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**Rapport national / National report / Landesbericht /
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L'IRLANDE / IRELAND / IRLAND / ИРЛАНДИЯ

The Supreme Court of Ireland
Chúirt Uachtarach na hÉireann

Anglais / English / Englisch / английский

XVIth Congress of the Conference of European Constitutional Courts in 2014

Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives Questionnaire for the national reports

REPLY OF IRELAND

I. Constitutional courts between constitutional law and European law

1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?

The Supreme Court is Ireland's highest constitutional court. The Supreme Court regularly considers European law when hearing appeal cases and drafting written judgments. Under the common law system, this depends on whether the parties have raised, and argued such grounds, and, that they form part of the appeal case to the Supreme Court from the lower court.

The Supreme Court is constitutionally obliged to consider and follow EU law following an amendment to Article 29 ("International Relations") of the Constitution of Ireland which facilitated the country's membership of the European Economic Community in 1973.

Ireland incorporated the European Convention in domestic law when it enacted the *European Convention on Human Rights Act 2003*. In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions. The Act provides that judicial notice shall be taken of the Convention provisions and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by the declarations, decisions, advisory opinions, opinions and judgments of the European Court of Human Rights, the European Committee of Human Rights and the Committee of Ministers.

In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, make a declaration of incompatibility that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

**2. Are there any examples of references to international sources of law, such as
a) the European Convention on Human Rights,**

The Convention is regularly cited by the Supreme Court. For example see the cases of Fleming v Ireland & Others [2013] IESC 19 (right to assisted suicide), Kennedy v DPP [2012] IESC 34 and Cosgrave v. DPP & Anor [2012] IESC 24 (delay in prosecution of criminal offences).

b) the Charter of Fundamental Rights of the European Union,

While, the Charter came into force in recent times in 2009 as part of the Treaty of Lisbon, nevertheless it has been regularly cited by the Supreme Court. Examples of cases include Smith v Minister for Justice and Equality & Others [2013] IESC 4 (immigration and refugee law), J.McB v LE [2010] IESC 48 (preliminary ruling to European Court of Justice regarding Council Regulation (EC) No 2201/2003).

c) other instruments of international law at European level,

Yes there are numerous examples of such instruments. For example Council Regulation (EC) No 2201/2003 or the Brussels II (*bis*) Regulation was cited by the Court in cases such as T v L [2008] IESC 48 and K v K [2004] IESC 21 (recognition of foreign divorces) and Health Service Executive v W [2013] IESC 38 (transfer of public law child care proceedings to another EU Member State).

d) other instruments of international law at international level?

Yes, one such example is the United Nations Convention on the Rights of the Child. See cases such as McD v L & Anor [2007] IESC 81 (rights of a non-marital family) and Sinnott v Minister for Education [2001] IESC 63 (right to primary education).

3. Are there any specific provisions of constitutional law imposing a legal obligation? on the constitutional court to consider decisions by European courts of justice?

This legal obligation is derived from the Third Amendment of the Constitution, Act 1972 which enabled the State to become a member of the European Communities and amended Article 29 of the Constitution which is concerned with the International Relations of the State. Thus, EU law is incorporated into Irish law at a constitutional level.

4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?

The jurisprudence of the Supreme Court is influenced by the Court of Justice of the European Union and the European Court of Human Rights. In practice, this jurisprudence is raised and argued by lawyers for both parties in an appeal case before

the Supreme Court, although Judges of the Supreme Court may refer to the jurisprudence independently during oral argument and in their written judgments.

Another factor to be considered is that traditionally at least one Judge of the Supreme Court has experience of the European Courts as either a Judge or a practitioner. Thus, in 2013/2014 the Supreme Court's membership includes a Judge who is a former Judge of the European Court of Justice, while another Judge is a former Advocate General of that Court. Many other serving Supreme Court Judges appeared before the European Courts as practising lawyers.

5. Does the constitutional court in its decisions regularly refer to the jurisprudence? of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?

The Court regularly refers to such jurisprudence. Following Ireland's membership of the then European Economic Community in 1973, the Supreme Court considered jurisprudence of the ECJ when discussing the doctrine of supremacy and the effect of such membership on Ireland's Constitution. See Crotty v An Taoiseach [1987] IR 713 (foreign affairs), Meagher v Minister for Agriculture [1994] 1 IR 329 (effect of EU legislation in Ireland) and more recently Pringle v The Government of Ireland, Ireland and the Attorney General [2012] IESC 47 (consideration of the European Stability Mechanism (ESM) Treaty).

The first case decided by the European Court of Human Rights was the Irish case, Lawless v Ireland (No.1) (1960) A/1, (1979-1980) 1 EHRR 1. The Supreme Court has a long tradition of referring to the jurisprudence of the Court, since Ireland was one of the first signatories of the Convention in 1950. This has complimented the constitutional jurisprudence of the Supreme Court when it interprets the Constitution of Ireland which also provides extensive protection to fundamental rights. See In re Article 26 and the Health (Amendment) Bill 2004 [2005] 1 IR 105 (Court review of proposed legislation).

Ireland is a dualist country in terms of the reception of international law in the domestic legal order. This is reflective of Ireland's common law heritage. The Convention was incorporated into Irish law with the enactment of the European Convention on Human Rights Act 2003.

6. Are there any examples of divergences in decisions taken by the constitutional? court and the European courts of justice?

The Supreme Court must follow EU law jurisprudence due to the requirements of EU membership, and the changes made to Ireland's Constitution to facilitate this membership. The Supreme Court takes judicial notice of the jurisprudence of the European Court of Human Rights, and may refer to it in its jurisprudence where appropriate.

7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?

The Supreme Court is bound by the decisions of the European Court of Justice. The lower courts of Ireland which include the High Court, the Circuit Court, and the District Court are also bound by the European Court of Justice and are bound by the decisions of the Supreme Court. Judicial notice is taken of the European Convention on Human Rights in all Courts.

8. Are there any examples of decisions by European courts of justice influenced by? the jurisprudence of national constitutional courts?

For example, in the case of Cartesio Oktató és Szolgáltató bt (a limited partnership), Advocate-General Maduro described the preliminary reference procedure referring to the judgment of the Supreme Court in Campus Oil Ltd and Others v. The Minister for Industry and Energy, Ireland, The Attorney General, and the Irish National Petroleum Co. Ltd [1983] IR 82 at 86 (preliminary reference procedure).

The European Court of Justice has drawn on the common law in the elaboration of a right to a hearing. For example in the case of Transocean Marine Paint Association v Commission Case 17/74 [1974] ECR 1063, Advocate-General Warner proposed that the principle of *audi alteram partem* or the right to a hearing was also a general principle of Community law and that it was binding on the Commission, even in the absence of a specific legislative provision. This conclusion was reached having surveyed the national legal systems, in which he pointed out the important role that natural justice plays in common law jurisdictions such as England and Wales and illustrated to the European Court of Justice that it applies in most other Member States, though often in a less developed form. The Court accepted his opinion and held that there is a general rule of Community law that “a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known”.

Since this case, the Court has developed a general doctrine of what it calls “the rights of defence”, which common law lawyers know to mean as the principles of natural justice, what American lawyers call due process, and what lawyers in Ireland could also describe as constitutional justice. The right to constitutional justice is an unenumerated right protected by Article 40.3 of the Constitution and was developed in the cases of McDonald v Bórd na gCon [1965] IR 217, East Donegal Co-operative Ltd v Attorney General [1970] IR 317, Glover v BLN Ltd [1973] IR 388 and Re Haughey [1971] IR 217.

II. Interactions between constitutional courts

1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

The Supreme Court often refers to decisions of both European and non-European constitutional courts. Ireland is a common law country and the Supreme Court regularly refers to decisions of courts in the United Kingdom and English speaking jurisdictions. In Fleming v Ireland & Others [2013] IESC 19 (right to assisted suicide) the Court referred to decisions of the United Kingdom's House of Lords and the constitutional courts of the United States (Supreme Court) and Canada (Supreme Court). The Supreme Court and indeed the Court of Criminal Appeal (which is presided over by a Supreme Court Judge) also refers to cases from other national courts including the Federal Constitutional Court of Germany. For example see the Court of Criminal Appeal case DPP v Cunningham [2012] IECCA 64 (unconstitutional grant of a search warrant).

2. If so, does the constitutional court tend to refer primarily to jurisprudence from? the same language area?

The Supreme Court would tend to refer primarily to jurisprudence from common law jurisdictions which happen to share one of Ireland's national languages, namely English. For example the Court refers to jurisprudence from the United Kingdom jurisdictions (England and Wales, Northern Ireland, Scotland), the United States, Australia, Canada and New Zealand.

3. In which fields of law (civil law, criminal law, public law) does the constitutional? court refer to the jurisprudence of other European or non-European constitutional courts?

The Supreme Court refers to this jurisprudence in all of these fields of law.

4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?

The jurisprudence of the Supreme Court of Ireland is similarly cited by other constitutional courts such as courts of the United Kingdom including the House of Lords (now the Supreme Court of the United Kingdom), the High Court of Australia, the South African Constitutional Court and the Supreme Court of New Zealand. The most notable example is the Supreme Court of the United Kingdom (formerly the House of Lords) since the United Kingdom shares a common national language with Ireland. More recently, the Judicial Committee of the Privy Council (which is the final court of appeal for many current and former Commonwealth countries, as well as the United Kingdom's overseas territories, crown dependencies, and military sovereign base areas) whose members are Justices of the UK Supreme Court referred to case law of the Irish Supreme Court when considering the European Arrest Warrant. See French v Public Prosecutor of the Central Department of Investigation

and Prosecution in Lisbon Portugal from the Supreme Court of Gibraltar [2013]
UKPC.

5. Are there any forms of cooperation going beyond the mutual acknowledgment? of court decisions?

Membership of European and international organisations for the judiciary such as the Conference of European Constitutional Courts enhances cooperation through conferences, meetings and exchange of information.

III. Interactions between European courts in the jurisprudence of constitutional courts

1. Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

The jurisprudence of the European Court of Human Rights certainly has an impact on the Supreme Court's jurisprudence and may be persuasive. EU law and the jurisprudence of the Court of Justice of the European Union have a binding effect on Ireland by virtue of Ireland's membership of the Union and amendment to the Constitution referred to above.

2. How does the jurisprudence of constitutional courts influence the relationship? between the European Court of Human Rights and the Court of Justice of the European Union?

The constitutional courts and the European courts are engaged in a dialogue with each other as they interpret and apply European law. This is because applications before the European Courts and preliminary references from national courts to the European Court of Justice, involve cases originally lodged in the national courts which require the determination of the European Courts. The European Court of Human Rights commonly adopts the "consensus" interpretative method drawing upon decisions of constitutional courts to ascertain a majority decision amongst the contracting States and this influences the manner in which the Court is interpreting the Convention. The jurisprudence of the Court is being increasingly referred to by the European Court of Justice in its judgments. Therefore, the constitutional courts are exerting some influence on the European Courts.

3. Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?

The European Union's accession to the European Convention on Human Rights is a topical issue. The EU incorporates many of the values of the Convention by virtue of the constitutional traditions of Member States, all of which have incorporated the Convention into domestic law. Where differences arise, the Supreme Court has a constitutional obligation to follow the jurisprudence of the Court of Justice of the European Union since EU law is incorporated in Irish law at a constitutional level. The Convention is incorporated by an Act of the Oireachtas (the Parliament of Ireland) which the Supreme Court must take judicial notice of.

*Note that case law of the Supreme Court of Ireland can be accessed on the website of the Courts Service of Ireland at www.courts.ie.