PILA/PILS INAUGURAL JOINT ANNUAL CONFERENCE

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Political Commitment, Practical Protection:

Using the ECHR North and South

Opening remarks of Donncha O'Connell, School of Law, NUI Galway

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Ladies & gentlemen, I am very grateful for the invitation to chair the opening session of this conference and apologise for the fact that I have to depart as soon as I have delivered these opening remarks.

One cannot speak about human rights protections in both parts of the island of Ireland - and, indeed, on 'these islands' - without recalling the enormous contribution of the late Professor Kevin Boyle who, very sadly, died on Christmas Day 2010. Kevin was an indefatigable optimist with a stubborn belief in the core and instrumental value of human rights. He educated a global battalion of optimists who now work in many capacities as human rights defenders around the world. On a day like today – when we gather to consider human rights on an all-island basis – we should remember Kevin with fondness, gratitude and respect, and be emboldened by the optimism that he demonstrated throughout his life of practical and dogged commitment to human rights and democratic values. Nowhere was his practical commitment more evident than in his work as a litigator before the European Court of Human Rights.

While incorporation of the European Convention of Human Rights (ECHR) pre-dated the Belfast / Good Friday Agreement in Northern Ireland and Great Britain it was a political 'outworking' of the Agreement in the Republic of Ireland. Of course, the Agreement had more to say about human rights in the

form of commitments regarding human rights institutions, a Bill of Rights for Northern Ireland and an All-Island Charter of Rights. It could also be argued that human rights principles informed other collateral benefits of the Agreement in areas like policing.

The purpose of today's conference is not to human rights-proof the Agreement thirteen years on but it is worth reflecting, however cursorily, on the degree to which progress has been slow in areas like the Bill of Rights for Northern Ireland and the All-Island Charter of Rights and on the different challenges faced by the Human Rights Commissions, north and south.

In the Republic of Ireland, at least, there is now a chance to address the issue of institutional protection for human rights and equality in the context of the proposed merger of the Irish Human Rights Commission and Equality Authority currently under consideration by a Working Group for an Enhanced Human Rights and Equality Commission appointed by the Minister for Justice, Equality & Defence. It is not clear what implications, if any, this process will have for 'equivalent' human rights and equality institutions in Northern Ireland but it is critically important that any changes introduced in the Republic do not provide a template for a diminution of institutional protections in Northern Ireland.

It would be especially regrettable if the litigation and related functions of the Irish Human Rights Commission and Equality Authority were further weakened by a merger process. Non-governmental organisations, with a commitment to human rights and equality, are not formally represented on the Working Group but it is likely that they will make robust and forthright submissions that seek to renew the original ambitions for both bodies that existed at the time of their establishment. One can only hope that these views will be taken seriously.

The legislation that will be necessary to establish a merged Human Rights and Equality Commission may also provide an opportunity to address deficiencies

in the ECHR Act 2003 and in its operation. These will, no doubt, be amplified and discussed in various sessions of today's conference but it would be worthwhile and valuable if this discourse influenced the deliberations of the Working Group.

While the UK Human Rights Act 1998 and the European Convention of Human Rights Act 2003 are similar in many respects the context of 'incorporation' was different in both jurisdictions. The perceptions of added-value to be gained from incorporation were decidedly different in both jurisdictions arising from the quite different constitutional arrangements in each.

This had everything to do with the fact that the Irish Constitution 1937 was readable (to those who were bothered to read it) while the UK Constitution had to be found before it could be read!

There was, however, something quite sad about the way the written Irish Constitution was pleaded by some as a kind of defence against real incorporation of the ECHR. At times it sounded like a jingoism that protested too much. While there were sensible legal arguments for interpretative incorporation these were sometimes used and stretched as a shield against the rather limited cosmopolitanism offered by the ECHR. Politicians and judges sang in this choir of harmonious scepticism in which the conductor, Mr. McDowell, sang loudest!

The idea behind sub-constitutional interpretative incorporation, as provided for by the ECHR Act 2003, is that you elevate the status of the ECHR from persuasive to interpretative, but subject to the Constitution. This is not nearly the same thing as giving direct effect to the incorporated provisions of the Convention, nor decisions of the European Court of Human Rights, in domestic law. It is further complicated by the fact that the interpretative obligation is engaged subject to any other rule of interpretation and only "in so far as is

possible". Section 2 is therefore weaker, at least in formulation, than the equivalent provision of the UK Human Rights Act. In fairness, this weakness is partially but not comprehensively offset by provisions of the Irish Constitution.

At a minimum the ECHR Act 2003 means that an Irish court cannot refuse to hear Convention-based arguments when the interpretative obligation in Section 2 or the so-called performative obligation in section 3 is pleaded and the requirement to take judicial notice of Strasbourg decisions contained in Section 4 means that lawyers do not have to prove such authorities before an Irish court. Of course, the Act has much greater potential than this but that potential has, thus far, been slowly realised. Absent the possibility of injunctive relief – on which the Supreme Court's view is eagerly awaited – the potential of Section 3 to operate as a statutory duty that significantly reorients the conduct of 'organs of the state' towards greater compliance with the ECHR is open to question.

Much criticism has been levelled at the remedy of a declaration of incompatibility, contained in Section 5, which is based on the same remedy under the UK Human Rights Act. It is a residual and decidedly declaratory relief not affecting validity that can be sought only when no other remedy is adequate and available. If a constitutional remedy is sought with a declaration of incompatibility it must first be considered by the court thus qualifying the normal rule of reaching constitutional issues last (*Carmody*). Fiona de Londras of UCD likens the declaration of incompatibility to "a cubic zirconia engagement ring: shiny, splendid looking and attractive but practically worthless apart from its sentimental value". As someone who comes from Galway (and on the day that is in it!) I prefer to compare it to a Claddagh Ring whose real value depends on whether the heart is turned inwards (towards the Irish Constitution) or outwards (towards the ECHR). A Claddagh Ring is also, of course, more non-committal than an engagement ring!

In a system where declarations of invalidity (under the Constitution) have long been available and given by the superior courts, it is tempting to dismiss the declaration of incompatibility as lacking in any value. Declarations of incompatibility are no different than decisions of the European Court of Human Rights in respect of Ireland except that they issue from an Irish court. This must have *some* value in an established political system that recognises judicial authority, or at least the judicial authority of its own courts. Political championing of the rights that might be the subject of declarations of incompatibility is admittedly weak. This deficit simply must be addressed to compensate for the lack of full legal force attaching to declarations under Section 5, a remedy designed to catalyse a political response. In this regard, Irish politicians would do well to note the system as it operates more effectively in the UK.

Giving further effect to the ECHR in Irish law has been disappointing in terms of impact – especially to those with heightened expectations – but this is no accident. The form and method of incorporation used was deliberately chosen so as to cause minimum disruption to the manner in which fundamental rights were judicially protected for years. At one level this indicated some defensiveness about domestic protections and a degree of scepticism about the added value to be gained by a fuller embrace of the ECHR in domestic law and, perhaps more pointedly, the jurisprudence of the European Court of Human Rights.

More tellingly, it hinted at a broader tentativeness about constitutional incorporation of the Belfast / Good Friday Agreement (and its outworkings) in the Republic of Ireland. It is possible to view the Agreement as requiring the 'reconstitutionalising' of states on the island of Ireland. This view of the Agreement was advocated by, among others, Professor Brice Dickson when he commenced his terms as Chief Commissioner of the Northern Ireland Human Rights Commission. The Agreement has been more constitutionally significant in Northern Ireland than in the Republic of Ireland.

In the south we have been too precious about our Constitution and too resistant to the need for it to be adjusted to take account of all-island imperatives. While the abandonment of the territorial claim contained in the original Articles 2 and 3 of the Irish Constitution was a potent symbol of acceptance of the Belfast / Good Friday Agreement more was and is required.

An event such as this joint conference of PILA and PILS, while focused on practical and comparative analysis of the use of a particular legal instrument – the ECHR – is also useful for providing a space in which deeper and perhaps less practical issues can be pondered and discussed.

The European Convention of Human Rights of 1950 is a set of minimum standards relevant mainly to the protection of some civil and political rights premised heavily on the protection of a version of democracy the vulnerabilities of which were tragically apparent at the time of drafting of the Convention. It means something quite different to the judges of the European Court of Human Rights now than it meant to those who drafted it in 1949-1950. As an international instrument guaranteeing minimum standards it can mean something *more* in the domestic courts of member states of the Council of Europe than it means to the Strasbourg court whose jurisdiction is subsidiary and necessarily distant.

While many are human rights ‘believers’ and see the system for the protection of human rights as intrinsically coherent and authoritative a more realistic perspective is to see human rights as instrumental or contingent and serving a ‘higher’ political purpose. For example: human rights were viewed as instrumental to the protection of liberal democracy in 1950 in the context of the ECHR; they were seen as no less instrumental in supporting the political values of consociation, confederation and federation (as well as the urgent and pragmatic imperative of ending political violence) that informed and underpinned the Belfast / Good Friday Agreement of 1998.

If human rights are instrumental they must be used. That is where lawyers have something valuable to contribute. I hope that the outcome of today's conference is that we develop ideas about how best to maximise the impact of the ECHR in the courts of Northern Ireland and the Republic of Ireland, not as some exercise in macho litigation but so as to advance the public interest.

The public interest is served by addressing the rights and interests of litigants but, also, by developing the decent jurisprudence that has evolved under the European Convention of Human Rights. This is where the courts can contribute positively to the dialogue that continues beyond the courts and is so essential to the development and protection of human rights.

Thank you.