometimes invoke ECHR provisions to support their decisions regarding Irish law); BYRNE & McCUTCHEON, *supra* n.14, at 17.10 (explaining that international treaties are unenforceable in State Parties' domestic courts). Additionally, although States Parties are not obligated to accept the jurisdiction of the European Court, Ireland has accepted the jurisdiction of the European Court. *Id.*; Dillon-Malone, *supra* n.58, at 48 (noting that ECHR does not compel States Parties' domestic courts to enforce ECHR provisions or European Court decisions).

95. *See* Jaconelli, *supra* n.14, at 13 (explaining that Ireland demonstrated commitment to ECHR by granting Irish citizens right of petition and accepting jurisdiction of Court indefinitely). Ireland has not yet incorporated the ECHR, unlike most of the other Members of the Council of Europe. *Id.*; DRZEMCZEWSKI, *supra* n.16, 170-75 (commenting that most other Members of Council of Europe have incorporated ECHR).

the Constitution of Ireland, 1937, which address fundamental rights, to sufficiently protect the rights of Irish nationals.⁹⁶ Because Articles 40 through 44 of the Irish Constitution do not exhaustively enumerate the human rights of Irish citizens, the Irish judiciary interprets Article 40.3 of the Irish Constitution, rather than the ECHR, as a source of unenumerated rights.⁹⁷ Experts agree that the Irish Constitution prevents automatic incorporation of the ECHR into Irish domestic law.⁹⁸

1. The ECHR in Ireland

On November 4, 1950, the Irish Minister for External Affairs signed the ECHR with the other Members of the Council of Europe.⁹⁹ Upon becoming a party to the ECHR, Ireland en-

96. IR. CONST. arts. 40-44; see DRZEMCZEWSKI, *supra* n.16, at 170 (explaining Ireland's motive for not incorporating ECHR upon ratification).

97. See Anthony Tyler Barnes, *Ireland's Divorce Bill: Traditional Irish and International Norms of Equality and Bodily Integrity at Issue in a Domestic Abuse Context*, 31 VAND. J. TRANS-NAT'L L. 643, 657 (1998) (noting that Irish judiciary construed Article 40.3 of the Irish Constitution as proclamation to Irish Parliament [hereinafter Oireachtas] that established no criteria for judicial review). Later, the Irish courts construed Article 40.3 as a source of unenumerated or "unspecified" rights. *Id.*; see also Ann Sherlock, *Constitutional Change, Referenda and the Courts in Ireland*, PUB. L. 125, 128 (Spring 1997) (marking year when Irish courts' attitude toward judicial review changed dramatically); see e.g., *Ryan v. Attorney-General* [1965] I.R. 294, 312-13 (finding protection for unenumerated rights under Article 40 of Irish Constitution). But see G.W. Hogan, *Unenumerated Personal Rights: Ryan's Case Re-evaluated*, 25-27 IRISH JURIST 95, 101 (1990-92) (explaining how Irish courts did not specify objective means of identifying the unenumerated rights to which Article 40.3.1 refers).

98. IR. CONST. art 29.6. Article 29.6 of the Irish Constitution provides: "[n]o international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." *Id.*; see O'Connell, *supra* n.11, at 85 (criticizing Art. 29.6 of Irish Constitution as impediment to domestic enforcement of ECHR). Under the dualist approach espoused in Article 29.6 of the Irish Constitution, the Oireachtas must take active steps, such as legislation, to incorporate the ECHR into Irish domestic law. *Id.*; see also Jaconelli, *supra* n.14, at 17 (explaining that Article 29.6 of Irish Constitution does not allow for automatic incorporation of ECHR); Dillon-Malone, *supra* n.58, at 48 (noting that Article 29.6 of Irish Constitution embodies dualist approach to international treaties; consequently, without legislation incorporating ECHR provisions, Irish courts have refused to enforce ECHR provisions, particularly as against conflicting Irish law); Lysaght, *supra* n.88, at 171 (stating that Article 29.6 of Irish Constitution adopts dualist approach to incorporation, whereby international agreements are not automatically incorporated); BYRNE & MCCUTCHEON, *supra* n.14, at 17.17 (concluding that Irish constitutional jurisprudence embraces dualist approach to international law, and therefore international agreements are not automatically incorporated into Irish domestic legal order).

99. See O'Connell, *supra* n.11, at 83 (stating when Ireland signed ECHR). Incidentally, when Ireland signed the ECHR, the Irish government was trying to prevent the partition of Ireland into Northern Ireland and the Irish Republic. *Id.*

tered a reservation explaining that it interpreted Article 6(3)(c) of the ECHR¹⁰⁰ as not requiring the provision of civil legal aid to any greater extent than Ireland already provided at the time.¹⁰¹ Subsequently, Ireland ratified all of the protocols to the ECHR, except the Seventh.¹⁰² Commentators note that despite these actions, Ireland has not yet incorporated the ECHR into its domestic law.¹⁰³

Scholars agree that Article 29.6 of the Irish Constitution formulates a dualistic approach to international treaties, which mandates that the Irish Parliament (the "Oireachtas") must take steps to incorporate such treaties into domestic law.¹⁰⁴ Thus, international law does not automatically enter the Irish legal order, and consequently, international treaties do not create obligations or rights presentable to an Irish court unless they are successfully incorporated into Irish domestic law.¹⁰⁵ In addition,

100. ECHR, *supra* n.8, art. 6(3)(c). Article 6(3)(c) states: "[e]veryone charged with a criminal offense has the following minimum rights: . . . to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." *Id.*

101. See HUMAN RIGHTS AND THE EUROPEAN CONVENTION 185 (Brice Dickson ed., 1997) (noting Ireland's reservation to Art. 6 of ECHR).

102. See ECHR, *supra* n.8, Seventh Protocol (mandating procedural safeguards relating to expulsion of aliens, right of appeal in criminal cases, compensation for wrongful conviction, freedom from double jeopardy, and equality between spouses); see also HUMAN RIGHTS AND THE EUROPEAN CONVENTION, *supra* n.101, at 185 (commenting that Ireland has ratified all protocols to ECHR, except for Seventh Protocol).

103. See Whyte, *supra* n.16, at 857 (explaining that Ireland has not incorporated ECHR); see also O'Connell, *supra* n.11, at 85 (noting that Ireland has not yet incorporated ECHR); DRZEMCZEWSKI, *supra* n.16, at 211, 306 (mentioning that Ireland has not incorporated ECHR).

104. IR. CONST. art. 29.6 (stating that Oireachtas alone may incorporate international agreements).

105. See Leo Flynn, *Ireland, in EUROPEAN CIVIL LIBERTIES AND THE EUROPEAN CONVENTION ON CIVIL RIGHTS: A COMPARATIVE STUDY* 183 (C.A. Gearty ed., 1997) (exploring ramifications of dualist approach to international law). Ireland has given force to international agreements as domestic law in several ways. *Id.* For example, when Ireland acceded to the European Communities ("EC"), Ireland amended the Irish Constitution so that EC law would have supremacy over the Irish Constitution. *Id.* Article 29.4.3 of the Irish Constitution states:

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union ("EU") or the Communities, or prevents laws enacted, acts done or measures adopted by the EU or the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having force of law in the State.

Id.

Article 15.2 provides that only the Oireachtas may incorporate international agreements into Irish domestic law, via Irish domestic legislation.¹⁰⁶ Conversely, countries such as the Netherlands adopt a monist approach, under which international agreements to which a State is a party immediately become part of domestic law.¹⁰⁷

In accordance with the Irish Constitution, the Irish judicial system consists of twenty-three District Courts that handle most trials of minor matters (e.g., landlord-tenant disputes), civil or criminal; nine Circuit Courts that handle more serious cases and District Court appeals; a High Court that has unrestricted civil and criminal jurisdiction, as well as original jurisdiction over cases involving constitutional challenges of laws; and a Supreme Court that exercises appellate jurisdiction over all High Court judgments.¹⁰⁸ Commentators agree that since 1965, the Irish courts have exercised more vigorous judicial review of legislation.¹⁰⁹ Scholars note that by using the power of judicial review,

106. IR. CONST. art. 15.2. Article 15.2 of the Irish Constitution provides: “[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.” *Id.*; see O’Connell, *supra* n.10, at 85 (explaining that under Article 15.2, if Oireachtas does not incorporate ECHR via Irish domestic legislation, ECHR will remain unincorporated and unenforceable in Ireland); see also BYRNE & McCUTCHEON, *supra* n.14, at 17.15 (concluding that Irish courts cannot enforce ECHR provisions as part of domestic Irish law unless ECHR is incorporated into Irish domestic law by Oireachtas).

107. See *Report of the Constitution Review Group* (May 1996), available at <http://pages.zoom.co.uk/david-surrIDGE/ConstRevGrpArt40-44.htm> (describing Netherlands as monist nation). The United Kingdom and Sweden have a dualist tradition. *Id.*; see also Lysaght, *supra* n.88, at 171 (contrasting monist and dualist approaches to incorporation). Britain is a proponent of the dualist approach to incorporation, which means that all international treaties, agreements, and conventions to which Britain is a party do not automatically become part of British law. *Id.*; see generally Andrew L. Strauss, “Could a Treaty Trump Supreme Court Jurisdictional Doctrine?”: *Where America Ends and the International Order Begins*, 61 ALB. L. REV. 1237, 1265 (1998) (mentioning American dualist approach).

108. See IR. CONST. art. 34 (establishing framework of Irish judiciary); see also Francis William O’Brien, *Judicial Review in Ireland*, 9 ST. LOUIS U. PUB. L. REV. 587, 589 (1990) (describing Irish judicial system). When the High Court acts as a trial court, it sits with one judge plus a jury in criminal cases, because Article 38.6 of the Irish Constitution requires a jury for civilians in all criminal cases. *Id.* When the High Court acts as an appellate court, it usually sits with three judges. *Id.*

109. See O’Brien, *supra* n.108, at 588-89 (explaining that Irish courts exercised judicial review especially from 1965 onward); see, e.g., Ryan v. Attorney-General, [1965] I.R. 294 (exercising judicial review to find constitutionality of statute); see generally Norris v. Attorney-General, [1984] I.R. 36 (using judicial review to uphold constitutionality of statute); Marbury v. Madison, 5 U.S. 137 (1803) (formulating concept of judicial review in United States).

Irish courts chose to give precedence to domestic law over conflicting provisions of the ECHR.¹¹⁰

For example, in *re O Laighleis*,¹¹¹ the applicant claimed that his internment violated his right to liberty under Article 5 of the ECHR and his right to a fair trial under Article 6 of the ECHR.¹¹² In response to plaintiff O Laighleis' claim, the High Court cited Articles 29.6 and 15.2 of the Irish Constitution to show that the ECHR had not automatically become part of Irish law.¹¹³ Next, the High Court reasoned that the ECHR could not affect or qualify Irish legislation.¹¹⁴ Accordingly, the High Court held that in the case of an irreconcilable conflict between an Irish statute and an international treaty, the domestic courts must give precedence to the Irish statute.¹¹⁵

Consequently, commentators agree that the Irish courts seldom interpret ECHR provisions or accept arguments based on ECHR provisions.¹¹⁶ Scholars further agree that Irish rights

110. See Dillon-Malone, *supra* n.58, at 48 (explaining that Irish courts consistently refused to enforce ECHR provisions against conflicting Irish domestic legislation). Consequently, the Irish tribunals seldom interpret, or listen to in-court arguments based on, the scope and meaning of ECHR provisions. *Id.*; see also Whyte, *supra* n.16, at 860-61 (noting that Irish courts have declined to take cognizance of ECHR provisions in domestic cases).

111. *Re O Laighleis*, [1960] I.R. 93 (holding that ECHR was irrelevant to validity of Offenses Against the State (Amendment) Act 1940 because supremacy of Irish domestic legislation is not displaced by unincorporated ECHR); see O'Connell, *supra* n.1, at 86 (referring to this holding as *O Laighleis* principle).

112. *Re O Laighleis*, *supra* n.111, at 122-23 (alleging violations of Articles 5 and 6 of ECHR); see also BYRNE & McCUTCHEON, *supra* n.14, at 17.17 (noting that O Laighleis was interned under Offenses Against the State (Amendment) Act 1940, which Irish Supreme Court upheld against prior challenge under Article 26 of ECHR).

113. See BYRNE & McCUTCHEON, *supra* n.14, at 17.17 (deducing that ECHR is not part of Irish law); see also O'Connell, *supra* n.11, at 85 (explaining that despite Ireland's relatively unqualified ratification of ECHR in 1953, ECHR lacks force of law in domestic legal proceedings because of Articles 15.2 and 29.6 of Irish Constitution). These Articles declare, respectively, that the Oireachtas has exclusive power to make Irish law and incorporate international agreements into domestic law. *Id.*; Whyte, *supra* n.16, at 857 (stating that *O Laighleis* court relied on Article 29.6 of Irish Constitution for proposition that ECHR is not part of Irish law).

114. See BYRNE & McCUTCHEON, *supra* n.14, at 17.17 (revealing ECHR's lack of effect on Irish law); see also Connelly, *supra* n.8, at 47 (concluding that ECHR has less power to protect human rights than domestic courts). Although Ireland displayed reluctance in implementing ECHR standards, the Irish Government never considered withdrawing from the ECHR. *Id.*

115. See *re O Laighleis*, *supra* n.111, at 124-25 (holding that Irish domestic legislation has supremacy over ECHR because Oireachtas has not incorporated ECHR).

116. See Dillon-Malone, *supra* n.58, at 48 (noting that Irish courts rarely interpret, or hear arguments relating to, ECHR provisions); see also BYRNE & McCUTCHEON, *supra*

claimants cannot rely on European Court judgments in domestic legal proceedings.¹¹⁷ As a result, commentators note that the Irish judiciary excluded itself from the ongoing dialogue concerning human rights between European courts and the European Court.¹¹⁸ This dialogue elaborated upon and expanded ECHR-based human rights with respect to changing circumstances since the signing of the ECHR in 1950, thus giving the ECHR the status of an evolving constitutional instrument in European human rights jurisprudence.¹¹⁹

2. Fundamental Human Rights Under The Irish Constitution

Scholars agree that the Irish government considered Articles 40 through 44 of the Irish Constitution, which address fundamental rights, to sufficiently guard the fundamental human rights of Irish citizens.¹²⁰ Article 40 classifies personal rights as a category of fundamental rights.¹²¹ Specifically, Article 40.1 requires that all citizens be held equal before the law.¹²² Additionally, Article 40.3.1 of the Irish Constitution contains the State's guarantee to defend and vindicate the personal rights of Irish

n.14, 17.15 (concluding that Irish courts refuse to recognize ECHR provisions as conferring rights in Irish tribunals and will continue to do so until Oireachtas incorporates ECHR).

117. See Whyte, *supra* n.16, at 858 (mentioning Irish citizens' inability to depend on European Court decisions in domestic tribunals). This commentator opines that, since Ireland has accepted European Court's jurisdiction and granted right of individual petition under ECHR to Irish citizens, Ireland should enable Irish citizens to rely on ECHR in domestic proceedings. *Id.*; see also O'Connell, *supra* n.11, at 85 (stating that ECHR lacks force of domestic law in domestic lawsuits and noting that various cases have upheld this view); BYRNE & MCCUTCHEON, *supra* n.14, at 17.16 (explaining that Irish citizens cannot rely on ECHR provisions in domestic courts, that lawyers have invoked ECHR provisions in in-court arguments, and that Irish courts have uniformly rejected ECHR-based arguments); DRZEMCZEWSKI, *supra* n.16, at 172 (stating that because Oireachtas has not incorporated ECHR in legislation, ECHR has no legal value as against Irish law); *Report of Constitution Review Group*, *supra* n.107 (remarking that incorporation would allow rights claimants to rely on ECHR provisions in Irish tribunals).

118. See Dillon-Malone, *supra* n.58, at 48-49 (noting Ireland's absence from dialogue between European national courts and European Court). Over time, this dialogue has endowed the ECHR with quasi-constitutional status in other Contracting States. *Id.*

119. See *id.* at 64 (commenting that European Court case law could provide source of constitutional law for Irish tribunals).

120. IR. CONST. arts. 40-44; see DRZEMCZEWSKI, *supra* n.16, at 174 (explaining Ireland's motive for not incorporating ECHR upon ratification).

121. IR. CONST. art. 40.

122. See *id.* art. 40.1 (stating that "all citizens shall, as human persons, be held equal before the law").

citizens through Irish legislation.¹²³

Experts recognize that Articles 40.3.1 and 40.3.2 provide a rich source of unenumerated rights in Irish constitutional law.¹²⁴ Following the 1965 watershed case *Ryan v. Attorney-General*,¹²⁵ Irish courts recognized that the Irish Constitution does not exhaustively enumerate the rights of Irish citizens.¹²⁶ Specifically, Irish tribunals began to acknowledge two types of rights under Article 40.3: enumerated and unenumerated.¹²⁷ The Irish courts employed various tests to identify unenumerated rights under the Irish Constitution, but these tests did not provide an objective source of unenumerated rights.¹²⁸

123. *Id.* art. 40.3.1. Article 40.3.1 of the Irish Constitution states: “[t]he State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.” *Id.* Article 40.3.2 of the Irish Constitution provides: “[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.” *Id.*

124. See *Norris v. Attorney-General*, [1984] I.R. 36, 96 (stating that Articles 40-44 of Irish Constitution contain fundamental rights of all Irish citizens); see also Hogan, *supra* n.97, at 97 (emphasizing importance of Articles 40.3.1 and 40.3.2 in Irish constitutional law); see generally David O’Connor, *Limiting “Public Morality” Exceptions to Free Movement in Europe: Ireland’s Role in a Changing European Union*, 22 *BROOK. J. INT’L L.* 695, 708 (1997) (canvassing Article 40 issues with respect to right to access abortion information abroad); S.I. Strong, *Christian Constitutions: Do They Protect Internationally Recognized Human Rights and Minimize the Potential for Violence Within a Society?*, 29 *CASE W. RES. J. INT’L L.* 1, 28, 29 n.132 (1997) (reviewing Article 40 *vis-à-vis* religion); Amy M. Buckley, *Other International Issues: The Primacy of Democracy Over Natural Law in Irish Abortion Law*, 9 *DUKE J. COMP. & INT’L L.* 275, 279, 282 (1999) (relating Articles 40 and 41 to Irish abortion law and family rights); Hugh O’Flaherty, *An Introduction to the Relationship Between European Community Law and National Law in Ireland*, 20 *FORDHAM INT’L L.J.* 1151 (1997) (explaining that Articles 40-45 protect fundamental rights); Liam Hamilton, *Matters of Life and Death*, 65 *FORDHAM L. REV.* 543, 544-46 (1996) (discussing Articles 40-43).

125. [1965] I.R. 294 (declaring existence of unenumerated rights under Article 40.3 of Irish Constitution).

126. See Sherlock, *supra* n.97, at 128 (examining Irish courts’ attitude toward unenumerated rights); see generally Abigail-Mary E.W. Sterling, *The European Union and Abortion Tourism: Liberalizing Ireland’s Abortion Law*, 20 *B.C. INT’L & COMP. L. REV.* 385, 389 (1997) (mentioning unenumerated rights in context of Irish abortion law); Anna Margaret McDonough, *When Irish Eyes Aren’t Smiling: Legalizing Divorce in Ireland*, 14 *DICK. J. INT’L L.* 647, 654-55 (1996) (canvassing unenumerated rights *vis-à-vis* Irish divorce legislation); Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community’s Legal Order*, 37 *HARV. INT’L L.J.* 307, 371 n.294 (1996) (addressing unenumerated right to information in Irish jurisprudence).

127. See Barnes, *supra* n.97, at 657 (describing specified and unspecified rights).

128. See Hogan, *supra* n.97, at 101 (positing lack of objective method of identifying unenumerated rights under Article 40.3.1); see also *Report of Constitution Review Group*,

a. Judicial Recognition of Unenumerated Rights

Scholars note that Article 40.3.1—coupled with Article 40.3.2’s substantive due process protection of Irish citizens’ lives, persons, and property rights¹²⁹—provides the principal source of unenumerated rights in Irish constitutional jurisprudence.¹³⁰ Initially, the Irish courts interpreted Article 40.3 as a proclamation to the Oireachtas to enact legislation protecting the personal rights of Irish citizens; the Irish courts concluded that this proclamation did not give the courts the power of judicial review.¹³¹ Later, the Irish courts changed their non-interventionist approach to Article 40.3.¹³² Beginning in 1965, the Irish judiciary looked to Article 40.3 to articulate unenumerated rights and determine whether those rights require legislative protection.¹³³

After *Ryan v. Attorney-General*, the Irish judiciary acknowledged that the Irish Constitution does not fully enumerate the rights of Irish citizens.¹³⁴ In particular, Irish courts started to recognize both enumerated and unenumerated rights under Ar-

supra n.107 (commenting that there seems to be no objective means of identifying unenumerated rights).

129. IR. CONST. art. 40.3.2.

130. See Hogan, *supra* n.97, at 97 (describing Article 40.3 as “cornerstone of Irish constitutional jurisprudence” and mentioning that Article 40.3.2 offers substantive due process protection); see also JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 314-15 (1992). Article 40.3.1 provides a general guarantee of the personal rights of every Irish citizen. *Id.* (discussing how Article 40.3.2 provides protection “in particular” for “the life, person . . . property rights of every [Irish] citizen.” *Id.*; *Ryan v. Attorney-General*, [1965] I.R. 294, 312-13 (finding that because Article 40’s other provisions do not specifically uphold Irish citizen’s right to life or right to free movement within State, Article 40’s other provisions do not contain complete enumeration of guaranteed rights); CASEY, *supra*, at 315 (noting that after *Ryan*, Irish judiciary assumed duty of determining which unenumerated rights Irish Constitution implicitly protects); see, e.g., Norris v. Attorney-General, [1984] I.R. 36, 96-97 (following *Ryan*’s interpretation of unenumerated rights).

131. See *Ryan*, [1965] I.R. at 313 (explaining that in “modern times,” Irish courts interpreted Article 40.3 as authorizing Oireachtas to articulate personal rights of Irish citizens). The *Ryan* court ruled against this assumption and allocated the function of articulating enumerated rights to the Irish courts. *Id.*; see also Barnes, *supra* n.97, at 657 (describing history of judicial review in Ireland).

132. See *Ryan*, [1965] I.R. at 313 (declaring that Irish courts could now identify unenumerated rights in Irish Constitution).

133. See Barnes, *supra* n.97, at 657 (explaining that Irish courts changed their non-interventionist approach to Article 40.3); see also Sherlock, *supra* n.97, at 128 (marking year when Irish courts’ attitude toward judicial review changed dramatically).

134. See Sherlock, *supra* n.97, at 128 (examining Irish courts’ attitude toward unenumerated rights); see generally Sterling, *supra* n.126, at 389 (discussing unenumerated rights in context of Irish abortion law); McDonough, *supra* n.126, at 654-55

ticle 40.3.¹³⁵ In addition, the Irish courts could now invoke unenumerated rights to invalidate conflicting legislation.¹³⁶ Thus, the Irish judiciary began providing protection of the unenumerated rights implicit in the Irish Constitution.¹³⁷

In *Ryan*, plaintiff Gladys Ryan claimed that Articles 40.3.1 and 40.3.2 of the Irish Constitution implicitly provides a right to bodily integrity.¹³⁸ Accordingly, she complained that an Irish water fluoridation law, the Health (Fluoridation of Water Supplies) Act 1960 ("Fluoridation Act"),¹³⁹ violated this constitutional right.¹⁴⁰ She claimed that fluoridation of water supplies created a health hazard, and, therefore, wanted the Act abolished.¹⁴¹

In response to Ryan's claim, the High Court concluded that the phrase "in particular", found in Article 40.3.2,¹⁴² provided for extensive unenumerated personal rights, which the Irish Constitution would protect.¹⁴³ The court explained that Article

(describing unenumerated rights *vis-à-vis* Irish divorce legislation); Ball, *supra* n.126, at 371 n. 294 (addressing unenumerated right to information in Irish jurisprudence).

135. See Barnes, *supra* n.97, at 657 (describing specified and unspecified rights).

136. See *Ryan*, [1965] I.R. at 314 (citing papal letter entitled *Pacem in Terris*, addressed to Roman Catholic Church, as source of unenumerated rights).

137. See John A. Quinlan, N., *The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution*, [1984] *BYU L. Rev.* 371, 378 (noting Supreme Court's constitutional protection of individual unenumerated rights).

138. See *Ryan*, [1965] I.R. at 313 (arguing that language of Articles 40.3.1 and 40.3.2 implies unenumerated right to bodily integrity); see also O'Brien, *supra* n.108, at 589-90 (noting that court agreed with plaintiff Ryan's finding of right to bodily integrity, but found no violation of that right in this case).

139. See *Ryan*, [1965] I.R. at 298 (discussing how Health (Fluoridation of Water Supplies) Act 1960 ("Fluoridation Act") compelled each health authority in Ireland to add particular percentage of fluoride to water supplies in order to decrease dental disease among Irish population). In addition, the Health (Fluoridation of Water Supplies) Act 1960 [hereinafter Fluoridation Act] required the health authorities to fluoridate the water by a certain date to be set by the Minister of Health. *Id.*

140. See *id.* at 314 (considering whether Fluoridation Act violated Ryan's right to bodily integrity); see also Hogan, *supra* n.97, at 101 (mentioning that Ryan belonged to association opposing fluoridation of Irish water supplies).

141. See *Ryan*, [1965] I.R. at 314 (analyzing Ryan's claim that the fluoridation of water is dangerous); see also Hogan, *supra* n.97, at 101 (opining that at outset, Ryan's chances of committing Irish Supreme Court to radical proposition that fluoridation invaded bodily integrity must have appeared slim).

142. IR. CONST. art. 40.3.2. Article 40.3.2 of the Irish Constitution provides: "[t]he State shall, *in particular*, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." *Id.* (emphasis added).

143. See *Ryan*, [1965] I.R. at 313 (finding support for unenumerated rights in Articles 40.3.1 and 40.3.2); see also O'Brien, *supra* n.108, at 590 (explaining that *Ryan* court

40.3.2 refers to rights related to life and noted that Article 40.3.1 does not articulate specific rights.¹⁴⁴ The court conceded that perhaps the Oireachtas should enumerate these rights, but because the courts had enumerated similar rights at formative common law, the courts had the power to do so now.¹⁴⁵ Accordingly, the *Ryan* court specified privacy and bodily integrity as unenumerated rights.¹⁴⁶ Thus, *Ryan* declared the Irish courts' ability to enumerate rights under the Irish Constitution and enshrined the rights to privacy and bodily integrity as enumerated rights.¹⁴⁷

b. Identifying Unenumerated Rights

The Irish judiciary used various tests to identify unenumerated rights under the Irish Constitution, but these tests did not

interpreted Article 40.3.2 as indicating intent of Irish Constitution's drafters to enumerate some, but not all, examples of extensive corpus of personal rights which Irish Constitution would protect).

144. *See Ryan*, [1965] I.R. at 313 (containing court's analysis of words "in particular" in Article 40.3.2 of Irish Constitution). The court construed the words "in particular" in Article 40.3.2 as a detailed statement of something already contained in the general guarantee of rights in Article 40.3.1. *Id.* But Article 40.3.2 refers to rights regarding life, and Article 40.3.1 specifies no rights regarding life. *Id.* Consequently, the court concluded that the general guarantee in Article 40.3.1 extended rights not specified in Article 40. *Id.*

145. *See Ryan*, [1965] I.R. at 313 (explaining that because Irish courts had specified unenumerated rights at early common law, Irish courts should be able to specify unenumerated rights now); *see also* O'Brien, *supra* n.108, at 590 (examining *Ryan* court's reasoning); *see generally* Strong, *supra* n.124 (reviewing court's approach in *Ryan*); McDonough, *supra* n. 126 (discussing *Ryan*); Hamilton, *supra* n.124 (addressing *Ryan*).

146. *See Ryan*, [1965] I.R. at 313-14 (enshrining rights to bodily integrity and privacy as constitutionally protected unenumerated rights). The *Ryan* court found that fluoridation of water supplies had reduced tooth decay according to various studies, and particularly, the benefits of fluoridation had been shown in the United States, which had fluoridated its drinking water for approximately seventeen years before *Ryan* was adjudicated. *Id.* After hearing expert and scientific testimony that the fluoridation process would benefit the population, the court held that the Fluoridation Act violated neither the right to privacy nor the right to bodily integrity. *Id.* The petitioner appealed to the Irish Supreme Court, which upheld the High Court's theory of unenumerated rights and affirmed the High Court's holding regarding the Fluoridation Act. *Id.*; *see also* Hogan, *supra* n.97, at 101 (noting that scientific and expert testimony in *Ryan* showed that fluoridation of water supplies was beneficial, not harmful, to health).

147. *See Ryan*, [1965] I.R. at 313-14 (declaring that rights to privacy and bodily integrity are constitutionally protected unenumerated rights); *see also* Hogan, *supra* n. 97, at 102 (discussing how *Ryan* court declared that Irish judiciary had power to identify unenumerated rights).

provide an objective source of unenumerated rights.¹⁴⁸ For example, in *Ryan*, the High Court proposed the following source of unenumerated rights: the Irish judiciary could find unenumerated rights in the Christian and democratic nature of Ireland.¹⁴⁹ To clarify the first limb of this test, the High Court relied on a papal letter called *Pacem in Terris* when it acknowledged the right to bodily integrity in *Ryan*.¹⁵⁰ The relevant portion of *Pacem in Terris* claims that each person has the right to life, bodily integrity, food, clothing, shelter, rest, medical care, and necessary social services.¹⁵¹ Of this list, however, the Irish judiciary only provided constitutional protection for the right of bodily integrity.¹⁵²

Similarly, the second part of the test, the democratic nature of Ireland, does not provide an objective means of identifying unenumerated rights.¹⁵³ For instance, the rights associated with a democratic State include a fair voting system and a representative government system, but Articles 16 and 28 of the Irish Con-

148. See Hogan, *supra* n.97, at 102-03 (positing lack of objective method of identifying unenumerated rights under Article 40.3.1); see also *Report of the Constitution Review Group*, *supra* n.107 (agreeing that case law after *Ryan* has not provided objective way to identify unenumerated rights).

149. *Pacem in Terris* (Apr. 11, 1963), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html, cl. 11. Clause 11 provides: “[m]an has the right to live. He has the right to bodily integrity and to the means necessary for the proper development of life, particularly food, clothing, shelter, medical care, rest, and, finally, the necessary social services.” *Id.*; see *Ryan*, [1965] I.R. at 314 (citing *Pacem in Terris* as bolstering court’s ruling that right to privacy and right to bodily integrity shall be recognized and protected as unenumerated rights); see also Quinlan, *supra* n.137, at 378-79 (mentioning Christian and democratic nature of Ireland as source of unborn baby’s unenumerated right to life).

150. See *Ryan*, [1965] I.R. at 314 (supporting right to bodily integrity with excerpt from *Pacem in Terris*); see also Hogan, *supra* n.97, at 107 (analyzing reliance on papal encyclical in *Ryan*).

151. See *Ryan*, [1965] I.R. at 314 (quoting *Pacem in Terris*); Hogan, *supra* n.97, at 106 (analyzing *Pacem in Terris* statement regarding human rights it considered universal).

152. See *Ryan*, [1965] I.R. at 314 (finding no violation of plaintiff’s right to bodily integrity). The *Ryan* court did establish the existence of an unenumerated right to bodily integrity under Article 40 of the Irish Constitution. *Id.*; see also Hogan, *supra* n.97, at 106 (pointing out that Irish courts do not protect most rights listed in papal letter). Moreover, the Irish courts did not specify reliance on any particular set of Christian documents. *Id.*

153. See Hogan, *supra* n.97, at 104 (discussing difficulty of applying “democratic nature of State” test).

stitution already contain these guarantees.¹⁵⁴ Other democratic rights, such as a free press and the right to criticize government policy, flow from Article 40.6 of the Irish Constitution.¹⁵⁵ Therefore, the second limb of the test does not add any rights that the Irish Constitution does not already provide, except for the right to travel.¹⁵⁶

Finally, commentators conclude that natural law also does not provide an objective means of identifying unenumerated rights under Article 40.3.¹⁵⁷ For instance, the Irish Supreme Court relied on natural law in the 1974 case *McGee v. Attorney-General*, but noted the drawbacks of natural law as a source of unenumerated rights.¹⁵⁸ In *McGee*, plaintiff McGee underwent several difficult pregnancies; she almost died during her second pregnancy.¹⁵⁹ Her doctor warned her that another pregnancy could jeopardize her life, so she opted for a diaphragm.¹⁶⁰ Subsequently, she tried to import additional contraceptives from En-

154. *See id.* (discussing which rights might arise from democratic nature of Ireland); *see generally* IR. CONST. arts. 16 and 28.

155. *See* Hogan, *supra* n.97, at 104 (opining that “democratic nature of Ireland” is difficult to define). For example, a State which denies its citizens the right to travel would likely be perceived as oppressive to the point of tyranny, but if the State allowed free elections and allowed free press, the State could still call itself democratic. *Id.*; *see generally* IR. CONST. art. 40.6.1. Article 40.6.1 of the Irish Constitution states:

The State guarantees liberty for the exercise of the following rights, subject to public order and morality: The right of the citizens to express freely their convictions and opinions. The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavor to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, shall not be used to undermine public order or morality or the authority of the State.

Id.

156. *See* Hogan, *supra* n.97, at 105 (concluding that right to travel is only right that Irish Constitution does not explicitly protect that could reasonably arise from democratic nature of State).

157. *See* Hogan, *supra* n.97, at 108 (describing natural law approach adopted in some Irish cases); *see also* *McGee v. Attorney-General*, [1974] I.R. 284, 318-19 (relying on natural law for its finding of marital privacy); Buckley, *supra* n.124, at 281 (citing *McGee* as example of natural law’s role in Irish jurisprudence).

158. *See McGee*, [1974] I.R. at 319 (conceding that natural law’s precise definition is elusive).

159. *See id.* at 325 (revealing that if McGee were to become pregnant, she would face considerable risk of death or paralysis); *see also* Quinlan, *supra* n.137, at 379 (noting that McGee had four children, two of whom were twins, in three years).

160. *See McGee*, [1974] I.R. at 289 (conveying McGee’s decision to use contraceptives); *see also* Quinlan, *supra* n.137, at 379 (mentioning doctor’s advice regarding contraceptives).

gland to supplement the diaphragm, but Irish customs officials seized the contraceptives under the Criminal Law Amendment Act, 1935 which forbade the importation and sale, but not the use of, contraceptives.¹⁶¹

The Supreme Court ruled that the Criminal Law Amendment Act, 1935 violated the unenumerated right to marital privacy under Article 40.3 and that natural law supported the Court's finding of the existence of an unenumerated right to marital privacy.¹⁶² In *McGee*, the court defined natural law as the law of God, promulgated by reason and ultimately governing all the laws of humanity.¹⁶³ The court also noted, however, that natural law's precise definition and import have eluded theologians for centuries.¹⁶⁴ Consequently, commentators acknowledge that natural law, like the "Christian and democratic nature of Ireland," does not provide an objective, precise standard that would ensure consistent case law on enumerated rights.¹⁶⁵

161. See *McGee*, [1974] I.R. at 297 (describing how Criminal Law Amendment Act, 1935 prohibits importation of contraceptives); see also Quinlan, *supra* n.137, at 379 (commenting that Irish officials confiscated Mrs. McGee's contraceptives).

162. See *McGee*, [1974] I.R. at 284-85 (holding that restriction on importation and sale of contraceptives violated right to marital privacy under Articles 40.3.1 and 41.1 of Irish Constitution); see also Quinlan, *supra* n.137, at 380 (mentioning that conservative Irish doctors and lawyers feared that *McGee* would lead to liberalization of Irish abortion laws); Norris v. Attorney-General, [1984] I.R. 36, 96 (recalling *McGee* as "forensic surprise"); see generally Sterling, *supra* n.126, at 406 (addressing liberalization of Irish abortion legislation).

163. See *McGee*, [1974] I.R. at 318 (discussing natural law); see also Hogan, *supra* n.97, at 108 (explaining that natural law approach was popular until early 1980s). The natural law approach is seldom used today, however, because natural law lacks precision and thus does not provide the objective standard required for consistent constitutional jurisprudence. *Id.*; see generally Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 272-73 (2001) (acknowledging flaws of natural law); Timothy L. Fort, *Corporate Makahiki: The Governing Telos of Peace*, 38 AM. BUS. L.J. 301, 325-26 (2001) (cataloguing drawbacks of natural law); Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT'L L. 713, 716-17 (1998) (mentioning flaws of natural law).

164. See *McGee*, [1974] I.R. at 317-18 (acknowledging vagueness of Justice Walsh's natural law definition); see also Hogan, *supra* n.97, at 110 (noting disputed nature and extent of natural law).

165. See Hogan, *supra* n.97, at 108 (discussing drawbacks of natural law as means of identifying unenumerated rights). Natural law is too vague to be a clear, objective source of unenumerated rights. *Id.* Nevertheless, case by case, without an objective test, the Irish courts derived and enshrined several unenumerated rights since *Ryan*. *Id.*; see, e.g., *The State (M.) v. Minister for Foreign Affairs*, [1979] I.R. 73 (deriving unenumerated right to travel); *Attorney-General v. Paperlink Ltd.*, [1984] I.L.R.M. 338 (enshrining unenumerated right to earn livelihood); *Kennedy v. Ireland*, [1987] I.R.

II. *FINDING THE PERFECT SWING: ALIGNING IRISH CONSTITUTIONAL RIGHTS WITH THE ECHR*

Commentators recognize that the Irish judiciary inconsistently construed the ECHR in light of domestic law—i.e., the Irish courts relied on the ECHR as persuasive legal precedent or disregarded the ECHR as legal authority.¹⁶⁶ At least one expert maintains that Ireland's enforcement record suggests that the Irish government provided inconsistent enforcement of European Court judgments regarding public morality.¹⁶⁷ Even when the Irish government complies promptly with European Court decisions, the petitioner may have an uncertain victory.¹⁶⁸

A. *The Irish Judiciary's Inconsistent Application of ECHR Provisions and European Court Decisions*

Scholars recognize that the Irish courts took inconsistent approaches to interpreting the ECHR as against domestic law.¹⁶⁹

553 (establishing unenumerated right to privacy); *Murray v. Ireland*, [1991] I.L.R.M. 465 (deriving unenumerated right to found family); *Murphy v. Greene*, [1990] 2 I.R. 566 (enshrining unenumerated right of access to Irish courts); see generally JOHN MAURICE KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* (1992); JOHN MAURICE KELLY, *FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION* (2d ed. 1967).

166. See Gleeson, *supra* n.31, at 259 (commenting that Irish courts made inconsistent and sporadic references to ECHR); see also Dillon-Malone, *supra* n.58, at 49 (noting that Irish courts selectively relied upon ECHR); BYRNE & McCUTCHEON, *supra* n.14, at 17.16 (mentioning that ECHR has not been incorporated into Irish law, but Irish courts sometimes invoke ECHR provisions in support of arguments challenging constitutionality of Irish legislation). Nevertheless, because the ECHR is not part of domestic law, parties to Irish legal proceedings cannot rely on ECHR provisions. *Id.*

167. See Dillon-Malone, *supra* n.58, at 54 (noting that Irish governments might be slow to enforce Court decisions concerning conduct considered immoral by Irish government); see, e.g., *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1988) (holding that Irish statute prohibiting certain sexual behavior did not invade applicant's privacy).

168. See Dillon-Malone, *supra* n.58, at 54 (showing how even immediate compliance can result in moot victories, because if European Court witnesses Contracting State's immediate compliance with European Court decisions regarding ECHR right, European Court will cease to monitor Contracting State's behavior with respect to that right). Consequently, the Contracting State may revert to violating that right, and petitioner will be discouraged from bringing suit because the European Court's previous decision failed to secure consistent compliance. *Id.*

169. See Gleeson, *supra* n.31, at 259-60 (describing Irish judiciary's references to ECHR as sporadic and inconsistent). For instance, the Irish courts have been inconsistent as they have not strictly followed the dualist view of the ECHR, insofar as the Irish tribunals have sometimes looked to the ECHR for guidance. *Id.*; see also Dillon-Malone, *supra* n.58, at 49 (noting Irish judiciary's inconsistent selective reliance upon ECHR provisions). In the United Kingdom, which has not incorporated the ECHR, judicial reliance upon the ECHR is construed as an attempt to incorporate the ECHR

For example, in *Norris v. Attorney-General*,¹⁷⁰ the petitioner argued that the Irish Supreme Court should treat the European Court decision in *Dudgeon v. United Kingdom*,¹⁷¹ which challenged the same legislation at issue in *Norris*, as binding authority.¹⁷² *Norris* claimed, moreover, that because Ireland ratified the ECHR, a presumption of conformity exists between Irish domestic law and the ECHR.¹⁷³

In its holding, the *Norris* court cited *O Laighleis* to support the proposition that Article 29.6 of the Irish Constitution allows only dualist incorporation (i.e., incorporation by the Oireachtas).¹⁷⁴ The Oireachtas did not incorporate the ECHR into Irish law. Accordingly, the *Norris* court concluded that no presumption of conformity existed between the ECHR and Irish law.¹⁷⁵ Indeed, the court claimed that the ECHR did not and could not affect Irish law in any way.¹⁷⁶

Nevertheless, in *State (D.P.P.) v. Walsh*,¹⁷⁷ the court stated a

into domestic law "by the back door." *Id.* at 50; O'Connell, *supra* n.11, at 84-85 (explaining that because Ireland follows dualist approach to incorporation, ECHR does not form part of Irish domestic law). Nevertheless, the Irish judiciary has sporadically acknowledged the ECHR's significance. *Id.* at 85.

170. [1984] I.R. 36 (upholding Irish law that prohibited consensual sodomy).

171. 4 Eur. H.R. Rep. 149 (1982) (holding that Irish law that prohibited consensual sodomy violated petitioner's right to privacy under Article 8 of ECHR).

172. *See Norris*, [1984] I.R. at 66 (containing *Norris*' argument that Irish tribunals should treat *Dudgeon* as more than persuasive authority); *see also* O'Connell, *supra* n.10, at 93 (discussing view which has found little support among Irish courts and scholars). Under this seldom-supported view, the ECHR can be given indirect effect domestically when an Irish citizen, acting as a private attorney-general, brings suit to compel the government to observe generally recognized principles of international law, in accordance with Article 29.3 of the Irish Constitution. *Id.*; *see generally* IR. CONST. art. 29.3. Article 29.3 of Irish Constitution states: "Ireland accepts the generally recognized principles of international law as its rule of conduct in its relations with other States." *Id.*

173. *See Norris*, [1984] I.R. at 66 (rebutting presumption of conformity); *see also* O'Connell, *supra* n.11, at 91 (noting that given presumption of conformity, Irish courts should query whether Irish laws are consistent with ECHR).

174. *See Norris*, [1984] I.R. at 69 (explaining that "touchstone of constitutionality" resides only in Irish Constitution); *see also* O'Connell, *supra* n.11, at 91 (positing that Irish courts consider ECHR provisions when resolving public policy questions, but not when determining constitutional issues).

175. *See Norris*, [1984] I.R. at 66 (citing Article 29.3 of Irish Constitution as proof that Oireachtas alone has power to incorporate ECHR); *see also* O'Connell, *supra* n.11, at 91 (mentioning that *Norris* court found no presumption of conformity between Irish domestic law and ECHR until Oireachtas incorporates ECHR into Irish domestic law).

176. *See Norris*, [1984] I.R. at 66 (declaring that ECHR has no bearing on questions arising under Irish Constitution).

177. [1981] I.R. 412.

presumption that the Irish law regarding contempt of court conformed to Articles 5 and 10(2) of the ECHR.¹⁷⁸ These Articles state the right to liberty, security, and freedom of expression.¹⁷⁹ At least one commentator notes that if the courts presumed that Irish law in particular areas conformed to ECHR standards, the ECHR would enjoy a higher status in Irish courts than it currently does amongst most Irish courts.¹⁸⁰

Similarly, in *O'Leary v. Attorney-General*,¹⁸¹ the High Court relied on Article 6 of the ECHR¹⁸² in discussing universal recognition of the presumption of the defendant's innocence at trial.¹⁸³ Yet when *O'Leary* went up to the Irish Supreme Court, the Irish Supreme Court affirmed the High Court's holding, independent of the ECHR.¹⁸⁴ The court in that case claimed that reference to the ECHR was unnecessary.¹⁸⁵

Likewise, in *Heaney v. Ireland*,¹⁸⁶ the Irish judiciary treated the ECHR with skepticism.¹⁸⁷ In *Heaney*, the petitioner claimed that Section 52 of the Offenses Against the State Act (1939), which allowed jurors to draw adverse inferences from an accused person's silence, violated an unenumerated constitutional right

178. *See id.* at 440 (stating presumption of conformity between ECHR and Irish law concerning contempt of court); *see also* Gleeson, *supra* n.31, at 260 (discussing presumption of conformity).

179. *See* ECHR, *supra* n.8, arts. 5 and 10 (enshrining right to liberty, security, and freedom of expression).

180. *See* Gleeson, *supra* n.31, at 260 (inferring that presumption of conformity would enhance ECHR status in domestic courts).

181. [1991] I.L.R.M. 454.

182. *See* ECHR, *supra* n.8, art. 6 (providing right to fair trial).

183. *See O'Leary*, [1991] I.L.R.M. at 461 (containing citation to Article 6 of ECHR); *see also* Gleeson, *supra* n.31, at 260 (exemplifying Irish judiciary's reliance on ECHR); O'Connell, *supra* n.11, at 87 (discussing *O'Leary*).

184. *See O'Leary v. Attorney General*, [1993] 1 I.R. 102 (referring to ECHR but not relying on it to find presumption of innocence of defendant at trial).

185. *See O'Leary*, [1993] 1 I.R. 102 (noting that Irish Constitution predates ECHR and presumption of innocence at trial can be wholly found in Irish Constitution and common law); O'Connell, *supra* n.11, at 87 (describing how Irish Supreme Court implied that it was needless to refer to ECHR).

186. [1994] 3 I.R. 593.

187. *See O'Connell*, *supra* n.11, at 87-88 (citing *Heaney* ruling as example of euro-skepticism, or reluctance to rely on European treaties as binding authority, insofar as *Heaney* court made no reference to ECHR's guarantee of freedom of expression or European Court decisions regarding freedom of expression). The ECHR's guarantee of freedom of expression and European Court decisions regarding this right were relevant to the *Heaney* court's analysis. *Id.* Nevertheless, the *Heaney* court relied instead on the Irish Constitution's Article 40 guarantee of freedom of expression. *Id.*

to silence.¹⁸⁸ Historically, Irish law recognized a common law right to silence.¹⁸⁹ Thus, the accused enjoyed a privilege against self-incrimination during both pre-trial detention and the trial itself.¹⁹⁰ Before *Heaney*, however, constitutional scholars detected no support for this right in the Irish Constitution.¹⁹¹ Petitioners, therefore, typically had little chance of success when challenging statutory invasions of the right to silence.¹⁹²

Nevertheless, the High Court in *Heaney* held that Article 38 of the Irish Constitution, which guarantees due process,¹⁹³ provides protection for the right to silence.¹⁹⁴ In reaching this decision, the High Court in *Heaney* relied on Article 6 of the ECHR¹⁹⁵ and the European Court decision in *Funke v. France*.¹⁹⁶

188. Offenses Against the State Act, No. 13, 1939 (Ir.); see *Heaney*, [1994] 3 I.R. at 605-06 (containing *Heaney's* allegation of violation of right to silence); see also O'Connell, *supra* n.11, at 87 (summarizing facts of case).

189. See O'Connell, *supra* n.11, at 87 n.20 (tracking Irish law's treatment of right to silence). The right to silence, in the form of a privilege against self-incrimination during trial and pre-trial detention, existed at Irish common law. *Id.* Until the *Heaney* decision in 1994, the Irish judiciary construed the privilege against self-incrimination as a common law right, not a right for which the Irish Constitution provided protection. *Id.* Therefore, Irish plaintiffs can now challenge statutes that violate the right to silence as unconstitutional. *Id.*; see generally Ni Aolain, *supra* n.11, at 1380-85 (discussing right to silence at Irish law); see generally Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence*, 31 COLUM. HUM. RTS. L. REV. 243 (2000) (exploring right to silence in Northern Ireland terrorism prosecutions); Martin S. Flaherty, *Interrogation, Legal Advice, and Human Rights in Northern Ireland*, 27 COLUM. HUM. RTS. L. REV. 1, 4-5 (1995) (addressing restrictions on right to silence in Northern Ireland); Siobhan M. Keegan, *The Criminal Cases Review Commission's Effectiveness in Handling Cases from Northern Ireland*, 22 FORDHAM INT'L L.J. 1776, 1795 (1999) (mentioning restrictions on right to silence in Northern Ireland).

190. See O'Connell, *supra* n.11, at 87 n.20 (explaining that following *Heaney*, Irish courts viewed privilege against self-incrimination as unenumerated due process right for which Article 38 of Irish Constitution provides protection); see generally Stacey Carrera Friends, *An Effective Way to Deal with Terrorism? Britain and Ireland Restrict the Right to Silence*, 23 SUFFOLK TRANSNAT'L L. REV. 227, 236 n.46 (1999) (citing *Heaney* in discussion of right to silence in Ireland).

191. See O'Connell, *supra* n.11, at 87 n.20 (noting that after *Heaney*, Irish plaintiffs can challenge constitutionality of statutes that curtail right to silence).

192. See *id.* (inferring unlikelihood of success with such challenges before *Heaney*). Even in *Heaney*, plaintiff lost his specific claim that the statute was unconstitutional. *Id.*

193. See IR. CONST. art. 38 (ensuring substantive due process for Irish citizens).

194. See *Heaney*, [1994] 3 I.R. at 610 (upholding Section 52 of challenged act as constitutionally valid); see also O'Connell, *supra* n.11, at 87-88 (describing *Heaney's* holding).

195. See ECHR, *supra* n.8, art. 6 (conveying right to fair trial).

196. 16 Eur. Ct. H.R. 297 (1993) (holding that proportionality test must be applied to government restrictions on right to silence). This test requires the government to have a legitimate aim in restricting the right to silence and ensure that the restriction

Specifically, the High Court in *Heaney* applied the proportionality test espoused in *Funke* when deciding whether Section 52 violated the Irish Constitution's unenumerated right to silence.¹⁹⁷ On appeal, the Supreme Court upheld the High Court's ruling in *Heaney* and also applied the *Funke* proportionality test to Section 52.¹⁹⁸ Although the Supreme Court applied the *Funke* test, it did not mention the case in its opinion.¹⁹⁹

Furthermore, in *Finucane v. McMahon*,²⁰⁰ the Irish Supreme Court unanimously held that the Irish government could refuse a request for extradition, if the requesting government was likely to violate or inadequately protect the suspect's fundamental rights.²⁰¹ As in *Heaney*, the *Finucane* court based its decision on a previous domestic Irish case, *Russell v. Fanning*,²⁰² and ignored the more recent European Court decision in *Soering v. United Kingdom*.²⁰³ At least one commentator notes that although *Soering* is distinguishable on the facts, its holding would have bolstered the Irish Supreme Court's conclusion that the government could refuse a request for extradition.²⁰⁴

Thus, the Irish judiciary disagreed as to the ECHR's influence on domestic law.²⁰⁵ Lower courts in Ireland have relied on

is proportionate to this aim. *Id.*; see also *Heaney*, [1994] 3 I.R. at 607 (explaining that means must be rationally linked to aim; means themselves must be rational and fair; and means' effects on rights must be proportional to aim).

197. See *Funke*, 16 Eur. Ct. H.R. at 329 (presenting proportionality test); see also *Heaney*, [1994] 3 I.R. at 610 (applying proportionality test); O'Connell, *supra* n. 11, at 88 (discussing proportionality test's previous application to Irish case); see, e.g., *Cox v. Ireland*, [1992] 2 I.R. 503, 511 (applying proportionality test to statutory restriction on right to earn living after conviction for certain crimes).

198. See O'Connell, *supra* n.11, at 88 (describing Supreme Court's euro-skepticism).

199. See *Heaney*, [1994] 3 I.R. at 610 (utilizing proportionality test without mentioning *Funke*); see also O'Connell, *supra* n.11, at 88 (mentioning how Supreme Court applied *Funke's* methodology, yet did not cite to *Funke* in its opinion). Irish courts prefer, *inter alia*, to base their human rights jurisprudence on domestic case law, even when European Court case law would strengthen their position. *Id.*

200. [1990] 1 I.R. 165.

201. *Id.*; see O'Connell, *supra* n.11, at 88 (discussing *Finucane* as further evidence of Irish judiciary's euro-skepticism).

202. [1988] I.R. 505; see O'Connell, *supra* n.11, at 88-89 (illustrating Irish Supreme Court's avoidance of European Court decisions).

203. 11 Eur. Ct. H.R. 439 (1989) (citing ECHR as basis for Contracting States' refusal to extradite individuals if they would be mistreated in their homeland).

204. See O'Connell, *supra* n. 11, at 88-89 (commenting that Irish Supreme Court could have relied on *Soering*, where ECHR provided basis for refusal of extradition). Instead, the Irish Supreme Court relied on the Irish Constitution alone. *Id.*

205. Compare *Norris v. Attorney General*, [1984] I.R. 36, 66 (holding that ECHR

the ECHR in human rights decisions and presumed that Irish law conforms with ECHR provisions.²⁰⁶ On appeal, however, the Irish Supreme Court often ignores the ECHR on appeal and inconsistently enforces European Court decisions.²⁰⁷

B. *Ireland's Failure to Enforce European Court Decisions Concerning Irish Practices*

Ireland's enforcement of three European Court decisions—*Airey v. Ireland*,²⁰⁸ *Keegan v. Ireland*,²⁰⁹ and *Norris v. Ireland*²¹⁰—illustrates Ireland's inconsistent enforcement of European Court judgments. Subsequent Irish legislative acts and cases, such as *E. v. E.*²¹¹ and *W.O'R. v. E.H.*,²¹² provide a basis to determine whether and to what extent Ireland has enforced *Airey*, *Keegan*, and *Norris v. Ireland*. Following a European Court judgment, after a Contracting State modifies the practice or law that violated petitioner's ECHR rights, the State can continue to regulate that practice or law within its margin of appreciation, allowing for legislative, administrative, and judicial discretion with respect to ECHR provisions.²¹³

has no effect on domestic law) *with State (D.P.P.) v. Walsh*, [1981] I.R. 412, 440 (stating presumption that Irish law conforms with ECHR); see Whyte, *supra* n.16, at 858 (interpreting Article 29.3 of Irish Constitution, which states that Ireland accepts international law principles as its rule of conduct, as requiring compliance with ratified international treaties or conventions before domestic, as well as international, courts).

206. See, e.g., *O'Leary v. Attorney General* [1991] I.L.R.M. 454 (relying on ECHR Article 6 to uphold presumption of innocence until proven guilty); *Walsh*, [1981] I.R. at 440 (claiming that Irish law conforms to ECHR principles).

207. See *Heaney v. Ireland*, [1994] 3 I.R. 593, 606-10 (applying proportionality test). The *Heaney* court did not, however, cite European Court's ruling in *Funke*, which contains proportionality test. *Id.*; see also *Finucane*, [1990] 1 I.R. at 192-93 (refusing extradition based on Irish judiciary's ruling in *Russell*). The *Finucane* court could have buttressed its reasoning by citing *Soering*, but did not. *Id.*; O'Connell, *supra* n.11, at 88-89 (analyzing *Finucane* court's reluctance to refer to *Soering*); Gleeson, *supra* n.31, at 259 (concluding that Irish courts have made inconsistent and sporadic references to ECHR); Dillon-Malone, *supra* n.58, at 49 (noting that Irish courts have selectively relied upon ECHR).

208. 1 Eur. Ct. H.R. 25 (1961) (holding that Ireland had violated plaintiff's right to fair trial under Article 6 of ECHR by not granting civil legal aid to plaintiff).

209. 18 Eur. Ct. H.R. 342 (1994) (recognizing family ties not based on marriage).

210. 13 Eur. Ct. H.R. 186 (1988) (invalidating Irish statute because it interfered with plaintiff's right to privacy).

211. [1982] I.L.R.M. 497 (denying civil legal aid to impecunious plaintiff).

212. [1996] 2 I.R. 248, 248 (refusing to recognize family ties not based on marriage).

213. See Dillon-Malone, *supra* n.58, at 55 (describing margin of appreciation as important tool enabling Irish Government to accept need to change domestic law re-

Commentators note that once the European Court determines the Contracting State's reforms to be satisfactory, the European Court is unlikely to enforce the reforms.²¹⁴ In addition, the Contracting State may not enforce the reforms.²¹⁵ Accordingly, at least one scholar notes that few petitioners would apply to the European Court because the prior application had proved fruitless.²¹⁶

1. The Right to Civil Legal Aid

In *Airey v. Ireland*, the European Court held that Ireland violated Airey's right to a fair trial under Article 6 of the ECHR by not granting civil legal aid to Airey so she could secure legal representation.²¹⁷ Scholars surmise that the European Court's decision in *Airey* caused Ireland to introduce a civil legal aid scheme in 1980.²¹⁸ The Irish courts, however, failed to enforce *Airey* in a 1982 Irish case, *E. v. E.*²¹⁹

a. The European Court's Decision in *Airey v. Ireland*

In *Airey v. Ireland*, the petitioner alleged that Ireland breached two Articles of the ECHR: Article 6's fair trial guarantee, because her poverty necessitated that she receive legal aid to secure legal representation and thus obtain a fair trial, and Article 8's promise of respect for private and family life.²²⁰ In re-

garding private sexual conduct (*Norris*), legal status of illegitimate children (*Keegan*), and civil legal aid (*Airey*)). The margin of appreciation gives Contracting States legislative, administrative, and judicial discretion with regard to ECHR provisions. *Id.*

214. *See id.* (mentioning unlikelihood of European Commission's examination of whether reformed measures still breach ECHR).

215. *See id.* (noting possibility that Contracting States might let reform measures fall into abeyance).

216. *See id.* (predicting that neglected reform measures could discourage would-be petitioners from applying to European Court).

217. *See Airey*, 2 Eur. Ct. H.R. at 318-19 (1979) (concluding that ECHR required Contracting States to take positive steps to ensure rights protection); *see also* Connelly, *supra* n.8, at 39-40 (commenting on European Court's finding that Article 6 of ECHR encompassed unenumerated right to civil legal aid).

218. *See* DRZEMCZEWSKI, *supra* n.16, at 175 (mentioning that Irish Government instituted aid scheme in response to *Airey* decision); *see also* BYRNE & MCCUTCHEON, *supra* n.14, at 17.11 (noting that *Airey* judgment led to introduction of Irish legal aid scheme); Whyte, *supra* n.16, at 856 (illustrating how Irish citizens could apply to State Legal Aid Board in order to secure legal representation).

219. [1982] I.L.R.M. 497 (refusing to grant legal aid to impoverished plaintiff).

220. *See Airey*, 2 Eur. Ct. H.R. at 305 (explaining that Airey claimed that Irish government violated these rights because, as result of her poverty, she could not get legal

sponse, the Irish government argued that the petitioner could have represented herself before the High Court.²²¹ The European Court replied, however, that the ECHR should secure effective and practical, not illusory and theoretical, rights.²²²

The European Court also considered whether Airey would have been capable of representing herself before the High Court.²²³ The European Court concluded that Airey could not have represented herself effectively.²²⁴ Accordingly, the European Court held that the Irish government violated Airey's rights under Articles 6 and 8 of the ECHR.²²⁵

Although the Irish government argued that the ECHR should not extend to social or economic rights, the European Court did not change its interpretation of the ECHR merely because it implicated an economic right, civil legal aid.²²⁶ Experts opine that the *Airey* court's decision impelled Ireland to introduce a civil legal aid and advice scheme in January 1980.²²⁷ This legal aid and advice scheme went into operation on September 8, 1980, but it proved insufficient, as illustrated by the 1982 case *E. v. E.*²²⁸

representation during her judicial separation proceedings); *see also* Connelly, *supra* n.8, at 39 (summarizing facts of *Airey*); ECHR, *supra* n.8, arts. 6, 8 (providing right to fair trial and right to respect for private and family life).

221. *See Airey*, 2 Eur. Ct. H.R. at 305 (presenting Irish government's argument that Airey could represent herself and thus enjoyed right of access to court).

222. *See id.* at 314 (stating European Court's finding that Contracting States must take positive action to protect individual rights).

223. *See id.* at 314-15 (analyzing such factors as legal issues and procedure, objectivity that trial advocacy requires, and fact that all other litigants relied on legal representation in separation proceedings during past seven years).

224. *See id.* at 315 (concluding that without legal representation, Airey had no access to court); *see also* Connelly, *supra* n.8, at 39 (explaining European Court's conclusion based on difficulties of self-representation).

225. *See Airey*, 2 Eur. Ct. H.R. at 318-19 (noting that ECHR required Contracting States to take positive steps to ensure rights protection); *see also* Connelly, *supra* n.8, at 39-40 (describing European Court's holding that Article 6 of ECHR included unenumerated right to civil legal aid).

226. *See Airey*, 2 Eur. Ct. H.R. at 316-17 (pointing out that instituting civil legal aid scheme was one solution among many to rights violations Airey had suffered); *see also* Connelly, *supra* n.8, at 40 (remarking that European Court willingly interpreted ECHR so as to enforce economic right).

227. *See* DRZEMCZEWSKI, *supra* n.16, at 175 (mentioning that Irish Government instituted aid scheme in response to *Airey* decision); *see also* BYRNE & McCUTCHEON, *supra* n.14, at 17.11 (noting that *Airey* judgment led to introduction of Irish legal aid scheme); Whyte, *supra* n.16, at 856 (illustrating how Irish citizens could apply to State Legal Aid Board for legal aid so that they could secure legal representation).

228. [1982] I.L.R.M. 497 (denying legal aid to indigent plaintiff).

b. The Irish Court's Failure to Enforce *Airey v. Ireland* in
E. v. E.

In *E. v. E.*, the defendant argued that Ireland's legal aid scheme remained in breach of the ECHR's Article 6.²²⁹ Initially, the plaintiff brought the case to secure child custody, alimony, and child support.²³⁰ Prior to the third hearing before the High Court, the defendant's lawyers withdrew from the case because the defendant could not pay them for their services.²³¹ Consequently, the defendant applied to the State Legal Aid Board for legal aid, but the Board rejected his application because he did not satisfy the means test.²³² The defendant then appealed to the Appeal Committee, established under the legal aid and advice scheme.²³³ Five months after the defendant's initial aid application, his appeal was still pending.²³⁴

Thus, the defendant had no legal representation at the third hearing before the court.²³⁵ His legal advisors, however,

229. ECHR, *supra* n.8, art. 6. Article 6 provides: "[I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." *Id.*

230. *See E. v. E.*, [1982] I.L.R.M. at 497 (explaining that wife brought action seeking custody of her three children and payments to support herself and her children); *see also* Whyte, *supra* n.16, at 856 (commenting that *E. v. E.* raised issue of ECHR's applicability in Irish tribunals); O'Connell, *supra* n.11, at 86 (discussing how plaintiff in *E.v. E.* petitioned High Court to apply *Airey* decision as analogous authority). The plaintiff argued that the High Court should distinguish the *O Laighleis* principle, because plaintiff in *E. v. E.* sought domestic enforcement of a European Court judgment to which Ireland was a party. *Id.* The *E. v. E.* court rejected this argument, suggesting instead that the plaintiff should bring the matter before the European Commission, and perhaps later seek a determination by the European Court. *Id.*

231. *See E. v. E.*, [1982] I.L.R.M. at 498 (relating how defendant's counsel withdrew because of defendant's inability to pay them); *see also* Whyte, *supra* n.16, at 856 (describing defendant's legal aid travails).

232. *See E. v. E.*, [1982] I.L.R.M. at 498 (discussing how defendant's disposable income exceeded maximum amount at which Legal Aid Board would dispense aid); *but see* Whyte, *supra* n.16, at 856 (deducing that impecunious defendants could fail Legal Aid Board's income test).

233. *See E. v. E.*, [1982] I.L.R.M. at 498 (revealing that defendant appealed); *see also* Whyte, *supra* n.16, at 856.

234. *See E. v. E.*, [1982] I.L.R.M. at 498 (explaining that defendant's lawyers continued case so that his legal right to indemnity by State could be decided); *see also* Whyte, *supra* n.16, at 856.

235. *E. v. E.*, [1982] I.L.R.M. at 498; *see* Whyte, *supra* n.16, at 856-57 (explaining defendant's position before third hearing).

agreed to help him adjudicate his right to legal aid.²³⁶ They served notice on the Attorney-General informing him that the defendant could not afford legal representation for complicated family proceedings and that he had not received legal aid under the State scheme. The defendant's legal advisors further informed the Attorney-General that the defendant would apply to the High Court for an order directing the Irish government to pay his legal expenses.²³⁷ At the hearing of this application, the defendant's lawyers relied on the ECHR's Article 6 and the European Court's *Airey* ruling.²³⁸

The defendant's counsel distinguished *O Laighleis* by claiming that a European Court judgment, if Ireland was a party to the case, bound Irish courts to the holding.²³⁹ The *E. v. E.* court rejected this argument.²⁴⁰ The court stated that if the Irish government's response to a European Court decision dissatisfied a citizen, she should apply to the European Court; thus, the *Airey* decision did not safeguard the *E. v. E.* petitioner's right to legal aid.²⁴¹

236. See *E. v. E.*, [1982] I.L.R.M. at 498 (describing counsel's agreement to represent defendant without pay); see also Whyte, *supra* n.16, at 857.

237. See *E. v. E.*, [1982] I.L.R.M. at 498 (conveying that defendant informed Attorney-General of appeal to High Court); see also Whyte, *supra* n.16, at 857 (discussing defendant's application to High Court for order requiring State payment of legal costs).

238. See *E. v. E.*, [1982] I.L.R.M. at 499 (revealing that defendant's case relied heavily on European Court's decision in *Airey*); see also Whyte, *supra* n.16, at 857 (naming defendant's counsel's chief sources for arguing that impecunious defendant had right to free legal assistance).

239. See *E. v. E.*, [1982] I.L.R.M. at 499 (expressing defendant's distinguishing of *O Laighleis* through reliance on fact that Ireland was party to *Airey*); see also Whyte, *supra* n.16, at 857 (explaining defendant's counsel's distinguishing of *O Laighleis*, where court ruled that ECHR had no effect on Irish law).

240. See *E. v. E.*, [1982] I.L.R.M. at 499 (disagreeing with defendant's contention that European Court's judgment in *Airey* should bind Ireland); see also Whyte, *supra* n.16, at 857 (describing Justice O'Hanlon's reason for rejecting defendant's counsel's argument as unclear); accord O'Connell, *supra* n.11, at 86 (agreeing that basis for judge's decision remained unclear).

241. See *E. v. E.*, [1982] I.L.R.M. at 500 (holding that defendant's right to legal aid was not infringed); but see Whyte, *supra* n.16, at 856 (opining that Ireland's legal aid scheme is insufficient because Irish rights claimants who cannot afford legal representation may fail means test); see also O'Connell, *supra* n.11, at 86 (recounting judge's recommendation that citizens dissatisfied with Irish legal aid scheme should apply to European Court, notwithstanding European Court's holding in *Airey*, which safeguards right to civil legal aid).

2. Family Rights

In *Keegan v. Ireland*, the European Court held that Ireland had violated an unmarried father's right to a fair trial and right to respect for family life under Articles 6 and 8 of the ECHR.²⁴² Thus, the European Court recognized family ties not based on marriage.²⁴³ Nevertheless, in *W.O'R. v. E.H.*, the Irish judiciary refused to recognize family ties not based on marriage.²⁴⁴

a. The European Court's Decision in *Keegan v. Ireland*

Similar to *Airey*, *Keegan v. Ireland*, a 1994 European Court case, received mixed enforcement in Ireland.²⁴⁵ In *Keegan*, a mother placed her illegitimate child up for adoption without the consent or knowledge of the child's natural father.²⁴⁶ The father protested because he had no standing in the adoption proceedings.²⁴⁷ He alleged violations of his right to a fair hearing under Article 6(1) of the ECHR, his right to respect for family life under Article 8 of the ECHR, and discrimination against him as a natural father under Article 14 of the ECHR.²⁴⁸ The Euro-

242. See *Keegan v. Ireland*, 18 Eur. Ct. H.R. 342, 365 (1994) (containing *Keegan* court's holding); see also Connelly, *supra* n.8, at 42 (mentioning European Court's conclusion that because Ireland violated *Keegan*'s right to respect for family life and his right to a fair hearing, European Court did not reach *Keegan*'s claim of discrimination against him as natural father).

243. See O'Connell, *supra* n.11, at 86 (connecting recognition of family ties not based on marriage to European Court's decision in *Keegan*). By protecting an unmarried father's rights regarding his child, the European Court also protected family ties not based on marriage. *Id.*

244. See *W.O'R. v. E.H.*, [1996] 2 I.R. 248, 270 (opining that Articles 41 and 42 of Irish Constitution apply only to family ties based on marriage). Indeed, the *W.O'R. v. E.H.* court stated that the Irish Constitution does not recognize de facto family ties. *Id.* at 265.

245. See O'Connell, *supra* n.11, at 86 (explaining that European Court decision in *Keegan* granted standing to sue to father of illegitimate child); but see *W.O'R. v. E.H.*, [1996] 2 I.R. at 265 (refusing to recognize family ties not based on marriage).

246. See *Keegan*, 18 Eur. Ct. H.R. at 345 (describing how mother acted without father's permission or awareness); see also Connelly, *supra* n.8, at 42 (summarizing facts of *Keegan*).

247. See *Keegan*, 18 Eur. Ct. H.R. at 364 (discussing father's lack of standing); see also Connelly, *supra* n.8, at 42 (describing father's legal status in Irish law); BYRNE & McCUTCHEON, *supra* n.14, 17.11 (opining that *Keegan* decision resulted in promulgation of Adoption (No. 2) Bill 1996, which gave natural fathers right of consultation in adoption situations).

248. See *Keegan*, 18 Eur. Ct. H.R. at 360, 364-65 (conveying father's allegations); see also Connelly, *supra* n.8, at 42 (listing father's claims); ECHR, *supra* n.8, arts. 6(1), 8, 14 (providing right to fair trial, right to respect for private and family life, and freedom from discrimination).

pean Court found violations of his rights under Article 6(1) and 8 of the ECHR and, because of these findings, did not find it necessary to decide the discrimination claim.²⁴⁹ Thus, the European Court recognized family ties not based on marriage.²⁵⁰

b. The Irish Court's Failure to Enforce *Keegan v. Ireland* in *W.O'R. v. E.H.*

In *W.O'R. v. E.H.*, however, the Irish Supreme Court considered whether the Irish Constitution recognized family ties not based on marriage.²⁵¹ The Irish Supreme Court emphasized that the European Court's decision in *Keegan* was not part of Irish domestic law and that Articles 41 and 42 of the Irish Constitution referred only to the family based on marriage.²⁵² Thus, the Irish court did not recognize family ties that were not based on marriage, despite the European Court's recognition of family ties not based on marriage in *Keegan*.²⁵³

3. The Right to Privacy

In *Norris v. Ireland*, the European Court ruled that an Irish statute prohibiting consensual sodomy violated Norris' right to privacy under Article 8 of the ECHR.²⁵⁴ Nevertheless, Ireland did not repeal the statute in question until five years later.²⁵⁵

249. See *Keegan*, 18 Eur. Ct. H.R. at 365 (explaining why *Keegan* court did not reach discrimination issue); see also Connelly, *supra* n.8, at 42 (discussing European Court's conclusion that because Keegan suffered violations of his right to respect for family life and his right to fair hearing, it was unnecessary to adjudicate Keegan's claim of discrimination against him as natural father).

250. See O'Connell, *supra* n.11, at 86 (linking concept of family ties not based on marriage to European Court's decision in *Keegan*). By providing protection for a father's rights regarding his illegitimate child, the European Court provided protection for family ties not based on marriage. *Id.*

251. *W.O'R. v. E.H.*, [1996] 2 I.R. 248, 265 (exploring issue of family ties in absence of marriage); see O'Connell, *supra* n.11, at 86 (stating issue before Irish Supreme Court in *W.O'R. v. E.H.*).

252. See IR. CONST. arts. 40 and 41; see also *W.O'R. v. E.H.*, [1996] 2 I.R. at 270 (maintaining that Articles 41 and 42 of Irish Constitution allude only to family ties based on marriage). Indeed, the *W.O'R. v. E.H.* court declared that the Irish Constitution does not recognize *de facto* family ties. *Id.* at 265.

253. See *W.O'R. v. E.H.*, [1996] 2 I.R. at 265 (holding that unmarried fathers did not have right to custody of his child); but see *Keegan*, 18 Eur. Ct. H.R. at 365 (affirming legal rights of unmarried fathers).

254. See *Norris v. Ireland*, 13 Eur. Ct. H.R. 186, 197 (1988) (overturning anti-sodomy law); see also Connelly, *supra* n.8, at 40 (reviewing *Norris v. Ireland*).

255. See Lysaght, *supra* n.88, at 172 (calling Irish legislature's response to *Norris v. Ireland* indefensible); see also Dillon-Malone, *supra* n.58, at 54 (surmising that Irish gov-

Commentators posit that Irish incorporation of the ECHR would cure such delays and improve enforcement.²⁵⁶

a. The European Court's Decision in *Norris v. Ireland*

Commentators opine that the well-known failure of successive Irish governments to enforce the European Court's ruling in *Norris v. Ireland* undermined the ECHR's status in Ireland.²⁵⁷ The case began as *Norris v. Attorney-General*,²⁵⁸ where Norris argued that an Irish law against consensual sodomy was invalid, based on the European Court's decision in *Dudgeon v. United Kingdom*,²⁵⁹ which held that a United Kingdom law criminalizing consensual sodomy was inconsistent with ECHR.²⁶⁰ Norris relied on a presumption of conformity between Irish law and the ECHR, because Ireland had ratified the ECHR.²⁶¹ In its holding, the *Norris* court cited the *O Laighleis* principle, which states that Article 29.6 of the Irish Constitution required dualist incorpora-

ernment's failure to enforce *Norris v. Ireland* undermined ECHR status in Ireland); see generally John R. Quinn, *The Lost Language of the Irishgaymale: Textualization in Ireland's Law and Literature*, 26 COLUM. HUM. RTS. L. REV. 553, 558-59 (1995) (noting that when Oireachtas repealed anti-sodomy law, there was little debate).

256. See Lysaght, *supra* n.88, at 173 (opining that incorporation would promote enforcement); see also Heffernan, *supra* n.20, at 33 (noting importance of domestic authorities in enforcing ECHR standards). Human rights can be more immediately and readily enforced in the plaintiff's domestic courts. *Id.*; Whyte, *supra* n.16, at 860-61 (contending that as long as ECHR remains unincorporated, complainants are forced to rely on ECHR enforcement machinery alone). Incorporation would expedite litigation and heighten enforcement of domestic complaints concerning human rights infringements. *Id.*

257. See Dillon-Malone, *supra* n.58, at 54 (noting how noncompliance with *Norris* inevitably undermined ECHR's status in Ireland); see also Lysaght, *supra* n.88, at 172-73 (citing *Norris* holding as example of unnecessarily dilatory and costly enforcement of ECHR in Ireland); Connelly, *supra* n.8, at 43, 46 (describing *Norris* ruling and concluding that Irish government's procrastination in implementing ECHR human rights standards does not improve Ireland's reputation in human rights area).

258. [1984] I.R. 36 (holding that Irish law that prohibited consensual sodomy did not violate petitioner's right to privacy under Irish Constitution).

259. 4 Eur. Ct. H.R. 149 (1982).

260. See *Norris v. Attorney-General*, [1984] I.R. at 66 (containing Norris' argument based on *Dudgeon*, where European Court invalidated statute criminalizing consensual sodomy in Northern Ireland). Norris argued that the Irish judiciary should follow *Dudgeon* as a binding precedent. *Id.* The *Norris* court rejected this argument, however, because the ECHR is not incorporated into Irish law. *Id.*; see also O'Connell, *supra* n.11, at 91 (summarizing facts of *Norris v. Attorney-General*).

261. See *Norris v. Attorney-General*, [1984] I.R. at 66 (expressing Norris' contention that because Ireland ratified ECHR, Ireland's laws should conform to ECHR); see also O'Connell, *supra* n.11, at 91 (relaying counsel's arguments).

tion of any international treaty before rights claimants could rely on that treaty in Irish courts.²⁶² Afterward, Norris appealed to the European Court.²⁶³

On appeal to the European Court, the European Court decided that Ireland's anti-sodomy law was incompatible with the ECHR's Article 8 pledge of respect for private life.²⁶⁴ The European Court required a compelling justification for government interference with an individual's privacy and found no such justification in this case.²⁶⁵ For instance, the Irish government provided no evidence to show that lack of enforcement of its anti-sodomy law had damaged moral standards in Ireland or caused public demand for more stringent enforcement.²⁶⁶

b. Ireland's Failure to Enforce *Norris v. Ireland*

The law which *Norris v. Ireland* invalidated remained on the Irish statute books for five years after the European Court denounced it as contrary to the ECHR.²⁶⁷ As a result, ten years elapsed between the initiation of Norris' lawsuit and the repeal of the law he successfully challenged.²⁶⁸ Scholars note that Irish incorporation of the ECHR would help to prevent these delays and enhance enforcement.²⁶⁹

262. See *Norris v. Attorney-General*, [1984] I.R. at 66-67 (explaining that ECHR is international agreement that lacks force at domestic level until it is incorporated into Irish domestic law); see also O'Connell, *supra* n.11, at 91 (reviewing *O Laignleis* principle).

263. See Connelly, *supra* n.8, at 40 (tracing procedural history of *Norris v. Ireland*).

264. See *Norris v. Ireland*, 13 Eur. Ct. H.R. 186, 197 (1988) (invalidating anti-sodomy law); see also Connelly, *supra* n.8, at 40 (discussing issue before Court in *Norris v. Ireland*).

265. See *Norris v. Ireland*, 13 Eur. Ct. H.R. at 198 (explaining justification requirement); see also Connelly, *supra* n.8, at 40 (analyzing Court's decision).

266. See *Norris v. Ireland*, 13 Eur. Ct. H.R. at 198 (containing no evidence of moral turpitude resulting from lack of enforcement); see also Connelly, *supra* n.8, at 40.

267. See Lysaght, *supra* n.88, at 172 (describing Irish legislature's response to *Norris v. Ireland* as indefensible); see also Dillon-Malone, *supra* n.58, at 54 (opining that Irish government's failure to enforce *Norris v. Ireland* undermined ECHR status in Ireland).

268. See Lysaght, *supra* n.88, at 172-73 (calculating time elapsed between initiation of proceedings and repeal of legislation).

269. See *id.* at 173 (explaining that incorporation would lead to better enforcement); see also Heffernan, *supra* n.20, at 33 (stating that role of domestic authorities in enforcing ECHR standards is crucial and human rights can be more easily enforced in complainant's domestic tribunal, subject to system of additional protection offered by international tribunals); Whyte, *supra* n.16, at 861 (arguing that so long as ECHR is unincorporated, complainants must rely on ECHR enforcement machinery). Incorporation

C. *Suggestions for Incorporating the ECHR into Irish Domestic Law*

In 2001, the Oireachtas passed the European Convention on Human Rights Bill, 2001 (“ECHR Bill”).²⁷⁰ Oireachtas described the ECHR Bill as an act to enable incorporation.²⁷¹ The ECHR Bill suggests that Irish courts should interpret rules of law as far as possible in accordance with the ECHR, but allows Irish courts to follow Irish domestic laws that are incompatible with the ECHR, because the ECHR is not yet incorporated into Irish domestic law.²⁷² The next step, choosing a method of incorporation, has sparked considerable debate.²⁷³ Commentators recognize the existence of several methods of incorporating the ECHR into Irish law: direct incorporation; ordinary legislation; “*a la carte*” incorporation; and constitutional incorporation.²⁷⁴

1. Direct Incorporation

Ireland often uses direct incorporation as a means of incorporating international treaties into domestic law.²⁷⁵ Direct incorporation reproduces certain obligations, previously assumed on an international level, at the domestic level.²⁷⁶ Under this approach, the Oireachtas would pass a statute stating that a treaty had become part of the domestic legal order.²⁷⁷ In addition, the statute could amend national law to eliminate incom-

ration would facilitate litigation and enforcement of domestic complaints regarding human rights violations. *Id.*

270. European Convention on Human Rights Bill, No. 26, 2001 (Ir.) [hereinafter ECHR Bill].

271. *See id.* at 3 (containing tentative presumption of conformity).

272. *See id.* at 4-6 (providing for interpretation of ECHR, judicial notice of ECHR provisions, and declarations of incompatibility).

273. *See De Rosa, supra* n.11 (relating how Attorney-General and Minister of Justice disagreed about method of incorporation two years ago).

274. *See id.* (noting that Ireland could incorporate ECHR in various ways); *see also* Jaconelli, *supra* n.14, at 20-23 (discussing direct incorporation, incorporation through ordinary legislation, and constitutional incorporation); O’Connell, *supra* n.11, at 97 (describing “*a la carte*” method of incorporation).

275. *See* Jaconelli, *supra* n.14, at 20 (describing direct incorporation as standard method of incorporation that Ireland frequently used); *see generally* Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT’L L. 427, 445 n.79 (1994) (mentioning direct incorporation of international agreements).

276. *See* Jaconelli, *supra* n.14, at 20 (defining direct incorporation).

277. *See id.* (explaining that direct incorporation entails legislating text of treaty into domestic law).

patibility with the treaty.²⁷⁸

At least one scholar notes that the ECHR stands apart, however, from this standard exercise in treaty incorporation.²⁷⁹ Unlike many other treaties, the ECHR establishes the judicial machinery for a continually evolving case law.²⁸⁰ Indeed, the current state of ECHR law depends on multiple European Court rulings.²⁸¹ Therefore, a statute that merely stated that a treaty had become part of the domestic legal order would not keep pace with the European Court's evolving jurisprudence, because the statute would provide no means of modifying the treaty.²⁸² Accordingly, the Report of the Constitution Review Group ("CRG") did not recommend the direct incorporation option.²⁸³

2. Ordinary Legislation

Under the ordinary legislation approach, the Oireachtas could pass a statute embodying the exact words of the ECHR or adapting those words to specific Irish law concepts.²⁸⁴ Such a statute would repeal prior inconsistent Irish legislation.²⁸⁵ The statute itself, however, would be vulnerable to repeal by later inconsistent legislation.²⁸⁶ Also, at least one commentator notes that a dichotomy would develop between ECHR-derived rights and the Irish Constitution's protection of fundamental rights; consequently, the rights would not receive equal recognition in Irish courts.²⁸⁷

Presumptively, the statute would enable plaintiffs to rely on

278. *See id.* (mentioning possibility of amendment).

279. *See id.* at 21 (conveying that static nature of incorporating statute would not capture current state of European Court case law).

280. *See id.* (noting evolving nature of case law under ECHR).

281. *See id.* (noting that ECHR law is based on multiplicity of Strasbourg rulings).

282. *See id.* (discussing how ECHR, if it was directly incorporated into domestic legal system, could not keep pace with evolving Strasbourg jurisprudence).

283. *See Report of Constitution Review Group, supra* n.107 (advising against direct incorporation). Instead, the Constitution Review Group [hereinafter CRG] recommended "a la carte" incorporation. *Id.*; *see also* O'Connell, *supra* n.11, at 97 n.63 (describing CRG as comprising fourteen experts from different fields who studied Irish Constitution and discussed how to incorporate ECHR into Irish law).

284. *See* Jaconelli, *supra* n.14, at 22 (describing ordinary legislation approach).

285. *See id.* (stating that statute would repeal earlier, inconsistent domestic law).

286. *See id.* (noting that statute could be overturned by subsequent inconsistent domestic law).

287. *See id.* (explaining how divergence would develop between ECHR rights and Irish Constitution-derived rights).

the ECHR in any Irish judicial proceedings.²⁸⁸ Conversely, Article 34.3.2 of the Irish Constitution gives jurisdiction to the High Court and the Supreme Court over the question of any law's constitutional validity.²⁸⁹ Consequently, while plaintiffs could plead ECHR rights in any Irish court, rights claimants under the Irish Constitution would be subject to vindication or defeat pending appeal to the highest Irish courts.²⁹⁰

3. "A La Carte" Incorporation

Alternatively, the CRG recommended "*a la carte*" incorporation.²⁹¹ Under this approach, Irish law would incorporate ECHR rights only where the Irish Constitution did not expressly protect such rights; where the ECHR offered a higher standard of protection than the Irish Constitution did for a particular right; or where the wording of an Irish Constitution clause, protecting a particular ECHR right, might be improved.²⁹² One scholar opines that this option, though flexible, would require intensive analysis of Articles 40-44 of the Irish Constitution, and could give rise to disagreement over whether the ECHR or the Irish Constitution offered greater protection for a particular right, and whether a certain constitutional clause needed improvement.²⁹³

4. Constitutional Incorporation

Finally, the Oireachtas could incorporate the ECHR into

288. *See id.* (commenting that statute would allow rights claimants to rely on ECHR in Irish judicial proceedings unless statute expressly provided otherwise).

289. IR. CONST. art. 34.3.2; *see* Jaconelli, *supra* n.14, at 22 (explaining that rights claimants can only rely on Articles 40-44 in High Court and Supreme Court).

290. *See* Jaconelli, *supra* n.14, at 22 (mentioning that rights claimants under Articles 40-44 of Irish Constitution would need to await possible vindication pending appeal to highest courts).

291. *See Report of Constitution Review Group, supra* n.107 (detailing "*a la carte*" approach). The CRG recommended that the Irish judiciary rely on the ECHR in cases where the Irish Constitution does not specifically protect a right, the ECHR offers greater protection of a right than does the Irish Constitution, or the phrasing of the Irish Constitution which protects such a right needs improvement. *Id.*; *see also* O'Connell, *supra* n.11, at 97 (setting forth "*a la carte*" approach).

292. *See Report of Constitution Review Group, supra* n.107 (reviewing "*a la carte*" means of incorporation); *see also* O'Connell, *supra* n.11, at 97 (analyzing "*a la carte*" method of incorporation).

293. *See Report of Constitution Review Group, supra* n.107 (noting that "*a la carte*" incorporation requires in-depth analysis of Irish Constitution's fundamental rights provisions); *see also* O'Connell, *supra* n.11, at 97 (mentioning need for intense scrutiny of Articles 40-44 of Irish Constitution under "*a la carte*" approach).

the Irish Constitution.²⁹⁴ This type of incorporation would require a constitutional amendment under Article 46 of the Irish Constitution and also a referendum under Article 46.1 of the Irish Constitution.²⁹⁵ First, Dail Eireann,²⁹⁶ the lower house of the Oireachtas, would initiate a proposal for amending the Irish Constitution. After both houses of the Oireachtas passed the bill and a simple majority of the people voted for the bill, the President would sign the bill, thus passing it into law.²⁹⁷ From 1972 to 1995, the Irish Constitution was amended in this manner ten times.²⁹⁸

Constitutional incorporation could take two forms.²⁹⁹ The Oireachtas could establish the ECHR and European Court case law as superior to the Irish Constitution.³⁰⁰ This type of incorporation would give precedence to the international legal order over domestic constitutional law.³⁰¹ Alternatively, the Oireachtas could incorporate the ECHR into the Irish Constitution and confer equal status on both.³⁰² Accordingly, judicial review

294. See Jaconelli, *supra* n.14, at 23 (discussing constitutional incorporation); see generally La Pergola & Del Duca, *New International Law in National Systems: Community Law, International Law, and the Italian Constitution*, 79 AM. J. INT'L L. 598, 601-06 (1985) (describing constitutional incorporation); Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281, 293 (1999) (mentioning constitutional incorporation of human rights treaties).

295. See Jaconelli, *supra* n.14, at 23 (summarizing logistics of constitutional amendment in Ireland); see also IR. CONST. art. 46.

296. See Sherlock, *supra* n.97, at 125 (elaborating upon mechanics of constitutional amendment in Ireland). Dail Eirann ("Dail") is the Irish equivalent of Britain's House of Commons, the lower chamber of Oireachtas. *Id.*; see also Flynn, *supra* n.105, at 178. Saenad is the upper house of the Oireachtas. *Id.* Dail and Seanad have equal voice in the passing of legislation. *Id.*

297. See Sherlock, *supra* n.97, at 125 (describing how bills become law in Ireland).

298. See *id.* at 126 (noting that amendments have lowered voting age (1972); enabled Irish accession to European Community (1972); removed provision privileging Catholic Church above others (1972); protected adoption orders against possible challenge (1979); allowed widening of representation of higher education institutions in Senate (1979); inserted provision on unborn's right to life (1983); permitted extension of voting rights to non-citizens (1984); allowed ratification of Treaty on European Union (1992); inserted provisions on right to travel and right to information regarding unborn's right to life (1992); and lifted constitutional ban on divorce (1995)).

299. See Jaconelli, *supra* n.14, at 23 (mentioning two possible sub-variations).

300. See *id.* (commenting that Oireachtas could give European Court judgments and ECHR provisions supremacy over Irish Constitution).

301. See *id.* (concluding that such entrenchment would lead to dominance of international legal system over Irish constitutional law).

302. See *id.* (explaining that ECHR could be embodied in Irish Constitution with same normative status as Irish Constitution).

would resolve inconsistencies and conflicts between the ECHR and non-constitutional Irish law.³⁰³ As for conflicts between the ECHR and the Irish Constitution, the last-in-time law, the ECHR in this case, would prevail, because the ECHR and Irish Constitution would have the same status.³⁰⁴

III. *A HOLE IN ONE: CONSTITUTIONAL INCORPORATION*

Constitutional incorporation would confer equal status on the ECHR, its case law, and the Irish Constitution, thus making the ECHR, as well as European Court judgments based on ECHR provisions, enforceable in Irish domestic courts.³⁰⁵ Consequently, Irish rights claimants under the ECHR would enjoy the same privileges (i.e., substantive due process and Irish rules of evidence) as Irish rights claimants under the Irish Constitution. Finally, even if these claimants faced delay in domestic courts, they would no longer undergo an additional, average six-year delay in the European Court.

A. *Solving the Problems of the ECHR Regime Through Constitutional Incorporation*

Currently, Irish rights claimants under the ECHR face an uphill climb. Such claimants must exhaust domestic remedies, which means lengthy litigation in the Irish courts before a plaintiff can even apply to the European Court.³⁰⁶ Moreover, if the European Court had previously decided a similar case brought by a claimant from another country, the Court would reject the Irish plaintiff's claim although the Court's previous decision would not bind Ireland.³⁰⁷ Indeed, the ECHR does not ensure

303. *See id.* (stating that issues of inconsistency or conflict between ECHR and ordinary Irish law would be subject to judicial review under Art. 34.3.2 of Irish Constitution).

304. *See id.* at 22-23 (describing *lex posterior* principle, giving priority to most recently passed law). For example, if two laws in a single jurisdiction have equal status, the more recently passed law prevails. *Id.*

305. *See supra* n.302 and accompanying text (conveying that Oireachtas may give equal status to ECHR and Irish Constitution via constitutional incorporation).

306. *See supra* n.'s 61-65 and accompanying text (reviewing exhaustion of remedies rule).

307. *See supra* n.57 and accompanying text (explaining that European Court rejects applications that are substantially similar to cases European Court previously adjudicated).

enforcement of European Court decisions.³⁰⁸

Even if an Irish plaintiff successfully brings an action in the European Court, the European Court has no set rules of evidence.³⁰⁹ In addition, the European Court cannot compel document production or witness attendance.³¹⁰ These procedural drawbacks would disadvantage a rights claimant because the Irish government could introduce virtually any evidence against her, yet she might be unable to produce incriminating documents or witnesses.³¹¹

Finally, the European Court takes an average of six years to decide each rights claimant's application.³¹² Thus, the average rights claimant waits six years for a decision that is moot at worst and unenforceable at best.³¹³ For example, in the *Norris* case, plaintiff waited ten years for satisfaction.³¹⁴ This result undermined the ECHR's already tenuous status in Ireland.³¹⁵

Constitutional incorporation would bestow equal status on the ECHR, its case law, and the Irish Constitution.³¹⁶ Consequently, Irish rights claimants under the ECHR would enjoy the same privileges as Irish rights claimants under the Irish Constitution. These privileges would include substantive due process under Article 40.3.2 of the Irish Constitution³¹⁷ and Irish evidentiary safeguards.³¹⁸

308. See *supra* text accompanying n.86 (stating that ECHR contains no provision ensuring enforcement of European Court decisions).

309. See *supra* n.75 and accompanying text (commenting that European Court has no evidentiary rules).

310. See *supra* n.80 and accompanying text (noting limits on European Court's powers regarding discovery).

311. See *supra* n.80 and accompanying text (explaining that Court of Human Rights cannot compel document production or witnesses' testimony).

312. See *supra* text accompanying n.69 (noting that European Court takes six years on average to adjudicate complaints).

313. See *Dillon-Malone supra* n.58, at 59 and accompanying text (commenting that lengthy delays often render European Court decisions moot); see also *supra* n.86 and accompanying text (mentioning ECHR's lack of enforcement mechanisms).

314. See *supra* text accompanying n.268 (noting that *Norris* waited ten years to obtain relief).

315. See *supra* n.257 and accompanying text (discussing how Ireland's dilatory enforcement of *Norris* undermined ECHR's status in Ireland).

316. See *supra* n.302 and accompanying text (mentioning that Oireachtas may bestow equal status on ECHR and Irish Constitution).

317. See *supra* n.129 and accompanying text (noting that Art. 40.3.2 of Irish Constitution provides protection of substantive due process rights).

318. See *supra* n.75 and accompanying text (explaining that European Court lacks evidentiary rules).

Also, Irish rights claimants would no longer need to exhaust domestic remedies³¹⁹ or risk preemption by similar cases in other countries.³²⁰ Even if these claimants faced delay in domestic courts, they would no longer risk subsequent, additional delay in the European Court. Unlike the European Court, the Irish courts could make and enforce decisions unhampered by margins of appreciation.³²¹ While the European Court could only recommend that a Contracting State revise its laws or administrative practices,³²² the Irish courts could order the Oireachtas to invalidate Irish laws that violated ECHR rights and award damages to successful rights claimants. Afterward, the Irish courts could supervise the Oireachtas to ensure compliance. Thus, home remedies would have teeth, especially in light of the ECHR's equal status with the Irish Constitution—the highest law of the land.

B. Incorporating the ECHR As an Objective Source of Unenumerated Rights

In the 1965 case *Ryan v. Attorney-General*,³²³ the High Court cited Article 40.3.2 of the Irish Constitution as a basis for recognizing unenumerated rights.³²⁴ In that case and afterward, however, Irish tribunals have failed to pinpoint a definitive source of unenumerated rights.³²⁵ Possible sources have included the “Christian and democratic nature of Ireland,”³²⁶ but this source is vague and subjective.³²⁷ Natural law, another possible source

319. See *supra* n.'s 61-65 and accompanying text (stating exhaustion of remedies rule).

320. See *supra* n.57 and accompanying text (remarking that European Court refuses to consider cases substantially similar to those it has already decided).

321. See *supra* n.213 and accompanying text (defining margins of appreciation as areas of domestic discretion).

322. See *supra* text accompanying n.82 (noting that Court can only recommend changes in law).

323. See *supra* n.134 and accompanying text (mentioning that *Ryan* initiated new era in unenumerated rights jurisprudence by establishing that Irish courts could identify unenumerated rights in Irish Constitution).

324. See *supra* n.'s 142-43 and accompanying text.

325. See *supra* n.128 and accompanying text (explaining that Irish judiciary has not identified objective source of unenumerated rights).

326. See *supra* n.149 and accompanying text (noting “Christian and democratic nature of Ireland” as potential source of unenumerated rights).

327. See *supra* n.152 and accompanying text (remarking that court has not specified set of Christian documents from which to derive unenumerated rights); see also

of unenumerated rights, proved difficult to define objectively.³²⁸

The first limb of the “Christian and democratic nature of Ireland” test has proven ambiguous and subjective.³²⁹ For example, although the relevant portion of the papal letter *Pacem in Terris* identified eight rights worth protecting, the Irish judiciary chose only to protect the right to bodily integrity.³³⁰ Moreover, the Irish courts have not specified reliance on any particular set of religious documents.³³¹ Finally, this first part of the test would not have much resonance for non-Christian Irish citizens.

As for the second limb of the test, it has not fared any better.³³² Most rights encompassed by the term “democratic nature” would already flow from guarantees in the Irish Constitution.³³³ These rights include the right to a fair voting system and a democratic system of government, as well as freedom of the press and the right to criticize government policy.³³⁴ Thus, the second limb of the test appears to add nothing to sources of rights in Ireland.

Finally, natural law, another possible source of unenumerated rights, proved difficult to define objectively.³³⁵ In *McGee*,³³⁶ the court described natural law as the law of God.³³⁷ The *McGee* court noted, however, that natural law’s precise definition had

supra n.153 and accompanying text (commenting that democratic nature of Ireland part of test does not provide objective source of unenumerated rights).

328. *See supra* text accompanying n.157 (concluding that natural law does not provide objective source of unenumerated rights).

329. *See supra* n.152 and accompanying text (explaining that court has not specified collection of Christian documents from which to derive unenumerated rights).

330. *See supra* n.152 and accompanying text (discussing how Irish judiciary has only enforced one right, right to bodily integrity, from list in *Pacem in Terris*).

331. *See supra* n.152 and accompanying text (describing lack of standard set of Christian documents to serve as objective source of unenumerated rights).

332. *See supra* n.153 and accompanying text (positing that second limb of test, “democratic nature of Ireland”, does not provide objective source of unenumerated rights).

333. *See supra* n.154 and accompanying text (noting that democratic rights such as voting are already contained in Irish Constitution).

334. *See supra* n.154 and accompanying text (revealing that Irish Constitution already protects most rights associated with “democratic nature of State”).

335. *See supra* text accompanying n.157 (remarking that natural law does not provide objective source of unenumerated rights).

336. *See McGee supra* n.157 (finding protection of marital privacy based on natural law).

337. *See supra* text accompanying n.163 (stating *McGee* court’s definition of natural law).

eluded theologians for centuries.³³⁸ By contrast, the incorporated ECHR and its attendant European Court case law would offer an objective source of unenumerated rights that the ECHR implies and that the European Court has identified and upheld.

For instance, in *Airey*, the European Court ruled that the fair trial guarantee, found in Article 6 of the ECHR, included an unenumerated right to civil legal aid.³³⁹ In *Airey*, the European Court also noted that the ECHR should secure effective and practical rights, not theoretical and illusory ones.³⁴⁰ Similarly, in *Keegan*,³⁴¹ the European Court interpreted Article 6's guarantee of a fair hearing and Article 8's guarantee of respect for family life to include a natural father's right to be appointed guardian of his child and to have standing in adoption proceedings.³⁴²

Thus, the European Court's ruling in *Keegan* recognized family ties not based on marriage,³⁴³ which the Irish Constitution does not.³⁴⁴ Likewise, the European Court held in *Norris v. Ireland*³⁴⁵ that the Article 8 pledge of respect for family life protected petitioner's homosexual behavior,³⁴⁶ which the Irish Constitution does not, according to the interpretation offered by the Irish judiciary when it failed to invalidate the anti-sodomy law in *Norris v. Attorney-General*.³⁴⁷ Finally, by incorporating the ECHR into the Irish Constitution, Ireland would assume the obligation to protect all rights enumerated and unenumerated in the ECHR and accord these rights the same status as Irish constitutional rights. This obligation would prevent the judiciary from

338. See *supra* n.164 and accompanying text (revealing *McGee* court's admission that natural law is difficult to define objectively).

339. See *supra* n.217 and accompanying text (reviewing *Airey* holding that Article 6 of ECHR contains unenumerated right to civil legal aid).

340. See *supra* n.222 and accompanying text (noting *Airey* court's conclusion that ECHR should protect practical rights, not theoretical ones).

341. See *supra* n.'s 242-44 and accompanying text (discussing *Keegan* holding).

342. See *supra* n.'s 242-50 and accompanying text (elucidating *Keegan* ruling).

343. See *supra* n.'s 242-44 and accompanying text (revealing *Keegan* decision).

344. See *supra* n.244 and accompanying text (containing Irish Supreme Court's statement that Irish Constitution does not recognize family ties not based on marriage).

345. See *supra* n.'s 258, 260-62 and accompanying text (describing Irish ruling in *Norris v. Attorney-General*, which found that Irish statute did not invade Norris' privacy under Irish Constitution). The European Court held in *Norris v. Ireland*, however, that Ireland's statute violated Norris' right to privacy under Article 8 of ECHR. *Id.*

346. See *supra* n.'s 258, 260-62, 264-66 and accompanying text (presenting *Norris v. Attorney-General* ruling).

347. See *supra* n.'s 258, 260-61 and accompanying text (summarizing holding in *Norris v. Attorney-General*).

selectively enforcing unenumerated rights, as when the High Court recognized the right to bodily integrity and disregarded the other rights listed in *Pacem in Terris*.³⁴⁸

C. Ensuring Fundamental Human Rights Through Judicial Review

Since 1965, the Irish tribunals have frequently exercised their power of judicial review.³⁴⁹ In the *Ryan* case that year, the High Court demonstrated that the judiciary could identify unenumerated rights.³⁵⁰ Previously, such identification was considered a legislative power.³⁵¹ After *Ryan*'s expansion of judicial power, Irish courts could invoke unenumerated rights in the Irish Constitution to invalidate conflicting legislation.³⁵² Thus, the Irish tribunals could now protect unenumerated rights in the Irish Constitution.³⁵³ The unenumerated rights in the Irish Constitution, however, need improvement.

For example, in *Airey*, an impoverished plaintiff vindicated her unenumerated right to civil legal aid under the ECHR, not the Irish Constitution.³⁵⁴ Similarly, in *Keegan*, the European Court recognized family ties not based on marriage, while the Irish Constitution did not.³⁵⁵ Finally, in *Norris*, the European Court protected a homosexual man's right to privacy,³⁵⁶ while the Irish Constitution did not.³⁵⁷ Thus, the European Court has

348. See *supra* n.152 and accompanying text (discussing how Irish judiciary only enforced one right from list in *Pacem in Terris*).

349. See *supra* n.109 and accompanying text (explaining concept of judicial review and its role in Irish jurisprudence).

350. See *supra* n.147 and accompanying text (describing how *Ryan* increased Irish judicial power by establishing Irish judiciary's right to identify unenumerated rights in Irish Constitution).

351. See *supra* n.131 and accompanying text (noting how Irish courts previously left identification of enumerated rights to Oireachtas).

352. See *supra* text accompanying n.136 (observing how Irish judiciary has been able to invoke unenumerated rights to invalidate conflicting legislation since 1965 *Ryan* case).

353. See *supra* text accompanying n.137 (explaining how Irish judiciary gained power after *Ryan* to provide protection of unenumerated rights in Irish Constitution).

354. See *supra* n.225 and accompanying text (revealing that *Airey* holding was based on ECHR).

355. See *supra* n.249 and accompanying text (showing that *Keegan* holding was predicated on ECHR, not on Irish Constitution).

356. See *supra* n.'s 262-64 and accompanying text (contrasting *Norris v. Attorney-General* holding, which was based on Irish Constitution, with *Norris v. Ireland* holding, which was based on ECHR).

357. See *id.* (discussing *Norris* decision).

used the ECHR as an instrument of social change, which the Irish judiciary has often resisted.

Moreover, Article 40.1 of the Irish Constitution requires that all citizens be treated equally before the law.³⁵⁸ This clause would seem to forbid discrimination against poor people, illegitimate children, and homosexuals. Nevertheless, the Irish judiciary failed to apply this clause in *Airey*,³⁵⁹ *Keegan*,³⁶⁰ and *Norris*.³⁶¹ The incorporated ECHR and its case law, however, would bolster the Irish Constitution's equal protection clause. Indeed, plaintiffs in *Airey*,³⁶² *Keegan*,³⁶³ and *Norris*³⁶⁴ vindicated their rights under the ECHR, though not under the Irish Constitution.³⁶⁵

Significantly, after incorporation into the Irish Constitution, the ECHR would prevail in a conflict between the two, under the last-in-time rule.³⁶⁶ Thus, the Irish courts could no longer ignore the ECHR's protection of poor people, illegitimate children, and other groups who had suffered discrimination under the Irish Constitution. Finally, the Irish judiciary would have to invalidate any future discriminatory legislation as incompatible with the ECHR, just as the judiciary would invalidate legislation that conflicts with the Irish Constitution.³⁶⁷

CONCLUSION

Constitutional incorporation of the ECHR would solve several serious problems. First, constitutional incorporation would decrease the current burden on Irish rights claimants, by giving such claimants a domestic forum where they could vindicate their rights in less time than the average six-year sojourn to Stras-

358. See *supra* n.122 and accompanying text (presenting text of Article 40.1 of Irish Constitution).

359. See *supra* n.225 and accompanying text (articulating *Airey* holding).

360. See *supra* n.249 and accompanying text (summarizing *Keegan* decision).

361. See *supra* n.'s 262-64 and accompanying text (reviewing *Norris* judgment).

362. See *supra* n.225 and accompanying text (elucidating *Airey* ruling).

363. See *supra* n.249 and accompanying text (stating *Keegan* holding).

364. See *supra* n.'s 262-64 and accompanying text (describing *Norris* ruling).

365. See *supra* n.'s 225, 249, 262-64, and accompanying text (demonstrating that plaintiffs in *Airey*, *Keegan*, and *Norris* triumphed under ECHR, not Irish Constitution).

366. See *supra* n.304 and accompanying text (describing last-in-time rule).

367. See *supra* text accompanying n.136 (revealing that Irish judiciary can invalidate domestic legislation that conflicts with unenumerated rights in the Irish Constitution).

bourg,³⁶⁸ as well as enforce the court's decisions. Second, constitutional incorporation would confer equal status on the Irish Constitution (the highest law of the land) and the ECHR, thus signaling the importance of human rights in the Irish regime.

Third, constitutional incorporation would offer an objective source of unenumerated rights for the Irish judiciary: the ECHR and European Court case law. Also, the ECHR and its case law would reinforce the unenumerated rights in the Irish Constitution and serve as an instrument for social change. Thus, Ireland could become an important speaker in the dialogue between European courts and the European Court,³⁶⁹ in which the ECHR reaches its fullest potential as a creator and protector of human rights in Europe and the world.

368. *See supra* n.69 and accompanying text (estimating that on average, Strasbourg proceedings take six years).

369. *See supra* n.'s 116-19 and accompanying text (concluding that Ireland is absent from continually evolving dialogue between European tribunals and European Court so long as Ireland does not incorporate ECHR).

