

International Human Rights Law and Fatal Foetal Abnormalities

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Abbreviations

CFR	Charter of Fundamental Rights	'The Charter'
CJEU	Court of Justice of the European Union	'The Court of Justice'
ECHR	European Convention on Human Rights	'The Convention'
ECtHR	European Court of Human Rights	'The European Court'
ICCPR	International Covenant on Civil and Political Rights	'The ICCPR'
HRC	Human Rights Committee	'The Committee'

1. Introduction

When faced with a legal question, one must know where to find the rules that apply to the question, must understand the relationship between the rules, and know which rule prevails in case of conflict. The legal origins of these rules are termed 'sources of law'. There are four main sources of law in the Irish legal system: common law (decisions of courts of law); legislation; the Irish Constitution 1937 and EU law. In addition, there are a number of secondary sources which impact on the Irish legal system, including international law. Secondary sources do not enjoy the force of law *per se* but may influence or 'persuade' an adjudicative body in determining the law on a legal issue.

As well as the Constitution, legislation and case law rules that were presented at the first weekend of the Assembly, legal rules on the issue of termination of pregnancy come from other sources, including the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and the International Covenant on Civil and Political Rights. It is necessary to understand the status of each of these instruments in Irish law and the nature of decisions of their supervisory / monitoring bodies, i.e. the Court of Justice of the European Union, the European Court of Human Rights and the Human Rights Committee respectively, in order to be able to ascertain the legal obligations on the Irish government in respect of this matter.

This Brief will set out the status of the Charter, the Convention and the Covenant in Irish law, and will also provide an overview of a recent case against Ireland before the Committee concerning abortion in Ireland, i.e. *Mellet v Ireland*.

2. EU Law and the Charter of Fundamental Rights

2.1 The status of EU Law in Ireland

EU law is a primary source of law in Ireland and it takes precedence over domestic Irish law, including constitutional provisions, if there is a conflict between them. The supremacy of EU law over domestic law was developed in cases of the European Court of Justice.¹ These cases established that the Treaties establishing the European Communities created a new legal order and that by signing the Treaties the member States had permanently limited their sovereign powers and transferred them to this new legal order. When Ireland became a member of the European Communities in 1973, Article 29 of the Constitution was amended to enable it to join.

The status of EU law in Ireland is dealt with in Article 29.4.6° of the Irish Constitution. This provision has two main implications; the first is that nothing in the Constitution can prevent laws enacted, acts done or measures adopted by the EU or by their institutions from having the force of law in the State and the second is that nothing in the Constitution can invalidate laws enacted, acts done or measures adopted by the State where these are necessitated by membership of the EU. Supremacy of EU law over domestic law is not provided for explicitly in the Constitution, but is clear from s.2 of the European Communities Act 1972.

¹ See *Van Gend en Loos v Nederlandse Belastingadministratie* [1963] ECR 1 and *Costa v ENEL* [1964] ECR 585.

2.2 The Charter of Fundamental Rights (The Charter)

The framework of human rights protection in the EU changed significantly in December 2009. Since then, the Charter has the same legal value as the EU Treaties in member States and it is binding on Ireland. However, it is important to note that the Charter will only apply where a question of EU law arises. For example, the Charter applies when EU member States adopt or apply a national law implementing EU law or when their authorities apply EU law directly. For example, if Ireland implements an EU law on healthcare services, the Charter will apply, as Ireland is implementing EU law and the Charter deals with healthcare. However, if a new piece of Irish legislation is adopted which does not have any connection with EU law, then the Charter will not apply. When the Charter does apply, it is directly applicable by Irish courts and will take precedence over domestic law if there is a conflict between the two. This means that the Charter can form the basis of a claim in Irish courts and judges must apply it.

The Court of Justice interprets EU law to ensure that it is applied in the same way in all EU members States, and also settles legal disputes between national governments and EU institutions. In addition, it can also be used by individuals, companies or organisations to take action against an EU institution, if they feel it has infringed their rights. The Court of Justice will apply the Charter where a fundamental rights issue arises and these decisions are binding on Ireland.

The Charter does not refer to abortion but a number of its provisions are of relevance if a case concerning abortion arises before Irish courts or the Court of Justice, including the right to life, the right to healthcare, the prohibition on torture etc.

3. The Irish Legal System and International Law

Ireland's approach to international law is set out in Article 29.6 of the Constitution. The effect of this rule is that even if Ireland has signed up to ('ratified') an international agreement, it is not Irish law unless the Oireachtas incorporates it into domestic law. The Oireachtas normally incorporates international law into domestic law by passing a piece of legislation. This means that an individual cannot base a claim on the international agreement in Irish courts. In addition, judges are not required to apply it. They can, however, be guided by the international law rules and may find it informative or 'persuasive' when determining the law on an issue.

Even if an international agreement is not incorporated into domestic law, it is still binding on the State. If Irish law is in conflict with an international agreement, Ireland can be found by an international court to have breached international law. Therefore, a State should not ratify an international agreement if its domestic law is in conflict with it. Ireland has indirectly incorporated the ECHR into domestic law but while it has ratified the ICCPR, it has not incorporated it yet.

4. The European Convention on Human Rights (The Convention)

The Convention was adopted by the Council of Europe in 1950 and entered into force in 1953.

4.1 The Status of the ECHR in Ireland

Under the ECHR there is no express requirement to incorporate the Convention into domestic law but a number of years after ratifying the Convention, Ireland indirectly

incorporated the Convention into domestic law in 2003 when it passed the European Convention on Human Rights Act (the Act). Section 2(1) of Act requires Irish courts to interpret rules of domestic law in a manner which is in line with the State's obligations under the Convention. Section 4 of the Act requires Irish courts to take account of judgments of the European Court. Irish judges assess Irish law against the human rights standards as set out in the ECHR Act. If they find that Irish law is incompatible with these standards they can issue a declaration of incompatibility. Such a declaration does not render the law in question invalid, rather requires the Taoiseach to bring any such declaration to the attention of both the Dáil and the Seanad. A litigant who has been granted a declaration of incompatibility can receive compensation at the discretion of the government.

It should be noted that when pleading the Convention before the Courts, this should be done solely by reference to the 2003 Act rather than to the Convention itself,² i.e. an individual can only bring a case claiming that the State breached their rights as they are set out in the Act, rather than in the Convention.

Cases may be brought by individuals and groups against their own State (or by a State that has ratified the Convention against another ratifying State) before the European Court. A case should always be appealed to a State's highest court before an application is made to the European Court, to give domestic courts a chance to sort out the issue. This is known as 'exhausting domestic remedies'. States are obliged to abide by the judgments of the court in any case to which it is a party. A State may be required to change its laws and / or make reparations (e.g. pay compensation) to an individual whose rights were violated.

The Convention does not refer to abortion but a number of Convention rights are of relevance to the issue, including the right to life, the right to freedom from torture, the right to privacy etc. Dr Carolan's presentation at the last meeting of the Assembly discussed the case of *A, B and C v Ireland*, which was brought before the European Court by Irish citizens. In this case the European Court held that uncertainty in Irish law concerning abortion was a breach of the rights of one of the three women (Ms C).

5. The International Covenant on Civil and Political Rights (Covenant) and its First Optional Protocol

The ICCPR is an international treaty, adopted by the United Nations (UN) in 1966. Pursuant to Article 2, States that have ratified the Treaty commit to respect the human rights recognised within it. Ratifying States are also required to adopt measures to give effect to the rights in the Covenant and to provide an effective remedy to those whose rights have been violated.³ States have discretion with regard to domestic implementation of the ICCPR, however, the Committee has repeatedly underlined the need for domestic implementation of UN human rights treaties. The UN also adopted an Optional Protocol⁴ to the ICCPR, whereby victims of violations of the ICCPR may make an individual communication to the Committee

² See *M.D. (a minor) v Ireland* [2012] IESC 10, in particular see paras. 57-64.

³ Article 2(3)(a) ICCPR.

⁴ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

after exhausting domestic remedies, and the Committee can adopt a ‘view’ / make a decision on the alleged violation.⁵

5.1 The Status of the Covenant in Ireland

Ireland ratified the ICCPR and also acceded to the First Optional Protocol in 1989. The Oireachtas has not adopted legislation to incorporate the Covenant into Irish law. Therefore, it does not have direct effect in Irish law and judges are not required to apply its provisions. However, the ICCPR can provide guidance to judges in determining a legal issue and may be of ‘persuasive’ value.

5.2 The Human Rights Committee (The Committee)

Article 28 of the ICCPR provides for the establishment of a supervisory / monitoring mechanism for the Covenant; The Committee. It is composed of 18 members, who are experts in the field of human rights, but may not necessarily be legally trained. It does not have the same legal status as an international court but can be considered a “quasi-judicial organ”.⁶ The Optional Protocol is silent as to the status and effects of the Committee’s views, only stating in Article 5(4) that the Committee “shall forward its views to the State Party concerned and to the individual.” In practice, however, where the Committee has found a violation of the Covenant, it has invited the State concerned to provide information within three months on the steps it has taken to give effect to the Committee’s views. While the decisions of the Committee are not legally binding, Article 2(3) of the ICCPR requires ratifying States to provide victims of violations of the Covenant with an effective remedy and reparation. The Committee has partially clarified the status of its decisions, noting that it is not a judicial body but pointing out that its views under the Optional Protocol have some important characteristics of a judicial decision, and are “arrived at in a judicial spirit”.⁷

The ICCPR does not refer to abortion, but a number of its provisions are of relevance if an issue concerning abortion arises before the Committee, including the right to life, the prohibition on torture and the right to privacy. These issues did, in fact, arise in the case of *Mellet v Ireland*.

5.3 *Mellet v Ireland*

In June 2016 the Committee adopted views in *Mellet v Ireland*.⁸ In November 2011, Ms Mellet, who was 21 weeks pregnant, learned that her pregnancy involved a fatal foetal impairment and she was told that the foetus would die *in utero* or shortly after birth. She decided to end the pregnancy and was informed by her doctors that she could not legally obtain an abortion in Ireland. She therefore travelled to a hospital in the United Kingdom and underwent a termination procedure. Because she had limited financial resources she flew back to Ireland 12 hours later although she was still bleeding and weak. In 2013, the Centre for Reproductive Rights filed a complaint to the Committee under the first Optional Protocol to the ICCPR on her behalf.

⁵ An exception to this is when those remedies would be “ineffective or unreasonably prolonged. Resolution 5/1 par. 87 (g)

⁶ See Nowak, M., *UN Covenant on Civil and Political Rights. CCPR Commentary*, 2nd revised edition, (Engel: Germany, 2005), p. 669.

⁷ in General Comment No. 33, para. 7.

⁸ *Mellet v. Ireland*, Human Rights Committee, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013, (2016).

In its decision, the Committee found that Ireland had violated Article 7 (right to be free from cruel, inhuman or degrading treatment), Article 17 (right to privacy), and Article 26 (right to equality before the law) of the ICCPR. The Committee unanimously held that prohibiting Ms Mellet from accessing abortion services in Ireland violated the prohibition on cruel, inhuman or degrading treatment, as well as Ms Mellet's right to privacy. It also held that the State discriminated against Ms Mellet as it denied her the bereavement counselling and medical care available to women who miscarry. The Committee highlighted that under Article 2(3)a of the Covenant Ireland has an obligation to provide an effective remedy to Ms Mellet as a victim of human rights violations and stated that Ireland must make full reparation to her for the harms that she suffered, including paying adequate compensation and making available any psychological treatment she may require.⁹ The Committee also recommended that the government reform its abortion law to ensure that other women do not face similar human rights violations.

On 30th November 2016, the Minister for Health Simon Harris met with Ms Mellet to outline Ireland's response to the Committee's decision. The State offered an *ex gratia* sum of €30,000 and access to appropriate psychological treatment to her.¹⁰

⁹ *Mellet v Ireland*, Human Rights Committee, Communication No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013, (2016), para 9.

¹⁰ Department of Health, 'Statement from Minister for Health, Simon Harris, TD, regarding the United Nations Human Rights Committee in the case of Ms Amanda Mellet', 30 November 2016. Available at <http://health.gov.ie/blog/press-release/statement-from-minister-for-health-simon-harris-td-regarding-the-united-nations-human-rights-committee-in-the-case-of-ms-amanda-mellet/>.