

MUNI

International and Domestic Law

Dr Bríd Ní Ghráinne
Senior Researcher, Judicial Studies Institute
brid.ni_ghrainne@law.muni.cz



EUROPEAN UNION
European Structural and Investment Funds
Operational Programme Research,
Development and Education



Postdoc@MUNI
No. CZ.02.2.69/0.0/0.0/16_027/0008360

E-seminar Outline

- Key concepts
- Your country
- Activity: Ireland and international law



MUNI

1. Key concepts

Monsim

- There is one single system of law and international law is an element of the domestic legal system along with all the other branches of law, eg. labour law, employment law.
- Generally civil law countries are monist.

Dualism

- Under this theory, international law has to be transformed into national law in order for there to be rights or obligations on individuals or entities
- Where international law is exercised domestically it is only because domestic law allows for it
- Generally many common law countries are dualist.

Transformation theory

- International law has to be transformed into municipal law by the appropriate constitutional machinery, such as by an act of Parliament. The general practice in the United Kingdom is that treaties do not bind national authorities unless they are translated into domestic legislation

Self-executing treaties

- A treaty is to be regarded as equivalent to an act of legislature only when it operates of itself without the aid of any legislative provision.
- USA: There is a method by which some international agreements do not need to go through this very time-consuming procedure and that is the executive agreement. These instruments can be made by the President alone, but these are generally for more minor agreements not affecting the rights of citizens.

Dualist states with monist elements

- Canada is dualist. Customary law, however, is accepted as part of the law of the land as supported by the Canadian Supreme Court in the *Reference Re Secession of Quebec* judgment (1998) 161 DLR 385
- This is also the case in New Zealand and Australia. Treaties, however, need incorporation by domestic legislation, as the provisions may alter the existing domestic law. For example, many jurisdictions have introduced legislation to incorporate the international obligations under the **Rome Statute of the International Criminal Court**

Role of municipal law in international law

- A state which has broken a provision of international law cannot justify itself by referring to domestic law. (Art 27 Vienna Convention on the Law of Treaties)

M U N I

2. Your country

TASK: Your country

- Is the legal system in your country monist or dualist?
- How do treaties become part of domestic law in your country?
- How does customary international law become part of domestic law in your country?

M U N I

3. International Law and the Irish Constitution

TASK: International Law and the Irish Constitution

- Please read Article 29 of the Irish Constitution and answer the questions.
- Both Article 2 and the questions are in the notes section below.
- The answers to the questions can be found in the subsequent slides

Irish Constitution and International Law

- *Crotty v an Taoiseach* [1987] IR 713, [1987] ILRM 400.
- Griffin J:
- ‘The Constitutional scheme in respect of international agreements would appear, therefore, to be that the Government, exercising the executive power, may enter into international agreements but such agreements must be laid before Dáil Éireann, and if the agreement involves a charge on public funds, the State is not to be bound by the agreement unless the terms of the agreement have been approved by Dáil Éireann.’

- The government has the power to commit the State to international agreements (29.4)
- Ireland is bound by a treaty at the INTERNATIONAL LEVEL after it has signed and ratified it
- the treaty is binding in DOMESTIC law after the Irish Parliament incorporates it.

Steps to becoming binding domestically

1. When Ireland *signs* a treaty, it is not yet bound. The signature is simply a political declaration that it intends to be bound later.
2. When Ireland *ratifies* the treaty by getting approval from the Dáil (lower house of Parliament) - Ireland is bound at the level of international law, but it is not yet part of domestic law.
3. When Ireland *passes domestic legislation* incorporating the treaty into Irish law, the treaty is binding at a domestic level.

Case Law on Irish Law and Treaties

Re o Laighleis (1960)

- He argued that the imprisonment provisions in Irish domestic law violated the ECHR.
- At that time, ECHR had not been determined by the Oireachtas (Parliament) to be part of the law of the state. There was no domestic legislative act incorporating the ECHR into Irish law.
- The Supreme Court said it could not give effect to the ECHR if it is contrary to domestic law or purports to grant rights or impose obligations in addition to those in domestic law.
- Therefore the applicant could not rely on the ECHR in an Irish court, because it had not yet been implemented into Irish law.

Case Law on Irish Law and Treaties

Application of Woods (1970)

- The applicant challenged his detention on the grounds that it was contrary to Art 4 of UDHR (the prohibition of slavery or servitude).
- Supreme Court said the declaration was not part of Irish law, citing *Ré Ó Laighléis* (the previous case we discussed) and Art 29 of Irish Const.

Case Law on Irish Law and Treaties

Kavanagh v Governor of Mountjoy Prison (2002)

- Kavanagh had been charged before the Special Criminal Court.
- He submitted a complaint to the UN Human Rights Committee. The HRC is a Committee of Experts that interpret the 1966 International Covenant on Civil and Political Rights
- .The HRC found that Ireland had violated Art 26 of the ICCPR (the right to equality before the law) as it *“failed to demonstrate that the decision to try the author before the Special Criminal Court was based on reasonable and objective grounds.*

- Kavanagh argued that Ireland was bound by the views of the HRC on the basis of Article 29.
- Ireland had ratified the treaty, but had not incorporated it.
- The Supreme Court rejected Kavanagh's argument. It said that Article 29.3 does not create rights for individuals.
- It also said that the ICCPR could not be applied by an Irish Court because it had not been incorporated by legislation.

– However, Fennelly J stated that:

‘I am prepared to assume that the state may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution.

– **Therefore Irish courts should abide by international law even if it is not binding yet in Irish law, provided it does not conflict with existing Irish law.**

Status of Customary International Law

Article 15.2 of the Irish Constitution: 'the Oireachtas has sole power to make laws for the State'

ACT Shipping (PTE) Ltd v Minister for the Marine : Article 15.2 does not inhibit the evolution of international customary law into Irish domestic law. It related to the “making” of laws for the State, which, it provides is a power exclusively reserved to the Oireachtas. Customary law is not ‘made’ in the sense envisaged by Article 15.2. Customary international law evolves from a practice or course of conduct which in time has become widely accepted.’

- *ACT Shipping (PTE) Ltd v Minister for the Marine* Barr J held that principles of customary international law can only be part of domestic law provided they are not contrary to domestic law in the form of provisions of Constitution, statute or common law.

Summary of the relationship between Irish law and international law

- When Ireland signs a treaty, it is not bound.
- Ireland is bound at an international level once it has ratified a treaty. However it is not yet part of domestic law.
- In order for a treaty to form a part of domestic law, it needs to be incorporated into domestic law

Monist or Dualist?

- Although Ireland is dualist, it has some monist elements:
 1. Irish courts *should* follow unincorporated treaties where possible (*Kavanagh v Governor of Mountjoy Prison*)
 2. Customary international law automatically becomes part of domestic law, provided it does not conflict with existing law (*ACT Shipping (PTE) Ltd v Minister for the Marine*).

Extra reading on International and Domestic Law

- Shaw, *International Law* (chapter on International Law and Municipal Law)
- Harris, *Cases and Materials on International Law*
- Higgins ‘The role of national courts in the international legal process’ in *Problems and Processes: International Law and How we Use It*
- Cassese ‘The implementation of international rules within national systems’ in *International Law*
- Denza’s chapter in Evans, *International Law*

Final remarks

- Please do not hesitate to contact me with any questions
- I will put the materials up online for the next seminar on Monday 6 April
- I will send you the final test on Monday 4 May
- brid.ni_ghrainne@law.muni.cz