Introduction

Economic, social and cultural rights are a central part of the remit of the Irish Human Rights Commission (IHRC). The Strategic Plan of the IHRC 2003-2006 identifies three key areas of work: the administration of justice; economic, social and cultural rights; and cross-cutting issues. In the first two years of the Strategic Plan, the IHRC has concentrated on the first and third of these areas. The publication of this Discussion Document marks a key stage in the IHRC's engagement with economic, social and cultural rights. The Discussion Document identifies the issues which will be the focus of an international conference on 9th and 10th December 2005 where the analysis and thinking of the IHRC on these issues will be opened up for debate and consultation to an audience of international and national experts and stakeholders. In 2006 we intend to take this process forward by publishing a follow-up report building on that debate, which will make recommendations on how Ireland might improve its structures and policies for the respect, protection and fulfilment of economic, social and cultural rights.

The starting point of the IHRC is that all human rights are universal, inalienable, interrelated, and interdependent. The universality of human rights means that they are inherent in every individual, without discrimination, are not dependent on gift or privilege and cannot be voluntarily given up nor taken away. When one considers that the core value at the heart of human rights discourse is that of human dignity, there can be little dispute as to the fundamental nature of economic, social and cultural rights and international human rights law clearly states that different types of human rights, economic, social, cultural, civil and political, are of equal importance and are mutually reinforcing. Internationally, there is a growing conviction that the implementation of human rights principles will strengthen social harmony and cohesion, advance the process of development and promote the accountability and legitimacy of governments.

Chapter 1 of this Discussion Document explores the background to the development of international human rights standards, focussing on how the evolution of international law in this area has created a rich body of legal norms which gives equal place to economic, social and cultural rights with civil and political rights. It traces the establishment of the human rights system in the 1940s and 1950s which was based on an attempt to bring together a diverse range of cultural and philosophical traditions, including, but not limited to, liberal rights theory, Marxism, Christian and other religious teaching and developments within modern philosophy. The development of the Welfare State in Germany and Britain and Roosevelt's "New Deal" in the United States are all shown as stages in the development of thinking about why protections aimed toward social justice are important in a democratic society. In particular, we look at Roosevelt's contribution in integrating the language of civil and political rights with that of economic and social rights, stemming from his strong sense that economic want must be met, not only to protect and guarantee human dignity, but also to ensure political stability and the enjoyment of political freedom.

Chapter 1 also recounts how, following the adoption of the UDHR in 1948, the debate around the relationship between the different categories of rights quickly became a victim of the polarised politics of the Cold War. By placing the division of the two

main international human rights covenants in their historical and political context, this chapter helps to illuminate how the separation of the two covenants occurred because of particular historical and political factors rather than because of any essential difference between the two sets of rights. The artificial nature of the separation of the two covenants has been recognised at the international level, most notably in the Vienna World Conference on Human Rights in 1993, which endorsed the principles of the equivalence and interdependence of both sets of rights.

One of the main purposes of this Discussion Document is to explore why these rights have remained so underdeveloped, particularly in the Irish context. In chapter 2 we address some of the key objections to economic, social and cultural rights as well as describing the existing structures and trends in Irish law and policy which may constitute obstacles to their protection. In Ireland economic, social and cultural rights have been the subject of much public debate and controversy in recent years, particularly in the context of a number of leading cases dealing with education and health issues. However, the IHRC believes that these debates have displayed a number of misunderstandings as to the nature of these rights within the international human rights framework and Ireland's obligations under international human rights law. The contention that there is a hierarchy of rights with civil and political rights taking precedence over economic, social and cultural rights is persistent and has particular significance for discussions on the form of protection, if any, which economic and social rights should be afforded in the domestic legal system. It is undeniable that economic, social and cultural rights remain less developed in law and in practice than civil and political rights, and widespread and gross violations of those rights continue to receive less scrutiny and attention than violations of civil and political rights. In this chapter we attempt to demystify some of the myths and misconceptions around economic, social and cultural rights and their relationship with civil and political rights and look at the place of economic, social and cultural rights in contemporary liberal democratic models of government and economics.

Chapter 3 is a detailed and comprehensive description of international human rights standards in the area of economic, social and cultural rights, focussing on the nature of Ireland's obligations under the relevant treaties. The issue of the failure of State agencies to incorporate these international rights into policies and programmes is a continuing source of controversy, as is the question of whether the Irish Constitution acts as a barrier to the incorporation of international treaties into domestic law. The Irish Government's position on this has been challenged by the UN Committee on Economic, Social and Cultural Rights. It is hoped that the promulgation of these rights and standards by the IHRC and others will act to speed up the process of ensuring that people in Ireland can enjoy the human rights protection which the Irish State has accepted on their behalf. The IHRC is particularly grateful to Dr. Padraic Kenna of N.U.I. Galway for his contribution to this chapter and his advice and assistance to the IHRC in preparing this Discussion Document in general.

What is clear from our survey of international law in this area is that mechanisms for protecting economic, social and cultural rights at the international level are becoming increasingly sophisticated and effective. Chapter 4 surveys models of enforcement of these rights at the legal and administrative levels, borrowing from international comparative experience of how human rights obligations in the area can be met effectively at the national level. It also explores the possibilities that are available in

creating a matrix of effective means of protection of rights and looks at the different ways in which constitutions, legislation, courts and administrative structures can be used to protect economic, social and cultural rights. Here, we see that exciting innovations are taking place in many countries to meet the obligations contained in international law. As the IHRC's comparative analysis focuses particularly on developments in common law countries, many of these innovations could be easily transferred to Ireland. In this sense the Discussion Document is intended map out how a framework for the protection of economic, social and cultural rights might be designed and implemented.

Chapter 5 examines Ireland's history of enforcing economic, social and cultural rights. This chapter aims to situate potential models of enforcement in the particular Irish legal and political context. Existing mechanisms for protecting rights in Ireland are analysed as are some of the limitations of our existing structures. Finally, Chapter 6 brings all of the previous analysis together and begins the discussion of what practical steps can be taken in Ireland to make our international commitments a reality.

The IHRC would like to emphasise that the analysis contained in this Discussion Document is not intended to be taken as the IHRC's final word on any of these issues. This Discussion Document is designed to stimulate debate on how Ireland can improve the protection and promotion of economic, social and cultural rights and help to meet its international obligations under the international human rights treaties to which it is a party. By publishing our analysis in this manner, we hope to stimulate an informed debate around the points raised and the IHRC welcomes submissions on the points raised from any interested party or organisation before June 30th 2006. As we have indicated, the discussions at the IHRC's international conference on 9th and 10th December 2005 and any feedback received on this Discussion Document will be incorporated in the IHRC Report on Economic, Social and Cultural Rights which we intend to publish in late 2006.

Chapter 1 - The origins of economic, social and cultural rights

1.1 What are economic, social and cultural rights?

In this chapter we discuss the question of what do we mean by economic, social and cultural rights. We look in particular to how they relate to other human rights and to the history of their development. Within human rights discourse, the grouping "economic, social and cultural rights" is usually set in opposition to the category of "civil and political rights", although, as we will see, this distinction is controversial. However, both in conceptual terms and in terms of the interpretation of human rights law, the various categories of economic, social and cultural rights are in fact overlapping and interrelated, both with one another and also with civil and political rights.

For the purposes of this report we use the phrases "economic, social and cultural rights"; "economic and social rights" and; "socio-economic rights" interchangeably. These various labels are used throughout the literature in this area. While we are conscious that the content of economic, social and cultural rights overlap and contain elements of each other, the main focus of the report is on economic and social rights rather than cultural rights. Therefore, in the context of the current report we do not examine certain aspects of cultural rights, in particular the cultural rights dimensions pertaining to minority and group rights.

Social rights centre on the core requirements for a dignified existence, with the key right being the right to an adequate standard of living. Related subsistence rights include the right to food and nutrition; the right to clean and safe water; the right to clothing; the right to housing; and the right to necessary levels of healthcare. The term *economic rights* encompasses rights to participate in economic activity and include the right to work, the right to social assistance and security and the right to property. These rights can be seen as pre-conditions for the enjoyment of social rights such as the right to food, the right to water and the right to housing, but they are also crucial to individual independence and freedom and to the exercise and enjoyment of civil and political rights. *Cultural rights* are somewhat more complex and encompass a range of different types of rights such as the right to participate in one's own culture, the right to benefit from scientific progress and the right to education. Cultural rights contain elements of the other categories of rights, for example, the right to education has civil, political, economic and social dimensions. A further area of rights in this category relates to the right to preserve the cultural identity of a particular group. Although we do not deal with that dimension of cultural rights here, we are conscious of cultural and minority dimensions to the enjoyment of economic and social rights by minority groups and the particular human rights issues these groups face.

The list of rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] includes:

- The right to self-determination (Article 1);

[1] UN Doc. A/6316 (1966). UNGA Resolution 2200A (XXI) Entered into force 3 January 1976.

- Equal rights for men and women (Article 3);
- The right to work (Article 6);
- The right to just and favourable conditions of work (Article 7);
- The rights of workers to organize and bargain collectively (Article 8);
- The right to social security and social insurance (Article 9) and protection and assistance for the family (Article 10);
- The right to an adequate standard of living (Article 11) which includes:
    - Adequate food
    - Adequate clothing
    - Adequate housing;
- The right to freedom from hunger (Article 11);
- The right to the highest attainable standard of physical and mental health, including the right to health care (Article 12);
- The right to education (Article 13); and
- The right to culture and to benefit from scientific progress (Article 15).

As economic, social and cultural rights are unequivocally established as human rights at international law, one might imagine that they should be non-contentious. However, there is a widespread sense that they are somehow more difficult to implement in practice: as Martin Scheinin puts it, "The problem relating to the legal nature of social and economic rights does not relate to their validity but rather to their applicability".[2] While the ICESCR provides a comprehensive list of economic, social and cultural rights, States are selective as to which rights they protect, and more particularly which rights they enforce through the creation of legal enforcement mechanisms.[3] An expression of this 'a-la-carte' approach to economic, social and cultural rights can be found in the Revised European Social Charter, where States are allowed to select which treaty obligations they undertake to be bound by. This approach contrasts with the wide acceptance of the universal and inalienable nature of civil and political rights.

1.2 The history of economic, social and cultural rights

The establishment of a human rights system in the 1940s and 1950s was based on an attempt to bring together a number of cultural and philosophical traditions, including, but not limited to, liberal rights theory, Marxism, Christian and other religious teaching and developments within contemporary philosophy. In this section we will explore the influence that each of these traditions has had on the development of ideas relating to economic, social and cultural rights.

1.2.1 Natural rights theory and the Enlightenment

Modern theories of universal or 'natural' rights can be traced to the British, French and American Enlightenment writers of the 18th century, in particular John Locke,

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[2] Scheinin in Eide, Krause and Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, (2nd Ed, Martinus Nijhoff Publishers, 2001) at p 29. Controversies and misunderstandings about the nature of economic and social rights are the focus of chapter 2.

[3] McKeever and Ní Aoláin, *Thinking Globally, Acting Locally:Enforcing Economic and Social Rights in Northern Ireland*, [2004] EHRLR 158 at p 164.

Thomas Hobbes, Thomas Paine, Jean-Jacques Rousseau and Montesquieu. Prior to the Enlightenment, discourse about rights generally restricted the enjoyment of rights to particular classes of people. The Enlightenment scholars based much of their thinking on the classical natural law theory of Aristotle, and in particular his development of the idea of "justice". They were also interested in the idea of a preordained 'natural law' which had been a principal concern of both Cicero and St. Thomas Aquinas.[4]

Added to these older ideas about natural law, a key contribution to the development of political theory during the Enlightenment period was the philosophical writings of Immanuel Kant. Kant's moral philosophy introduced a number of concepts that were to prove central to future theories on the relationship between the individual and the State and between individuals in society. In particular, his development of the ideas of *duties of respect*, ethical duties prohibiting injury to the dignity and freedom of others, and *duties of love*, duties to improve conditions for others to exercise their own freedom, have had a profound resonance on thinking around rights and duties.

The Enlightenment writers were mainly concerned with natural rights connected to the relationship between the individual and the State in the civil and political realms, although some writers at the time questioned the exclusion of certain important economic rights. Thomas Paine, motivated by concern at the increasing economic polarisation of late 18th century society, believed that it was necessary to challenge the manner in which, "Civilisation, or that which is so called, has operated in two ways, to make one part of society more affluent, and the other part more wretched, than would have been the lot of either in a natural state".[5] The right to work also formed an important element of French revolutionary theory and appears prominently in the Declaration of the Rights of Man, as does the right to public relief and the right to education. Despite the important debt that modern economic and social rights owes to these 18th century writers, Matthew Craven claims that there is a persistent misunderstanding that human rights derive exclusively or predominantly from a 'natural law' pedigree which is civil and political in nature, and that economic and social rights are out of place in this system.[6]

1.2.2 Religion

Contrary to this view of human rights as a direct descendent of natural law theory, the drafters of early human rights law clearly articulated how these new treaties were a departure from the narrow natural rights tradition and were intended to incorporate a wide range of divergent philosophies. Foremost amongst these were the various religious traditions, many of which developed a wider idea of rights which

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[4] See further Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights*, (Hart, Intersentia, 1999) pp 9-11; Lauterpacht, *International Law and Human Rights*, (Stevens &Son, London, 1950).

[5] Paine was a convinced democrat and was instrumental in the establishment of an independent United States. He argued that the revolutionary movement should move onwards to distributive economic justice, advocating, for example, that a National Fund be established by law to make payments to the needy and the elderly.

[6] Craven, *The International Covenant on Economic, Social and Cultural Rights*, (Clarendon Press, 1995) at p 10.

emphasised ideas of charity and social justice. Lewis and Woods trace how reference to charity and social justice appears in some of the main religious teachings, such as Buddhism, Judaism, Islam, and Christianity, expressed through doctrines such as *tithing* to support the poor.[7] Indeed, most modern taxation systems recognise the role of recognised churches in supporting the actions of the government in meeting social needs.

The influence of Roman Catholic canon law on early natural rights theory has been traced by a number of writers, including Brian Tierney who looks at how the conception of natural rights in canon law had a strong communal dimension and emphasised God's view of how society should be organised. For example, canon law does not just demand that the rich should make charitable donations; it also teaches that the poor can demand to be supported if in need *as of right*.[8] In the late 19th century, in response to the growth of socialism, the Catholic Church began to address political issues of social justice in a more comprehensive manner. In 1891 Leo XIII issued Papal Encyclical *Rerum Novarum*, which defended private property but argued that the state had economic and social duties to the working classes, including calls for fair wages and social protections for workers and their families. The further encyclical *Quadragesimo Anno* of 1931 deepened Catholic thinking in this area. These two encyclicals developed an economic view on the elimination of poverty which was to have a significant influence on the drafting of a number of national constitutions, including the Irish Constitution of 1937.[9]

1.2.3 Marxism and the Welfare State

Another key influence on modern ideas of rights is that of socialism. The origins of socialism lay in movements such as the British Chartists who were concerned with gaining legal protection for political rights such as freedom of association and for social rights such as fair wages and conditions of employment. The rise of Marxist theory in the nineteenth century provided a new understanding of the nature of the individual's relationship with society and the role of the State in meeting the needs of citizens. Marx believed that the enjoyment of civil and political rights without an economic and educational basis would be meaningless. He was also critical of existing natural rights theory as masking the reality of widespread economic and political inequality. In Marxist theory, human rights based on natural law theory were both the product and the instrument of capitalist society, created by bourgeois classes to maintain their, mainly material, interests. The social and economic analysis of Marx continues to have a profound effect on society today.

Marxist analysis stimulated the first real consideration of the relationship between economic and social conditions and the enjoyment of rights and paved the way for the

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[7] Lewis and Woods (eds.), *Human Rights and the Global Marketplace*, (Transnational Publications, 2005) at pp 43-50. Lewis and Woods also refer to perspectives on rights based on human dignity in African spiritualist traditions and Chinese Confucian philosophy.

[8] Tierney in Lewis and Woods *loc. cit.* at p 49. Quotes from R.H. Helmholz, *Natural Human Rights: the Perspective of the Ius Commune,* 52 Catholic University Law Review 301 (2003).

[9] See chapter 5.2.1 below.

development of economic and social rights. Already by the 1880's in Germany a welfare state had been established and Lloyd George's 'People's Budget' of 1909 established a significantly expanded role for the State in addressing social need in the United Kingdom. The constitutions of Mexico in 1917[10] and Weimar Germany in 1919 gave explicit recognition to economic and social rights, a trend that would soon spread to other European and Latin American states and would become even more widespread after World War II. Today all developed societies conform, to a lesser or a greater extent, to the Welfare State model, which rests on the idea that social provision of certain basic goods should be treated as a right and not as an act of charity and applies elements of socialist analysis to liberal democratic political systems.

1.2.4 Internationalism

Throughout the nineteenth century, stimulated by the internationalisation of trade, there developed a growing sense of the mutual dependence of States and the need for super-national forms of protection of rights. This movement towards a growing body of international law recognised that the Nation State, as well as being the major actor in protecting rights could also be seen as the major potential violator of those rights and contributed to a growing acceptance of the value of universal rights. Interestingly, economic and social rights gained protection at the international level before civil and political rights through the establishment of the International Association for the Legal Protection of Workers in 1908 and the establishment of the International Labour Organisation (ILO) in 1919. The ILO was established by the victorious powers after the First World War, partly as a response to the rise of state socialism and communism in the wake of the Russian revolution. During the inter-war years the ILO developed a body of international minimum standards across a wide range of issues that now fall within the remit of economic and social rights. These include freedom of association, rights relating to basic conditions of work, prohibition and regulation of child labour and of the role of women in industrial work, and standards relating to the resolution of labour disputes.

1.2.5 From the Welfare State to the New Deal

In the 1930s there was a dramatic shift in the understanding of the role of Government in the United States under the government led by President Franklin Roosevelt and his "New Deal" programme of reform. Although there had been a general movement towards the recognition of some social and economic rights in the United States over the preceding 50 years, Roosevelt's contribution was to integrate the language of civil and political rights with that of economic and social rights as expressed in his famous 1941 State of the Union Address known as the "Four Freedoms Address".[11]

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[10] See Paolo Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HRLQ 281.

[11] At the same time in Britain, Macmillan was publishing his "Middle Way" policy, committing his Government to eliminating poverty and social reconstruction. The agreement of the Atlantic Charter between the two countries in 1941 copper-fastened the commitment of both States to guarantee and protect social rights. Beveridge's 1942 report "Social Insurance and Allied Services" laid the way for the Welfare State we know today.

Roosevelt's conviction in the need for a clear body of law incorporating economic and social rights developed to the point where, in his 1944 State of the Union Address, he advocated a Second Bill of Rights, or an "Economic Bill of Rights", for the United States Constitution. It is worth quoting from that Address:

> "It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known. We cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.
>
> This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.
>
> As our nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness.
>
> We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.
>
> In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed."

What is notable here is the link that Roosevelt makes between economic security, equality of opportunity and individual freedom. He had a strong sense of the relationship between high levels of deprivation during the Great Depression and the rise of extremism in Europe. He was expressing a widespread international acknowledgement that economic want must be met, not only to protect and guarantee human dignity, but also to ensure political stability and the enjoyment of political freedom. Roosevelt went on to list what he regarded as the key rights that require protection, including: the right to a useful and remunerative job; the right to earn enough to provide adequate food and clothing and recreation; the right of every farmer to raise and sell his products at a return which will give him and his family a decent living; the right of every businessman, large and small, to trade free from unfair competition and domination by monopolies; the right of every family to a decent home; the right to adequate medical care and the opportunity to achieve and enjoy good health; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and the right to a good education. These rights listed by Roosevelt in 1944 were to go on to comprise the economic, social and rights content of the main international human rights treaties.

1.2.6 Economic, social and cultural rights in the Universal Declaration of Human Rights

Even before the end of World War II, calls for an international bill of rights to map the future peace had been voiced by public figures such as Pope Pius XII and the writer H.G. Wells. In the immediate aftermath of the war, and during the early stages of the establishment of the United Nations, it was the Latin American group of nations that pushed for the drafting of a universal charter of rights. The task of drafting a text that would bring together the various traditions and philosophies of rights was charged to a select drafting group drawn from among the original Commission on Human Rights of the United Nations. It is difficult to overstate the scale of the project undertaken by the Commission. It consulted with a wide range of thinkers from across the spectrum of religious, cultural, political and philosophical traditions and with a range of prominent political figures including Mahatma Gandhi.[12]

We can find separate references to "social justice" and "human rights" in the text of the Universal Declaration of Human Rights (UDHR)[13], and a minority of socialist states abstained from, but did not vote against, the UDHR on ideological grounds, objecting to certain Articles of the Declaration, particularly Article 17 pertaining to the individual right to property. Nevertheless, there was widespread international agreement that economic and social rights must be at the centre of the new treaty. Notably, the United States was among those who supported the inclusion of economic, social and cultural rights in the Declaration and general acceptance of the principle of interdependence of economic and social and civil and political rights was clear from the preamble of the UDHR which states:

> "The highest aspiration of the common people is the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want."

1.2.7 Two separate human rights covenants

The UDHR was intended to be the first stage in a process of setting out a comprehensive body of human rights law and it was intended that it would act as a statement of the ideals which should underpin the more detailed legal obligations to be set out in a human rights covenant. However, as the process of drafting this Covenant began, divisions emerged on the form and substance of the Covenant. As a result of increasing divisions the Sixth Session of the UN General Assembly in 1951, in its Resolution 543 (VI), decided to prepare two separate Covenants: one dealing with civil and political rights and one dealing with economic, social and cultural rights. This resolution still attempted to hold on to the principle of interdependence of all human rights, by stipulating that the two Covenants were to be submitted to the

[12] The American Law Institute had earlier been charged by the United States Government with preparing a draft for a charter of rights and their text was central to the drafting work conducted by the Division on Human Rights of the United Nations in 1947-1948. Another influential draft was submitted by the Latin American group and became known as the Bogota Declaration on the Rights and Duties of Man.

[13] UNGA Resolution 2200A (XX1) UN Doc A/810 (1948).

General Assembly simultaneously in order to ensure their simultaneous adoption and opening for signature.[14]

One of the assumptions behind the decision to separate the two sets of rights was that States would be unwilling to accept legal obligations in respect of economic, social and cultural rights. However, on this point, the Member States of the UN in 1951 were clearly mistaken as the ICESCR has gone on to obtain widespread support from the Member States of the UN.[15] The separation of the two Covenants undoubtedly contributed to a growing sense of difference between the two sets of rights, in a debate which quickly became a victim of the polarised international politics of the Cold War. During this period, both sides in the Cold War tended to advocate the superiority of one set of rights over the other from extreme positions: one side in this debate arguing that economic and social rights and equality are antecedent to civil and political freedoms (a view connected with State communism); and the other side arguing that economic and social rights are not rights in the proper sense and are oppositional to civic freedom (a view not dissimilar to 19th century *laissez faire* economics and prominent in the United States). Since the 1970s there has also been a North-South dimension to this polarity, often centred around debates on the Right to Development, where developing nations have placed a stronger emphasis on the need for assistance in addressing the social and economic needs of their people, claiming that the civil and political emphasis of developed nations is an unbalanced view of commitments contained in the UDHR.

There are also some differences in the formulation of the two Covenants themselves. The most obvious difference is that the ICCPR contains phrases such as "everyone has the right to" and "no one shall", whereas the ICESCR uses the formula "States Parties recognise the right of everyone to…" in relation to most of the rights contained therein. Perhaps more significant, however, is the distinction between the two different phrases in the respective Articles 2 of the two texts, the articles setting out the nature of States' obligations under the covenants. In the case of the ICCPR, features of this formulation include the specific obligation on States in Article 2 (2) of that Covenant to adopt legislation and other measures to give effect to the rights contained in the Covenant and the obligations contained in Article 2 (3) to ensure effective remedies for anyone who suffers a violation of the rights set out in the Covenant.

In contrast Article 2 of the ICESCR makes reference to the concepts of "the maximum of its available resources", and "achieving progressively the full realization" to describe the nature of State obligations under the ICESCR, suggesting that the obligations here are contingent on resources. Similarly the reference in the text to international cooperation in achieving the protection of rights under the Covenant and the specific reference to developing States being free to determine the

[14] For a discussion of the background to the separation of the two covenants, see Arambulo, *Strengthening the Supervision of the ICESCR*, (Hart Publishing, 1999) at p 18.

[15] Of the 154 States that have ratified the ICCPR, only three have not also ratified the ICESCR, these are South Africa (which has incorporated the ICESCR into its Constitution and which has set in motion a process of ratification), Mozambique, and the United States (which opposes the treaty on ideological grounds).

application of the Covenant to non-nationals do not find any equivalent provisions in the ICCPR. The full significance of Article 2 of the ICESCR is the subject of a General Comment of the International Committee on Economic, Social and Cultural Rights and is discussed at length in chapter 2 below. However, despite the differences in language, the various competent United Nations bodies have made clear that the differences in the nature of State's obligations are differences of emphasis, rather than differences of importance or significance.

1.2.8 "Indivisibility, interdependence and interrelatedness" of rights

Against the backdrop of the debates and controversies about the two sets of rights, the Vienna World Conference on Human Rights in 1993 examined the question of the relationship between the two Covenants as a central part of its considerations. From that conference a consensus view emerged endorsing the principles of the equivalence and interdependence of both sets of rights. The Vienna Declaration and Programme of Action (VDPA) contains many references to the relationship between both sets of rights and refers specifically to the importance of the right to development, the significance of environmental issues for the protection of human rights and the importance of indebtedness among developing countries for their capacity to protect the rights of their citizens. The VDPA also contains a definitive statement of the principle of interdependence:

> "**5.** All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

The text also addresses the relationship between poverty and human rights, affirming that extreme poverty and social exclusion constitute a violation of human dignity and human rights.[16]

1.2.9 Relationship between the two sets of rights today

Current data discloses strong links between poverty and access to a wide range of both social and economic rights and civil and political rights.[17] In the developing world, the link between lack of water, basic nutrition and health care and mortality is obvious. However, similar links can also be demonstrated in developed societies such as our own as illustrated by the lower life expectancy of marginalised groups in Ireland, most notably Travellers. Poverty is also a key barrier to accessing other rights. People living in poverty have lower voting patterns, lower levels of

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[16] World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, Part I at paragraph 25.

[17] For a study of the relationship between poverty and human rights See the UN Human Development Reports, available at http://hdr.undp.org/reports/global/2005/.

educational attainment, and lower participation in cultural activities. At an individual level, those denied basic economic rights such as a permanent address are also often excluded from the critical civil and political right of voting.

After Vienna most States now take an intermediate position on how they approach the protection of economic and social rights by (i) subscribing to the official view that the two sets of rights are of equal status, accompanied by (ii) failure to make these rights effective through constitutional or legislative protection or by establishing effective administrative systems of enforcement.[18] The statement of the UN Committee on Economic Social and Cultural Rights' to the Vienna World Conference in 1993 contrasted the inaction of States Parties in response to large scale violations of that treaty with the concern that is generally expressed at violations of civil and political rights,

> "In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights."

As already stated, the diverse sources and inspirations for economic, social and cultural rights mean that theoretical ideas about these rights are constantly evolving. If we look again to the development of economic, social and cultural rights' regimes in Europe and North America after World War II, there was undoubtedly a new political consensus, recognising the limitations of a civil and political conception of rights as a means of achieving social justice, and even as a means of ensuring the stability of democratic government. An important recent stage in the development of a theory of economic, social and cultural rights can be found in the influential work of John Rawls, widely regarded as one of the most important political philosophers of the second half of the twentieth century. He is primarily known for his theory of justice as fairness, which develops principles of justice to govern a modern social order. Rawls' theory provides a framework that explains the significance, in a society assumed to consist of free and equal persons, of political and personal liberties, of equal opportunity, and cooperative arrangements that benefit the less advantaged members of society.[19]

A theme that will recur in this report is that of the role of these rights in the contemporary market economy and the dominant political ideology of our time, which is liberal market capitalism. While the basis of economic, social and cultural rights in international law is both strong and sound, these rights have undoubtedly been neglected and have come under pressure from market-driven philosophies. The challenge we are addressing in this report is to examine how these rights can be rediscovered and made real in our current economic and political systems.

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[18] See Alston and Steiner, *International Human Rights in Context: Law Politics, Morals*, (2nd ed. Oxford University Press, 2000) at p 237.

[19] See further Rawls J., *A Theory of Justice*, (Rev. ed., Harvard University Press, 1999).

Chapter 2 - Key concepts and debates

Despite the statements of governments and international bodies as to the equal status of economic, social and cultural rights as human rights, these rights remain contentious. Opponents of enforceable economic, social and cultural rights claim that the content of these rights is fundamentally different to civil and political rights and that social goods such as health care, nutrition, water and the other conditions for human sustenance are "desirable", while political rights, such as the right to vote, are "fundamental". The contention that there is a hierarchy of rights with civil and political rights taking precedence over economic and social rights is persistent and has particular significance for discussions on the form of protection, if any, which economic, social and cultural rights should be afforded in the domestic legal system.

In this chapter we examine some of the main concepts and issues that have dominated debates about the relationship between economic, social and cultural rights and the political, economic and legal systems. Broadly speaking there are three main strands of opposition to making economic and social rights justiciable. These are objections relating to the nature of economic, social and cultural rights; the separation of powers and the appropriate means of resolving disputes about economic, social and cultural rights; and to the political and economic effects of having legal protections of economic, social and cultural rights.[20]

In the view of the IHRC, much of the opposition to economic, social and cultural rights is based on misunderstandings, not only of the nature of these rights, but also of the relationship between economic and social rights and civil and political rights. As already indicated, it can be clearly demonstrated that the enjoyment of civil and political rights is inextricably linked to the protection of basic economic, social and cultural rights. While there is no doubt that some significant differences do exist between the two sets of rights, these differences are often overstated and misconstrued. However, there are no technical or procedural barriers prohibiting the courts from engaging with economic, social and cultural rights, rather, it is a matter of policy to choose whether to make these rights justiciable or not, there is no inherent capacity difficulty in courts so doing.

2.1 Economic, social and cultural rights as human rights

At the heart of the controversy around economic and social rights is our understanding as a society of what we mean by human rights. It can be said that the term 'human rights' can be used in two senses. In a legal sense human rights are an agreed body of rights and obligations, which the State must respect, protect and fulfil through the institutions within its power. At the national level, human rights standards can also be set out in national constitutions. At the international level human rights treaties and other standards are agreed by sovereign states through their membership of international bodies such as the United Nations or the Council of Europe. It is worth recalling here that international law is unequivocal that all treaty

[20] These objections to justiciable economic and social rights are summarised succinctly by Hardiman J in his judgment in *Sinnott v. Minister for Education* [2001] 2 IR 545 at p 710.

obligations undertaken by States are binding. Article 26 of the Vienna Convention on the Law of Treaties 1969 states:

> "Every treaty in force is binding upon the parties to the treaty and must be performed by them in good faith."

However, human rights are more than just a code of legal rules and obligations; they can be distinguished from other legal rights in that they are founded on a body of core moral beliefs and values. Human rights have their origin in philosophical developments over a number of centuries and in a number of religious and political traditions. They centre on the inherent dignity of all human beings, the equality of all persons and the rule of law. A key feature of human rights standards is their focus on restricting the exercise of State power and the regulation of the relationship between the various arms of Government. In this context, it is often stated that human rights must always create correlative responsibilities or obligations. In other words, where human rights for the individual are established, legal obligations flow for States who ratify those treaties, to their agents and agencies and in some cases also to other actors. Questions of the nature of these obligations and how the holders of duties and obligations can be identified are complex and nuanced.

2.2 Justiciability

Notwithstanding the oft repeated affirmations of the various UN bodies about the interdependence, indivisibility and mutually reinforcing nature of all human rights – civil, political, economic, social and cultural – there remains significant opposition and hostility to the legal enforcement of economic, social and cultural rights. One of the most common arguments articulated against the protection of such rights is that they are qualitatively distinct from 'real' (that is civil and political) rights to such an extent that that they are not susceptible to legal protection. This is, loosely, the argument from justiciability, and Martin Scheinin has summed the basic thrust of the justiciability argument up as follows

> "Many authors are of the opinion that economic and social rights, because of their very nature, are not 'justiciable' in the sense that they are not capable of being invoked in courts of law and applied by judges."[21]

Discussions around justiciability and non-justiciability often centre on statements by courts or tribunals about their competence and attitudes about the competence of courts are closely related to particular conceptions of the "separation of powers" and the constitutional culture prevalent in a particular society. An example can be found in a recent report by the Joint Committee on Human Rights of the British Parliament, which contains a general, and unsupported, statement by the British Government that the rights contained in the ICESCR do not lend themselves to justiciable processes.[22] This is despite clear statements from the international human rights system there is

[21] Scheinin in Eide, Krause and Rosas *loc. cit.* at p 29.
[22] UK JCHR Report at p 22.

nothing *inherently* non-justiciable about economic, social and cultural rights, as is made clear in General Comment 9 of the Committee on Economic, Social and Cultural Rights, which states:

> "There is no Covenant right, which could not, in the great majority of systems, be considered to possess at least some justiciable dimensions."

The charge of non-justiciability against economic, social and cultural rights (or perhaps more accurately socio-economic rights) amounts to the claim that such rights do not easily lend themselves to judicial scrutiny and enforcement. Craven has addressed this issue in the following terms:

> "To speak of economic, social and cultural rights as being non-justiciable *per se* is to suffer under a general misconception. The question whether a court has jurisdiction to consider a particular issue depends not only on the nature of the issue itself, but upon an understanding of the constitutional role and function of the court concerned; this may, and indeed does, vary from State to State."[23]

Thus, for Craven, socio-economic rights cannot be presumed, because of their very nature, to be non-justiciable. On the contrary, certain aspects of socio-economic rights, such as the right not to be arbitrarily evicted from one's home, "are ideally suited to judicial determination in most countries".[24]

Justiciability is about much more than the role of the courts and whether judicial activism is a good thing. In this regard, we must remember that there are different levels of law at which economic, social and cultural rights can be made justiciable. Economic, social and cultural rights can be made justiciable at a constitutional level, as is evidenced by the many jurisdictions where this is the case. Where there is constitutional protection, there is both recognition of the importance of the rights involved and clear democratic legitimacy of judicial enforcement of those rights. There are also many precedents demonstrating that justiciable rights can be provided for in statute and that concerns about balancing competing demands for resources and ensuring appropriate accountability can be addressed. In both cases, the role of the judge is an important aspect in any system for effective protection of economic, social and cultural rights. The establishment of enforceable rights can regulate and even reduce the role of the courts, if proper legislative and/or constitutional guidance is provided.

Economic, social and cultural rights can also be realised at the administrative level, but, as General Comment 3 of the Committee in Economic and Social Rights makes clear, legislation will sometimes be indispensable to achieve effective protection of rights. We will examine in detail the different means of making rights enforceable in chapter 4. However, the key point is that the establishment of clear justiciable means

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[23] Craven, *loc. cit.* at p 28.
[24] *Ibid.*

of protecting rights can lead to the regulation of the judicial role in interpreting these rights. In this regard debates around whether certain rights are justiciable should be separated from debates as to how rights are to be made justiciable.

2.3 Positive rights, negative rights and the question of resources

One of the main objections to economic, social and cultural rights is that they require positive measures to be taken, and in this respect they are clearly different form civil and political rights. The argument runs that freedom rights (i.e. civil and political rights) are concerned with the State abstaining from certain areas of life, whereas economic and social rights are concerned with the acceptance of certain communitarian or social obligations on the part of the State. In this view, the demands that these (positive) economic and social rights would place on finite public resources makes their protection undesirable or impractical. The view that there is a distinction between positive and negative rights was one of the contributing factors which led to the decision to draft two international Covenants on human rights instead of one. In that context Eide has summed up the argument as follows:

> "It was … believed that civil and political rights were 'free' in the sense that they did not cost much. There main contents were assumed to be obligations of States not to interfere with the integrity and the freedom of the individual. The implementation of economic, social and cultural rights, in contrast, was held to be costly since they were understood to obliging the State to provide welfare to the individual."[25]

While there is some truth in this generalisation, the distinction between the two sets of rights does not stand up to scrutiny. First, many rights fall into both categories. For example the right to education involves high positive duties on the State to provide resources, but it has important civil and political dimensions as well as important economic, social and cultural components. Furthermore, there are many economic, social and cultural rights which can be characterised as predominantly negative in nature. The right to freedom from discrimination is perhaps the most obvious example; other examples include obligations not to interfere with the cultural rights of groups and obligations not to engage in arbitrary evictions. The right to freedom of association is also largely negative in nature, but it comprises economic and social aspects as well as important civil and political dimensions.

It should also be noted that a large range of civil and political rights involve extensive demands on resources. The right to a fair trial is one of the central civil rights, but it necessitates the establishment of a functioning judicial system and the provision of legal representation to those who cannot afford it. Similarly, the right to vote involves the organisation of expensive and complex electoral systems, a cost base that may involve high expenditure on electronic systems of recording and counting votes. Similarly, the right to freedom from torture requires the building and maintenance of humane places of detention and the proper training of prison officials. Even the institution of private property rights itself demands extensive State action through Government and law to record, guarantee and secure the claims of owners of

[25] Eide in Eide, Krause and Rosas *loc. cit.* at p 10.

property. From these simple examples, we can see that, while there is certainly a difference between the demands involved in protecting the right to health, for example, and a classical civil liberty such as the right to freedom of religion, the distinguishing line between the two categories of rights is not as clear as it might at first appear.

One area where there is a particular overlap between civil and political rights and economic, social and cultural rights is in the relationship between equality and non-discrimination and economic, social and cultural rights. There is considerable overlap between concern about violations of economic, social and cultural rights and equality and discrimination discourse. Canadian law provides an interesting example of how equality guarantees can lead to substantive protection of economic and social rights.[26] At a legal level, there is the potential for a much wider invocation of equality protections at the international level through Protocol 12 of the ECHR and also through domestic equality guarantees, such as Article 40.1 of the Irish Constitution.[27] Similarly the experience of Northern Ireland points towards innovative schemes for mainstreaming equality considerations in public policy, which may also have significant impact in the area of economic, social and cultural rights.

2.4 The indeterminacy of economic, social and cultural rights

It has been argued that economic, social and cultural rights are not as susceptible to legal protection as they are more vague and difficult to define. While modern welfare systems and budgetary processes are undoubtedly highly complex, it can be argued that judges already engage in consideration of many highly complex and specialised matters in areas such as commercial law, intellectual property law and medical law. Furthermore, many of the rights contained in the ICESCR and in the Revised European Social Charter are at least as specific as the civil and political rights contained in the European Convention on Human Rights and Fundamental Freedoms (ECHR) or under the Irish Constitution. For example, the right to respect for private and family life under Article 8 of the ECHR is at least as complex and as disputed as any economic, social or cultural right. While the jurisprudence around this right has been developed carefully and in a sophisticated manner by the European Court of Human Rights, its scope and meaning continues to be debated. Similarly the right to freedom of expression, the right to due process of law are complex and constantly evolving and other rights-related issues, such as abortion and freedom of speech, must be considered to be at least as complex as issues of economic, social and cultural rights.[28] In relation to these civil and political rights, the complexity of the concepts involved is not regarded as a barrier to their legal enforcement. In this context, we might well ask why indeterminacy or complexity is seen as a problem for one set of rights and not for another.[29]

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[26] See for example Porter, *Rewriting the Charter at 20,* Contemporary Moral Issues (5th Ed., McGraw-Hill Ryerson, YEAR); Porter, *"Homelessness, human rights, litigation and law reform: a view from Canada"*, 2004 AJHL Volume 10(2) p 133.
[27] Quinn, *Rethinking the Nature of Economic, Social and Cultural Rights,* in Costello (ed.), *Fundamental Social Rights*, (ICEL, 2000) at p 44 on the US 14th Amendment.
[28] Liebenberg in Eide, Krause and Rosas *loc. cit.* at p 60.
[29] Quinn in Costello *loc.cit.*

The main question raised by opponents of economic, social and cultural rights in this regard is whether judges have the capacity to examine issues relating to economic and social rights.[30] In response to this question, it can be argued that many alleged violations of economic, social and cultural rights may be easily amenable to court adjudication, for example allegations of gender discrimination in the workplace or on the legality of restrictions on union membership are matters which courts currently have no difficulty in dealing with. Secondly, international bodies have developed their thinking on the nature and impact of the more complex economic, social and cultural rights, providing valuable guidance to national courts or other bodies charged with interpreting the rights set out in international treaties. Thirdly, and more importantly, there are many areas where economic, social and cultural rights have been set out in detail in legislation, such as in the social welfare codes, providing guidance and assistance to judges.

2.5 The separation of powers

Linked to the proposal that the two sets of rights are different in substance is the proposal that they should be treated differently for political reasons. Political objections to economic, social and cultural rights are closely associated with the doctrine of the 'separation of powers' between the three main arms of government, namely the executive, the legislative and the judicial. Opponents of economic, social and cultural rights contend that the enforcement of these rights through the courts constitutes an inappropriate interference with the discretion of elected governments and parliaments to allocate resources as they see fit. They hold that economic, social and cultural rights are so fundamentally different from civil and political rights that they should be considered, not as rights to be protected at law, but as 'claims' to be contested in the political marketplace. Arguments against economic, social and cultural rights based on the separation of powers are not directed at challenging the validity of these rights, but more specifically, they object to the improper adjudication of these rights by courts or tribunals.

In the liberal democratic tradition, constitutional rights are considered to be primarily about guarantees from the State to desist from interfering with the life of the individual i.e. constitutions supported by courts protect the *private* life of the citizen from the *public* actions of the State. On this basis a distinction is drawn between those issues on which courts are vested with policing the public/private distinction and those where the political arms of government make decisions affecting the private life and welfare of the individual: in other words, courts should be concerned only with policing issues which do not generally have resource implications, whereas

[30] It is worth noting here that the issue of whether it was appropriate to include socio-economic rights in the fundamental rights provisions of the Constitution was debated at length in South Africa leading up to the adoption of the new Constitution in 1996. As part of that process the Court concluded, "In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred on the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers." See (*Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* (First Certification judgment) 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 77).

questions of how resources are allocated should remain exclusively within the political marketplace.

The doctrine of the separation of powers in the United Kingdom, which has been influential in the common law countries such as Ireland, is informed largely by the idea of parliamentary sovereignty and by a historical resistance to judicially enforced rights. This is mirrored in the Irish context, where recent rejections of justiciable economic, social and cultural rights by the Supreme Court have suggested a hierarchy of rights in Irish law.[31] In many other countries an alternative model of the separation of powers has been developed in which courts have developed mechanisms for monitoring government action. In this alternative model of "constitutional dialogue", the purpose of the separation of powers is understood as being to ensure that power does not become concentrated in any one arm of government by creating a constructive relationship of mutual checks and balances between the various arms of Government. This model involves robust scrutiny by the courts over executive action and may also involve the courts 'prodding the legislature to take action', a process familiar in many areas of law, but which has been vigorously resisted in relation to economic, social and cultural rights.[32]

It should be emphasised that a commitment to the principle of the separation of powers does not necessarily preclude the legal protection of economic, social and cultural rights. For example, the Joint Committee on Human Rights of the United Kingdom Parliament recently stated that, even in a legal system with a strong tradition of respect for the separation of powers, there must still be accountability for Government in relation to economic, social and cultural rights. The Committee went on to find that incorporation of economic, social and cultural rights into law could, "with appropriate safeguards, be achieved without such constitutional impropriety".[33]

In relation to the type of safeguards referred to by the UK Joint Committee, questions arise as to how wide a discretion judges should be afforded in enforcing rights. There is an important distinction between cases where judges invoke rights through wide use of judicial discretion and cases where economic, social and cultural rights are set out in law and judges apply these rights as directed by a constitution or by statute. In the case of judges applying legislation in this area, no question of the separation of powers arises as the legislature has set out the content of the right and directed how the courts should enforce that right. Where rights are set out in the constitution, courts are also exercising a power to apply and protect rights that has been vested in them by government and by the people. In other words, issues about the separation of powers only arise where courts take it upon themselves to apply laws without a clear mandate. The separation of powers cannot be used as an argument against setting out rights in law.

Much of the controversy about court enforcement of rights in Ireland and elsewhere has centred on courts invoking international human rights treaties in support of their protection of economic, social and cultural rights at the domestic level. In support of the role of the courts in such cases, it can be argued that if the rights concerned are

[31] See chapter 5 below.
[32] Liebenberg in Eide, Krause and Rosas *loc. cit.* at p 59.
[33] UK JCHR at p 27.

contained in international treaties to which the State is a party, these rights already enjoy a democratic legitimacy by virtue of their ratification by government at the international level. Furthermore, international treaty-monitoring bodies, courts and tribunals have also developed a body of interpretation around these rights which can be of assistance to domestic courts in adjudicating on these rights. Against the use of international law in this way, it can be contended that only treaties directly incorporated into domestic law should be applied in this way. However, it should be made clear that the use of international law in this way is an issue of what constitutes enforceable law in the domestic legal order; it is not essentially a question of whether courts should ever protect economic and social rights. This point was made clear by the UN Committee on Economic, Social and Cultural Right in its General Comment 9.[34]

2.6 Paramountcy of one branch of government over the others

A closely linked strand of reasoning in the separation of powers argument is that this separation exists as a high constitutional value in order to prevent the accumulation of excessive power in any one organ of the Government. The argument runs that activism in the courts would expand their own powers at the expense of the other organs of government. From this view, it has been extrapolated that, where a judge considers that there has been a failure by the legislature and the executive in some area of "constitutionally significant policy" and orders either of these branches to implement a particular policy, this represents an enormous increase in the power of an unelected judiciary at the expense of the politically accountable branches of government, and would effectively attribute 'paramountcy' to the judicial branch of government.

In an Irish context the view has been expressed that Article 6 of the Constitution does not attribute to any of the branches of government an overall, or residual, supervisory power over the others, but rather that there are three equal powers, none of which is to be dominant. In addition to expanding the powers of the courts beyond their constitutional remit, it has also been argued that this expansion will be progressive and incremental. In his judgment in the *TD* case, Hardiman J has expressed the view that if citizens are taught to look to the courts for remedies for matters within the legislative or executive remit, they will progressively seek further remedies there, rather than looking to the political arms of government, in turn downgrading the other branches of government.[35]

However, this view of the separation of powers has been challenged by many commentators. Whyte argues that the understanding of the doctrine of the separation of powers advanced by the Supreme Court rests on certain pre-interpretative values that prize judicial restraint. He asserts that the Supreme Court's fears that an activist role in promoting socio-economic rights would give paramountcy to the judicial branch over the other branches of government are misplaced. He argues that the understandable concern about what is perceived as an anti-democratic role for the courts is arguably based on the American experience which does not fit the Irish

[34] See chapter 3 below.

[35] See *TD v. Minister for Education* [2001] 4 IR 259, p 361. For a comprehensive consideration of the judgment in this case see chapter 5 below.

situation in which judicial decisions based on national law, including the Constitution, are always susceptible to reversal by the people and/or the Oireachtas.[36] The constitutional provisions for amending the Constitution provide the people with the ultimate means of responding to judicial interpretation of constitutional norms and where judicial decisions are based on statutory norms, they are even easier to nullify or modify.[37]

2.7 Economic, social and cultural rights and parliamentary democracy

The IHRC believes that it is important to challenge the idea that the political marketplace necessarily provides a conclusive means of protecting economic, social and cultural rights. The argument that the promotion of economic, social and cultural rights should emerge naturally through the democratic process overlooks the fact that those suffering extreme disadvantage are largely disenfranchised from the political system in the first instance. The clientelist nature of parliamentary democracy also means that some voices will always be louder in the political system, while the needs of others may often be ignored. In other words, majoritarian politics which is concerned primarily with process or formal rights, sometimes fails to vindicate the substantive rights of marginalised groups. The vulnerability of particular groups and the need for special measures to protect and vindicate their rights is a key concern of human rights law, as expressed through the development of special treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[38], the Convention on the Rights of the Child (CRC)[39], and the Convention on the Elimination of Racial Discrimination (CERD)[40]. In an Irish context, it is worth noting that a report commissioned by the Constitution Review Group reveals that lower socio-economic groups are significantly underrepresented in the Dáil and Seanad.[41]

An appraisal of the proper role of litigation and judicial action is required. From the perspective of the separation of powers, it can be argued that the judiciary should only be in a position to intervene in the absence of legislative and administrative protection of rights. Whyte makes the argument that judicial activism is not about usurping the role of the legislature, but can be seen as being corrective of failures by the legislature, handing the initiative back to the legislature to address the flaws or failings of politics.[42] As Quinn puts it, "What is therefore required is not a vehicle with which to supplant political judgment, but one that can enrich the political process."[43]

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[36] Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland,* (IPA, 2002) at p 38.
[37] *Ibid.* p 17.
[38] Adopted by the UN General Assembly (Resolution 34/180 of 18 December 1979) entered into force on 3 September 1981.
[39] Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entered into force 2 September 1990.
[40] Opened for signature Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).
[41] Whyte *loc. cit.* p 32.
[42] *Ibid*.
[43] Quinn *loc. cit.* p 41.

Court based adjudication as a tool to uphold economic, social and cultural rights is necessarily limited as litigation deals with the symptoms and not the underlying structural causes that result in persons being deprived of their economic, social and cultural rights. In this sense, elected politics will always have the paramount role in protecting economic, social and cultural rights. Whyte, a strong supporter of public interest litigation, acknowledges that while public interest litigation cannot ultimately resolve political issues, however, it can stimulate and underwrite important legal change. By prompting the other arms of government to correct their failures, litigation can result in a greater role for the legislature and executive, placing an onus on them to act in areas which they might otherwise have ignored. Law, in terms of the judicial function, and politics, in relation to the executive and the legislature have complementary and not exclusive roles to play in furthering protection of economic, social and cultural rights, just as they have in relation to civil and political rights. The IHRC believes in the complementary role of the various branches in delivering these rights. Apart from litigation as a strategy to uphold economic, social and cultural rights, we need to put in place other tools by which we can require the executive to effectively implement its economic, social and cultural rights obligations in policy and law making, and examine the capacity and role of the parliament in this regard also. By various mechanisms we need to strengthen the capacity of the parliament to more accurately reflect the interests of diverse and marginalised groups in society.[44]

2.8 The democratic legitimacy of economic, social and cultural rights

The commonly stated view of many politicians and lawyers is that there is greater attachment to civil and political rights than to economic, social and cultural rights in our political culture. In relation to economic, social and cultural rights, the question of whether the Irish public would be in support of the inclusion of such rights in the constitution may not be as clear as politicians and other commentators might sometimes have us believe. The interests of the public in establishing constitutional rights which are beyond political reach are likely to be different from the perspective of the legislature and executive. There may well be at least as much antipathy among the public against certain civil and political rights (for example defendants' rights) and possibly greater affinity with pressing issues of economic, social and cultural rights.

Ultimately, if we place a strong emphasis on the democratic legitimacy of rights, then a plebiscite through referendum on whether economic, social and cultural rights should be included in the Constitution is the ultimate test of their legitimacy. The report of the United Kingdom Joint Committee on Human Rights refers to a recent study of public opinion in that country which found that the right to hospital treatment within a reasonable time was the single most popular answer to the question what rights should be included in a Bill of Rights (94%), with 76 % supporting the right to housing for homeless persons. These findings were echoed in a subsequent study conducted in Northern Ireland by the Northern Ireland Human Rights Commission.[45] Similarly, Sunstein cites samples in the United States where large majorities of citizens distinguished between privileges such as third level education and telephones

[44] See discussion of parliamentary proofing mechanisms in chapter 4 below.

[45] Report of the Joint Committee on Human Rights, 21st report of session 2003-2004, The International Covenant on Economic, Social and Cultural Rights, at p 14.

with social goods such as adequate housing, provision for retirement, an adequate standard of living, adequate medical care and adequate leisure time.[46] He demonstrates that social goods are widely perceived as rights and not as privileges or claims.

In the view of the IHRC there is no reason to believe that a large proportion of Irish people do not also consider adequate housing, adequate health care, education and social security to be fundamental entitlements which should be protected by law. International evidence suggests that the general public may well see basic economic, social and cultural rights as entitlements rather than privileges and that the opposition to such rights among legal and political figures is not representative.

2.9 Economic, social and cultural rights as a diminution of civil and political freedoms

A further claim levelled against economic, social and cultural rights is that this category of rights are inimical to civil and political rights and frustrate the objectives of liberal democracy. The argument runs that positive provision of services by the State detracts from liberty, in that it deprives the wealthy of their private assets through taxes, while at the same time increasing the dependency and eroding the self-sufficiency of the poor. This view is associated with *laissez faire* or liberal economic policies and can be contrasted with the welfare state social model firmly established in European political culture.[47]

Against this view, advocates of economic, social and cultural rights would argue that the legal protection of such rights has the potential to strengthen rather than diminish autonomy and freedom. As Philip Alston puts it, positing a claim as a human right has the potential to empower people at the grassroots level to hold government accountable and to demand that government justify its treatment of the marginalised.[48] Recognition of rights contributes to a move from seeing the duty to meet needs as charity to seeing this duty in the context of justice. It also mobilises those deprived of rights to claim entitlements. This dimension of rights may not always be attractive to governments seeking to strengthen their powers of discretion, but it can certainly contribute to strengthening of democracy. Enforceable economic and social rights can also be seen as deepening and strengthening democracy by making government more transparent in its fiscal policy and in its planning of resource allocation. [49]

It can also be argued that the level of protection of economic, social and cultural rights in a given legal system is reflective of the view of democracy within that political system. Indeed, the linkage between denials of economic, social and cultural

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[46] Sunstein, *The Second Bill of Rights*, (Basic Books, 2004) at p 63.

[47] For an analysis of this perspective see Quinn *loc. cit.* at p 36; examples of this view of economic and social rights can be found in the writings of Robert Bork, F.A. Heyak and Robert Nozisck.

[48] Alston, Symposium Paper, Human Rights Council of Australia, Oslo, 1998, quoted in Filmer-Wilson, *The Human Right-Based Approach to Development: The Right to Water*, (2005) NQHR p 213 at p 217.

[49] See the discussion on South Africa contained in the report of the UK Joint Committee on Human Rights at p 27.

rights and the growth of threats to democracy were very much in the minds of President Roosevelt and the drafters of the UDHR in the 1940s.[50] In terms of the democratic political system, what links the two sets of rights is the idea of citizenship and the belief that both freedom from fear and freedom from want are needed for effective citizenship. At a deeper level, legislating for human rights obligations can also have an impact on politics more generally by contributing to the development of a culture of human rights within government and parliament.[51]

2.10 Commutative and distributive justice

A further difference that is put forward between the justiciability of economic, social and cultural rights and civil and political rights is based on the distinction between disputes involving two parties and disputes around rights which may involve a wide range of interested parties. This latter type of case can be described as a "polycentric dispute" and includes cases such as those involving complex issues of revenue and spending.[52] In simple terms, commutative justice involves the relationship that arises in dealings between individuals, whereas distributive justice involves the relationship which arises between the individual and those in authority in the political community. In this context, there is also a widespread view among legal academics that the province of the court system is to deal with *commutative* justice as between two parties, while politics deals with issues of *redistributive* justice between many parties.[53] The argument runs that, in enforcing economic, social and cultural rights, courts will be inexorably drawn into inappropriate forms of distributive justice. Existing systems of judicial review around civil and political rights concentrate on procedural aspects of decision-making around resources and avoid substantive issues of rights' violations.[54] In this scheme, the suggestion is that systems of individual justice are inappropriate for issues of resource allocation.[55]

In an Irish context, the distinction between distributive and commutative justice was explored in detail by Costello J. in the case of *O'Reilly v. Limerick Corporation.*[56] This involved an application by members of the Travelling community living in considerable poverty and deprivation for a mandatory injunction directing the local authority to provide them with adequate halting sites. According to Costello J in that case, distributive justice is solely the obligation of the Government because it involves the allocation of goods held in common and this can only be carried out in a

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[50] See chapter 1 above.

[51] In this regards the UK Joint Committee on Human Rights drew a parallel between the possible impact of incorporating the ICESCR into British law and the measurable effect of the enactment of the UK's Human Rights Act 1998 in the area of civil and political rights, see UK JCHR Report at p 28.

[52] Lon Fuller, *The forms and limits of adjudication*, Harvard Law Review (vol. 92) no.2 (1978) pp 353-409.

[53] This distinction can be found in the writings of Aristotle and Thomas Aquinas. The Irish jurisprudence in this area is peppered with reference to Aristotle, see chapter 5 below.

[54] McKeever and Ní Aoláin *loc. cit.* at p 163.

[55] See also the report of the National Economic and Social Council (NESC) at p 366.

[56] [1989] ILRM 181.

fair manner by the Government who are charged with furthering the common good.[57] Costello J asserted that the courts' constitutional function is to administer justice and that it would be inappropriate for the Court to adjudicate on the fairness or otherwise of the manner in which the other organs of the state had administered public resources as this would involve the Court making an assessment of the validity of the many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiff's claim. As he put it, such demands "should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts".[58]

Again the asserted dichotomy between the two sets of rights can be challenged. A wide range of areas in which the courts are currently active can often have profound redistributive effects, for example in decisions to mandate legal aid systems in the criminal and civil spheres.[59] Whyte lists a number of cases which could be considered commutative yet have resulted in significant public spending or reduced tax yields.[60] The case of *The State (Healy) v. Donoghue*,[61] concerning the right to criminal legal aid is an obvious example of where adjudication of individual liberties had serious financial implications for the State. Similarly, the case of *Murphy v. Attorney General*,[62] concerning the social welfare assessment of families, resulted in dramatic changes in that area and in the case of *Blake v. Attorney General*[63] the courts considered the relationship between the capacity of the legislature to restrict rents and the constitutional right to private property.

In all of these cases the consequences for State revenue were far-reaching and the effects on the distribution of resources profound, despite the fact that they fall within the commutative model. Costello J himself resiled somewhat from the position he adopted in the *O'Reilly* case six years later in the case of *O'Brien v. Wicklow UDC*.[64] In *O'Brien*, which was also concerned with the duty of local authorities to provide halting sites for Travellers, Costello J had no difficulty in accepting the argument that the plaintiffs' right to bodily integrity was infringed by the conditions under which they were living and that a mandatory order to provide the necessary resources was appropriate.

2.11 Economic, social and cultural rights and market economics

A further category of objections to economic and social rights contends that such rights sit uneasily in a market economy. These concerns follow on from the general separation of powers objection that resource matters are properly to be debated within

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[57] *Ibid.* at p 194.
[58] The decision has been endorsed by the Supreme Court in a number of subsequent cases in particular, *MhicMhathúna v. Attorney General* [1995] 1 IR 484; *Sinnott v. Minister for Education* [2000] 2 IR 545 and *T.D. v. Minister for Education* [2000] 2 ILRM 231.
[59] See chapter 5.
[60] Whyte *loc. cit.* at p 13.
[61] [1976] IR 325.
[62] [1982] IR 241.
[63] [1982] IR 117.
[64] Unreported High Court, 10th June 1994.

a political marketplace, rather than set out in a binding legal form. These objections are also linked to concerns about the resources that would be required to meet rights claims. It is suggested that enforceable economic, social and cultural rights would lead to inefficient allocation of resources and discourage self-sufficiency. Against this, one of the key arguments in favour of intervening to protect economic, social and cultural rights is that economic markets are not always effective in delivering social goods.

Certainly a large part of the hostility to judicial protection of economic, social and cultural rights lies in the potential redistributive effect of decisions on these rights.[65] Opponents of enforceable economic, social and cultural rights are concerned with the possibility that judicial enforcement of these rights could compel governments to divert scarce resources. However, while this argument may be pressing in the context of a developing economy where resources are clearly constrained, it is worth considering what "scarcity" means in the context of a developed economy such as Ireland's.

In this regard, enforceable economic and social rights can provide a standard to examine political decisions about resources and basic commodities against the barometer of whether they meet the needs of basic human dignity. In other words, claims about the scarcity of resources and the unfettered power of the executive to distribute resources should not be beyond rational examination. Where the State has assumed obligations to meet fundamental human rights obligations, and where resources cannot be considered scarce in a critical sense, surely economic factors cannot supplant the moral and social choices involved in decisions about rights.

It is also argued by opponents of economic, social and cultural rights that resources allocated through a judicial system will benefit certain active claimants over and above other claimants who may be more deserving. The argument runs that judicial enforcement of rights will disproportionately favour those claimants who are best placed to argue for their rights i.e. those with "the sharpest elbows". Against this view it can be argued that this criticism is even truer within the political system, where interventions are more likely to be led by certain vocal constituencies. It is an undeniable feature of majoritarian political systems that legislatures and executives respond to their electoral bases. With a system of legal rights it is possible for the law to intervene on behalf of the vulnerable in a coherent and rational manner. The legal principles of equality before the law, the right to freedom from discrimination and obligations on public bodies to act reasonably and through proportionate measures can contribute to more rational allocation of resources around agreed objectives. There is no reason to believe that legislated rights in the area of economic, social and cultural rights would not have the same effect.

The issue of the economic cost of litigation as a means of resolving disputes is also relevant here. One of the greatest difficulties with the debate on justiciability of economic, social and cultural rights has been a false imputation that those who believe in justiciable rights are in favour of extensive and expensive litigation, while those opposed to justiciability of these rights are concerned with the cost involved in resolving cases through the courts. However, this argument is often disingenuous in

[65] McKeever and Ní Aoláin *loc. cit.* p 161.

that in many cases it is the State who has initiated or appealed expensive litigation. More importantly, it is clear that legal remedies need not be expensive, as can be seen from the successful working of many specialist quasi-judicial bodies in many jurisdictions.

2.12 Economic, social and cultural rights and policy development and planning

Taking the State's obligations under the ICESCR seriously demands a rethink of how public services and public financing are structured in order to centre them on the need and right to respect for the basic dignity of the individual. Making rights legally enforceable can help to streamline public administration and improve the rationality of administrative systems. Ultimately in a system of legal protections of economic, social and cultural rights, governments will still be charged with balancing rights and scarce resources, but they will be obliged to do so in a transparent manner. The key effect of such rights will be to improve accountability of government, which will improve the effectiveness and transparency of government action and to induce duty-bearers within government to meet their obligations. Addressing poverty and inequality in society in terms of rights can also have the associated effect of improving the precision of diagnosing and prescribing policy development.[66] Acceptance of clearly defined rights and obligations in this area focuses debates about how competition for resources and legal accountability structures can have a dramatic impact on how budgetary and other decisions are made, bringing many significant benefits to society and to politics.[67]

It should be emphasised that there is nothing exotic about adopting a rights approach to policy and practice in this area. The kind of practice that will result from basing policy on the need and rights of individuals is, in most areas, what we currently consider to be efficient practice. It is also the type of practice that is synonymous with ideas of good governance and effective management, as human rights give concrete expression to the democratic ideals of transparency and accountability in the exercise of public functions. Rights then can encourage rational policy planning and the development of benchmarks by which progressive achievement of standards can be measured.

More fundamentally, we need to question the association of enforceable economic, social and cultural rights with an economic cost on the State. Treaties such as the revised European Social Charter were born out of a desire for economic stability and growth and a belief that rights create a climate of security and stability in which freedoms can flourish. It is important to recognise that inequality and acute poverty damage our society in many ways, including inhibiting our economic development. In Ireland, this relationship is acknowledged in a number of Government policies and in contemporary models of citizenship, which hold that a socially just and cohesive society is a productive one.

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[66] See Combat Poverty Agency report at p 14. See also Quinn *loc. cit.* at p 44.

[67] The World Health Organisation (WHO), in its study of how human rights can be made central to health policy, describes how a process of rooting strategy in an international legal framework strengthens the centrality of the state in design, implementation and oversight of strategies. See chapter 4.7 below.

Chapter 3 – International human rights standards

Economic, social and cultural rights are set out in many international human rights instruments and have generated a large corpus of jurisprudence at the international level. Indeed, the fundamental importance of international economic, social and cultural rights as part of the broader family of human rights is now beyond dispute. The foundational document of the international human rights regime, the UDHR, contains no distinction between civil, political, economic, social and cultural rights, and contains commitments on the protection of rights in each category. However, as we have already seen, when the time came to translate the aspirations of the declaration into binding legal treaties, the unity of the rights catalogue was shattered.[68] For a variety of reasons the rights adumbrated in the UDHR were to be articulated in two distinct treaties, one focussing on civil and political rights and the other on economic, social and cultural rights, each with its own enforcement mechanisms. Since that time, economic, social and cultural rights have existed as the veritable "poor cousins" of civil and political rights,[69] in so far as the latter have, generally, received greater State protection and judicial attention, as compared to the former.[70]

However, notwithstanding the uneven development of the two sets of rights there exists a formidable body of international and regional jurisprudence, understood in the broadest sense of that term, in relation to States' obligations for the protection of economic, social and cultural rights. These obligations are set out in a large number of international treaties as well as in the comments, cases and practices of the monitoring institutions established under these various treaties. The obligations of the Irish State with respect to economic, social and cultural rights are articulated in two distinct, although related, fora: first, in the United Nations system for the protection of human rights; and second, at a regional level under the auspices of the Council of Europe and the European Union. In relation to the nature of Ireland's obligations under international law, the constitutional position relating to the status of treaties also has a critical effect.[71]

In this chapter, section 3.1 examines the principal international treaties on economic, social and cultural rights, including the ICESCR and its various interpretative norms. While the ICESCR is the main UN treaty dealing with such rights, there are also a number of other UN treaties which impact on the protection of socio-economic rights, and each of these shall also be considered. Section 3.2 examines the obligations arising at a European level, from the Council of Europe instruments, - European Social Charter (ESC) and the Revised European Social Charter (RESC) and the European Union. The European Convention on Human Rights and Fundamental Freedoms (ECHR) also protects a number of economic, social and cultural rights and, perhaps more importantly, the case law of the European Court of Human Rights has developed to protect certain 'quasi' socio-economic rights. Finally, the European

[68] See chapter 1, para. 1.2.7.
[69] Hare, "Social Rights as Fundamental Human Rights", in Hepple (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* ,(Cambridge University Press, 2002) 153 at p 154.
[70] See Eide and Rosas in Eide, Krause and Rosas *loc. cit.* at p 3.
[71] See chapter 4.

Union Charter of Fundamental Rights, which contains commitments to a number of social rights, will be examined. Section 3.3 seeks to address how international law addresses the issues raised in chapter 2 above, including the thorny question of the justiciability of socio-economic rights and issues of resource allocation and prioritisation. It considers the obligations which States have undertaken as a result of signing and ratifying these international instruments, as well as their reporting obligations. The more recent approaches arising from the United Nations such as National Action Plans will also be addressed.

In this chapter, reference is made to a number of soft-law instruments such as the *Limburg Principles* and the *Maastricht Guidelines*. In this regard it is important to distinguish between 'hard law' and 'soft law' measures for the protection of rights. Hard law is generally held to comprise the everyday understanding of law, which is enforced by public agencies or individuals through the courts, with pre-established rules on evidence, procedures, remedies and penalties. The efficacy of hard law measures relies on uniformity of treatment, promulgation of their contents, established and accepted procedures for creation and change and the existence of an effective enforcement system.[72] Soft law is not binding on individuals, national organisations or government agencies in the same way as hard law. It is often derived from agreements between States and monitored at international level through specific supervisory machinery.[73] In relation to socio-economic rights hard law involves the range of international treaties, conventions and other instruments which set out the human rights that States have guaranteed at the international level.

3.1 International economic, social and cultural human rights instruments and standards to which Ireland is a party

3.1.1 Universal Declaration of Human Rights

The UDHR adopted by the UN general assembly in December 1948, was the progenitor of, and subsequently a central element in, what has come to be known as the International Bill of Rights.[74] It is, as one commentator has noted, "the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today".[75] Thus, the UDHR, notwithstanding the fact that it is not widely justiciable, represents the international normative standard for the protection of human rights. It was drafted in the aftermath of the atrocities of World War II and was committed, as set out in its Preamble to the "advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want". As such, the rights set out in the UDHR were to be a "common standard of achievement" towards which all peoples and nations should strive.

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[72] See Abbott, K & Snidal, D. *Hard and Soft Law in International Governance* (2000) 3 International Organization 54.

[73] See Boyle, A.E. *Some Reflections on the Relationship of Treaties and Soft law*, International and Comparative Law Quarterly, vol. 48, pp 901-913.

[74] The International Bill of Rights is comprised of the UDHR, taken together with the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).

[75] Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, (1998) 73 *Notre Dame Law Review* at p 1153.

In adumbrating a set of fundamental rights that would lead to the development of a more just and humane world, the authors of the UDHR drew no distinction between civil, political, economic social and cultural rights. Thus one can find in the UDHR commitments to the right to life, equality before the law, freedom of thought and conscience and freedom of expression, alongside rights to work, to a decent standard of living – including food, clothing, housing and medical care – and to education. Within the paradigm of the UDHR each of the individual human rights are "interrelated and mutually reinforcing".[76] It bestows on every person a basic level of socio-economic rights. Thus, the UDHR imposes, at the very least, "a moral obligation … on all states to seek to realize social and economic rights".[77] The protection of economic, social and cultural rights is an integral part of the obligations of the UDHR. The Cold War froze the debate on the inter-divisibility of human rights, leading to an ideological division between civil and political rights claimed by the 'West' as theirs, and the priority given to socio-economic rights in socialist States. Indeed, the two UN Covenants drafted in the 1960s, the ICCPR and ICESCR, arose from that artificial division of human rights.[78]

3.1.2 International Covenant on Economic, Social and Cultural Rights

The ICESCR was opened for signature and ratification, along with the ICCPR, in 1966 in order to transform the aspirations of the UDHR into binding legal norms. It constitutes the "principal instrument for the protection of economic, social and cultural rights within the United Nations human rights system".[79] The Covenant entered into force on the 3 January 1976 and enshrined, *inter alia*, the right to work, the right to form and join trade unions, the right to social security, the right to an adequate standard of living, including adequate food, clothing and housing, the right to the highest attainable level of mental and physical health and the right to education.

The "linchpin of the ICESCR",[80] can be found in Article 2(1) of the Covenant, which sets out a broad outline the nature of the obligations of the States who are party to the Covenant. Article 2(1) provides

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The "obscure and imprecise nature"[81] of the language in Article 2(1), and in particular the apparent resource qualification and the idea of progressive realisation, created

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[76] Eide, in Eide, Krause and Rosas *loc. cit.* p 15.
[77] *Ibid*. at p 22.
[78] See chapter 1 above. See also UN Doc. A/CONF 157/24 (1993) *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna.
[79] Rosas and Scheinin in Eide, Krause and Rosas *loc. cit.* at p 426.
[80] Craven *loc. cit.* at p 106.
[81] Craven, *loc. cit*. at p 3.

much uncertainty at first. This took place partly because of trenchant opposition to the protection of economic, social and cultural rights from certain quarters,[82] and also because of the absence of international and domestic jurisprudence on the protection of such rights.[83] There were serious concerns that the ideas of progressive realisation and the reference in the ICESCR to States' available resources would allow signatories to the Covenant to shirk their obligations under it and render the guarantees contained therein nugatory.[84] In these circumstances, it was essential that substantive meaning be given to the terms of Article 2(1), so that the rights protected by the ICESCR would become a tangible reality for those whom it was designed to benefit. Following a decade of stagnation after its entering into force, the ICESCR was reinvigorated in the late 1980s through, in the first instance, the work of a number of international experts committed to the development of the rights protected by the Covenant and subsequently through the work of the newly established Committee on Economic, Social and Cultural Rights. In the following pages we will see how the obligations of the States parties to the ICESCR, including Ireland, were clarified and substantiated.

Limburg Principles

In 1986 a distinguished group of international experts was convened to consider the nature and scope of State parties' obligations under the ICESCR. What emerged from this meeting was what has come to be known as the 'Limburg Principles on the Implementation of the ICESCR'.[85] The purpose of these principles was to (i) emphasise the rightful place of economic, social and cultural rights in international human rights law; (ii) aid the development of the Covenant as a whole; and (iii) indicate how the object and purpose of the Covenant may be achieved.[86] In this way the Limburg Principles represent the first authoritative statement on the nature of States obligations under the ICESCR. The Limburg Principles are also important because many of the positions which were first articulated therein, *vis-à-vis* States obligations in relation to the ICESCR, were subsequently adopted by the Committee on Economic, Social and Cultural Rights.

The Limburg Principles begin by reiterating that economic, social and cultural rights are "an integral part" of the international human rights regime, and by restating the indivisible and interdependent nature of all human rights, as a consequence of which "equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights". Limburg Principle No. 8 points out that while Article 2(1) of the ICESCR accepts that full realisation of the rights contained therein can only be attained progressively and over time, certain of the rights in the Covenant can be "made justiciable immediately", while others can become justiciable over time. The point about the need for the State to adopt immediate measures towards the realisation of

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[82] Alston and Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", (1987) 9 *Human Rights Quarterly* 156 at pp 159-160.

[83] Craven, *loc. cit.* at p 4.

[84] Alston and Quinn, *loc. cit.* at pp 172-177.

[85] UN doc. E/CN.4/1987/17, Annex.

[86] Dankwa and Flinterman, "Commentary by the Rapporteurs on the Nature and Scope of States Parties' Obligations", (1987) 9 *Human Rights Quarterly* p 136.

the Covenant rights, although such rights can only be fully realised progressively, is reiterated in Principle 16.

Principles 17 and 18 address the nature of the steps that States parties should take towards the realisation of economic, social and cultural rights, with legislation being singled out as a particularly important means. However, it is stressed that, by itself, legislation will rarely be sufficient and should thus be augmented by appropriate administrative, judicial, economic, social and educational measures. State parties to the ICESCR are obliged to make provision for adequate remedies at a domestic level, including judicial remedies, where a violation of a Covenant right occurs. Principle 21 stresses the nature of the obligation to progressively realise the rights contained in the Covenant, and states that this requires:

> "[States] parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant."

Thus, the Limburg Principles reject the idea that the requirement of progressive realisation, placed on States by Article 2(1) of ICESCR, limits in any way the efficacy and value of the rights protected by the Covenant. As if to emphasise this point, Principle 22 provides that some of the obligations under the Covenant, for example the requirement of non-discrimination in Article 2(2), require immediate implementation.

The issue of resources is addressed in Principles 23 and 24; these provide that the obligation on States parties to take moves towards the progressive realisation of the Covenant rights is not contingent on the level of resources available; instead it requires the effective use of whatever resources are available. Principle 25 establishes a very important point. It provides that, regardless of its level of economic development, a State is obliged to ensure respect for certain "minimum subsistence rights". Principles 35 to 41 deal with the prohibition on discrimination contained in Article 2(2) of the Covenant, which is held to be of immediate domestic application, and which should immediately be made amenable to judicial supervision. Finally, for present purposes at least, Principles 70 to 73 set out some examples of what will constitute a violation of the Covenant, which includes: (i) a failure to take a step required by the Covenant; (ii) to promptly remove barriers inhibiting the full enjoyment of Covenant rights and; (iii) deliberately retarding or halting the progressive realisation of a Covenant right.

General Comments

The Committee on Economic, Social and Cultural Rights was created by the Economic and Social Council (ECOSOC) in 1987 as the body with principal responsibility for the monitoring and implementation of the ICESCR. The Committee is primarily concerned with assessing the reports submitted by States under the Covenant and producing concluding observations in relation to such reports. However, from an early point in its existence the Committee has also developed the

practice of adopting General Comments in relation to the ICESCR and the rights protected therein. To date the Committee has adopted sixteen such Comments, dealing with both procedural and substantive aspects of the Covenant.[87] The General Comments are an important mechanism for developing the jurisprudence of the Committee and a means by which the Committee establishes normative standards with respect to the Covenant's various provisions.

General Comment No. 3 contains the Committee's assessment of the obligations imposed on States parties by Article 2(1) of the Covenant. For the Committee Article 2(1) imposes both obligations of conduct and obligations of result on the States parties. It obliges them to act in a certain manner, but also to meet certain mandated goals. The Committee reiterates the Limburg Principles in holding that while Article 2(1) "provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect".[88] The Committee gives the example of the non-discrimination provision in Article 2(2), but also holds that the term "to take steps" in Article 2(1) of the Covenant imposes a duty on States parties, notwithstanding the fact the Covenant rights can only be fully realised progressively, to take "steps towards that goal … within a reasonably short time after the Covenant's entry into force for the State concerned". Such steps should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[89]

In General Comment No.3 the Committee also notes that, in many instances, the adoption of legislative measures will be highly desirable, and in certain cases indispensable, for the satisfaction of the States obligations. However, the Committee points out that "the adoption of legislative measures … is by no means exhaustive of the obligations of States parties". States parties should thus be open to the adoption of a wide variety of measures, in particular the provision of judicial remedies for Covenant rights which are consonant with the State's domestic legal order. In this regard, the Committee points out that a number of the rights contained in the Covenant would seem to be "capable of immediate application by judicial or other organs in many national legal systems". The Committee also notes that the adoption of appropriate administrative, financial, educational and social measures might be sufficient, however the ultimate arbiter of the appropriateness or otherwise of a State's actions will be the Committee.

The Committee considers the significance and the nature of the idea of progressive realisation contained in Article 2(1). It makes the point that Article 2(1) of the Covenant imposes tangible obligations on States parties to introduce measures targeted towards the realisation of the substantive Covenant rights. What is more the Committee also introduced here, what might be referred to as the principle of non-regression: any back-pedalling, as it were, with regard to the progressive realisation of economic, social or cultural rights will be presumptively invalid.

The Committee also introduced another important principle in General Comment No.3, one which had also been intimated in the Limburg Principles, - the idea of

[87] See table below.
[88] CESCR General Comment No.3, UN doc. E/1991/23 at para.1.
[89] *Ibid* at para.2.

'minimum core obligations'. The Committee gives the examples of a State party in which any significant number of individuals is deprived of "essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education", and states that any such State would be *prima facie*, failing to discharge its obligations under the Covenant. The Committee states "If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*."[90]

This obligation, however, is somewhat qualified by the Committee noting that it would have cognisance of the available resources in a given State when deciding whether or not its failure to secure certain minimum core obligations was so egregious as to constitute a violation of the Covenant. However, the Committee again stressed the importance of such minimum core obligations by noting that a heavy burden of proof will rest on the State to demonstrate that "every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".[91]

General Comment No.9 addresses a number of other important issues with regard to States parties' obligations under the ICESCR. The Committee begins this Comment by asserting that the central, overarching obligation of States in relation to the ICESCR is to "give effect to the rights recognized therein". The Covenant adopts an intentionally flexible and eclectic approach as regards the manner in which such rights are effectuated within the domestic legal order. Notwithstanding this flexibility, the Committee states that the Covenant places an obligation on States parties to ensure that appropriate means of redress and remedies are available for the violation of Covenant rights. In particular, the Committee believes there must be some form of domestic judicial remedy available for infringements of economic, social and cultural rights.

The central point of General Comment No.9 is the Committee's desire to emphasise the interdependence and interrelatedness of the rights enshrined in the ICESCR, as well as their justiciability. In this regard, the Committee leaves to the discretion of individual States the manner in which they implement the Covenant within their domestic legal order. However, the Committee insists that the means through which this is done should be on a par with the way in which the State provides protection for other rights, for example civil and political rights, and where a State fails to do this it will have to provide a compelling justification for its failure. This is an important defining feature of socio-economic rights determined at United Nations level, and distinguishes socio-economic rights from the more contemporary public service 'customer rights' advanced in much recent literature. As regards the issue of judicial remedies for the protection of Covenant rights, the Committee expresses the view that such remedies will not always be necessary. In certain instances administrative remedies will suffice, but the guiding principle in this regard should be that "whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary" and should be provided.

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[90] *Ibid* at para.10.

[91] See Robertson, "Measuring State Compliance with the Obligation to Devote the Maximum Resources to Realizing Economic, Social and Cultural Rights", (1994) 16 *Human Rights Quarterly* pp 693-714.

Finally, in General Comment No.9 the Committee rejects the commonly held view that economic, social and cultural rights are not amenable to judicial enforcement and protection. The Committee notes that "there is no Covenant right which could not … be considered to possess at least some significant justiciable dimension". The Committee continued in a similar vein to note that the adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principles of indivisibility and interdependence. The Committee continues, "It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society". The Committee thus rejects the idea that economic, social and cultural rights are qualitatively different to civil and political rights, as many of their detractors claim, and instead re-asserts their justiciability within the paradigm of the interdependence and indivisibility of all international human rights standards.

Summary of General Comments

- General Comment No.1 relates to the reporting by States parties, (24/02/89);[92]
- General Comment No.2 concerns international technical assistance measures, (02/02/90);[93]
- General Comment No.3 applies to the nature of States parties obligations, (14/12/90);[94]
- General Comment No.4 addresses the right to adequate housing, (13/12/91);[95]
- General Comment No.5 relates to persons with disabilities, (09/12/94);[96]
- General Comment No.6 addresses the economic, social and cultural rights of older persons, (08/12/95;)[97]
- General Comment No.7 is concerned with the right to adequate housing - forced evictions, (20/05/97);[98]
- General Comment No.8 applies to the relationship between economic sanctions and respect for economic, social and cultural rights, (05/12/9);[99]
- General Comment No.9 relates to the domestic application of the Covenant, (03/12/98);[100]
- General Comment No.10 is concerned with the role of national human rights institutions in the protection of economic, social and cultural rights, (03/12/98);[101]
- General Comment No.11 addresses plans of action for primary education, (10/05/9);[102]

[92] UN Doc. E/1989/22.
[93] UN Doc. E/1990/23.
[94] UN Doc. E/1991/23.
[95] UN Doc. E/1992/23.
[96] UN Doc. E/1995/22.
[97] UN Doc. E/1996/22.
[98] UN Doc. E/1998/22, annex IV.
[99] UN Doc. E/C.12/1997/8.
[100] UN Doc. E/C.12/1998/24.
[101] UN Doc. E/C.12/1998/25.
[102] UN Doc. E/C.12/1999/4.

- General Comment No.12 relates to the right to adequate food, (12/05/99);[103]
- General Comment No.13 applies to the right to education, (08/12/99);[104]
- General Comment No.14 is concerned with the right to the highest attainable standard of health (4/7/2000);[105]
- General Comment No.15 relates to the right to water (20/01/2003);[106]
- General Comment No.16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (13/05/2005):[107]

Maastricht Guidelines

Ten years after the adoption of the Limburg Principles the International Committee of Jurists again convened a gathering of international experts in economic, social and cultural rights with a view to addressing the issue of violations of these rights. What emerged from this meeting were the 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights'.[108] These Guidelines represent an important codification of the principles which had been developed in the ten years since the Limburg Principles, through the General Comments and other practices of the Committee on Economic, Social and Cultural Rights and other relevant bodies.

The Guidelines begin by restating the relevance and importance of economic, social and cultural rights in the present era of globalisation, as well as reaffirming the indivisibility and interdependence of all human rights. The emergent multi-layered typology of States' obligations in relation to human rights, under which States are understood to have the related obligations to respect, protect and fulfil all human rights is introduced and affirmed. Each of these layers of obligation is understood to create a corresponding State duty at that level. The Maastricht Guidelines also restate a number of important principles, which had already been developed in the Limburg Principles and the various General Comments of the Committee on Economic, Social and Cultural Rights, including the importance of the protection of a "minimum core" level of certain Covenant rights.

The Guidelines then set out what might be understood as constituting a violation of economic, social and cultural rights in the following terms:

> "A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant."[109]

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[103] UN Doc. E/C.12/1999/5.
[104] UN Doc. E/C.12/1999/10
[105] UN Doc. E/C.12/2000/4.
[106] UN Doc. E/C.12/2002/11.
[107] UN Doc. E/C.12/2005/3.
[108] *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, (1998) 20 Human Rights Quarterly 691.
[109] *Ibid*. para. 11.

More specific violations of Covenant rights are also indicated in the Guidelines. Finally, the Guidelines restate the point that the State is the primary duty bearer in relation to ensuring the realisation of economic, social and cultural rights.

This, then, represents the general nature of the States' obligations under the ICESCR with respect to the protection of economic, social and cultural rights. While – following the division of the rights catalogue in 1966 – the ICESCR has been the principal international treaty for the protection of economic, social and cultural rights, the general trend over the last number of decades has been, as Eide notes, towards the reintegration of human rights norms.[110] The following sections will consider a number of international treaties intended to strengthen the human rights of particular groups in society as women, children and others.

Ireland's obligations under the ICESCR

Under Article 16(1) of the ICESCR, States parties to the Covenant are obliged to submit reports "on the measures which they have adopted and the progress made in achieving the observance of the rights" recognised in the Covenant. Failure on behalf of a State to submit such reports constitutes a violation of the Covenant.[111] In its General Comment 1 on States obligations with respect to reporting under the Covenant, the Committee on Economic, Social and Cultural Rights noted that such obligations are principally intended to assist that State in fulfilling its obligations under the Covenant and to assist the Committee in monitoring State compliance with the terms of the Covenant. The Committee rejects the view that the States' obligations to report under the Covenant are merely of a formal nature to satisfy the States' international obligations. Rather, the Committee views the process of preparing and submitting reports under the Covenant as being conducive to certain substantive objectives.

The substantive objectives to which the States' reporting obligations are conducive include: (i) ensuring that States are aware of the actual extent to which the rights protected by the Covenant are, or are not, being enjoyed within the State; (ii) to provide the State with a framework within which it can formulate clearly stated and targeted policies to effect the progressive realisation of the rights recognised in the Covenant; (iii) to facilitate public scrutiny of government policies with respect to economic, social and cultural rights; (iv) to provide a concrete basis on which the State, and the Committee, can evaluate the progress which has been made towards realisation of States' obligations under the Covenant; and (v) to allow the State party itself to realise the difficulties and obstacles impeding the progressive realisation of economic social and cultural rights.

Article 17(1) of ICESCR provides that the periodicity of States' reporting shall be set by ECOSOC, in consultation with States parties and specialised agencies. However, since the establishment of the Committee on Economic, Social and Cultural Rights it has been that body which sets standards and procedures for the production of States' reports. The current practice is that States parties are expected to issue an initial report within two years of the Covenant's entry into force and thereafter at five-yearly

[110] Eide in Eide, Krause and Rosas *loc. cit.* at p 11.
[111] Craven, *loc. cit.* at p 57.

intervals.[112] The Committee has also established guidelines for the content of States party reports, which includes the obligation that reports are required to cover all of the rights in the Covenant on the same basis, and that reports should include all the information necessary for the Committee to make a proper evaluation of the extent to which the State is in compliance with its obligations under the Covenant.[113] Having considered a State's report the Committee will then issue concluding observations and recommendations in relation to the report and the State's compliance with the Covenant.[114]

To date Ireland has submitted two reports under the ICESCR; the initial report was submitted in October 1996[115] and the second report was submitted in August 2000. The next report from Ireland must be submitted to the Committee before the 30 June 2007. In response to the initial report of the Irish Government under the Covenant, the Committee[116] highlighted what it considered to be a number of positive developments within Ireland, including the introduction of the Employment Equality Act, 1998, the Equal Status Act, 1998 and the adoption of the National Anti-Poverty Strategy. The Committee went on to point out a number of areas of concern, which included the fact that the Covenant had not been fully incorporated or reflected in domestic legislation, that the National Anti-Poverty Strategy did not adopt a human rights approach to tackling the issues related to poverty, and the high rates of illiteracy among various sections of society.

The Committee made a number of specific suggestions and recommendations in relation to the protection of Covenant rights within the Irish legal order. These included the recommendation that the State incorporate justiciable economic, social and cultural rights through an amendment to the Constitution, that the State speed up the process of adopting a rights-based Disability Bill, and that the State adequately supervise the quality of primary education received by students in the formal educational system. Finally, the Committee urged the State to take all necessary measures to ensure the wide dissemination of the provisions of the Covenant and of the present concluding observations.

The Committee examined Ireland's second periodic in May 2002. Again the Committee began its observations by highlighting what it considered to be positive developments in the State during the period under review. [117] These included the State's ratification of the ESC, the establishment of the Human Rights Commission and the introduction of a national minimum wage in April 2000. In an interesting general observation, before going on to highlight areas of concern and make specific recommendations, the Committee stated its view that in light of the favourable economic conditions which pertained in the State there are "no insurmountable factors

[112] Craven, *loc. cit.* at p 62.
[113] *Ibid* at p 63.
[114] *Ibid* at pp 87-89.
[115] UN Doc. E/1990/6/Add.15.
[116] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland E/C.12/1/Add.35 at para.1.
[117] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland E/C.12/1/Add.77.

or difficulties preventing the State party from effectively implementing the Covenant".[118]

The Committee then went on to highlight specific areas or subjects of concern in response to Ireland's second report. These included the continued failure to take steps to transpose the Covenant's provisions into domestic law, the failure of the Government to adopt a rights-based approach in the (then) Disability Bill and the lack of affordable housing for many individuals as well as the unsatisfactory housing conditions of many Traveller families. The Committee then made a number of specific recommendations. It pointed out that in affirming that all economic, social and cultural rights are justiciable, - "strongly [recommending] that the State party incorporate economic, social and cultural rights in … to the Constitution, as well as in other domestic legislation". The Committee made the point that regardless of the State's constitutional approach to international law (monism or dualism), the State, following ratification of an international instrument, was under an obligation to comply with and give full effect to the terms of that instrument in the domestic legal order. The Committee also made a number of other interesting recommendations, including that the State should adopt a rights-based approach in the Disability Bill; to accelerate the social housing programmes to reduce waiting times for social housing; and to enact legislation extending the constitutional right to free primary education to all adults with special educational needs. Again, as with the observations in relation to the first State report, the Committee requested that the State disseminate the present concluding observations throughout all sections of society, particularly among State officials and the judiciary.

3.1.3 Convention on the Rights of the Child

The CRC entered into force on the 2 September 1990 and is the most ratified of all the UN human rights treaties. Ireland ratified the CRC in 1992 and has submitted two periodic reports to the Committee on the Rights of the Child, the most recent report being submitted in 2005. It is one of a number of treaties which seek to apply the fundamental human rights standards adumbrated in the UDHR to the needs of particular groups within society. As well as guaranteeing to each child a number of civil and political rights, the CRC also includes guarantees with respect to a number of economic, social and cultural rights, such as, the right to the highest attainable level of health, to an adequate standard of living and to education. In common with most other UN human rights treaties the CRC also contains a provision on non-discrimination in the enjoyment of Convention rights in Article 2. Article 4 of the CRC sets out the nature of States parties' obligations as regards the rights adumbrated in the Convention in the following terms:

> "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

[118] *Ibid* at para.11.

The body charged with monitoring the implementation of the Convention is the Committee on the Rights of the Child. The monitoring mechanisms of the Committee are similar to those utilised by the other principal treaty bodies – the analysis of periodic State reports, followed by the issuing of a set of concluding observations. There is as of yet no individual complaint system under the CRC. The Committee on the Rights of the Child also issues general comments to aid States parties in understanding the CRC.[119] With regard to the rights guaranteed in the Convention the Committee has developed a particular approach to their protection, insisting on the dynamic and holistic nature of the Convention and using a number of guiding principles, such as non-discrimination and the doctrine of the best interests of the child, in assessing the extent to which the Convention has been advanced within the domestic legal order of States parties.

The Committee's General Comment No.5, setting out the general measures of implementation of the CRC, is of particular interest. In this General Comment, the CRC notes that the enjoyment of "economic, social and cultural rights is inextricably intertwined with the enjoyment of civil and political rights". In this regard the Committee notes that the second sentence of Article 4 of the Convention simply represents a "realistic acceptance that lack of resources … can hamper the full implementation of economic, social and cultural rights in some States". However, the Committee insists that the concept of progressive realisation introduced by the second part of Article 4 detracts in no way from the importance of the economic, social and cultural rights protected by the Convention, and that States parties will have to be able to demonstrate that they have genuinely implemented the Convention rights to the maximum of their available resources. The Committee on the Rights of the Child also endorses the interpretation of the Committee on Economic, Social and Cultural Rights on the doctrine of progressive realisation of economic, social and cultural rights in stating that "[whatever] their economic circumstances, States are required to undertake all possible measures towards the realization of the rights of the child, paying most attention to the most disadvantaged groups". The Committee then goes on to affirm the justiciability of the economic, social and cultural rights protected by the Convention and insists that appropriate domestic remedies and methods of reparation be provided for. As regards the other appropriate measures to be taken by the State in implementing the Convention the Committee is adamant that the adoption of legislative measures alone would be insufficient to satisfy the States' obligations under the CRC. Instead, the States' approach to realising the rights in the Convention should be comprehensive and holistic; incorporating various governmental departments as well as elements of civil society, and the measures should be constantly kept under review.

The CRC represents another layer of protection for economic, social and cultural rights at the international level. While the economic, social and cultural rights mentioned in the Convention are made subject to the same notion of progressive realisation contained in the ICESCR, the Committee on the Rights of the Child has interpreted this principle in a manner which is congruent with the views of the Committee on Economic, Social and Cultural Rights. The CRC, while confining itself to the rights of the child, strengthens the case for the protection of economic, social

[119] For a study of these general comments, see Hammarberg, *Children*, in Eide, Krause and Rosas *loc. cit.* at p 369.

and cultural rights and places tangible obligations on States parties with regard to the protection of such rights. We will now go on to consider two other UN human rights treaties, which, although concerned with specific classes within society, further strengthen the position of economic, social and cultural rights.

3.1.4 Convention on the Elimination of All Forms of Discrimination against Women

The CEDAW is another one of the UN treaties which seeks to "elaborate in one particular field the norms and ideals that are … stated in the [UDHR]".[120] In particular, CEDAW is intended to strengthen the human rights of women, as a distinct social group, by ending discrimination and achieving equality for them in the enjoyment of the entire panoply of international human rights. Ireland ratified CEDAW in 1985 and submitted its 4th and 5th Report to the Committee on the Elimination of Discrimination against Women in 2005. CEDAW is less concerned with the enumeration of rights for their own sake; instead it is designed to ensure the advent of a political, legal, cultural and social system in which women enjoy parity with men. However, to this end it places significant emphasis on the States parties ensuring equal enjoyment of the various rights referred to in the Convention without discrimination.

Fundamentally, CEDAW is about improving the position of women in society through the entrenchment of a substantive conception of equality.[121] In this regard it insists on the enjoyment by women of all human rights, including, *inter alia*, the rights to education, to work, to access health care and to financial and economic autonomy on an equal footing with men. The protection of these specific rights is realised within the overarching paradigm established within Articles 2 to 4 of the Convention. Article 2 provides:

> "States Parties condemn discrimination against women in all of its forms, agree to pursue by all appropriate means without delay a policy of eliminating discrimination against women … by any person, organization or enterprise [and] … modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."

To this exacting standard Article 3 adds the obligation on the States parties to:

> "[Take] in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

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[120] Alston and Steiner, *loc. cit.* at p 179.

[121] See Cook, "State Responsibility for Violations of Women's Human Rights" (1994) 7 *Harvard Human Rights Journal* 125 at pp 163-166 and Frostell and Scheinin, "Women" in Eide, Krause and Rosas *loc. cit.* at pp 336-337.

In order to facilitate the States in meeting the onerous obligations created by Articles 2 and 3, Article 4 allows for the adoption, where appropriate, of "temporary special measures aimed at accelerating the *de facto* equality between men and women", in effect affirmative action to realize the human rights of women.

To date the body charged with overseeing the implementation of the Convention, the Committee on the Elimination of Discrimination against Women, has yet to provide an authoritative interpretation of the States' obligations under CEDAW. However, we can draw some guidance from the Committee's General Recommendation No.24 on Article 12 of the Convention. Article 12 deals with the right of women to have equal access to health care, and according to Alston and Steiner this "imposes a limited duty to provide health care" on States parties.[122] In setting out the specific nature of States Parties' obligations with respect to this specific right the Committee on the Elimination of Discrimination Against Women adopted the methodology which had previously been utilized by the Committee on Economic, Social and Cultural Rights.

In General Recommendation No.24 the Committee on the Elimination of Discrimination Against Women held that Article 12 implied an obligation on States parties to "respect, protect and [fulfill] women's rights to health care" and to ensure the "legislation and executive action and policy comply with these three obligations". Also, States parties are obliged to put in place "effective judicial action" with respect to women's rights to health care. A failure to comply with any of these requirements will constitute a violation of Article 12. With regard to States' obligation to fulfill the rights guaranteed by Article 12, the Committee held that this places an obligation on States parties to take "appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum of its available resources to ensure that women realize their rights to health care". However, while the Committee introduced the issue of resources, it also adopted an expansive interpretation of what that term refers to – including budgetary, human and administrative – and held that women's health care must receive an equal share of the available resources in any given State.

Although still very much at an embryonic stage, one must assume that the jurisprudence developed by the Committee on the Elimination of Discrimination Against Women in General Recommendation No.24 will be of general application and that it will be extended to the other rights in CEDAW with an economic or social character. With regard to its jurisprudence on economic, social and cultural rights the Committee would appear, if only implicitly, to have opted for guidance from the experiences of the Committee on Economic, Social and Cultural Rights and while the jurisprudence of the Committee is confined to the status of women it nonetheless represents another layer in the international protection of economic, social and cultural rights and the States' corresponding duties with respect thereto.

[122] Alston and Steiner, *loc. cit.* at p 180.

3.1.5 Convention on the Elimination of All Forms of Racial Discrimination

The CERD has at its centre the principles of equality and non-discrimination, which are the cornerstones in the international protection of minority rights.[123] Ireland ratified CERD in 2000 and submitted its first report to the Committee on the Elimination of Racial Discrimination in 2004. The State's obligations under the Convention are set out in Article 2. It provides:

> "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."

Consequent upon this, States parties undertake not to defend or support any manifestation of racial discrimination, to repeal any national laws contrary to the principle of non-discrimination, to prohibit discrimination by non-state actors and to take positive measures to encourage multi-cultural integration. Within the paradigm established by Article 2, the rights to be enjoyed without discrimination are set out in Article 5:

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of [a number of rights]."

CERD includes the right to security of person, to participate, stand and vote in elections, to freedom of thought and conscience, to peaceful assembly and, crucially, a number of economic, social and cultural rights including the right to work, to housing, to health care and education. Article 6 of the Convention provides that States parties shall make available to everyone effective protection and remedies, including judicial, in the event of a violation of the non-discrimination principle under the Convention.

The Committee on the Elimination of Racial Discrimination has also recently adopted a more robust understanding of the guarantees contained in CERD. In its General Recommendation No.30, which deals with the issue of discrimination against non-citizens, the Committee begins by restating the position under Article 5 of the Convention and notes that States parties are under an obligation to guarantee equality

[123] Bloch, "Minorities and Indigenous Peoples" in Eide, Krause and Rosas *loc. cit.* at p 376.

between citizens and non-citizens in the enjoyment of these rights.[124] Having restated this orthodoxy the Committee then went on to recommend that States parties actively remove "obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health". Thus, the Committee had taken the rather weak requirement of mere non-discrimination and extended it to encompassing positive obligations on the State to the remove barriers, whatever their source, which prevent minorities from enjoying their economic, social and cultural rights.

Much like the jurisprudence under CEDAW, the principles with respect to the protection of economic, social and cultural rights under CERD are only just developing. Already the Committee on the Elimination of Racial Discrimination has made the leap from a tame demand of non-discrimination, to insisting on positive State action to ensure ethnic, racial and religious minorities are able to enjoy their rights on a par with the rest of society. Developments under CERD will be of particular interest in the Irish context as the State continues to cope with the changed ethnic picture on the island. In such circumstances the development of the Committee's jurisprudence on economic, social and cultural rights could give rise to interesting claims in the future.[125]

3.1.6 Vienna Declaration and Programme of Action

The importance of the various and disparate commitments to the protection of economic, social and cultural rights at the UN level was reiterated in the 1993 Vienna Declaration and Programme of Action (VDPA).[126] The VDPA was a product of the Vienna World Conference on Human Rights, - "the largest assembly ever on global human rights issues",[127] and represents a global consensus on human rights principles. The VDPA makes a number of important normative declarations about the protection of human rights. Indeed, the Declaration is so replete with important statements on the nature, status and future of human rights that we could not possibly rehearse them all here. Instead, we will look at the two central elements stressed in the VDPA that have the greatest significance for the protection of economic, social and cultural rights.

The first of these is the reiteration at paragraph 5 of the VDPA of the indivisibility of all human rights:

> "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights

[124] CERD/C/64/Misc.11/rev.3 at para.3.

[125] See Randall, "Racial Discrimination in Health Care in the United States as a Violation of the International Convention on the Elimination of All Forms of Racial Discrimination" (2002) 14 *University of Florida Journal of Law and Public Policy* p 45.

[126] Adopted by the World Conference on Human Rights on 25 June 1993, UN Doc. A/CONF.157/23 [hereinafter: Vienna Declaration].

[127] Boyle, "Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993" in Beetham (ed.), *Politics and Human Rights* (Blackwell Publishers, 1995) at p 79.

> globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

In adopting this position the VDPA, in many respects, validates and reinforces the work of the Committee on Economic, Social and Cultural Rights, and lends its weight to the normative standards developed under the ICESCR. As well as restating the indivisibility and interdependence of all human rights in general terms, the Declaration also emphasised the importance of protecting all of the human rights – civil, political, economic, social and cultural – of a number of distinct social groups, including women, minorities, children and individuals with disabilities. Thus, the Declaration reinforces the importance of the disparate UN human rights treaties, including the economic, social and cultural rights protected therein, and commits the international community to their further elaboration and entrenchment.
The second important theme to emerge from the VDPA is the reiteration of the States obligation to uphold human rights. Thus, under the VDPA the "obligation on States to respect human rights in international law was significantly reinforced".[128] The Declaration is, in many respects, akin to the UDHR, in that it is principally a normative statement of human rights standards, which imposes, principally, moral obligations on Governments. The Declaration differs from the UDHR insofar as the UDHR was an optimistic step into unknown territory, but the Declaration had the benefit of drawing on the actual experience of four decades of the UN and at least three decades of international human rights protection. Thus, in looking to the future the Declaration had the benefit of drawing on the actual practice of the various UN human rights bodies, codifying the general principles developed by such bodies and adumbrating them as normative principles and guidelines for the international protection of human rights.

The idea of States adopting National Action Plans with a view to improving the protection of human rights within their domestic order originated in the World Conference on Human Rights held in 1993. The Vienna Declaration and Programme of Action, which was produced at the end of the conference, stated that:

> "The World Conference on Human Rights recommends that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights."[129]

While the recommendations contained in the Vienna Declaration are not binding, in any strict sense, they do have a "strong persuasive character" owing to the

[128] Boyle *loc. cit.* at p 84.
[129] UN doc.A/CONF.157/23 Part II, para.71.

significance of the World Conference and the fact that the recommendations were adopted unanimously. [130]

The UN High Commissioner for Human Rights has produced a handbook dealing with the issue of National Action Plans in which it indicates the benefits which flow from the adoption of such a plan, as well as setting out general guidelines for the development of such a plan. In this document the "fundamental purpose of national human rights action plans" is described as being "to improve the protection of human rights in a particular country".[131] The UN handbook sets out general principles for a National Action Plan, although – being cognisant of the particular circumstances of different States – the handbook is not overly prescriptive. It includes the following elements:

i. stressing the nature of the action plan as being both process and an outcome, encouraging participation from as wide a section of society as possible, so as to enhance the legitimacy of the plan;
ii. clear commitment to international human rights standards, including the interdependence and indivisibility of all human rights and to realising the States' specific international human rights obligations;
iii. clear commitments to action, as opposed to rhetoric, meaning that the action plan should (a) indicate the current human rights situation in the country, (b) identify problems to be overcome, (c) specify action to be taken, by whom and within a specified time frame and (d) provide an effective monitoring and evaluation mechanism for such proposed action;
iv. the national action plan must be a public document, which is widely disseminated and easily obtainable, it should also be incorporated into national education and made accessible to groups with minority languages and special needs;
v. clear and effective mechanisms for monitoring and evaluating the achievement of the plan, and;
vi. a recognition that promoting and protecting human rights is a long term process, thus the plan should also make provision for replacement of the original plan by a subsequent one, taking on board lessons learnt.[132]

To date Ireland has not adopted such a plan. However, it must be considered that the adoption of such a plan could only further enhance the protection of human rights, in particular economic, social and cultural rights, within the Irish context. There is, of course, much difficulty in relation to the language and terminology used in the preparation of such Action Plans. There are various pressures and efforts to interpret international human rights legal standards in non-legal ways. Some States, such as Ireland, seek to interpret socio-economic rights purely in terms of formal expressions of entitlement in public services. This approach, which seeks to place international

[130] OHCRC, *Handbook on National Human Rights Plans of Action*, (United Nations, 2002) at p 7.
[131] *Ibid* at p.9.
[132] *Ibid* at pp.12-23.

human rights norms within a local and national 'architecture of rights', reduces rights to managerialist concerns about the delivery of services. Indicators, benchmarks, action plans, strategies and other managerialist approaches become the terms of discussion. Indeed, the use of managerial indicators and benchmarks are proclaimed as the means of defining and implementing rights. There is no sanction on States who do not meet such benchmarks, and there is no avenue for complaint or appeal from citizens who suffer a violation of their rights as a result. Indeed, there is often no specific, measurable, time-limited or relevant objective included in the administrative based management benchmarks. The development of a rights rhetoric in public management systems has effectively committed many NGOs seeking to advance human rights approaches to non-specific and indeterminate outcomes, as the price of participation in the process.

3.2 Regional Economic, Social and Cultural Rights Instruments and Standards

3.2.1 European Social Charter and Revised Charter

The European Social Charter (ESC) of 1961[133] sets out an extensive range of socio-economic rights and establishes a supervisory mechanism guaranteeing their respect by State parties.[134] The Revised European Social Charter (RESC), which came into force in 1999, is gradually replacing the initial 1961 Charter, as well as adding new socio-economic rights, in such areas as social inclusion and housing.[135] Ireland ratified the ESC in October 1964 and the RESC in November 2000, but with some derogations. It accepted some 92 out of 98 of the paragraphs of the Revised Charter. Those which were not ratified are Article 8(3) (to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose), Article 21 (rights to information and consultation for workers), Article 27 (the right of workers with family responsibilities to equal opportunities and equal treatment and to develop or promote services, public or private, in particular child day-care services and other childcare arrangements) and all parts of Article 31 (right to housing). In relation to the derogation from Article 31 a declaration from the Permanent Representative of Ireland in November 2000 stated:

> "In view of the general wording of Article 31 of the Charter, Ireland is not in a position to accept the provisions of this Article at this time. However, Ireland will follow closely the interpretation to be given to the provisions of Article 31 by the Council of Europe with a view to their acceptance by Ireland at a later date."[136]

[133] Turin, 18.X.1961, Council of Europe, European Treaty Series - No. 35.

[134] For up to date details on signatures, ratifications and reservations on the Charter and Revised Charter see Council of Europe website: http://www.coe.int.

[135] See Harris, D. & Darcy, J. (2001) *The European Social Charter: The Protection of Economic and Social Rights on Europe,* New York: Transnational.

[136] Council of Europe, *European Social Charter, Collected texts* (5th edition), p. 123.

The Preamble to the ESC of 1961 states that the Governments have agreed the text of the Charter and places the Charter in the context of the overall aims of the Council of Europe:

> "[C]onsidering that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms … Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin … Have agreed as follows … [the Charter]"

Part 1 of the ESC makes clear that the rights set out in the Charter are to be protected *effectively*. Part V of Article E of the RESC goes on to set out the obligations to prevent discrimination in implementing socio-economic and other rights:

> "The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

Article I of Part V of the RESC on the implementation of the undertakings given by States parties, demonstrates the methods which can be used to advance the rights set out in the Charter:

> 1. Without prejudice to the methods of implementation foreseen in these articles the relevant provisions of Articles 1 to 31 of Part II of this Charter shall be implemented by:
> a. laws or regulations;
> b. agreements between employers or employers' organisations and workers' organisations;
> c. a combination of those two methods;
> d. other appropriate means.

The ESC provides that States parties must ratify a number of core socio-economic rights, set out in the Charter. These core rights are Article 1 (right to work), Article 5 (right to organise), Article 6 (right to bargain collectively), Article 12 (right to social security), Article 13 (right to social and medical assistance), Article 16 (right of the family to social, legal and economic protection) and Article 19 (right of migrant workers and their families to protection and assistance). In addition, States parties are required to adopt not less than ten full Articles or 45 numbered sub-paragraphs of the Charter to which they agree to be bound, and overall must include five out of the seven Articles - 1,5,6,12,13,16 and 19. In relation to the Revised Social Charter of 1996 with its increased number of obligations, States parties must accept sixteen Articles or sixty three paragraphs. The core Articles which must be adopted include

the seven from the 1961 Charter plus Article 7 (rights of children and young persons) and Article 20 (equal treatment of men and women at work).

The range of socio-economic rights contained in the Charter which States parties may adopt in addition to the core Articles include, right to just conditions of work, right to safe and healthy working conditions, right to fair remuneration, rights of employed women to protection, right to vocational guidance, right to protection of health, right to benefit from social welfare services, right of physically and mentally disabled persons to vocational training, rehabilitation and social resettlement, right of mothers and children to social and economic protection and right to engage in a gainful occupation in the territory of other Contracting parties.

The RESC introduced a further range of socio-economic rights which States parties may adopt in addition to the core Articles.[137] These include right of workers to information and consultation, right to take part in the determination and improvement of the working conditions and working environment, right of elderly persons to social protection, right to protection in cases of termination of employment, right of workers to the protection of their claims in the event of the insolvency of their employer, right to dignity at work, right of workers with family responsibilities to equal opportunities and equal treatment, right of workers' representatives to protection in the undertaking and facilities to be accorded to them, right to information and consultation in collective redundancy agreements, right to protection against poverty and social exclusion and right to housing.

Collective Complaints Protocol

The Additional Protocol of 1995 providing for a system of collective complaints under the RESC resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter.[138] The States which have ratified the Collective Complaints Protocol of 1995 (at 1st June 2005) are Belgium, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Norway, Portugal and Sweden.[139] In relation to any collective complaint made, the Committee on Social Rights examines the complaint and, if the formal requirements have been met, declares it admissible. Once the complaint has been declared admissible, a written procedure is set in motion, with an exchange of memorials between the parties. The Committee of Social Rights may decide to hold a public hearing. The Committee of Social Rights then takes a decision on the merits of the Complaint, which it forwards to the parties concerned and the Committee of Ministers in a report, which is made public within four months of its being forwarded. Finally, the Committee of Ministers adopts a

[137] See Council of Europe, *European Social Charter, Collected texts* (5th edition). Article 20 is among the core Articles.

[138] This Protocol came into force in 1998**.** See website: http://conventions.coe.int/treaty/en/Treaties/Html/158.htm

[139] Bulgaria and Slovenia have made a declaration to be bound by the Protocol under Article 2D of the RESC. See website: http://www.coe.int/T/F/Droits_de_l%27Homme/Cse/1_Pr%E9sentation_g%E9n%E9rale/Sig+rat01June05.pdf

resolution. If appropriate, it may recommend that the State Party concerned take specific measures to bring the situation into line with the Charter.[140]

Organisations entitled to lodge Collective Complaints with the Committee of Social Rights, in the case of all States that have accepted the procedure, fall into three categories (i) international organisations including the European Trade Union Confederation (ETUC), Union of Industrial and Employers' Confederations of Europe (UNICE), International Organisation of Employers (IOE), and Non-governmental organisations (NGOs) (defined in this context as those with participative status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee); (ii) Employers' organisations and trade unions in the country concerned; and (iii) national NGOs, which are only entitled to lodge complaints where the State concerned has agreed to this. Ireland has not yet made a declaration enabling national NGOs to submit collective complaints.

The complaint file must contain the following information:

(a) the name and contact details of the organisation submitting the complaint;
(b) proof that the person submitting and signing the complaint is entitled to represent the organisation lodging the complaint;
(c) the State against which the complaint is directed;
(d) an indication of the provisions of the Charter that have allegedly been violated;
(e) the subject matter of the complaint, i.e. the point(s) in respect of which the state in question has allegedly failed to comply with the Charter, along with the relevant arguments, with supporting documents.

To date 32 Collective Complaints have been considered by the Committee of Social Rights. The subject matter of these Complaints involved the right to strike,[141] right to economic, social and legal protection,[142] right to housing and non-discrimination,[143] prohibition of all forms of discrimination in employment,[144] right to just conditions of work, right to safe and healthy working conditions and right to protection of health,[145] the right of mothers and children to social and economic protection,[146] right of children and young persons to social, legal and economic protection,[147] the right to a

[140] See website: http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation/CHARTERglance_Nov_2004.
[141] Complaint No. 32/2005 *European Trade Union Confederation (ETUC), Confederation of Independent Trade Unions in Bulgaria (CITUB), Confederation of Labour "Podkrepa" (CL "Podkrepa") v. Bulgaria.*
[142] Complaint No. 31/2005 *European Roma Rights Center (ERRC) v. Bulgaria.*
[143] Complaint No. 27/2004 *European Roma Rights Center v. Italy.*
[144] Complaint No. 24/2004 *Syndicat Sud Travail Affaires Sociales* v. *France.*
[145] Complaint No. 22/2003 *CGT (Confédération générale du travail) v. France.*
[146] Complaint No. 21/2003 *World Organisation Against Torture (OMCT) v. Belgium.*
[147] Complaint No. 18/2003 *World Organisation Against Torture (OMCT) v. Ireland.*

fair remuneration, the right to bargain collectively including the right to strike and the right of workers with family responsibilities to equal opportunities and equal treatment,[148] right to social and medical assistance[149] and the rights of persons with disabilities.[150]

The Collective Complaints system offers a valuable and innovative method for establishing the responsibility of States parties in the area of the implementation of socio-economic rights. Its jurisprudence draws on and supplements other international human rights bodies.

Reporting mechanism
The supervisory mechanism set up under Part IV of the European Social Charter involves periodic reporting by States parties and their assessment by the Committee of Social Rights. Its fifteen independent, impartial members are elected by the Council of Europe for a period of 6 years, renewable once. The assessment of these periodic Reports by the Committee of Social Rights leads to 'Conclusions' which are published in successive volumes corresponding to the reporting cycle. There are established procedures for the reporting arrangements, with reports on specific Articles within particular time frames and calendars.[151] The reports submitted by States parties follow a format adopted by the Committee of Ministers in 1999 and a detailed set of questions on each Article is provided to assist States parties:[152]

> The reports drawn up on the basis of this Form should give, for each accepted provision of the European Social Charter, any useful information on measures adopted to ensure its application, mentioning in particular:
> 1. any laws or regulations, collective agreements or other provisions that contribute to such application;
> 2. any judicial decisions on questions of principle relating to these provisions;
> 3. any factual information enabling an evaluation of the extent to which these provisions are applied; this concerns particularly questions specified in this Form.

The Conclusions of the Committee of Social Rights are presented to the Committee of Ministers *via* an intermediate body called the Governmental Social Committee (now

[148] Complaint No. 16/2003 Confédération Française de l'Encadrement – CFE CGC v. France.
[149] Complaint No. 14/2003 *International Federation for Human Rights (IFHR) v. France*.
[150] *Complaint No. 13/2002 Autisme-Europe v. France*.
[151] NGO and other organisations can submit information and reports to the CSR, which can then be considered alongside the State reports. Secretariat of the European Social Charter, Directorate General of Human Rights, Council of Europe, F – 67075 Strasbourg.
[152] See Council of Europe. FORM for the reports to be submitted in pursuance of the European Social Charter. Adopted by the Committee of Ministers on 24 November 1999. and amended by the Committee of Ministers on 17 January 2001.

Governmental Committee). The latter body prepares decisions by the Committee of Ministers and in particular drafts Resolutions that the Committee of Ministers might adopt. If a State party takes no action on a Committee of Social Right's decision to the effect that it does not comply with the Charter or RESC, the Committee of Ministers addresses a recommendation to that State, asking it to change the situation in law and/or in practice.[153]

3.2.2 European Convention for the Protection of Human Rights and Fundamental Freedoms

The ECHR was adopted by the Council of Europe in 1950 and has been the "jewel in the crown" of the Council of Europe's human rights regime ever since. Although primarily concerned with the protection of civil and political rights the ECHR does extend protection to certain economic and social rights, such as the right to property[154] and the right to education.[155] However, of more significance is the dynamic way in which the European Court of Human Rights (ECtHR) has developed its jurisprudence on civil and political rights to extend indirect protection to economic and social rights. In the following paragraphs we will look at the manner in which the ECtHR has developed protection for economic and social rights under the Convention.

In a relatively early case, coincidentally involving Ireland, the ECtHR held that:

> "While the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature … the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water tight division separating that sphere from the field covered by the Convention."[156]

In the instant case the Court concluded that, under Article 6(1) ECHR (right to a fair trial), the Irish Government was under an obligation to ensure that any litigant had *effective* access to the legal system. As the applicant did not have sufficient financial resources to access the court system, the response of the Irish Government in this case was to establish a system of providing financial support to litigants of limited means, in circumstances where their case would require legal representation, .[157]

Since that decision Article 6(1) ECHR has become the principal vehicle through which the ECtHR has implemented an "integrated" approach to the protection of

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[153] The Charter database at website: http://huDoc.esc.coe.int/esc/search/default.asp, which can be accessed online or on CD Rom, makes it easy to find out about the case-law of the European Committee of Social Rights, including Reports, Conclusions and Collective Complaints. See also Samuel, *Fundamental social rights – case law of the European Social Charter,* (Strasbourg, Council of Europe Publishing, 2002).
[154] ECHR, Article 1 of Protocol 1.
[155] *Ibid* Article 2 of Protocol 1.
[156] *Airey v Ireland*, Judgment of 9 October 1979 at para.26.
[157] *Ibid* at para.28.

human rights, in which it uses explicitly entrenched civil or political rights to provide a degree of protection for economic and social rights.[158] Having extended the formal right of access to the courts contained in Article 6(1) to encompass a right to free legal aid in the *Airey* case, the Court then began to rely on Article 6(1) to extend procedural protection to social benefits provided for in the domestic legal order of States party to the Convention. Thus, in the case of *Feldbrugge v the Netherlands*,[159] the Court held that the right to health insurance under Dutch law, notwithstanding the fact that it was classified as a public law right at the domestic level, was predominantly of a private law character and thus constituted a subjective 'civil right' of the applicant, and the applicant was thus entitled to the procedural safeguards provided by Article 6(1).

In the later case of *Salesi v Italy*,[160] in which the applicant had claimed that a six year delay in the processing of her appeal against a refusal to grant her a statutory disability allowance constituted a violation of Article 6(1), the Court held that regardless of whether or not individual social entitlements were of a predominantly private or public law character, they would be subject to the procedural safeguards contained in Article 6(1). The litmus test, the Court concluded, was if the applicant was "claiming an individual right flowing from specific rules laid down in a statute", then Article 6(1) would apply to such entitlements.[161] Martin Scheinin has argued that the development of this doctrine could go even further as regards the protection of social rights. Scheinen stated:

> "To the extent that domestic statutory law defines, for example, the right to public kindergarten services, to housing or to certain services for the handicapped, as individual rights, such rights may receive additional protection under [Article 6(1)]."[162]

In the recent case of *Connors v. UK*[163] the importance of Article 6 in relation to the right not to be evicted from a caravan site was highlighted.

However, Ivan Hare is less encouraged by the development of this doctrine under the ECHR on the basis that (i) it does not confer a right to any substantive social benefits on individuals and (ii) that it only applies in cases where a given social benefit is made generally available, as of right, and not to discretionary social benefits, "which constitute the vast majority of such provision".[164] The ECtHR has also extended protection of economic and social rights through a number of other substantive civil and political rights entrenched in the Convention. For example, in *Gaygusuz v*

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[158] See Scheinin in Eide, Krause and Rosas *loc. cit.* at pp 34-38.
[159] Judgment of 29 May 1986. See also *Deumland v Germany*, Judgment of 29 May 1986.
[160] Judgment of 26 February 1993.
[161] *Ibid* at para.18. See also *Schuler-Zgraggen v Switzerland*, Judgment of 24 June 1993.
[162] Scheinin in Eide, Krause and Rosas *loc. cit.* at p 38.
[163] *Connors v. UK*. ECtHR Judgement 27 May 2004. (Application no. 66746/01).
[164] Ivan Hare *Social Rights as Fundamental Social Rights* in Hepple (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press, 2002) 153, *loc. cit.* at p 176.

Austria[165] the Court held that the applicant, a Turkish national who had worked in Austria for a number of years but had been denied emergency unemployment assistance on the basis that he was not an Austrian national, had suffered a violation of his rights under Article 14 (non-discrimination) and Article 1 of Protocol 1 (right to property) of the ECHR.

Another interesting area for potential development under the Convention relates to the prohibition of "inhuman and degrading treatment" under Article 3 ECHR. In a case from 1990 the European Commission of Human Rights appeared to leave open the prospect that the prohibition contained in Article 3 "bans any social and economic treatment of persons that is so humiliating as to amount to inhuman treatment".[166] The potential upshot of this would be that "Article 3 guarantees the right of everybody to have their most basic social needs met", which in turn would imply a duty on States to "provide basic social benefits to everybody under their jurisdiction".[167] The applicant in that case was unsuccessful and the ECtHR has yet to elaborate on the potential in this doctrine, but it nonetheless remains of interest. However, the UK Court of Appeal has interpreted the obligations of Article 3 in the matter of homeless destitute asylum seekers who had failed in their applications but who had remained in London. In one case the "question raised by the present appeals, in its starkest form, is to what level of abject destitution such individuals must sink before their suffering or humiliation reaches the 'minimum level of severity' to amount to 'inhuman or degrading treatment' under Article 3 of the European Convention of Human Rights".[168] The Court held that the State had an obligation to provide a minimum level of shelter and subsistence where none was available from other sources. Article 8 protects the right of individuals to 'respect' for their private life, family life and home. This is considered further below.

A recent case in the UK House of Lords relating to destitute asylum-seekers would appear to validate the position that the State is prevented from treating the socio-economic needs of a person so badly as to amount to inhuman and degrading treatment.[169] The judgement of Lord Bingham of Cornhill sets out the position:

> "A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life."[170]

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[165] Judgment of 16 September 1996.
[166] Cassese, *Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions*, (1991) 2 European Journal of International Law 141 at p 143.
[167] *Ibid* at p 144.
[168] *R. ex parte Adam and others v. Secretary of State for the Home Department* [2004] EWCA Civ. 540. at para. 84.
[169] *Regina v. Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent)* [2005] UKHL 66 (3rd November 2005), on appeal from [2004] EWCA Civ 540
[170] *Ibid*. para. 7.

Article 14 of the Convention contains a wide-ranging prohibition against discrimination similar to that included in the ESC. However, this provision applies only to non-discrimination in relation to the rights and freedoms set out in the Convention and a new Protocol 12 covers all areas of discrimination by public bodies.[171]

The ECHR has recently been partially incorporated into the Irish legal order by way of the European Convention on Human Rights Act, 2003 (ECHR Act)[172] and with it the various principles developed by the ECtHR, including those relating to economic and social rights. However, the ECHR Act is still very much at a fledgling stage and it is difficult to say exactly what impact it will have on the Irish legal order.

3.2.3 European Union Charter of Fundamental Rights

The European Union Charter of Fundamental Rights (EUCFR), agreed at Nice in December 2000, represents another, albeit limited, layer of protection for economic, social and cultural rights at the regional level. The EUCFR essentially represents a codification or restatement of the various fundamental rights already protected throughout the European Union in a disparate body of treaties, charters and Community legislation.[173] The central importance of the EUCFR is that it eschews the traditional distinction drawn between civil and political rights, on the one hand, and economic, social and cultural rights on the other, and places all such rights on the same footing, thus elevating the status of traditionally neglected rights within the Community legal order.[174]

Various rights, which are traditionally understood as economic, social and cultural rights, are protected throughout the Charter; such as the right to education, and freedom to choose an occupation. However, the bulk of the economic and social rights are contained in Title VI of the Charter, under the heading 'Solidarity'. Within this section of the Charter rights to collective bargaining, fair and just working conditions, social security and social assistance, health care and access to services of general economic interest, subject to Union law and the law of individual member States, are recognised. The statements in each of these sections represent both the definition of broad policy goals to be pursued within the EU and a number of individual rights guarantees.[175]

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[171] Entered into force April 2005.
[172] On the ECHR Act see O'Connell, *The ECHR Act 2003: A Critical Perspective* in Kilkelly (ed.), *ECHR and Irish Law* (Jordan Publishing Limited, 2004).
[173] Ashiagbor, *Economic and Social Rights in the European Charter of Fundamental Rights*, (2004) 1 European Human Rights Law Review p 62 at p 65.
[174] Weiss, *The Politics of the EU Charter of Fundamental Rights* in Hepple (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press, 2002) p 73 at p 89 and Ward, *Access to Justice* in Peers and Ward (eds.), *The European Charter of Fundamental Rights* (Hart Publishing, 2004) 123 at pp 131-132.
[175] Weiss, *loc. cit.* at p 84.

The Charter has since been annexed to the Treaty Establishing a Constitution for Europe as Part II, and will, providing the Constitution is adopted, become a legally binding instrument.[176] However, Article 51 of the Charter makes it clear that the rights referred to elsewhere in the Charter are concerned with the "institutions and bodies of the Union … and to the member States only when they are implementing Union law".[177]

While the Charter is not directly applicable to national law in the way Directives are, it must be interpreted under the background of international treaties, which prevent a decrease in its protective level.[178] Hervey and Kenner pose the question of whether, in the context of "globalisation, post-Fordism and other challenges and changes to the post-war European labour law and welfare settlement", the inclusion of economic and social rights in the Charter is likely to make any difference in terms of "embedding values of community and solidarity within the EU's legal order?".[179] One potential manner in which the Charter could contribute to the enhanced protection of economic and social rights is if the European Court of Justice (ECJ) continues to use the Charter as a normative reference point in the development of Community law,[180] and while the ECJ has already shown its willingness to have recourse to the Charter,[181] it is unclear exactly how this trend will develop *vis-à-vis* the economic and social rights recognised in the Charter.

The impact of the Charter in other areas is developing. The European Social Agenda – as presented by a Communication of the Commission in 2000[182] mentioned the importance of the EUCFR for the future development of social policy in the Union. The political meaning of the EUCFR is not limited to its legal scope. As stated by the EU Network of Independent Experts in Fundamental Rights the EUCFR is also intended to guide the direction in which Union law is developed.[183] The Network of Independent Experts states that the natural aim of the Charter is to influence the development of European Union secondary legislation. However, they go further to

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[176] At the time of writing, the future of the Constitution process s unclear following negative results in referenda to endorse the Constitution in a number of EU member states.

[177] See Robin White, *Social Security* in Peers and Ward (eds.) at p 320.

[178] See Peers & Ward *loc. cit.* and Hervey & Kenner, J. (eds.) *Economic, Social and Cultural rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Oxford, Hart 2003).

[179] See Hervey & Kenner *loc. cit.* at p viii.

[180] See Manfred Weiss, *loc. cit.* at pp 91-92 and Hans Christian Kruger, *The European Union Charter of Fundamental Rights and the European Convention on Human Rights: An Overview* in Peers and Ward *loc. cit.* at p xx.

[181] See for example the conclusions of Advocate-General Tizzano in *R (on the application of Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry* (C173/99) [2001] E.C.R. I-4881 at paras.26-28.

[182] COM (2000) 379 final 30.6.2000

[183] See EU Network of Independent Experts in Fundamental Rights. *Report on the situation of Fundamental Rights in the European Union and its Member States in 2002*. Luxembourg: European Communities, p 11.

claim the Charter must constitute the basis for a genuine fundamental rights policy within the European Union:

> "The institutions of the European Union are already obliged to *respect* fundamental rights but, by exercising the competences allocated to them, they must ensure the *progressive development* thereof, by building on fundamental rights as a source of inspiration to guide their initiatives."[184]

The impact of the EUCFR is growing. Since 2001 there is a requirement on the European Commission to accompany all legislative proposals which could have an impact on fundamental rights with an indication that the proposals were considered to be compatible with the requirements of the EUCFR.[185] The Commission will defend the standards for the protection of fundamental rights laid down in its proposals for legislation and will ward against any unjustified violation of them by the legislature. A formal Impact Assessment is required for items on the Commission's Work Programme and since 2005 all legislative and major policy-defining proposals contained in its annual Legislative and Work Programme will be subject to Impact Assessment.[186] Among the social impacts to be considered is the compatibility of the measure with the Charter of Fundamental Rights.[187] This effectively requires the Commission to examine the impact on the EUCFR of its proposed measures. For example, in relation to market integration measures, which could impact on social housing provision and other areas, the protection of Article 34(3), which refers to the rights to social and housing assistance, must be considered.

In 2005, the issue of compliance with the EUCFR in Commission legislative proposals was the subject of a communication from the Commission.[188] This will allow the Commission to check all legislative proposals systematically and rigorously to ensure that they respect all the fundamental rights concerned in the decision making process. It is additional to the checks for compliance with the legality of the EUCFR in place since 2001. Thus, while the EUCFR may not have direct application in national law, its values and standards are permeating EU social policy and social inclusion approaches will also have to incorporate a consideration of the fundamental rights set out in the EUCFR.

3.3 How international law addresses the issues of justiciability and resources

3.3.1 Justiciability

In chapter 2 we pointed out that the question of justiciability and whether economic and social rights are enforceable has been central to debates about economic, social

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[184] *Ibid*. p 12.

[185] See Alston and De Schutter, *Monitoring Fundamental Rights in the EU*, (Oxford, Hart, 2005) at p 4.

[186] European Commission - *Impact Assessment Guidelines* (15 June 2005) SEC(2005) 791.

[187] COM(2002) 276 final, 5.6.2002, para. 1.5.

[188] See Communication from the Commission, *Compliance with the Charter of Fundamental rights in Commission legislative proposals – Methodology for systematic and rigorous monitoring,* COM(2005) 172 final, 27.5.2005.

and cultural rights. The suggestion that there is any fundamental difference between economic, social and cultural rights and civil and political rights in this respect has consistently been rejected by proponents of economic and social rights and by the principal body with responsibility for the global observance of such rights; the Committee on Economic, Social and Cultural Rights.

In the seminal Limburg Principles, it was clearly stated that, although the full realisation of the rights contained in the ICESCR was to be achieved progressively, "the application of some [Covenant] rights can be made justiciable immediately while other rights can become justiciable over time".[189] The Limburg Principles also implicitly reject the non-justiciability argument by noting that among the steps States should take at a domestic level for the protection of Covenant rights, the introduction of judicial measures for the protection and enforcement of such rights would be essential.[190]

Likewise, in its general comments the Committee on Economic, Social and Cultural Rights has consistently rejected the argument that Covenant rights are non-justiciable and stressed, within the paradigm of the indivisibility of all human rights, that such rights are justiciable. In its General Comment No.3 the Committee states that among the measures States might take in relation to the realisation of Covenant rights, the introduction of judicial remedies in relation to Covenant rights which are considered justiciable would be most appropriate. Also, as regards justiciability, the Committee considers that a number of the rights protected in the Covenant "would appear to be capable of immediate application by judicial organs … in many national legal systems".

The Committee also deals with the issue of justiciability, both explicitly and implicitly, in its General Comment No.9. In this Comment the Committee notes that while the Covenant provides a degree of flexibility to States party in relation to the means to be used in realising Covenant rights, it would be difficult to show that, for example, legislative and administrative means are effective where they "are not reinforced or complemented by judicial remedies". Thus, the Committee implicitly rejects the idea that Covenant rights are non-justiciable, by holding that their effective realisation is unlikely to be achieved without avenues of judicial recourse. The Committee then addresses, in a more explicit manner, the question of justiciability, and its comments in this regard merit quotation at some length:

> "In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 (1990) it cited, by way of example, Articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a);

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[189] Limburg Principles on the Implementation of the ICESCR, UN doc.E/CN.4/1987/17, Annex at para.8.
[190] *Ibid* at para.17.

> 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, *there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions*. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. *The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent*. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."[191]

The Committee on Economic, Social and Cultural Rights has thus rejected outright the idea that economic, social and cultural rights are, by their very nature, not subject to judicial enforcement. While the Committee accepts that the respective competences of various organs of State must be respected, a blanket prohibition on judicial enforcement of socio-economic rights is incompatible with the fundamental principles of international human rights law. Indeed, the commitments made in the Vienna Declaration (outlined above) on the indivisibility of rights would be meaningless without justiciable socio-economic rights. In any case, States parties regularly enforce a range of socio-economic rights in national and local courts. This includes such matters as minimum wage rights, labour laws, rights to education, certain property rights and health and safety laws, all recognised as socio-economic rights in current international instruments.

3.3.2 Positive rights, negative rights and the question of resources

Another of the commonly advanced arguments against socio-economic rights is that such rights are, unlike civil and political rights, "by definition, resource dependant" and consequently create the threat of too great a drain on the public resources, as well as an unwarranted restriction on the freedom of choice of the elected branches of Government in the distribution of public funds.[192]

The Committee on Economic, Social and Cultural Rights has obviated this apparent difficulty through its adoption of a tripartite typology of State obligations with respect to all human rights, civil, political, economic, social and cultural. Within the framework that obliges States to respect, protect and fulfil individual human rights,

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[191] *Ibid* at para.10 [emphasis added].
[192] See chapter 2 above.

States are understood to have different types of duties in relation to each of these levels of obligation. For example, the obligation to respect certain socio-economic rights, such as the right to form and join trade unions, imposes only a negative duty on the State and can be complied with at little or no cost; whereas the obligation to protect certain socio-economic rights, such as the right to work without discrimination, may be satisfied by the State enacting legislation which prohibits discriminatory practices in the sphere of employment. It is only in relation to the obligation to fulfil (which encompasses the obligations to facilitate and provide) an individual's socio-economic rights that exacting demands are placed on public finances,[193] but as Hunt pointed out there is no qualitative distinction between this requirement and a State's obligations with respect to certain civil and political rights.

Finally, Article 2 of the ICESCR, which provides that States parties must pursue the realisation of the Covenant rights to the "maximum of its available resources," refutes the argument that socio-economic rights place some form of absolute demand on national resources. The Committee on Economic, Social and Cultural Rights has held that there are certain 'minimum core obligations', which must be provided for regardless of the economic situation in a given State. The general practice of the Committee in assessing State reports has been to defer to State parties reasonable budgetary allocations, provided there has been no retrogression and the terms of the Covenant have been taken into account.[194] Thus, the protection of socio-economic rights does not place demands on national resources which is qualitatively different from that created by the protection of civil and political rights, nor does it make absolutist or unrealistic demands on a State's finances.

[193] Eide in Eide, Krause and Rosas *loc. cit.* at pp 22-28 and CESCR, General Comment No.12 UN doc.E/2000/22.
[194] Craven *loc. cit.* at pp 136-144.

Chapter 4 Models of Enforcement

From the preceding chapters we have a clear picture of *why* we should have an effective system of economic and social rights. Most importantly, we have seen how these binding legal obligations are the product of an understanding of the relationship between civil and political freedoms and freedom from want and how there is a morally compelling, as well as a legally compelling, case for their protection. Despite the clear legal imperatives to effectively respect, protect and fulfil these rights, the national and international implementation mechanisms are at an embryonic stage.[195] This is so for a number of reasons, not least the ideological opposition to economic and social rights that persists in many States.

In this chapter we explore the present stage of development of these mechanisms and how such mechanisms can be developed by showing that it is both legally and practically feasible to do so. We will explore each of the different systems and methods of protecting economic, social and cultural rights and examine the particular legal, political and practical dimensions to each system of protecting rights. Examples of good practice from countries around the world will be looked at to give a concrete edge to this analysis. We will emphasise the richness of the continuum of enforcement mechanisms in order to facilitate knowledgeable choices about the right mix of mechanisms to suit local circumstances.

In this regard, we do not see judicial and administrative systems of protection as being mutually exclusive; rather, we see an optimum system for the protection of rights as involving a combination of both these forms of enforcement of rights among other forms. In relation to the legal remedies and enforcement mechanisms, we will examine how courts might be appropriately involved without taxing the separation of powers. We aim to break free from one set of assumptions that courts can/should never be allowed a role to play in 'enforcing' these rights and another set of assumptions that holds that courts are the only way of 'enforcing' them. While, in our liberal democratic society, democratic institutions must have the primary role in allocating resources, we need to have a wider understanding of the possibilities of our democratic structures in this regard. We need to be innovative in developing new institutions to assist and facilitate the political process to vindicate these rights and where it fails to do so, to prompt and hold that system accountable. By exploring a range of different tools at the constitutional, legislative and administrative/policy levels, the ultimate objectives of this chapter are to find the *combination* of different forms of protection that will be most effective in an Irish context.

In this regard we note that Liebenberg describes the optimum system of protecting rights as being based on four different levels of protection:

(a) the entrenchment of economic and social rights as fundamental norms in the legal system (preferably in the Constitution);
(b) comprehensive legislation that give concrete effect;
(c) accessible and effective remedies;
(d) appropriate institutions to monitor and investigate.

[195] Rosas and Scheinin in Eide, Krause and Rosas *loc. cit.* at p 425.

The principal models of enforcement which we will explore in this chapter are:

1. International enforcement
2. Making international treaties effective at the domestic level
3. Constitutions
4. Legislation
5. Courts
6. Administrative Tribunals and Quasi-Judicial structures
7. Benchmarking and Indicators

4.1 International systems of protecting economic, social and cultural rights

The existing international forms of enforcement are dealt with in detail at the end of chapter 3. Here we recap the main dimensions to that protection:

- Reporting Mechanism under the ICESCR
- Individual Petition rights under ICCPR, CRC, CEDAW, CERD
- Reporting Mechanisms of the Council of Europe Committee of Social Rights
- Collective Complaints to Council of Europe Committee of Social Rights
- ECHR Case-law

UN Committee on Economic, Social and Cultural Rights

At present, under the ICESCR, the only monitoring mechanism is through the reporting process, however there are attempts to develop an Optional Protocol to the Covenant on Economic, Social and Cultural Rights which would introduce some form of complaints system.

Other UN Treaty Monitoring Bodies

Chapter 3 contains an overview of how the existing treaty monitoring mechanisms of the other main UN human rights treaties can be utilised to protect economic, social and cultural rights.

European Committee of Social Rights

Under the Council of Europe's European Social Charter and the Revised European Social Charter, a monitoring body, the European Committee of Social Rights, has the function of both examining State reports and examining collective complaints. Under the collective complaints system a potentially large category of trade union, employer and civil society organisations can bring complaints against States who have ratified the Charter.

European Court of Human Rights

There are a number of areas where the European Court of Human Rights has interpreted the mainly civil and political rights of the ECHR to impose positive obligations on States to take actions to protect and vindicate rights in such a manner as to have a significant impact on the protection of economic, social and cultural rights. In particular the role of the Court in protecting the right to respect for private and family life and in protecting the right to freedom from torture, inhuman and degrading treatment has impacted on the protection of the right to health, the right to a

safe environment, the right to a basic standard of living and the right to adequate housing.[196]

European Union
There is also the question of enforceability through the growing EU competence in this area. Although there is no binding human rights treaty governing the EU as an entity or its member States, the development of the EU Charter of Fundamental Rights and the moves towards its inclusion in an EU Constitution indicate a growing competence for the Union in the area of human rights. More significantly, the areas of legislative competence of the Union encompass issues of social and economic policy thereby creating substantive rights for EU citizens. European law takes precedence over domestic law in each member State of the Union and the European Court of Justice in Luxembourg ensures compliance by each member State with EU law.

Analysis
International systems of enforcement are important, but will always play a subsidiary role. Due to the primacy of domestic law, protection of rights at the international level is only one factor towards the effective protection at the domestic level and should be seen as only one element in the move towards effective protection. As set out in General Comment 9 of the Committee on Economic, Social and Cultural Rights, the rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies. International procedures for the pursuit of individual claims are ultimately only supplementary to effective national remedies.

Notwithstanding this, the development of a working system of enforcement at the international level has a profound impact on the question of justiciability at the domestic level. Where a system of international enforcement is seen to work effectively, as in the case of the European Committee of Social Rights, this greatly strengthens the position of those who claim such systems can be made effective at the national level and points the way towards the development of such domestic remedies. The jurisprudence of international monitoring bodies has also greatly assisted the development of the theory of economic, social and cultural rights. Just as international systems of enforcement influence domestic law, through the reporting procedures, the development of effective means of protection at the domestic level can inform treaty monitoring bodies such as the Committee on Economic, Social and Cultural Rights of best practice models that can be recommended for other jurisdictions.[197] In this respect, the reporting systems at the international level can be an effective way of raising awareness of best practice and innovation from different jurisdictions.

The advantages of international enforcement mechanisms are:

- International enforcement mechanisms enjoy strong moral and political force. Criticism and legal sanction from an established independent international

[196] See Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford, 2004).
[197] See Liebenberg in Eide, Krause and Rosas p 55.

body injures the prestige of a State among its peers and lends ammunition to the critics of the policies of a particular Government at the domestic level;
- International enforcement bodies are often able to apply experience learned in relation to one State to the situation of another, therefore fostering use of best practice models;
- Reporting systems have the advantage of being conducive to incremental improvements in the protection of rights over time;
- Most importantly, the creation of a clear body of case-law at the international level would provide an important stimulus for the invocation of economic and social rights at the national level.

The disadvantages of international enforcement mechanisms are:
- Sanctions and remedies available at the international level are generally weak;
- Many international monitoring bodies face severe shortages of resources and suffer from subsequent backlogs and delays;
- International remedies are generally inaccessible to many potential claimants and particularly to disadvantaged groups. The collective complaints mechanisms of the Council of Europe Committee of Social Rights is interesting in this regard in that it encourages the channelling of complaints through unions and NGOs.

4.2 International treaties at the national level[198]

A fundamental question for every State which subscribes to international treaties and norms is the status that those standards have within the domestic legal system. As a basic principle of international law, international and national modes of enforcement are deemed to be interdependent.[199] Chapter 2 of this report outlines the various international human rights treaties Ireland has ratified which contain specific legal obligations for the State in relation to economic, social and cultural rights. However, an important aspect of the context of protection of economic, social and cultural rights in Ireland is our "dualist" legal system, under which these international treaties do not have direct force of law in Ireland unless implemented by legislation. This aspect of our legal system distinguishes us from countries with a 'monist' legal system, whereby international treaty obligations which are ratified by government have effect in the domestic legal system as a matter of course. In this section we examine what international law says about the status treaties should have in domestic law, and compare this to the status they are currently afforded by the Irish Constitution and courts.

The actual enforceability of these human rights at national level depends on the legal and constitutional arrangements for transposing international treaties into national law - the dualist/monist paradigm. Ireland operates a dualist system arising from Articles 15 and 29 of the Constitution which provide that only laws originating from the Oireachtas, regardless of whether or not the State has accepted these at international

[198] For a discussion of the issue of the legal status of international treaties in Irish law see chapter 5 below.
[199] For a general discussion of contemporary treaty law, see Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000).

level. In a monist system, such as operates in the Netherlands and Finland, international human rights instruments accepted by the State automatically become law in the State and are enforceable as hard law.

The UN Committee on Economic, Social and Cultural Rights has addressed the specific question of the status of the rights contained in the ICESCR at the national level, and how these rights must be implemented through national law, in its General Comment No.9. The General Comment first states the general principle that human rights standards should "operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals."[200] The general comment goes on to examine the question of incorporation of treaties into domestic law, and notes that States have discretion in how they make the rights contained in the ICESCR effective at the domestic level.

While the General Comment acknowledges that States have different approaches to international treaties, it also states that whatever means are used to give effect to the treaty "should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party." The Committee goes on to set out some basic conditions which must be met. It is worth quoting these conditions at length as they speak to some of the main objections to domestic enforcement of economic, social and cultural rights which we will return to in the course of this Discussion Document:

> "7. … First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.
>
> 8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

[200] General Comment No. 9 of the Committee on Economic, Social and Cultural Rights at para. 4. See chapter 3 above.

> 10. … While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."

Even where international treaties are not incorporated into domestic law, they can be used as interpretative tools by national courts in interpreting their own laws. Indeed, in common law legal systems there is a well established presumption that domestic laws should comply with a State's international treaty obligations. Even without the direct effect of international treaties in the domestic legal system, there is no legal barrier to courts using these treaties as an interpretative tool. In practice a spectrum of attitudes to international law exists in dualist legal systems, with some dualist legal systems making extensive reference to international law, whereas in other systems the courts appear to take a more 'isolationist' approach. In South Africa, for example, the courts have referred to international law as "providing a framework within which the [South African Bill of Rights] can be evaluated and understood", including the decisions of international treaty-monitoring bodies.[201]

4.3 Protection of economic, social and cultural rights in national constitutions

In this section we examine the potential role of national constitutions in protecting economic and social rights. The constitutional position in Ireland *vis-à-vis* economic, social and cultural rights is discussed in detail in chapter 5. This section is divided into three main areas:

1. Characteristics of constitutional protection of human rights generally;
2. Overview of international practice in relation to constitutional protection of economic and social rights;
3. Different forms of constitutional protection of rights;
    i. Direct protection
    ii. Indirect protection through civil and political rights
    iii. Directive principles.

[201] See the judgment of Chaskalson P of the Constitutional Court in the case of *State v. Makwanyane & Others*, which was quoted in the leading case of *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC), at paragraph 26.

4.3.1 Characteristics of constitutional protection of rights

We have already discussed some of the characteristics of constitutions as instruments to protect economic, social and cultural rights. Broadly, constitutions can serve two functions: (i) they act as the fundamental law of the State, which cannot generally be amended by ordinary legislation - where constitutions can only be adopted or amended by popular vote, the text of a constitution enjoys particularly strong democratic legitimacy; and (ii) they can also have a function in expressing the values of a society.

(i) Constitutions as fundamental or supreme law

The protection of rights through constitutions is a particularly strong form of protection. In most jurisdictions, constitutions enjoy a much greater sense of permanence than ordinary law, with amendment often only possible through special procedures. Constitutions which prescribe elaborate systems of amendment are described as being "entrenched". The United States, Canada and Australia are examples of common law states with such systems. In contrast, the United Kingdom is an example of a jurisdiction where its (unwritten) constitution can be amended without any special procedure. The Irish case, whereby the text of the constitution can only be amended through a popular plebiscite, represents a particularly strong model of constitutional entrenchment, and in legal systems like ours the constitution can be seen as a form of law which enjoys unique democratic legitimacy.

The inclusion of rights in constitutions also has a deep effect on the whole legal system. Generally, a doctrine of supremacy will apply whereby, if legislation conflicts with a provision of the constitution, the constitutional provision will take precedence. In most states, constitutional or supreme courts are charged with reviewing the compatability of laws with the constitution (judicial review of legislation), and have the power to declare laws unconstitutional. The effect of such rulings vary, but it is common for such rulings to make a law unenforceable, either automatically, or pending subsequent action by the legislature. In the Irish legal system we are familiar with this concept, and the Irish courts have the opportunity to examine the constitutionality of legislation through ordinary case-law and also when legislative proposals are referred to the Supreme Court by the President. Such a system of constitutional supremacy can be contrasted with a system of parliamentary sovereignty, such as operates in the United Kingdom, where laws made by parliament cannot be overturned by the courts. The combination of constitutional supremacy with the tool of judicial review allows courts to develop remedies where the fundamental rights provisions of the constitution are offended and helps to influence how legislation is drafted in respect of these rights.

In respect of economic, social and cultural rights, Liebenberg makes the point that formal recognition of these rights in a country's constitution does not automatically guarantee their practical and effective protection.[202] She cautions that much depends, "on the commitment of the political authorities to the effective implementation of economic and social rights, and the willingness of the judiciary and other national institutions to enforcing these rights". At the same time, the omission of economic, social and cultural rights from the text of a constitution need not always be decisive

[202] Liebenberg in Eide, Krause and Rosas *loc. cit.* at p 56.

against their protection, insofar as courts will often interpret civil and political rights in an expansive way in order to vindicate basic economic and social rights. In other instances courts are led to protect economic, social and cultural rights in order to be able to protect prescribed civil and political rights which cannot thrive without the basic security provided by social security and autonomy. However, Liebenberg argues persuasively that entrenchment of economic and social rights in constitutions provides a safeguard against the withdrawal of these rights for reasons of political expediency. In other words, just as has been the case with traditional civil and political rights, inclusion of economic, social and cultural rights in a bill of rights acts as a final shield for the citizen against the influence of strong groups within the political system.

(ii) Constitutions express the values of a society

Constitutions also serve to express the basic values and aspirations of a political society and often include provisions that are explicitly intended as statements of principle, for example in the form of preambles to the main text. As far back as the United States Constitution, the preamble referred to the purpose of the Constitution being to "establish Justice, insure domestic tranquillity, provide for the common defence, promote the general Welfare, and secure the blessings of liberty to ourselves and our posterity." The Indian Constitution of 1949 expresses the intention to establish a "sovereign, socialist, secular republic", which will guarantee "justice, social, economic and political; liberty of thought, expression, belief, faith and worship; and equality of status and of opportunity." In the more recent South African Constitution, the preamble refers to the injustices of the past and sets out as the purposes of the Constitution "to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" and to "improve the quality of life of all citizens and free the potential of each person."

As many constitutions are founding documents for nation states, often following periods of colonialism or oppression, idealism and radical optimism are common hallmarks of such texts. It may be asked how this aspirational quality of constitutions relates to "reflecting the values of society". In an important sense, laws in general, and particularly laws setting our fundamental rights, are usually pitched somewhat 'ahead' of societal consensus: they partly represent social values as they are and partly as society aspires them to be. Where the contents of law are pitched too far ahead of social consensus, then they will fail to garner widespread support; where they are too far behind, they become irrelevant and unnecessary. The South African Constitution and its Indian predecessor are examples of the large number of constitutions that can be described as being transformative in nature, in that they seek to prescribe a better society.

It is often stated that constitutions are living documents, adapting the meaning of constitutional texts to reflect changing values. The concept of living texts presupposes that the original language will be interpreted in a contemporary setting to reflect contemporary knowledge, morals, values and beliefs. We can see how this doctrine has been applied successfully and dramatically in relation to the Irish constitution and to international texts such as the ECHR. However, life is only breathed into the text of these documents by their usage. The vitality of these texts springs from the act of contemporary interpretation. Where elements of a constitution are not interpreted and reinterpreted, such as in the case of Ireland's non-justiciable

Directive Principles of Social Policy, those provisions lose their vitality. Certainly, in any comprehensive programme of constitutional reform we must begin with a clear picture of the principles and beliefs which we as a society wish to express, including those involving economic, social and cultural rights.

Ultimately the manner in which a Constitution recognises, or omits to recognise, economic, social and cultural rights reflects that society's understanding of what its members are entitled to and in what areas of life they are not entitled to protection from the State in the face of the excessive demands of others. At one end of a spectrum we have the clear choice to protect rights directly as in the case of South Africa. On the other side the historic failure to protect these rights in the US was recognised as a fundamental flaw of that constitutional scheme by President Roosevelt in the 1940s. However, his proposal to remedy this omission by introducing a second Bill of Rights has never been acted on. In this regard, recently adopted constitutions, tend to reflect modern understandings of rights and of the relationship between the individual and the State.

The distinction between the function of the text of a constitution as being expressive or pragmatic has a particular significance in the common law tradition, where a strong tradition of judicial review has tended towards an emphasis on the pragmatic function of the constitution. Common law countries tend not to include aspirational claims in the main text of their constitutions because they are sceptical of including provisions that are unlikely to have any effect. As there has generally been no significant tradition or precedent of enforcing economic, social and cultural rights, the tendency historically has been to omit these rights from the main body of the constitution as law, and marginalise them to preambles or directive principles' sections. Of course, this view of constitutional texts is somewhat circular – if rights or claims are included in the text of a constitution it thereby creates an implication that they are to be enforced. Now that there are clear precedents in many jurisdictions for the effective enforcement of economic, social and cultural rights, any opposition to their inclusion on this basis is weakened.

Analysis

The expressive value of constitutions is sometimes contrasted with their pragmatic value in having tangible legal consequences, but in most cases provisions in constitutions can be both expressive and pragmatic. In particular, the inclusion or exclusion of particular rights in bills of rights can have clear legal consequences, while also expressing the values and priorities of a community.

In the view of the IHRC, there is a strong argument, from both a legal and a political perspective, for updating the language of the Irish Constitution to reflect contemporary understandings of the proper place of economic, social and cultural rights in the constitutional order. In particular, since 1937 we have witnessed the operation of a welfare state model in Irish social policy and we have also seen developments in political and legal theory, such as the writings of John Rawls and others, which have shown how distributive justice and liberal democracy are not mutually exclusive. Most importantly, we have witnessed the development of a sophisticated body of human rights law at the international level, to which Ireland has been an active party. If we are serious about our commitment to the basic human rights principles of dignity and equality as developed through the international human

rights treaties which the State has ratified, then we are drawn inextricably towards expressing our commitment to these rights in our Constitution. In our welfare state system, where issues such as housing, education and health care are consistently named as the main political priorities of the public at large, it is at least arguable that these matters should be addressed in an effective manner in the operable text of the constitution.

4.3.2 Overview of economic, social and cultural rights in constitutions internationally

It is no longer uncommon for States to have wide-ranging provision for enforceable economic, social and cultural rights in their Constitutions. In some cases, States make comprehensive provision for these rights adopting the language of the UDHR or of the ICESCR. However, it is more common for States to make provision for a selection of these rights in a justiciable, or legally enforceable, form. There have been a number of comparative studies of how different States have provided for economic, social and cultural rights in the texts of their Constitutions.[203] The general international consensus towards standard protection of civil and political rights is contrasted with an impressive heterogeneity regarding how States approach economic, social and cultural rights, although some general trends can be observed in categorising countries on the basis of their approach in this sphere.

In Ben-Bassat and Dahan's study, they categorised legal systems into five groups: English common law, French civil law, German, Scandinavian and Socialist. Though there are wide variations within each of these categories, in general there is a higher average level of protection of economic and social rights in French civil law countries than in English common law countries, with a number of Latin American countries, Portugal and Spain having generally the highest levels of protection. This group of countries also tends to have a higher level of protection of these rights than post-socialist countries. The German and Scandinavian countries tend to take an intermediate position between the French civil and English common law groups. Therefore, there is certainly a cultural and historical context to the different levels of protection of these rights, although we acknowledge there is considerable diversity within each group. In the common law tradition, for example, we find that despite the general low level of protection of economic, social and cultural rights, South Africa has one of the most elaborate and comprehensive systems of protecting these rights. One of the key findings of this study is that countries which feature highly in studies of the quality of democracy also tend to have higher levels of protection of economic and social rights.[204] Other variables such as GDP per capita or the size of government expenditure were far less clearly associated with the level of commitment to social rights. This supports the view of the Committee on Economic, Social and Cultural rights that these rights can be protected in different political and economic systems.

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[203] Rosas and Scheinin in Eide, Krause and Rosas *loc. cit.* at p 452, referring to comparative studies by Bercusson and Liebenberg. See also a study compiled by Avi Ben-Bassat and Momi Dahan of the Hebrew University of Jerusalem cited in Sunstein *loc. cit.* at p 104.

[204] The study applied a democratic index of political rights in the various countries based on standards set by Freedom House, an international NGO.

On the question of which economic, social and cultural rights are afforded constitutional protection, comparative analysis suggests that the right to education appears far more often in the texts of domestic constitutions than the other main economic, social and cultural rights, and also tends be afforded a higher level of protection. The same study shows that the rights to housing and health receive the lowest level of protection.[205] One of the more interesting findings of the study related to education was that it was found that the level of constitutional protection of education has a *negative* effect on the proportion of GDP spent on public education. There may be several reasons for this. The inclusion of education to the exclusion of other social rights may serve to emphasise an ideological opposition to these rights in general – in other words, the sole inclusion of this right may be the exception which proves a wider legal rule against economic and social rights. Conversely the level of protection afforded to the right to health in a constitution tends to have a positive effect on public health expenditure, but is included more rarely in constitutions.

4.3.3 Different forms of constitutional protection

There is a wide variety in the forms of constitutional protection afforded to economic, social and cultural rights in different states. These forms fall into the following three main categories:

(i) Direct protection of economic and social rights;
(ii) Indirect protection of economic and social rights, through the interpretation of other rights and;
(iii) Recognition of the economic and social rights as norms within the constitutional order.

(i) Direct protection of economic, social and cultural rights through a bill of rights

By direct protection of economic, social and cultural rights, we mean explicit inclusion of these rights in the bill of rights provisions of a constitution. Within the model of direct protection of economic, social and cultural rights, the form of protection can vary. Liebenberg categorises the protections contained in the South African Constitution into three types: (a) the absolute or basic rights, which are stated in the unequivocal form "everyone has the right to"; (b) qualified rights to access, which contain general rights of access to social goods such as food, water or housing accompanied by a qualifying clause that the State shall take reasonable measures to progressively achieve these rights within available resources; and (c) negative rights which prohibit the State, and possibly others, from interfering with certain rights, such as a prohibition on evictions without proper authorisation and a prohibition on refusal of emergency medical treatment.

The Irish Constitution contains a number of examples of formulations of rights in the first category relating to civil and political rights, but also relating to the right to primary education. Direct protection in the first category has the advantage of clearly

[205] See *loc. cit.* Ben-Bassat and Dahan at p 11.

setting the right concerned as being fundamental, although as we will see in relation to education in an Irish context, courts may still restrictively interpret such rights.[206]

Formulations similar to the second category can be found in the ECHR, where many of the rights set out in the Convention are qualified by clauses referring to restrictions on rights.[207] Analogous formulations also appears in the Irish Constitution in relation to civil and political rights, particularly in Article 40.6, but the qualifying criteria invoke concepts such as "public order and morality", rather than the ECHR reference to being necessary in a democratic society *and* being for certain prescribed public policy considerations. The concept of progressive realisation, which has been developed in the context of economic, social and cultural rights, is not reflected anywhere in the Irish Constitution. These can be seen as examples of where the language in the Irish Constitution is more limited and archaic than the equivalent language of later international human rights treaties. In relation to the third formulation, direct statements of rights found in the Irish Constitution are in Article 40.4.1and 40.5 where the Constitution guarantees that no citizen shall be deprived of his personal liberty save in accordance with law, and that the dwelling of every citizen is inviolable and shall not be entered save in accordance with law.

Probably the most interesting example of where economic, social and cultural rights have found direct constitutional expression is in the post-apartheid South African Bill of Rights. In the South African case, we see a combination of the three formulations discussed above. In relation to housing, for example, the text of Article 26 of the Bill of Rights reads:

> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In relation to these qualification clauses, South Africa has obviously benefited from ideas of progressive achievement of rights, as developed through international human rights law. Other rights are stated in a more absolute formulation. For example, Article 11 dealing with the right to life states simply, "Everyone has the right to life". Similarly, Article 28 dealing with children's rights states that every child (defined as any person under the age of 18) has a number of absolute rights, as well as a smaller

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[206] Chapter 5, para. 5.2.2.

[207] For example, Article 8 of the ECHR contains the qualifying clause, "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." Closely equivalent formulations can also be found in Articles 9, 10 and 11 of the ECHR.

number of qualified rights. The Constitution also includes a number of novel features such as the inclusion of environmental rights, and cultural and religious rights alongside the more traditional rights such as the right to property. The approach taken to interpreting this new form of constitution has been most instructive. In the short few years since the enactment of the Constitution, the South African court has developed a rich jurisprudence on these rights and specific forms of judicial remedies to make them effective (see below)

(ii) Indirect protection of economic, social and cultural rights through the interpretation of civil and political rights

By indirect protection, we refer to instances where despite the absence of explicit economic, social and cultural rights in the text of a constitution, courts have succeeded in achieving a level of protection of economic, social and cultural rights by interpreting civil and political rights in an expansive manner. For example, the right to life which is obviously uncontested as a fundamental human right in our Constitution, can be interpreted to mean much more than the negative right not to be unlawfully killed by the State, but also to place a positive duty on the State to ensure that people do not starve. The extent to which indirect invocation of civil and political rights can lead to effective protection of economic, social and cultural rights will depend to a great extent on the attitude of the judges charged with interpreting the Constitution.

We should bear in mind that in many common law jurisdictions, and particularly in Ireland and the United States, superior courts regularly engage in significant expansive interpretations of the text of their constitutions. In both jurisdictions this has led to the "discovery" of new rights and constitutional norms that have radically differed from the conception of rights set out by the drafters of the respective constitutions. In Ireland, the doctrine of unenumerated rights under the Irish Constitution is a striking example of judicial discovery of rights.[208] In the United States, Cass Sunstein makes a compelling argument that the US Supreme Court was well on the way to recognising many of the key economic, social and cultural rights in this way prior to the appointment of four judges in the late 1960s and early 1970s which signalled a dramatic reversal of that courts approach to these rights.[209] He argues that the approach a court takes to economic, social and cultural rights is open to contention and challenge within a common law tradition and personnel or politics or both may influence the approach taken.

There is an interesting question here of which rights protected by a court are to be categorised as economic, social and cultural. For instance, the provision of legal aid for the poor is a right that has come to be recognised in many States, including Ireland (albeit at the prompting of the European Court of Human Rights). Those who hold with the dichotomy between enforceable civil and political rights and unenforceable or non-justiciable economic, social and cultural rights might argue that legal aid involves facilitating the exercise of civil and political rights – however in a very real sense it involves the social right to demand a legal service on equal terms. It is a curious feature of the debate around these rights that once a right becomes recognised; it often comes to be considered from the perspective of a civil and political right.

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[208] See chapter 5 below.

[209] Sunstein *loc. cit.* at p 155

The potential for an expansive interpretation of the right to life is particularly interesting. The Indian Supreme Court has, in a number of cases, interpreted this right to require protection of basic social rights, including the right to health,[210] and the right to earn a livelihood.[211] The position of the Indian courts is expressed in the following passage from a decision of the Supreme Court in the case of *Jain v. State of Karnataka*:

> "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself."[212]

This language resonates with the language of the majority of the Irish Constitution Review Group, when it explained its rejection of the proposal to include justiciable economic, social and cultural rights in the Constitution by stating, that should any case of extreme social or economic need arise, the Constitution "appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity."[213] Ultimately, however, the Courts in Ireland and the United States have not gone very far in protecting these rights. If it is accepted that courts will inevitably have to face up to questions of the extent to which the right to life and other civil and political rights should be interpreted in this area, it might be argued that judicial decision-making in an uncertain area of law would be better replaced by democratic enactment of clear constitutional norms in the text of the Constitution itself.

(iii) Recognition of economic, social and cultural rights as norms – the Directive Principles approach

Apart from Ireland, the most prominent example of the inclusion of economic and social rights as directive principles is the Constitution of India, adopted in 1947.[214] At a superficial level there are many similarities between the two Constitutions and the contexts in which they were introduced. In both cases, post-colonial experience inspired a strong commitment to fundamental individual rights which is reflected in the constitutional texts.

However, there are also a number of distinguishing features of the Indian system of Directive Principles. Firstly, it should be borne in mind that while the Indian Constituent Assembly which drew up its Constitution was influenced by the Irish

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[210] See for example *Shaibya Shukla v. State of U.P.*, AIR 1993 Allahabad 171.
[211] *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 S.C.C. 180.
[212] AIR 1992 S.C.C. 1858 at paragraph 10.
[213] Report of the Constitution Review Group at p 236.
[214] In its analysis of the comparison between the Indian Constitution and the Irish Constitution in this area, the IHRC is indebted to the analysis of John O'Dowd, lecturer in law at University College Dublin. Another jurisdiction which has adopted this approach is Nigeria. Lewis and Woods *loc. cit.* quote from the decision of the Nigerian Supreme Court in the case of *Archbishop Anthony Olumbuni v. Attorney general of Lagos State* at p 700, which reflects the thinking of the Indian courts.

1937 Constitution, it was also influenced by the moves during the late 1940s towards a Universal Declaration of Human Rights. The Indian drafters were also influenced by the pressing issues of social need facing the newly independent State as expressed in a resolution of the Indian National Congress of 1931 that political freedom for India must include "real economic freedom of the starving millions." Thirdly, at a more general level, the Indian Constitution has an avowedly revolutionary character, whereas the Irish Constitution of 1937 sought to consolidate Irish independence. Certainly, Prime Minister Nehru expressed a strong commitment to social and economic rights on several occasions, particularly emphasising the crucial role of the protection of these rights in securing the stability of India's new democracy.[215]

Questions about the legal status of the Directive Principles were resolved in India by an amendment of the Indian Constitution in 1971 which ensured that legislation implementing the Directive Principles cannot be invalidated for infringing the fundamental rights provisions. This amendment reflects the efforts of the Indian Supreme Court to integrate the fundamental rights provisions of the Constitution with the Directive Principles. The formulation taken in Article 37 of the Indian Constitution also indicates a more positive emphasis than that contained in the equivalent Article 45 of the Irish Constitution. The Indian text states:

> "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

This duty of the State to apply the Directive Principles has also been interpreted by the Indian courts to be of real significance. The Indian courts have held that, while the Directive Principles are not justiciable in a strict sense, the inclusion of these provisions requires that the courts have some role in monitoring whether the legislature is complying with its legislative duty to fulfil these principles. In particular the Court has interpreted the right to life with reference to the Directive Principles. The Indian invocation of enforceable social and economic rights from their Directive Principles was based on a number of principles:

1. The constitutional imperative to address social and economic rights must be made meaningful;
2. The failure by the executive and legislature to act on the constitutional imperative should not be left without answer;
3. Due to the responsibility imposed on State agencies to meet the Directive Principles, it is repugnant for these agencies to attempt to stifle determination of allegations of violations of these rights on procedural grounds In emphasising the constitutional importance of human dignity (Article 21 in India, presumably Article 40 in Ireland), the court derived core minimums of that right in line with the Directive Principle. The adversarial model, in which the State is defendant, is not fully appropriate

[215] See quote from Justice K.S. Hedge contained in Lewis and Wood *loc. cit.* at pp 657-658.

for public interest litigation where the State should be primarily acting in the public interest.

While there has been limited judicial reference to the Directive Principles in an Irish context, it is remarkable that these rights have not been extended or given greater legal force. As we have indicated above, for constitutions to truly become living documents, life must be breathed into the provisions by continuing judicial interpretation. The neglect of these provisions, even to the extent of not using Article 45 in interpreting the rights contained in Articles 40-44, has meant that this part of our constitution has not been able to adapt and evolve over the intervening decades.[216]

4.4 Legislative models of enforcement of economic, social and cultural rights

In this section we explore the role that legislation and legislative proofing processes can play in protecting economic, social and cultural rights in a practical and feasible way. In particular, we explore the various purposes that legislation implementing socio-economic rights can serve and the key elements that should be contained in a piece of legislation through which the Government seeks to effectively implement a particular socio-economic right. We further explore what role legislative screening processes can play in ensuring that relevant human rights standards around economic and social rights feed into the legislative process.

As we have noted in Chapter 3 the key requirement of international human rights law is that the Government of Ireland should be seeking to effectively implement economic, social and cultural rights by *all appropriate means*. Article 2(1) of the ICESCR requires States to progressively realise the rights recognised in the Covenant by all appropriate means "including particularly the adoption of legislative measures". In its General Comment No. 3 the Committee on Economic, Social and Cultural Rights has stated that in many instances the adoption of legislative measures will be highly desirable, and in certain cases indispensable, for the satisfaction of the States' obligations.[217] However, the Committee further notes that the adoption of legislative measures is by no means exhaustive of the obligations of States parties. States parties should thus be open to the adoption of a wide variety of measures to give effect to the rights recognised in the Covenant and to ensure that the appropriate means of redress and remedies are available for the violation of Covenant rights.

4.4.1 Legislation's role in defining the normative content of economic, social and cultural rights

Liebenberg has identified a number of advantages to using legislation to implement economic, social and cultural rights in the domestic legal order, the first of which is that legislation provides a more precise definition of the scope and content of the rights encountered in international instruments and national constitutions.[218] As we have seen in chapter 3, the Committee on Economic, Social and Cultural Rights, through its general comments, has played an important role in exploring the

[216] See chapter 5, para. 5.4.
[217] CESCR General Comment No. 3, UN doc. E/1991/23.
[218] Liebenberg in Eide, Krause & Rosas *loc. cit.*

normative content of economic, social and cultural rights. One of the key criticisms of economic and social rights has been that they are complex rights that lack precision and determinacy and are therefore not susceptible to legal enforcement. Legislation can play a key role in giving normative content to economic, social and cultural rights at the domestic level.

In particular, legislation can play an important role in defining the minimum core content of a right. As we have also seen in chapter 3, under the ICESCR the State is obliged to provide for the minimum core content of a right immediately, regardless of resource constraints, to ensure that the core value of human dignity is not undermined. In its recent observations on the Disability Act 2005, for example, the IHRC criticised the fact that the Bill failed to define the basic level of services which persons with disabilities are entitled to and to which the State is required to give immediate effect.[219] In defining socio-economic rights in legislation it is important that some explicit statutory expression should be given to the concept of the basic threshold or minimum core content of a right.

Courts tend to be more receptive to the enforcement of concrete and precise legislative rights and duties than broadly framed constitutional norms.[220] One of the primary objections of the Irish courts to the enforcement or even the recognition of economic, social and cultural rights under the Constitution is that the judiciary should not be involved in what they consider to be political questions because they are not democratically elected, and are not accountable to the people for their decisions in the same way that the branches of government are accountable.[221] However, if socio-economic rights are provided for adequately in legislation with clear guidelines on their enforcement, arguments around the separation of powers do not arise and the courts can become engaged in assessing whether a statutory right has been adequately protected, or alternatively whether a statutory duty has been adequately discharged.

Defining economic, social and cultural rights in legislation also helps to unpack the various elements that make up those rights. Greater normative clarity around specific economic, social and cultural rights will raise public awareness of the meaning of such rights. Where a rights holder can see what elements of a socio-economic right they are entitled to or are being denied, this enables greater awareness around what exactly it means to have a right to housing or a right to education for example. The definition of an economic, social and cultural right in legislation should be inclusive and of relevance to the diverse groups of the population. The definition should also be linked with the principle of non-discrimination and should retain the possibility that special temporary measures can be put in place to ensure equality of access to a particular right for a vulnerable group of the population who are particularly disadvantaged in their access to that right.

In summary, the definition of a socio-economic right in national law requires the legislature to address a number of questions including: defining the minimum core content of a right; defining the various elements that make up that right; applying the non-discrimination standard; and making some provision for special temporary

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[219] IHRC, *Observations on the Disability Bill 2004*, November 2004 www.ihrc.ie .
[220] Liebenberg in Eide, Krause and Rosas *loc. cit.* at p 80.
[221] See further chapter 2, para. 2.5.

measures to promote equality of access for groups who are particularly disadvantaged in their access to that right.

4.4.2 Stipulating financial arrangements for the delivery of economic, social and cultural rights

A second advantage of legislation implementing economic, social and cultural rights according to Liebenberg is that legislation can stipulate the financing arrangements for the delivery of rights.[222] The key requirement in this regard is that legislation places Government Ministers under a statutory obligation to ensure that there is a rational and transparent allocation of resources. In allocating resources, Ministers should be put under a statutory obligation to ensure the minimum core content of a right is immediately provided for, and to incrementally provide for the realisation of socio-economic rights within a reasonable time. An examination of Irish legislation dealing with socio-economic rights in such areas as housing, education and health reveals that, in general, financing arrangements for the delivery of the statutory entitlements defined in these pieces of legislation remains at the discretion of the relevant Minister who is required to obtain the consent of the Minister for Finance for any expenses incurred in the operation of the legislation. There tends not to be an obligation on the relevant Minister or the Minister for Finance to ensure that the minimum core content of a right is provided for immediately and in addition that the resources allocated will be adequate to progressively realise a particular right.

An example of how financial arrangements for the protection of rights can be introduced in Irish legislation can be seen in the recent Disability Act 2005. In its *Observations on the Disability Bill 2004*, the IHRC stated that international human rights law holds that resources earmarked for protecting human rights cannot be simply provided and withdrawn at the discretion of the executive. Rather, the allocation of resources must be clearly aimed at the progressive realisation of rights programmatically and over the longer term to ensure the progressive realisation of rights and to ensure that basic levels for the protection of economic, social and cultural rights are achieved.[223] The IHRC expressed concern that the Disability Bill retained general qualifications that the provision of services should be dependent on resources and the term "as far as practicable" appeared throughout the Bill. The IHRC further criticised the fact that the Bill did not place any obligation on the Minister for Finance to have regard to the provisions of the Bill in allocating the funds to which the various Ministers responsible for implementing the Act would have available to them. The IHRC recommended that the Bill should make some provision that the Minister for Finance must take into account the requirements of the Bill when allocating resources to all of the relevant Departments.[224] The recommendations of the IHRC in this regard are not reflected in the Disability Act 2005.

4.4.3 Locating accountability for the delivery of economic, social and cultural rights

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[222] *Ibid*. at p 79.
[223] IHRC, *Observations on the Disability Bill 2004,* p 20.
[224] *Ibid*. pp 22-22.

A further advantage of having a legislative framework implementing economic, social and cultural rights identified by Liebenberg is that legislation can prescribe the exact responsibilities and functions of the different levels of government at the national and local levels in giving effect to the rights.[225] In practice accountability is often not clearly defined between different levels of government and different government departments. It is crucial that the different levels of government tasked with varying levels of responsibility for delivering a particular right or service should be under a statutory obligation to progressively deliver these rights in a reasonable and transparent manner. Legislation can also create a coherent and co-ordinated institutional framework for the delivery of socio-economic rights. A co-ordinated institutional framework is required to measure the level of access to and need for a particular right or service on an ongoing basis. In addition, a co-ordinated institutional framework should be required to demonstrate by means of indicators and targets that reasonable progress is being made towards the realisation of a particular right. In short, clear legislation setting out rights and responsibilities allows inequities to be identified and rectified and improves democratic accountability of public office holders.

4.4.4 Role of legislation in preventing violations of economic, social and cultural rights

An adequate legislative framework can prevent and prohibit violations of rights by both public officials and private parties such as landlords, employers, corporations and banks. Legislation could, for example, place a Government Minister or a relevant statutory body under a statutory obligation not to pursue by act or omission a policy or practice which deliberately contravenes or ignores the State's constitutional obligations and its international legal obligations under the ICESCR and the Revised European Social Charter. In particular, legislation could prohibit the relevant Minister from the adoption of any retrogressive measures that are incompatible with the minimum core obligations of a right such as the repeal of legislation that is essential for the continued enjoyment of a minimum level of protection or the adoption of legislation which is manifestly incompatible with ensuring the minimum core obligation is met. In addition, the legislation could prohibit the relevant Minister and other responsible bodies from failing to take appropriate steps towards the full realisation of the right in question and from failing to take all necessary measures to safeguard persons from infringements by third parties.

4.4.5 Providing remedies/redress for violations of economic, social and cultural rights

Finally, Liebenberg points out that legislation can provide concrete remedies to redress violations of socio-economic rights. Legislation may provide for administrative remedies which can be cheaper, speedier and more accessible than formal court proceedings. The key standard in relation to administrative remedies is that they should provide an effective remedy for a violation of rights. The Committee on Economic, Social and Cultural Rights has made it clear that in many cases administrative remedies will be rendered ineffective if they are not reinforced or complemented by judicial remedies. The onus is on the State to demonstrate that the

[225] Liebenberg in Eide, Krause and Rosas at p 79.

administrative remedies are effective, particularly where such remedies are not backed up with judicial enforcement.

A recent example in the Irish context of where legislation puts in place an administrative system to provide a remedy for a violation of rights is contained in the Disability Act 2005. In its Observations on the Disability Bill 2004, the IHRC criticised the administrative remedy system stating that a number of gaps could be identified. In particular, (i) there was no clear means to challenge the content of an individualised assessment of need; (ii) in determining a complaint in relation to an assessment, the complaints officer is required to have regard to issues of resources or practicality; service providers are not strictly bound by the findings of complaints officers; (iii) the appeals system contained in the legislation restricts access to an appeal to a limited number of grounds; and (iv) the Bill provides that no appeal shall lie to a court from a decision of an appeals officer save on a point of law. The IHRC stated that any proposals to exclude judicial remedies must be accompanied by evidence that proposed administrative mechanisms will provide effective alternative remedies and concluded that many aspects of the administrative system do not meet those standards of effectiveness.

4.4.6 Economic, social and cultural rights and the legislative process

Structures which place government ministers and parliaments under statutory duties to ensure that a legislative proposal is in full compliance with international human rights treaties are a potentially important means of ensuring new legislation complies with States' obligations in relation to economic, social and cultural rights. In this section we look at recent developments in the United Kingdom designed to contribute to the compliance of legislation with human rights standards.

Human rights proofing of legislation in the United Kingdom

Since the incorporation of the ECHR in the United Kingdom, section 19 of the Human Rights Act 1998 requires Ministers in charge of a Bill in either House of Parliament to make a statement to the effect that, in his or her view, the provisions of the Bill are compatible with Convention rights; or to make a statement to the effect that although he or she is unable to make a statement of compatibility, the government nonetheless wishes the House to proceed with the Bill. In Scotland the obligation to ensure legislation is ECHR compliant is more stringent, with section 29(2)(d) of the Scotland Act 1998 providing that an Act of the Scottish Parliament must not be incompatible with any ECHR rights of individuals. In addition, section 57(2) of the Scotland Act provides that "A member of the Scottish Executive has no power to make subordinate legislation or to do any other act, so far as the legislation or other act is incompatible with any of the Convention rights".

The UK Joint Committee on Human Rights has observed that the section 19 process contained in the Human Rights Act 1998 could operate equally effectively in relation to the economic, social and cultural rights obligations contained in the ICESCR.[226] The Committee expressed the view that an obligation on government to address compliance with these rights at an early stage, before the introduction of a Bill to Parliament, would significantly enhance protection of the Covenant rights and would

[226] See fn. 45 above.

assist Parliament and the JCHR in its scrutiny of legislation. The Committee proposed that one means of introducing this mechanism would be for the Government to decide as a matter of policy to include in the explanatory notes published with a Bill on its introduction to Parliament, a statement as to whether the Bill is considered to comply with the ICESCR rights, and a short explanation, where appropriate, of why this is considered to be the case. This is similar to the explanation of compliance with ECHR rights which is currently as a matter of practice included in the explanatory notes.

The role of the parliamentary committee system in the United Kingdom

The creation of a parliamentary committee with a specific mandate to scrutinise new legislative proposals to ensure compliance with international human rights treaties is a further important means of ensuring economic, social and cultural rights are considered at an early stage during the legislative process. In the United Kingdom, for example, the JCHR has been appointed by the House of Lords and House of Commons to consider matters relating to human rights in the United Kingdom. The terms of reference of the Committee are broadly defined as follows:

> "To consider:
> (a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);
> (b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and
> (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order 73 (Joint Committee on Statutory Instruments)."

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time, to adjourn from place to place, to appoint specialist advisors and to make reports to both Houses. Given its broad terms of reference, the Committee decided to prioritise legislative scrutiny and to consider in a comprehensive way the compatibility of all new legislation with the ECHR and with other human rights instruments to which the UK is a party. The JCHR has regularly made reference to the provisions of the ICESCR in its scrutiny of new legislative proposals. For example, the Committee examined a Homelessness Bill in its first report of 2001. In that instance the Committee examined a clause that proposed to prevent a local housing authority from allocating housing accommodation to certain classes of person, including categories of immigrants and persons found guilty of unacceptable behaviour. The Committee raised concerns that, along with Article 3 and 8 of the ECHR, in certain circumstances the effect of this proposal would be incompatible with Article 11(1) of the ICESCR. The Committee has also published a report examining the UK's compliance with the provisions of the ICESCR stating that greater public discussion on the implications of economic, social and cultural rights guarantees under the Covenant and other international treaties, and the implications of these rights for UK law and policy was needed.

4.4.7 Analysis

The role of legislation in effectively enforcing economic, social and cultural rights at a domestic level has not received the same attention in the literature in this area as the more contested issues of the role of courts and constitutions. However, McKeever and Ní Aoláin have observed that "a model of judicial enforcement only of economic and social rights at the national level can operate as a limited means to bring about successful rights enjoyment in this sector. More particularly, a judicial enforcement model on its own may not address underlying structural causes that give rise to economic, social and cultural rights violations in the first place".[227]

A sound legislative framework giving effect to economic, social and cultural rights and providing effective remedies where these rights have been violated has many advantages. A legislative framework is perhaps the most accessible and direct way of enforcing socio-economic rights where effective enforcement and complaints mechanisms are put in place in legislation. Providing for socio-economic rights through legislation can circumvent the separation of powers argument against enforceable rights and the argument that economic, social and cultural rights are too vague and imprecise to give rise to enforceable legal obligations. However, it is clear that a number of key elements need to be included in legislation to ensure that there is effective protection and effective redress mechanisms in place. Legislation that does not contain all of these key elements may fail to guarantee economic, social and cultural rights as directly enforceable subjective rights. As we have seen in the case of the Disability Act 2005 legislation is often used to limit access to the courts and to provide as alternatives multi-layered administrative remedies that may not be adequate and accessible, affordable and timely.

Putting in place comprehensive human rights proofing of legislation and an effective parliamentary committee with adequate resources, powers and expertise will enhance the capacity of parliament to promote fundamental rights and inclusion. These mechanisms may also give more visibility to the concerns of particularly vulnerable groups. If these mechanisms are taken seriously they have enormous potential to raise the level of debate around human rights and in particular economic, social and cultural rights, and to further open up questions around how we allocate available resources and whether this is in line with our domestic and international human rights obligations.

4.5 Court remedies

In this section we propose to discuss the various types of court orders that can be made to enforce and protect economic, social and cultural rights. In respect of each type of order we discuss the nature of the order; whether such orders have existing or analogous precedent in Irish law; and the strengths and weaknesses of this type of order. While the IHRC strongly believes that creative thinking is needed around the use of remedies and procedures from the full range of legal systems, we have concentrated here on an analysis of common law legal systems and in particular the jurisdictions of the United States, India, South Africa and the United Kingdom.

[227] McKeever & Ní Aoláin *loc. cit.* at p 159.

4.5.1 Declaratory Orders

A declaratory order involves the Court declaring that a particular piece of legislation or a policy is incompatible with the State's constitutional obligations. Having made a declaration that the State is failing to comply with its constitutional obligations, the Court essentially hands the initiative back to the Executive to take the necessary action to ensure that its laws and policies comply with the declaratory order. In the *Grootboom*[228] case before the South African Constitutional Court, for example, the Constitutional Court reversed a High Court order that immediate shelter or housing be provided to the applicants upon demand on the basis that this was not provided for in the relevant legislation. Rather, the Constitutional Court ordered that the housing programme in question fell short of the obligations imposed on the State by the relevant legislation and the Constitution, in that it failed to provide any form of short term relief for those desperately in need of access to housing. In reaching this conclusion the Court applied the reasonable review test stating:

> "The measures taken must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The programme must be capable of facilitating the realisation of the right. The precise contours of the measures to be adopted are primarily a matter for the legislature and the executive. They must however, be reasonable. In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium, and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable."[229]

In a declaratory order the Court stated that the housing programme must include reasonable measures to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations.

In the Irish context the superior courts have made declaratory orders in a number of cases involving economic and social rights. In the case of *O'Donoghue v Minister for Health*[230] O'Hanlon J outlined his view of the role of declaratory relief stating:

> "In a case like the present one it should normally be sufficient to grant declaratory relief in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful applicant. I therefore propose to make no further order at the present time, save in relation to the costs of the proceedings, but I reserve liberty to the applicant to

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[228] *Government of the Republic of South Africa & Ors v Grootboom & Ors* [2000] ICHRL 72 (4 October 2000).
[229] *Ibid.* at para. 41.
[230] [1996] 2 IR 20.

> apply to the Court again in the future should it become necessary to do so for further relief by way of mandamus or otherwise as may come within the scope of the present proceedings. A general liberty to apply will also be given to all the parties to the proceedings".

Therefore, in this case the Court appears to have retained a supervisory role with the threat of a mandatory injunction against the State should it fail to comply with the declaratory order. In some cases, however, the Irish courts have demonstrated considerable restraint even in making a declaratory order and have simply adjourned cases without making any order with liberty to re-enter to give the Executive time to take action to remedy the situation for the individual applicant. The courts have adopted this restrained approach even in cases where they have recognised that the constitutional rights of the applicants were not being adequately provided for by the State.[231]

A declaratory order is an important mechanism which is available to courts where they find the Executive is failing to comply with its constitutional or statutory obligations. Courts appear to be more comfortable and more willing to use orders of this type to allow the Executive to exercise its discretion in relation to the exact measures and policies that need to be put in place. However, the implementation of declaratory orders depends on the Executive, which may not always act in a prompt manner. Therefore a declaratory order may not provide immediate relief to the applicants. It could be argued that this form of order provides a limited remedy, particularly where a further delay by the State in complying with their obligations may have a detrimental effect on the applicant. In addition, declaratory orders have the disadvantage that they may require the applicants to approach the courts a second time to ensure enforcement in cases where the State fails to act.

4.5.2 Mandamus

Where a court makes a mandatory order (*mandamus*) it directly requires the Government to take specific steps, adopt specific programmes or even enact or repeal legislation. The imposition of mandatory orders in relation to economic, social and cultural rights by courts remains perhaps the most controversial type of court order in this area. In the *Treatment Action Campaign*[232] case in South Africa, the Constitutional Court found that the restriction on the availability of antiretroviral drugs in the public health sector was unconstitutional. By way of remedy the Court made a mandatory order requiring the Government to take the following specific steps:

> 1. To remove the restrictions that prevent antiretroviral drugs from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals;

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[231] *FN v. Minister for Education* [1995] 1 IR 409; *GL v. Minister for Justice* Unreported High Court, 24 March 1995;

[232] *Treatment Action Campaign v. Minister for Health & Ors*. [2002] ZACC 14 (15th July 2002).

2. To permit and facilitate the use of the antiretroviral drugs in the public health sector;
3. To make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of antiretroviral drugs to reduce the risk of mother-to-child transmission of HIV;
4. To take reasonable measures to extend testing and counselling at hospitals and clinics throughout the public health sector in order to facilitate and expedite the use of the antiretroviral drugs.[233]

This case is of particular interest because the judgment considered whether or not it was appropriate for the Court to make a mandatory order in light of the separation of powers doctrine. The Government argued that the Court was only competent to issue a declaratory order, leaving the Government to pay heed to the declaration made and to adapt its policies in so far as this may be necessary to bring them in conformity with the court's judgment. The Court disagreed with the Government, stating that there was no merit in the distinction the Government was seeking to draw between declaratory and mandatory orders. The Court stated that even simple declaratory orders against government or organs of the State can affect their policy and may well have budgetary implications. Moreover, the Court observed that the Government is constitutionally bound to give effect to declaratory orders whether or not they affect its policy and have to find the resources to do so.

The question of the power of the courts to grant mandatory orders in cases involving economic and social rights has also arisen in the Irish context. In the case of *TD v. Minister for Education*[234] the High Court granted a mandatory injunction requiring the Minister to complete the development of suitable accommodation for a child with behavioural difficulties within a specific time period. In granting this order the High Court pointed out that it had already granted declaratory relief concerning the obligations of the State towards minors in a similar situation. In addition, the Court pointed out that if a declaration is to be of any benefit to the minors in whose favour it was made, the necessary steps consequent upon it must be taken expeditiously. The Court further pointed to the profoundly negative impact of failure to provide them with the appropriate facilities on the lives of the children in question. In this case the High Court concluded that in light of the ongoing delays in the provision of appropriate accommodation for these children and the failure of the executive to meet its self imposed deadlines in this regard except in instances where a Court injunction had been granted against the State, it was compelled to make a mandatory order to uphold the constitutional rights of the applicant. In the same case, the Supreme Court took a different view and indicated that, in accordance with the doctrine of the separation of powers, mandatory injunctions vindicating constitutional rights can only be obtained against the executive in the rarest of circumstances. The Court defined such circumstances as being restricted to where an organ of the State had shown a "clear disregard" for its constitutional obligations, described by Murray J as "a

[233] *Ibid.* at para. 63.
[234] [2000] 2 ILRM 321. See also chapter 5 below.

conscious and deliberate decision by the organ of the State to act in breach of its constitutional obligations to other parties accompanied by bad faith or recklessness."

The IHRC agrees that, with appropriate consideration of the importance of the separation of powers, courts should only impose directive orders on the executive in limited circumstances. However, as has been indicated by the Irish courts, such circumstances will sometimes arise. What is required then is a principled and transparent basis on which to determine the circumstances in which such orders should be imposed. In this regard, the first criteria should be that fundamental rights should be engaged before such orders can be contemplated.

4.5.3 Supervisory or structural orders

This type of order is used by the courts to require the State to undertake structural reforms over a period of time. The courts may even charge non-judicial bodies with supervision of the order as is the case in South Africa where the South African Human Rights Commission has been given a supervisory role in monitoring whether the State is taking adequate steps to comply with a number of court orders. Another example of this type of order is the case-law around desegregation of schools in the US. For example, in the leading case of *Brown v. Board of Education*[235] the US Supreme Court held that lower courts should have the power to determine how much time was necessary for the school boards to achieve full compliance with its decision and should also be able to consider the adequacy of any plan proposed by the school boards "to effectuate a transition to a racially non-discriminatory school system".

This type of supervisory remedy is also common in India. In the case of *Bandhua Mukti Morcha v. Union of India*[236] the court declared that the non-enforcement of welfare legislation like the Minimum Wages Act 1948 and the Bonded Labour (Abolition) Act 1976 was tantamount to a "denial of the right to live with human dignity enshrined under Article 21 of the Constitution". However, the Court did not stop with the declaration of the law but issued a series of directions for compliance by state authorities and proceeded to monitor the implementation of these directions.

As noted earlier, in some cases the Irish courts also appear to have undertaken a form of supervisory role, both in cases where they have refused to grant a declaratory order but have adjourned the proceedings with leave to reappear, and in proceeding where they have granted mandatory orders only after initially granting declaratory orders which the Government had failed to fulfil.

4.5.4 "Reading in" excluded groups

A further remedy available to some courts is the "reading in" of a specific group or word to correct a defect in legislation. An example of this type of remedy can be seen in the South African case of *Khosa v. Minister for Social Development*[237] which concerned social welfare legislation that did not provide for the allocation of social grants to permanent non-citizen residents regardless of their period of residence in the

[235] 347 U.S. 483 (1954) (USSC).
[236] (1984) 2 SCR 67 (AIR 1984 Sc 802).
[237] 2004 (6) SA 505 (CC).

country. The Court found that this was a discriminatory and unfair exclusion that was not justifiable under the Constitution. In relation to the remedy to be awarded the Court observed that remedying the defect with the necessary precision would require the reading in of the words "permanent residents" into the legislation, rather than striking down the impugned provisions. In taking this decision the Court observed that there is every reason not to delay payment of social grants any further to the applicants and those similarly situated. The Court stated that, even if the Court were to grant interim relief to the applicants during the period of suspension, other permanent residents would be barred from applying until the end of the period of suspension. The Court concluded that this form of remedy was the best means to provide immediate relief to the applicants and those in a similar situation to the applicants.

4.5.5 Compensatory damages

Damages are generally available where there has been a breach of a constitutional or statutory duty and consequential loss and damage results, usually estimated by an assessment of any entitlement to damages had the person proceeded by way of a civil action. This type of remedy is commutative in nature and is directed at the position of the plaintiff only and does not generally have any wider impact on the systemic failures which may have led to the violation.

4.5.6 Reparation in kind or rehabilitation

This type of order may be considered when it is inappropriate and impractical to make cash awards to the victims for the injury they have suffered. The State is ordered instead to provide appropriate remedial services for the benefit of the victimised class as a whole for example requiring the State to provide remedial education to the victims of past racial discrimination in the school system. A leading example is the US case of *Milliken v. Bradley (II)*, a case concerning the power of District Courts to make orders compelling local authorities to pursue the racial desegregation of schools.[238] This type of remedy may be combined with supervisory orders and may direct appropriate remedial services to be provided to a particular class of victims.[239]

4.5.7 Social action litigation and procedural innovations in the Indian courts

The development of social action litigation in India is closely linked to the idea of establishing economic, social and cultural rights as a means of protecting civil and political rights. By improving access to courts, the objective is to deepen citizenship and democratic participation. In the process it is hoped that litigation may contribute to meeting the constitutional commitment to address social and economic inequalities and injustices, as has been stated by Bhagwati, J:

> "The task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs

[238] 433 US 267.

[239] See also Indian case-law on rehabilitation, summarised in Lewis and Woods *loc. cit.* at pp 673-677.

> to the legislature and the executive, but mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multi-dimensional strategies, including public interest litigation that these social and economic programmes can be made effective …. Courts are not meant only for the rich and the well-to-do, for the landlord and gentry…".[240]

A number of interesting procedural innovations have taken place in the Indian courts including the development of the idea of 'epistolary jurisdiction' whereby, in cases of alleged breaches of fundamental rights, letters from citizens to the courts could be converted to writs. This innovation has greatly opened access to the courts and fundamentally altered the law of standing, in that the bringers of a writ need not be the alleged victim of a violation. A further significant innovation is the collection of social data as well as legal evidence by court-appointed commissions of citizens, including social scientists and university research institutions. This innovation has created a new inquisitorial role for the courts, which may prove particularly useful in cases concerning economic, social and cultural rights.

4.6 Administrative tribunals and quasi-judicial structures

Specialised tribunals, ombudsmen and human rights commissions possess various means of adjudicating and enforcing rights, including reporting and monitoring structures. These quasi-judicial mechanisms have a potentially significant role to play in this area.

National human rights commissions

There are an increasing number of national human rights commissions being established worldwide with a variety of mandates and powers. In some instances national human rights institutions have been vested with a specific mandate in relation to monitoring the implementation of economic, social and cultural rights. For example, section 184(3) of the Constitution of South Africa empowers the South African Human Rights Commissions (SAHRC) to:

> "require relevant organs of the state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights, concerning housing, health care, food, water, social security, education and the environment".

The SAHRC, in discharging its constitutional mandate, has in the main focussed on requiring the organs of state to report to the Commission on the measures that they have taken concerning the various economic, social and cultural rights they are mandated to consider. To date the SAHRC has published five economic, social and cultural rights reports covering the years from 1997 to 2003 and looking at each of the specific rights. It has developed protocols and questionnaires as monitoring tools for each of the main economic, social and cultural rights. Where State organs have failed

[240] per Bhagwati J in *People's Union for Democratic Rights v. Union of India*, quoted in Lewis and Woods *loc. cit.* at p 663.

to provide the SAHRC with information in a timely and accurate manner the SAHRC has issued subpoenas requiring the organs of state to provide them with the necessary information and has even threatened to institute criminal proceedings in accordance with section 18(a) and (i) of the Human Rights Commission Act of 1994 for continuing delays.

The SAHRC has also taken a role in monitoring the implementation of the State's statutory duties. In the *Grootboom* case discussed above, for example, the SAHRC intervened as *amicus curiae* (friend of the court) and indicated it was prepared to monitor and report on the compliance by the State with its obligations under domestic law in relation to the provision of housing. The Court stated that in the circumstances the SAHRC should monitor, and if necessary, report in terms of these powers on the efforts made by the state to comply with the relevant legislation in accordance with the Court's judgment.

The Indian National Human Rights Commission has also been granted an innovative role to monitor court orders by the Supreme Court of India. In the case of *Dr. Upendra Baxi et. al. (II) v. State of U.P.*[241] the Court issued a detailed set of directions in relation to the running of a Government protective home for girls following a petition that the living conditions in the home were abominable and that they were being denied their right to live with basic human dignity. In 1997 the Supreme Court referred the supervision of the protective home to the Commission to monitor the home's compliance with the directions of the Court.

4.7 Benchmarking and indicators

Finally, we look at instruments for measuring the progressive achievement of economic, social and cultural rights. One of the most prominent myths about enforceable economic, social and cultural rights is that, of necessity, legal guarantees of rights will require a significant increase in resource allocation to these areas. However, the objective behind making economic, social and cultural rights enforceable is to put the rights and needs of the individual at the centre of the design and strategy of service provision. This requires a change of focus or rationale for service provision which raises the question of what is the existing rationale and strategy behind our provision of services. There is some evidence to suggest that in some cases, systems are currently designed around the administrative needs of the systems themselves. In other cases, there is little evidence of any underpinning clear strategy. In the same vein, it can be argued that a system of service provision based clearly on the need and rights of the individual will be *more* efficient at achieving these objectives. An important dimension of any system of monitoring progressive achievement of economic, social and cultural rights is proper planning and design of systems of measurement. As Katarina Tomacevski has stated, monitoring necessitates a conceptual framework to define what to monitor before one can proceed to discuss how to monitor it and move to the design of indicators.[242]

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[241] AIR (1986) 4 S.C.C. 106.

[242] See also quote from Tomacevski in Eide, Krause and Rosas *loc. cit.* at p 545.

4.7.1 Human Rights Based Approach projects (HRBA) at the UN level

A World Health Organisation (WHO) project designed to address the specific issues of anti-poverty strategies provides a useful example of how a system of indicators can be designed and put into effect.[243] The process begins with a stock-taking of the government's human rights obligations under international treaties and the Constitution. The WHO goes on to describe the benefits of making human rights central to policy making as follows:

- Rooting strategy in an international legal framework strengthens the centrality of the state in design, implementation and oversight of strategies;
- As human rights obligations speak in the language of progressive achievement, an approach based on human rights standards is an effective mechanism through which a State can gradually achieve its longer-term obligations;
- Any strategy aimed at addressing social exclusion and poverty depends upon the empowerment of the poor and human rights are effective tools of such empowerment;
- Human rights allow strategies to focus on particularly vulnerable groups and are not restricted to addressing overall average improvements;
- Human rights recognise the resource constraints facing countries through the principle of progressive realisation.

The WHO publication also describes which indicators should be used. The WHO divides the indicators into three categories dealing with structural issues, process issues and outcome issues. While again these indicators are presented in the context of health, they can easily be adapted for other areas of economic, social and cultural rights.

Structural indicators:

- Have legislation, regulations or codes of conduct been introduced to address discrimination and damaging practices?
- Have internal oversight mechanisms been put in place?
- Have plans, policies or strategies been put in place?
- Can the poor and vulnerable participate effectively in decision-making, and can they have a role in monitoring and evaluating?
- Has information about people's rights been disseminated?

<u>Process Indicators;</u>

- Have changes occurred in how staff are recruited and trained?
- Are excluded groups using services more frequently?
- What additional preventative programmes are in place?
- What proportion of the population has access to basic services?
- To what extent have basic services improved?

<u>Outcome indicators</u>

- The importance of economic indicators

[243] See WHO *Human Rights, Health and Poverty Reduction Strategies*, UN document WHO/THE/HDP/05.1 at p 12.

- The model of indicators required will depend on the model of poverty used.[244]
- Who should be charged with developing these?

The WHO also states that benchmarks should not be set unrealistically high, but also should not be so low as to allow complacency. "They should present a challenge that with sufficient levels of commitment, diligence and resources could be achievable."[245]

[244] Combat Poverty Agency has conducted work on indicators with the New Policy Institute in London.

[245] *Ibid.* at p 42. In an Irish context the Combat Poverty Agency has referred to the need to have benchmarks SMART (stretching, measurable, agreed, recorded, and time-limited) and EASY (economic, appropriate, simple, and updated yearly).

Chapter 5 -The protection of economic, social and cultural rights in Ireland

In this chapter we consider the main models of enforcement discussed in chapter 4 in an Irish context and look at how each of the various levels of protection operate in Ireland. First we examine what status international human rights law has in Irish domestic law. Secondly, we examine the manner in which economic, social and cultural rights are protected in the Irish Constitution. In particular, we critically examine the extent to which these rights are provided effective protection. Finally, we examine the issues of legislative and judicial protection of economic and social rights in Ireland, including the approach taken by the Irish courts.

5.1 Status of international law in Irish law

Article 29.5 of the Irish Constitution states that every international agreement to which the State becomes a party, other than purely technical agreements "shall be laid before Dáil Eireann."[246] Article 29.6 goes on to state that "No international agreement shall be part of the domestic law save as may be determined by the Oireachtas". Read with Article 15.2.1 of the Constitution, which states that the sole and exclusive power of making laws is vested in the Oireachtas, Article 29.6 excludes international treaties from having the force of law at the domestic level unless they have been transposed into legislation by the Irish parliament. These provisions of the Constitution establish the 'dualist' nature of the Irish legal order. In relation to the various international treaties protecting economic, social and cultural rights, successive Governments have generally not exercised the procedure of incorporation, prescribed by Article 29.6, meaning that these treaties have had little penetration into our legal system.

Over the years a number of litigants had sought to rely on this latter provision of the Constitution to bolster the argument that international human rights treaties to which the State had become a party created subjective individual rights for Irish citizens. However, the courts, relying on Articles 29.6 and 15.2.1, have consistently rejected such arguments. In the earliest case on this question, *Re O'Laighleis*,[247] the applicant sought to challenge the internment provisions of the Offences Against the State (Amendment) Act, 1940 on the grounds that the legislation, *inter alia*, violated Articles 5 and 6 of the ECHR. The Court held that the Constitution created an "insuperable obstacle" to importing the provisions of the ECHR into domestic law until the Oireachtas had so legislated and that the courts could not give effect to the ECHR if it is contrary to domestic law or if it grants rights or imposes obligations additional to those of domestic law.[248] The net result of the Court's holding in this case is that even where the State is a party to an international agreement, such an

[246] For treaties which involve a charge upon public funds, there is an additional requirement that the Dáil must approve the treaty.
[247] [1960] IR 93.
[248] *Ibid* at pp 124-125.

agreement will not confer rights on individuals in Ireland until such time as the Oireachtas has legislated to create such rights.[249]

In *Kavanagh v Governor of Mountjoy Prison*,[250] the applicant sought to challenge his conviction in the Special Criminal Court on the basis that, *inter alia*, the UN Human Rights Committee had held that trial in such circumstances constituted a violation of the applicant's right to equal treatment under the ICCPR, a treaty to which the State was a party. The Supreme Court, in rejecting the applicants claim, held that the Irish Constitution "establishes an unmistakable distinction between domestic and international law" and that where the Government wished the terms of an international agreement to have the force of domestic law it could "ask the Oireachtas to pass the necessary legislation". In the absence of such legislation, international agreements to which the State was a party did not create subjective individual rights for people within the States jurisdiction.[251]

Against this line of reasoning, there is some authority for the proposition that unincorporated international agreements to which the State is a party can have an indirect legal effect within the domestic legal order through the courts applying a presumption of compatibility of domestic legislation with international obligations.[252] However, it must be recognised that the stance established in the *O'Laighleis* case is the predominant position within the Irish legal order. This is particularly so given the forceful restatement of the *O'Laighleis* orthodoxy by Kearns J in the High Court case of *Horgan v An Taoiseach*.[253] Thus, the position at present is that the various international human rights treaties to which the State is a party have no force, as such, within the domestic legal order until such time as the Oireachtas transposes them into the domestic legal order, whether by way of legislation or a proposed constitutional amendment. The exception, of course, is the legislation on economic, social and cultural rights emanating from the European Union which has direct effect in many cases.

This Irish position conflicts with the clear statement of the UN treaty monitoring bodies on the nature of States parties' obligations.[254] Nevertheless, in its reports to the various UN treaty-monitoring bodies the Irish Government has claimed that the dualist nature of the Irish legal system constitutes an *obstacle* to incorporating any international human rights treaty except where domestic law already conforms to the relevant standards.[255] In the course of its examination of Ireland's second national report under the ICESCR, the UN Committee on Economic, Social and Cultural Rights rejected the Government's position on incorporation of the Covenant, stating:

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[249] See Charles Lysaght, *The Status of International Agreements in Irish Domestic Law* (1994) 12 *Irish Law Times* 171.
[250] [2002] 3 IR 97.
[251] *Ibid* at p 129.
[252] See *O'Domhnaill v Merrick* [1984] IR 141.
[253] [2003] 2 IR 468.
[254] See chapter 4.2 above.
[255] Ireland's second periodic report under the ICCPR, UN Doc. CCPR/C/IRL/98/2 at paras. 13-17; Ireland's second periodic report under the ICESCR, UN Doc. E/1990/6/Add.29.

> "12. The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts. …
>
> 23. Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (see paragraph 22 of the Committee's 1999 concluding observations) and strongly recommends that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as in other domestic legislation. The Committee points out that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order. In this respect, the Committee would like to draw the attention of the State party to its General Comment No. 9 on the domestic application of the Covenant."[256]

In the view of the IHRC, the Government's position is based on a mistaken interpretation of the *facilitative* nature of Article 29.6 and is undermined by the fact that other countries with dualist legal systems have incorporated international human rights treaties into their domestic law, either by legislation or by constitutional initiative.[257] This position is also undermined by the fact that Ireland has given direct legal effect to a number of international treaties, most notably in the case of the ECHR which was given legal effect in Ireland by the European Convention of Human Rights Act 2003. It has been argued that the case of the ECHR is somehow distinguishable, in that Ireland was already in compliance with this treaty before giving it legal effect at the domestic level, although this claim is open to question. Ireland has also given direct effect in domestic law to a number of other international

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[256] UN document CESCR E/C.12/1/Add.77, adopted at 5th June 2002. Other examples of where the UN treaty monitoring system had rejected the Irish position on incorporation of international treaties include the Concluding Observations of the UN Committee one the Rights of the Child in respect of Ireland's first report under the ICRC, UN document CRC/C/15/Add.85, adopted on 4th February 1998; and the Concluding Observations of the Committee on the Elimination of Racial Discrimination in its examination of Ireland first national report under ICERD, Concluding Observations of the CERD Committee, UN Document CERD/C/IRL/CO/2, adopted 10th March 2005.

[257] The IHRC raised a number of objections to the Government's resistance to the incorporation of international human rights treaties in its recent submission to the Committee on the Elimination of Racial Discrimination (the CERD Committee) in respect of Ireland's first national report under that treaty, *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Racial Discrimination in respect of Ireland's First National Report under CERD*, March 2005 at pp 12-18.

treaties addressing important human rights issues.[258] In other cases, the provisions of international treaties have been given effect at the domestic level by statutory enactments which address the obligations of the treaty in question.[259]

5.2 Protection of economic, social and cultural rights in the Irish Constitution

As we have seen from chapter 4.3 above, national constitutions can play an extremely important role in protecting economic and social rights and it is not uncommon for States to have wide-ranging constitutional protections of these rights. The key question examined in this section is the extent to which the Irish Constitution provides for the effective protection of economic, social and cultural rights. Similar to constitutions in other jurisdictions, the protection afforded to economic, social and cultural rights in the Irish Constitution falls into the following three main categories:

(i) Direct protection of economic, social and cultural rights through express inclusion of these rights;
(ii) Indirect protection of economic, social and cultural rights through the interpretation of other rights; and
(iii) Recognition of the economic, social and cultural rights as norms within the constitutional order, for example as directive principles of social policy.

In carrying out this examination of the Irish Constitution the IHRC is mindful that the All-Party Oireachtas Committee on the Constitution, in its ninth progress report dealing with private property, flagged the question of the inclusion of justiciable socio-economic rights in the Constitution. The Committee did so as a result of the numerous submissions it received on this issue, particularly around the right to adequate housing and shelter, and stated that the question of socio-economic rights is one that merits extensive debate as it bears upon the fundamental constitutional issue of the separation of powers. The Committee went on to state that it would discuss the question of whether the Constitution ought to include justiciable socio-economic rights in a later report. We understand that the Committee will reconsider its future programme of work after the publication of its Tenth Progress Report (on the Family), expected in January 2006.

5.2.1 Background to the Constitution

Philosophical influences on the Irish Constitution

The 1937 Constitution (*Bunreacht na hEireann* in the Irish language) was enacted on 1st July 1937 following a popular plebiscite and replaced the 1922 Constitution. In

[258] These include the Vienna Conventions on Diplomatic and Consular Immunities; the Hague Convention on the Civil Aspects of International Child Abduction; and the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration.

[259] Examples of where this has happened include: the Genocide Act 1973 (which gave effect to the UN Convention on Genocide); and the Chemical Weapons Act 1997 (which gives effect to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction).

contrast to the 1922 Constitution, the Preamble of the 1937 Constitution identifies the enacting authority as "the people of Éire".[260] One of the key concerns of the drafters of the 1937 Constitution was the concept of popular sovereignty, which they felt had been compromised in the Constitution of the Irish Free State of 1922. The drafters of the 1937 Constitution instead invoked the vision of sovereignty which had been articulated in the 1916 proclamation and in the *Programme for Democratic Action* of the First Dáil in 1919.[261] This was a broad multi-faceted vision of sovereignty which signified not only political independence but also encompassed social justice and harmony as well as economic prosperity and cultural autonomy, which the new Constitution sought to give expression to as the basic values and aspirations of Irish society.

Building on the constitutional philosophy set out in the Preamble, Whyte asserts that the Constitution derives its inspiration from two political models – those of liberal democracy and Christian democracy.[262] The influence of traditional liberal ideas about rights is evident in the articles dealing with fundamental rights and freedoms, or "bunchearta", which have been developed by the courts over the years to a high level of sophistication. The liberal democratic elements of the Constitution were strongly influenced by the English Bill of Rights, the American Constitution and its amendments, the French Constitution and other more recent Western European Constitutions. In philosophical terms, the traditional liberal model of rights can be contrasted with the understanding of rights found in international human rights law in that even the most progressive versions of 'liberal political philosophy' emphasise tolerance of 'difference' in human identity, rather than recognition of the inherent value and dignity of every human person.[263]

However, the Constitution also invokes a communitarian vision of society reflecting Roman Catholic social teaching and expressing the values of solidarity and social justice.[264] The Christian philosophical origins of the Constitution are clearly stated in

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[260] See further Murphy, *The 1937 Constitution – Some Historical Reflections*, in Murphy & Twomey, *Ireland's Evolving Constitution 1937-1997, Collected Essays*, (Oxford, Hart Publishing, 1998).

[261] *Ibid*. pp 16-17. Both the Proclamation of the Republic in 1916 and the "Programme for Democratic Action" issued by the first Dáil in 1919 identify the State's egalitarian duties. In particular, in the "Programme for Democratic Action" the first Dáil stated,

> "It shall be the first duty of the Government of the Republic to make provision for the physical, mental and spiritual well-being of the children, to secure that no child shall suffer hunger or cold from lack of food, clothing or shelter but that they shall be provided with the means and facilities requisite to their proper education and training as Citizens of a Free and Gaelic Ireland."

[262] Whyte *loc. cit.* p 45.

[263] See chapter 1.

[264] Quinn notes the influence of Catholic social teaching in the Constitution and points specifically to the papal encyclicals of 1883 and 1933 as being particularly influential during the formative years of the Republic, Quinn in Costello *loc. cit.* at pp 47-48 In these encyclicals the Catholic Church focussed on the concept of subsidiarity, the idea that market forces should be left to themselves except in cases where it was obvious that acceptable social outcomes could not result. In such cases the State had

the Preamble, the relevant passages of which the courts have referred to on a number of occasions. The Preamble declares that the objective of the people in enacting the constitution is to:

> "promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations".

In the case of *Buckley v. Attorney General*,[265] O'Byrne J stated that these "most laudable objects" inform the various Articles of the Constitution and that the Constitution should be construed in so far as possible as to give them life and reality. In *McGee v. Attorney General*,[266] Walsh J expanded on the philosophical and religious ancestry of the concepts of prudence, justice and charity, referring to justice and prudence as having origins in Aristotelian philosophy, but charity as a being "the great additional virtue introduced by Christianity". In the case of *The State (Healy) v.* Donoghue,[267] O'Higgins CJ stated that the Preamble makes it clear that rights given by the Constitution must be considered in accordance with the concepts of prudence, justice and charity which may gradually change or develop as society changes and develops. Hogan and Whyte observe that the implications of having elements of these different political models of liberal democracy and Christian democracy in the Constitution have yet to be addressed by the Irish courts.[268]

Judicial review under the Constitution

A key feature of the 1922 Constitution was that it vested in the courts limited powers to invalidate legislation adjudged to infringe certain fundamental rights. The drafters retained this doctrine of judicial review in the 1937 Constitution and greatly expanded the range of rights protected to include matters such as equality before the law, the right to a good name, the right to family life, the right to education and the right to private property. Articles 40-44 outline the 'Fundamental Rights' guaranteed under the Constitution, and can be described as Ireland's "bill of rights". The doctrine of judicial review has developed significantly over the years, so much so that it is easy to forget that the drafters of the Constitution did not originally envisage that the courts would regularly overturn the legislative function. Hogan and Whyte cite a number of passages from the Oireachtas debates on the text of the Constitution which indicate that the drafters intended these articles to act as "guidelines" to the legislature rather

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"subsidiary" responsibilities to intervene. Quinn traces how the influence of these ideas can be found in the way the right to property is drafted (Article 43), in the provisions on the right to education (Articles 42 and 44), and in the directive principles of social policy (Article 45).

[265] [1950] IR 67.

[266] [1974] IR 284.

[267] [1976] IR 325.

[268] Hogan and Whyte, Kelly's Irish Constitution, (4th Ed., Butterworths, 2003) p 2079. See also Hollenbach, *A Communitarian Reconstruction of Human Rights: Contributions from Catholic Tradition*, in Hollenbach and Douglas (eds.) *Catholicism and Liberalism: Contributions to American Public Philosophy* quoted in Whyte *loc. cit.* at p 48.

than acting as a vigorous mechanism of judicial review.[269] In this regard it is questionable to what extent the drafters of the Constitution envisaged a strict dichotomy between Articles 40-44 which were regarded as mere "headlines to the legislature", and Article 45 which is intended for the "general guidance" of the legislature.

Constitution as a living document

The question of whether constitutions should be interpreted in light of the intentions of its drafters at the time or as an evolving document is a matter of no little contention in many common law legal systems. In Ireland, the doctrine of unenumerated rights is a powerful example of how the courts have on many occasions adopted a dynamic and organic view of the Constitution. Hogan and Whyte recount how the courts have, on a number of occasions, had to grapple with the competing claims of a historical interpretation and a living document approach.[270] In *Croke v. Smith*, Budd J addressed the question of whether an organic and teleological approach should be taken to rights' provisions generally, concluding:

> "The Supreme Court has recognised that concepts relating to human rights evolve over the years and in considering rights protected by the Constitution the court, recognising this evolution, should apply contemporary norms rather than an originalist approach of assessing the present situation according to the norms and values existing at the time when the Constitution was enacted in 1937."[271]

Gerard Hogan has also made the persuasive argument that the language of Articles 40.3 and 45 of the Constitution strongly suggests that the framers of the Constitution envisaged that Article 40.3.1 would be interpreted in an expansive manner over time and that new rights would be judicially discovered.[272]

Analysis

There is clear evidence that the Constitution was intended by its drafters to be more than just a formula for liberal democratic Government. While the Constitution is primarily a liberal document which prescribes a strict view of the separation of powers and a robust system of judicial review, it also promotes a view of a just society, underpinned by the idea of a sovereign people in an ideal Irish State and informed by the communitarian philosophy of Roman Catholic social teaching. The liberal elements of the Constitution have been strongly developed over the years, whereas the communitarian elements of the Constitution have played only a marginal role. It can be observed that the communitarian philosophy of Roman Catholic social teaching, part of the basic principles which informed the drafting of the Constitution, is consistent with a strong system of protection of economic, social and cultural rights.

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[269] Hogan and Whyte *loc. cit.* at p 1245.
[270] *Ibid.* at p 22.
[271] Unreported High Court judgment of 31st July 1995.
[272] Hogan, *Directive Principles, Socio-Economic Rights and the Constitution,* (2001) 36 Irish Jurist at p 114.

5.2.2 Direct protection of economic, social and cultural rights in the Constitution

The Irish Constitution explicitly protects the right to free primary education and the right to property, rights which clearly fall into the category of economic, social and cultural rights. Direct constitutional protection of these rights clearly establishes these rights as being fundamental. However, the Irish courts have taken a quite restrictive approach towards economic, social and cultural rights even where these rights have been given explicit recognition in the Constitution. Much of the wider judicial debates around the protection of economic and social rights have been played out in the courts in the context of the right to free primary education, particularly in relation to the accommodation and educational needs of children with special needs. To a certain extent, the approach taken by the courts appears to have come full circle in these cases. In a number of High Court cases mandatory injunctions were granted against the State directing Government Ministers to take specific measures to uphold the socio-economic rights of applicants. However, this trend was halted by the Supreme Court which has taken a more restrictive view of the role of the courts in relation to public expenditure and economic, social and cultural rights in general.

Article 42.4– Free primary education

Article 42.4 of the Constitution provides for the right to free primary education in the following terms:

> "The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

The formulation of the right to free primary education contained in Article 42.4 of the Constitution is more limited than might first appear and the interpretation which the courts have given this right has ensured that it has not become a strong tool for vindicating children's rights. In particular, the failure of the courts to vindicate the rights of disabled persons over the age of 18 is indicative of how any attempts to take an expansive interpretation of Article 42.4 have been curtailed.

In *Crowley v. Ireland*[273] it was held that the constitutional duty of the State to provide for free primary education creates a corresponding right to receive primary education on the part of those for whom it is intended. However, the Court took a quite minimalist interpretation of the State's constitutional obligations by stating that the duty imposed on the State by Article 42.4 was not to "provide" but to "provide for" free primary education. In other words, the State has an indirect aiding duty rather than a duty to directly supply free primary education. This reflects the practice whereby a large proportion of primary schools are owned or managed by religious or other private bodies, while being funded by the State. Glendenning has been critical of this decision, stating that the decision in *Crowley* seemed to confer constitutional

[273] *Crowley v. Ireland*, [1980] IR 102, at p 126.

sanction on the existing informal arrangements for education, thereby delaying much-needed educational reform.[274]

The impact of this approach is most apparent in relation to the rights of persons with special educational needs. The case of *O'Donoghue v. Minister for Health*[275] was the first major case dealing with the State's obligation to protect the right to free primary education for children with severe and profound learning difficulties. In this case O'Hanlon J concluded that the constitutional obligation imposed by Article 42.4 involves, "giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be". In doing so, O'Hanlon J borrowed from the language of the United Nations Convention on the Rights of the Child.[276]

In the subsequent case of *Sinnott v. Minister for Education*,[277] Barr J in the High Court found that, while the applicant was over 18 years, he was still entitled to free primary education appropriate to his needs for as long as he was capable of benefiting from such education. The High Court granted a mandatory injunction enforcing this entitlement. However, the Supreme Court overturned this decision taking the view that the State's duty to provide for free primary education ceased upon the person with learning disabilities reaching the age of eighteen. The Supreme Court also took a more restrictive view of the role of the courts in the enforcement of the right to education, and in particular in relation to the types of relief the courts are entitled to grant. In a criticism of this decision, Whyte comments that the strict distinction drawn between those over and under the age of eighteen is inappropriate in the light of the view of the right to free primary education as outlined in the *O'Donoghue* case, where O'Hanlon J had described that right as encompassing a right for every child to an education that fosters his or her inherent or potential capacities however limited those capacities may be.[278]

Article 42.5- Children in need of secure accommodation and/or education
Article 42.5 of the Constitution provides that:

> "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard to the natural and imprescriptible rights of the child."

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[274] Glendenning, *Education and the Law*, (Butterworths, Dublin, 1999) p 88. The Constitution Review Group recommended that the right of every child to free primary education should be explicitly stated in the Constitution, by removing the word "for" after "provide" in the text. The Group also recommended that the Oireachtas should seriously consider extending this right to the second level. Report of the Constitution Review Group 1996, p 353.
[275] *O'Donoghue v. Minister for Health* [1996] 2 IR 20.
[276] *Ibid.* p 65.
[277] *Sinnott v. Minister for Education*, [2001] 2 IR 545 (12th July 2001).
[278] See Whyte *loc. cit.* at pp 340-357.

Beginning in the mid-1990s, a series of cases were taken seeking to direct the State to make adequate provision in relation to both the accommodation and educational needs of children with behavioural problems. In a number of cases High Court judges found that the State was failing to vindicate the statutory and constitutional rights of this vulnerable group of children by failing to provide adequate secure accommodation and adequate education to meet their particular needs.[279] However, the courts were reluctant to get involved in determining the detail of the solutions required and preferred to grant declarations and/or to adjourn cases with liberty to re-enter so as to afford the executive an opportunity to respond to these judgments. Kelly J took a different approach, as outlined in the case of *DB v. Minister for Justice*,[280] where he held that the Court's jurisdiction in these cases stems from its obligation to vindicate and defend constitutional rights in an effective manner. In the subsequent case of *TD v. Minister for Education*,[281] he granted mandatory injunctions requiring the Minister to complete the development of suitable accommodation within a specified time scale.

The Supreme Court in the *TD* case again took a different view and indicated that, in accordance with the doctrine of the separation of powers, mandatory injunctions vindicating constitutional rights can only be obtained against the executive in the rarest of circumstances. The Court defined such circumstances as being restricted to where an organ of the State had shown a "clear disregard" for its constitutional obligations, described by Murray J as "a conscious and deliberate decision by the organ of the State to act in breach of its constitutional obligations to other parties accompanied by bad faith or recklessness." As with the *Sinnott* judgment, this decision appears to greatly restrict the power of the courts to vindicate the rights of this group of young persons and shows a marked unwillingness on the part of the courts to intervene in such cases.

In contrast, the European Court of Human Rights has found Ireland to be in violation of Article 5(1)(d) of the ECHR in a case where a minor with behavioural problems was detained in a penal institution because there was no appropriate accommodation available for him.[282] The European Court of Human Rights found that the applicant's detention in St. Patrick's Institution did not satisfy the conditions contained Article 5(1)(d) that the detention of a minor should be for the purpose of educational supervision. The European Court of Human Rights also found that the detention of the applicant could not be regarded as an interim temporary measure because when the High Court made its first detention order no secure educational facilities were available in Ireland for the applicant. The case of *DG v. Ireland* before the European Court of Human Rights highlights how the limited form of protection afforded to the right to education by the Irish Constitution has directly led to violations of the human rights standards contained in the ECHR.

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[279] *GL v Minister for Justice*, unreported High Court, 24th March 1995; *Comerford v. Minister for Education* [1997] 2 ILRM 134; *FN v. Minister for Education* [1995] 1 IR 409; *DT v. Eastern Health Board*, unreported High Court 24th March 1995; *DD v. Eastern Health Board*, unreported High Court, 3rd May 1995.
[280] [1999] 1 IR 29.
[281] [2000] 2 ILRM 321.
[282] *DG v. Ireland* (Application no. 39474/98), judgment of 16th May 2002.

Article 43 – Private property

The right to private property is guaranteed by Article 43 of the Constitution. Article 43.1 deals with the institution of property itself and provides that "man (*sic*) has the natural right, antecedent to positive law, to the private ownership of external goods". Article 43.2 provides that the State recognises that the exercise of the right to property ought to be regulated by the principles of social justice and states that the State may delimit by law the exercise of rights to property in the interests of the common good.

The general duty of the State to introduce law to protect individual rights, including property rights, under Article 40.3.2 has a particular relevance in relation to how property rights are to be balanced with the common good. While Article 43 may be said to offer protection to the institution of private property in general, the Article has also been interpreted in conjunction with Article 40.3.2 to protect against certain interferences with the property rights of individuals, by compelling the State to take measures to vindicate individual property rights. On a number of occasions the courts have been tasked with assessing what types of interferences with property could be justifiable in line with considerations of social justice.

The first significant invocation of the Article 43 right was in the *Sinn Féin Funds* case where the Supreme Court affirmed that the question of whether a particular restriction of property rights was justified by considerations of social justice was a matter within its competence.[283] The Kenny Report on the price of building land in 1973 discussed the constitutional problem of controlling the price of land and recommended that a court should be authorised to operate a form of price control in designated areas.[284] However, following the decision in the case of *Blake v. Attorney General*[285] some years later, which found that elements of the Rent Restrictions Acts were unconstitutional, the recommendations of the Kenny Report were never acted on.

The 1984 case of *Dreher v. Irish Land Commission*[286] clearly established that the interpretation of Article 40.3.2 should be informed by Article 43 and that State action which is authorised by and comports to Article 43 cannot be considered unjust for the purposes of Article 40.3.2. In that case Walsh J remarked that, in particular cases, social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the State as being required by the exigencies of the common good.[287] In *Re Article 26 and Part V of the Planning and Development Bill*

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[283] *Buckley and ors (Sinn Féin) v. Attorney General* [1950] IR 67. For an account of the jurisprudence of the superior courts in this area see Hogan and Whyte *loc. cit.* at pp 1978-2011.

[284] The recent 9th Progress Report of the All-Party Oireachtas Committee on the Constitution addressed the issue of private property and examined Articles 43 and 40.3.2. The Report largely revisits the issues that were addressed by the *Kenny Report* in 1973. As mentioned earlier, the Committee put aside the question of the inclusion of economic and social rights in the Constitution, stating that it would deal with this issue at a later date. The consideration by the CRG of the right to private property is contained at pp 357-367 of its report.

[285] [1982] IR 117.

[286] [1984] ILRM 94.

[287] This decision is reminiscent of Indian case-law in this area.

1999 the Supreme Court endorsed the *Dreher* decision.[288] The proposed regulations in the 1999 Bill required developers to provide 20% affordable housing as part of new developments and, when assessing whether this measure constituted unjust interference with property rights, the Supreme Court endorsed the use of a proportionality test, stating that the serious social problems which the legislation aimed to address justified the minimal interference with property rights involved.[289]

In contrast, in a different context the courts have been unwilling to allow the cost of a particular social policy to be visited on another group of private citizens. In the case of *Re Article 26 and the Employment Equality Bill 1996*,[290] the Supreme Court was asked to rule on the constitutionality of provisions which required employers to provide appropriate facilities for employees with disabilities, where employers were not to be provided with compensation for the cost of providing such facilities. In deciding that the failure of the Bill to provide for compensation amounted to an unjust attack on property rights, the Court concluded that, while the making of provision for citizens with disabilities was clearly in accordance with principles of social justice, it also appeared to be in line with principles of justice that *society* should bear the cost of such provision rather than the employer, asserting that to impose the cost on the employer would give rise to 'undue hardship'.

In *Re Article 26 and the Health Amendment Bill 2004*,[291] the question again arose as to whether an interference with property rights, in this case the right to restitution for charges illegally recovered by the State, could be justified. The Court examined whether the interference with property rights was in accordance with the principles of social justice and then inquired whether the Bill was required so as to delimit those rights in accordance with the exigencies of the common good. In that case, the Court found that in relation to the Bill in question, there was no evidence that the abrogation of property rights in question could be justified as being required for the avoidance of an extreme financial crisis or a fundamental disequilibrium in public finances. The test applied by the Supreme Court in this case probably reflects the current position.[292]

In summary, it has been clearly established that under the Constitution the private property rights of particular groups can be legitimately restricted by the legislature. The courts have deemed themselves competent to assess the legitimacy of interferences with property rights introduced with the objective of pursuing social justice. Following initial reluctance on the part of the courts to apply Article 43, due in part to the Article's "indeterminate language", the courts have now developed a sophisticated approach to balancing Articles 43 and 40.3.2. The approach of the courts in applying the general interpretative standard of proportionality to broad concepts such as "social justice" and "the exigencies of the common good" presents a strong counter argument to suggestions that the same courts might be prohibited from enforcing economic, social and cultural rights by reasons of competence. The strong commitment to promoting social justice seen in the case-law around Article 43 also reflects the communitarian origins of the Constitution and demonstrates the

[288] [2000] 2 IR 321.
[289] *Ibid.* p 354.
[290] [1997] 2 IR 321.
[291] Unreported Supreme Court judgment of 16th February 2005
[292] *Ibid.* p 40.

legitimacy of further explicit protection of economic, social and cultural rights under the Constitution.

5.2.3 Indirect protection of economic, social and cultural rights in the Constitution

We now turn to examine the means by which the Constitution indirectly protects economic, social and cultural rights. By indirect protection, we refer to instances where the expansive interpretation of the civil and political rights contained in Articles 40-44, including, in particular, the equality guarantee and the doctrine of unenumerated rights, has led the courts to provide some level of protection to economic, social and cultural rights.

Article 40.1 - Equality under the Constitution

Article 40.1 of the Constitution states:

> "All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

The limitations of this guarantee of equal treatment before the law have been highlighted by a number of academic commentators and by the Constitution Review Group. Critics have pointed out that, in contrast to the substantive equality guarantees contained in the laws of many other countries, the formulation in the Irish Constitution has resulted in a remarkably underdeveloped jurisprudence on equality in Irish constitutional law.[293] One major limitation of the provision is that it is directed at the State and has no horizontal application in relation to discrimination by other actors. This limitation has excluded the courts from applying the Constitution to the wide range of areas of discrimination by private actors. Furthermore, the provision only relates to discriminatory provisions contained in law and does not apply to the discriminatory actions of public bodies or others which forms the major body of what is called discrimination law in this jurisdiction and elsewhere.

The courts have also interpreted the phrase "as human persons" contained in the text of Article 40.1 to mean that the guarantee of equality only applies in relation to the "essential attributes of the human person". 'Essential' here is taken to mean those features that all humans share in common, rather than as core to one's identity, though different across humans. In other words, the guarantee of equal treatment refers only to the narrow circumstances of where persons or groups are singled out for discriminatory treatment, rather than protecting persons in any lawful activities, trades or pursuits which they may engage in or follow. This "human personality doctrine" has been widely criticised and the Constitution Review Group recommended that the words "as human persons" should be removed from Article 40.1. A further difficulty is that the text of Article 40.1 applies only to the rights of citizens. The position of

[293] See for example, Doyle, *Constitutional Equality Law*, (Dublin, Thomson Roundhall 2004).

non-citizens under Article 40.1, and the other fundamental rights' provisions of the Constitution which refer to citizens' rights, is unclear.[294]

The potential for Article 40.1 to have a significant impact in the area of economic, social and cultural rights is also qualified by the broad limitation clause contained in the second sentence of the Article. This clause allows a wide scope to judges to uphold discriminatory practices under a subjective analysis of 'capacity' or 'social function' and has even been used on occasion to allow courts to find a different social function as between the genders in relation to the raising of children.[295]

Notwithstanding these difficulties however, the provision has been of limited use in raising issues of discrimination in a number of areas that impact upon economic, social and cultural rights. While the courts have yet to provide an exhaustive definition of what constitutes the "essential attributes of the human person" for the purpose of Article 40.1, interestingly there have been a number of cases in which they have considered the social or economic position of the person at the centre of a case. In *Quinn's Supermarket Ltd. v. Attorney General*,[296] Walsh J referred to "human attributes…or ethnic or racial, *social* or religious background". In *Redmond v. Minister for the Environment*[297] Herbert J held that discriminating between persons on the basis of money is an attack upon the human dignity of those persons who do not have money. He referred to the history of poverty and social deprivation in Ireland and the link between poverty and dignity of persons as human beings, stating his belief that discrimination on the basis of poverty was envisaged by the drafters of Article 40. In the case of *K v. W (No. 2)*[298] Barron J also held that, in the context of a custody dispute between a natural father and putative adoptive parents, he was precluded by Article 40.1 from having regard to differences between the two households springing solely from socio-economic causes as, "to do otherwise would be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equally before the law".[299]

These cases are all the more notable because Ireland does not include socio-economic status as a statutory ground to make a claim of discrimination under the Employment Equality Act 1998 and the Equal Status Acts 2000 and 2004. Notwithstanding the limitations of the Irish constitutional framework for protecting and promoting equality, it is important to note that the general principle of equal treatment is afforded substantial recognition in a number of provisions of the Constitution. We should also mention here that the general prohibition on discrimination under law contained in Article 40.1 does not stand alone as a safeguard against discrimination. Discrimination in specific areas and on specific grounds is dealt with in a number of

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[294] See Hogan and Whyte *loc. cit.* at pp 1260-1265 and the Report of the Constitution Review Group at p 224. See also IHRC's *Observations on the 27th Amendment to the Constitution Bill 2004*, available at the IHRC website www.ihrc.ie.
[295] *State (Nicolaou) v. An Bord Uchtála* [1966] IR 567, cited by Lynch and Connelly in Appendix 18 to the Report of the Constitution Review Group at p 587.
[296] *Quinn's Supermarket Ltd. v. Attorney General,* [1972] I.R. 1.
[297] *Redmond v. Minister for the Environment*, [2001] 4 I.R. 61.
[298] *K v. W (No. 2)* [1990] ILRM 791.
[299] *Ibid.* at 799.

other provisions. These are Article 9.1.3 (discrimination on the ground of sex as in relation to nationality and citizenship), Article 16.1.1, 2 and 3 (discrimination on the ground of sex as to eligibility for membership of Dáil Éireann and voting at an election for members of Dáil Éireann), Article 40.6.2 (discrimination on the grounds of political opinion, religion or class in relation to freedom of assembly and of association), Article 44.2.3 (discrimination by the State on the grounds of religious profession, belief or status) and Article 44.2.4 (discrimination on the ground of religion in relation to public funding of schools).

Article 40.3.2 – The right to life

One of the objections to proposals to include new rights in the Constitution or to the development of unenumerated rights under Article 40.3.1 is that the rights which are to be appended or judicially "discovered" could have been found to be implicit in other rights specified in the text of the Constitution. It is certainly possible to construe the right to life protected under Article 40.3.2 in an expansive manner to encompass basic socio-economic rights. This approach has been followed by the Indian courts where the right to life was held to cover basic socio-economic rights such as adequate nutrition, clothing and shelter.[300] We recall here also that the majority of Constitution Review Group, in its rejection of the proposal to include justiciable economic, social and cultural rights in the Constitution, also claimed that the Irish courts would intervene if anyone should fall below a minimum level of subsistence.[301]

Although there are no clear examples of where the right to life has been applied in an expansive manner to protect economic, social and cultural rights, in the case of *G v. An Bord Uchtála*[302] Walsh J referred to the right to life as necessarily implying:

> "the right to be born, the right to preserve and defend, and to have preserved and defended, that life and the right to maintain that life at a proper human standard in matters of food, clothing and habitation."

Therefore there is some support in the case-law for an expansive interpretation of the constitutional right to life to guarantee at least the core minimum of the basic economic and social rights. However, Whyte and Hogan argue it is extremely unlikely that such an approach will be endorsed by the present Supreme Court, having regard to their recent decisions in *Sinnott* and *T.D.*[303] If Hogan and Whyte are correct on this point, this raises deep questions not only about the capacity of the Constitution as it is currently drafted to protect even the most basic human rights, but also about the rationale underpinning the Constitution Review Group's rejection of the proposal to include economic, social and cultural rights in the Constitution.

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[300] See chapter 4 of this report dealing with possible models of enforcement of economic and social rights.
[301] Report of the Constitution Review Group at p 236.
[302] [1980] IR 32.
[303] See Hogan and Whyte *loc. cit.* at p 1402.

***Article 41 – The Family*[304]**

Article 41 establishes the position of the nuclear family "as the fundamental unit of society" and is closely related to the provisions dealing with education in Article 42, which place the primary onus for education on the family and the parents. Article 41.2.1 of the Constitution also states that the State recognises that, by her life within the home, woman gives to the State a support without which the common good cannot be achieved. As an expression of archaic gender stereotyping, this provision has been the subject of persistent criticism from both national and international sources in recent years[305] and the IHRC has supported calls for its removal in its recent submission to the UN Committee on the Elimination of Discrimination Against Women.[306]

While this provision can be seen as being primarily aimed at prescribing a particular religious and moral view of society, it also contains direct reference to the economic role of the State in supporting the family as Article 41.2.2 goes on to state that the State shall endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. In this respect, the Article would appear to also hold a promise of economically supporting the prescribed domestic role of the mother. Hogan and Whyte refer to the decision of Finlay CJ in *L v. L*[307] and the decision of Hederman J in *McKinley v. Minister for Defence*[308] in support of the suggestion that this provision could be used in this positive sense. However, while the provision has been cited in a number of cases concerning discrimination to justify differential treatment of men and women, it has not been used successfully to impose an obligation on the State to provide financial support for woman working in the home.

Notwithstanding the possibility raised in these cases that the prescribed social role of women contained in Article 41 could be used to assert positive rights for women working in the home, no such protection has been offered by the courts. In the view of the IHRC, the fact that the duty of the State to support the role of women in the home has proved of no substantial benefit to women or families leads to the conclusion that the existing draft of Article 41 is deeply flawed, even in terms of contributing to the social model it aspires to. There is little basis for assuming that this provision is likely to become a source of vindication for economic, social or cultural rights in the future.

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[304] The right to family life is provided for in both the ICCPR and the ICESCR and has important implications for both civil and political rights and economic and social rights. Therefore we include our consideration of this provision here rather than in the section of this chapter dealing with more explicitly economic and social rights.

[305] See the recommendation of the Constitution Review Group, and the Report of the Commission on the Status of Women etc. Hogan and Whyte *loc. cit* refer to this provision as "perhaps, the single most dated provision of the Constitution", p 1866.

[306] See IHRC *Submission on Ireland's 4th and 5th National Reports under CEDAW*, January 2005, at section 2.

[307] [1992] 2 IR 77.

[308] [1992] 2 IR 333. See also Hogan and Whyte *loc. cit.* at p 1866, fn. 189.

Article 40.3.1 – The doctrine of unenumerated rights

Article 40.3.1 of the Constitution requires the State by its laws to respect and, as far as practicable, to defend and vindicate the personal rights of the citizen. The courts have interpreted Article 40.3.1 as a guarantee of certain personal rights which are not enumerated in the Constitution. Under this doctrine, eighteen unenumerated rights have been recognised by the courts to date including the right to marital privacy and the right to bodily integrity.[309] The seminal case in this regard is that of *Ryan v. Attorney General*,[310] where the Court refers to "rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40." Over the years since *Ryan* the identification of unenumerated rights by the courts has developed on an *ad hoc* basis, and has been heavily influenced by natural law theory. The Constitution Review Group describes the list of rights identified to date as being incomplete, and points out that many rights contained in international conventions dealing with fundamental rights have not yet been recognised. Obviously, this can be partially explained by the fact that the Constitution was drafted before the major international human rights treaties such as the ICCPR and the ICESCR were adopted. Nevertheless, some of the unenumerated rights that have been identified to date do have the potential to provide protection for economic, social and cultural rights. In this section we consider three examples which are of particular relevance: (i) the right to bodily integrity; (ii) the right to health; and (iii) the right to earn a livelihood.

(i) The rights to bodily integrity

In *Ryan v. Attorney General* the Supreme Court recognised the right to bodily integrity. The scope of the right was described by Judge Kenny in the High Court as encompassing protection from mutilation and the imposition of any process which is harmful to health.[311] This right was considered again in cases involving the treatment of prisoners serving sentences, and defined as a general right not to have one's health endangered by the actions of the State. In the case of *State (C) v. Frawley* the applicant, a prisoner, complained that he did not have access to appropriate medical treatment in prison for a rare psychiatric condition.[312] Finlay P stated that he did not think the State should be obliged to build, equip and staff a specialised unit to treat the applicant and a small number of other persons, however he accepted that the principle in the *Ryan* case could apply to prevent an act or omission of the Executive which, without justification, would expose the person to a risk to their health. This judgment could be seen as being restricted to the very special circumstances of penal imprisonment, however, in the case of *O'Brien v. Wicklow UDC*[313] Costello J found that the constitutional right to bodily integrity could create a positive obligation on the part of a local authority to provide a basic level of accommodation to members of the Travelling community, suggesting that the right may have a far wider application.

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[309] See further Report of the Constitution Review Group p 246 for a comprehensive list of unenumerated rights and the relevant case-law.
[310] [1965] IR 294 at p 313.
[311] *Ibid.* p 313.
[312] [1976] IR 365.
[313] Unreported High Court, 10th June 1994.

(ii) The right to health

In the case of *Heeney v. Dublin Corporation*,[314] O'Flaherty J alluded to the existence of a constitutional right to health, as being second only to the right to life in the hierarchy of rights. In this case the plaintiffs were seeking to compel Dublin Corporation to take certain steps in relation to the breakdown in the elevator services in the Ballymun flats complex. The Supreme Court observed, that there was a hierarchy of constitutional rights and "at the top of the list is the right to life, followed by the right to health and with that the right to the integrity of one's dwellinghouse." The Court went on to state that the Constitution expressly provides that the dwelling of every citizen is inviolable and a corollary of that guarantee must be that a person should be entitled to the freedom to come and go from his or her dwelling provided he or she keeps to the law. The outcome of that case raises interesting issues about how such rights can be effectively and reasonably enforced by the courts. In this case the Court granted an order on the consent of the Corporation that it would "take all reasonable steps within their power and authority to explore every means so as to repair or have repaired and when repaired to keep maintained the lifts in the Ballymun complex."

In the recent case of *In the Matter of Article 26 of the Constitution and the Health (Amendment)(No. 2) Bill* 2004,[315] counsel raised the possibility that either a constitutional right to healthcare existed under Article 40.3.1 or that such a right could be derived from the right to life, the right to personal dignity, and/or the right to bodily integrity under that Article. The case centred on questions relating to property rights, but in its judgment the Court rejected the existence of a right to health that would create an obligation to provide free healthcare service.

(iii) The right to earn a livelihood

The right to work or earn a livelihood was recognised as a right latent in Article 40.3 in the case of *Murphy v. Stewart*.[316] However, the courts have subsequently made clear that the freedom to exercise this constitutional right is not an absolute one and that it may be subject to legitimate legal restraints. In the case of *Shanley v. Galway Corporation*[317] the Court stated that the Constitution "does not impose a positive duty either on the State or on any body such as a local authority to which the State may have delegated powers, to provide a livelihood for the plaintiff". In *Greally v. Minister for Education (No. 2)*[318] Geoghan J held that the right to a particular livelihood does not encompass a right to employment from a particular employer. The courts have held, however, that statutory restrictions on the right to earn a livelihood must be clear and that such restrictions must not be disproportionate. Therefore, in *Cox v. Ireland*,[319] section 34 of the Offences Against the State Act 1939, which disqualified a person convicted by the Special Criminal Court of a scheduled offence from holding office or employment remunerated out of public monies for a period of seven years from the date of conviction, was held to be disproportionate as it affected persons whose motive or intention in committing a scheduled offence bore no

[314] Unreported Supreme Court, 17th August 1998.
[315] Unreported Supreme Court decision of 16th February 2005.
[316] [1973] IR 97.
[317] [1995] 1 IR 396.
[318] [1999] 1 IR 1.
[319] [1992] 2 IR 503.

relation at all to any question of the maintenance of public peace and order or the authority of the State. The importance of *Cox* is that it establishes that the test for any such restriction is one of proportionality and reasonableness.

Analysis

In recent case-law there has been a trend towards greater judicial restraint in the recognition of further unenumerated rights and in particular economic, social and cultural rights. In the case of *TD v. Minister for Education*,[320] Keane CJ first questioned whether the duty of declaring unenumerated rights is properly the function of the Court rather than the Oireachtas. In particular he stated he would have the "gravest doubts" as to whether the courts at any stage should assume the function of declaring socio-economic rights to be unenumerated rights. He stated that the resolution of that question must await a case in which it is fully argued. In the same case Murphy J also demonstrated a marked reluctance to recognise socio-economic rights as unenumerated rights. He asserted that, with the exception of education, the personal rights identified in the Constitution all lie in the civil and political sphere and, that the absence of express reference to these rights, combined with the failure to correct this omission by means of a referendum suggests a conscious decision to withhold recognition of these rights which in his view are now conferred by appropriate legislation. On this particular point, Hogan and Whyte have commented that the concept of implied rights would be denied any efficacy if the courts had to await a decision of the Oireachtas as to whether or not such a right existed.[321]

5.4 Directive Principles of Social Policy– Article 45

The area of the Constitution where we find an unequivocal commitment to a communitarian view of society and to realising social justice is in Article 45 titled "the Directive Principles of Social Policy". Article 45 focuses on the social aspect of life, the common good and the relationship between the individual and society. However, the Directive Principles of Social Policy in Article 45 are stated not to be cognisable by any court. Article 45 of the Constitution opens as follows:

> "The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under the provisions of this Constitution".

There are a number of early judicial decisions to the effect that Article 45 was completely outside the range of judicial consideration and should not be used by courts under any circumstances. In a number of cases it was stated that the exclusive value of Article 45 lay in the implication it created that Articles 40-44 *were* enforceable by the courts.[322] However in subsequent judgments, in particular in the

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[320] *TD v. Minister for Education*, [2001] 2 I.R. 259

[321] Hogan and Whyte *loc. cit.* p 1418-1419.

[322] See for example, *Byrne v. Ireland* [1972] IR 241. See further *Comyn v. Attorney General*, [1950] IR 142; *O'Brien v. Manufacturing Engineering Co. Ltd*. [1973] IR 334.

case of *Murtagh Properties v. Cleary*,[323] a different line of opinion emerged suggesting that Article 45 can be used as an interpretative guide by courts in deciding whether or not a constitutional right exists. In this case, the plaintiff asserted that, while Article 45 was not cognisable by the courts, it was still capable of providing guidance to the courts in their recognition of the personal rights latent in Article 40.3. Kenny J agreed, holding that the opening paragraph of Article 45 does not prohibit the courts from taking Article 45 into consideration when deciding whether a claimed constitutional right exists. In subsequent cases the courts have also held that they can have regard to the Directive Principles of Social Policy in Article 45 when considering the constitutionality of a pre-Constitution statute[324] and in the construction of the common law.[325]

Hogan and Whyte note that the Supreme Court has yet to give a definitive ruling on whether or not the courts can have regard to Article 45 in judicially reviewing legislation or in the identification of constitutional rights.[326] One question that was raised in *McGee v. Attorney General*[327] was whether there was a significant difference between the Irish and English language versions of Article 45. In that case it was noted that the Irish version, which takes precedence, suggested that the courts were excluded from considering Article 45 only in respect of legislation. That case, however, was concerned with legislation and the judge did not feel that Article 45 was of any relevance.

A further question to be addressed is whether the State can rely on Article 45 before the courts to defend a piece of legislation that it seeks to enact to give effect to the principles of social policy contained in Article 45. In *Re Article 26 and the Planning and Development Bill 1999* the Supreme Court considered whether legislation designed to set aside a certain percentage of development land for social housing was repugnant to the Constitution's property rights guarantees.[328] The Attorney General argued in defence of the Bill that the Court was entitled to have regard to the Directive Principles in assessing the constitutionality of this measure and, in particular, the requirement in Article 45.2.ii that the State shall direct its policy towards securing that the ownership and control of the material resources of the community "may be so distributed amongst the private individuals and the various classes as best to serve the common good." In that case, ultimately, the Court found that it could uphold the constitutionality of the Bill without reference to the Directive Principles. However, the Court noted the various High Court judgments where account was taken of Article 45, but reserved the question of whether these cases were correctly decided.

The most striking aspect of the Article 45 jurisprudence is the minimalist approach taken to its application by the Irish courts, which lies in stark contrast to the jurisprudence of the Indian Constitution where the Directive Principles have taken a

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[323] [1972] IR 330.
[324] *Landers v. Attorney General* (1975) 109 ILTR 1.
[325] *Kerry Co-operative v. An Bord Bainne*, [1991] ILRM 664.
[326] *Kelly* (4th ed.) at p2083.
[327] [1974] IR 284.
[328] [2000] 2 IR 321.

central and dynamic role in Constitutional jurisprudence.[329] Hogan traces some of the background to the drafting of Article 45 and refers in particular to the input of the Department of Finance to the process. It appears that the Department was of the view that the inclusion of justiciable economic, social and cultural rights was unnecessary as the executive was already taking appropriate measures to meet economic and social needs. In his analysis of the operation of the Article, however, Hogan concludes that Article 45 has thus far been unsuccessful in practice but that nobody has yet come up with a better formula.[330] Certainly, there are alternative interpretations of Article 45 available to the courts, which support greater judicial notice to be taken of it. For example, there is the canon of interpretation that the inclusion of the Article in the text must be afforded *some* weight and significance. There is also the rule of *harmonious interpretation* of all of the provisions of the Constitution[331] Article 45 could be read to influence the interpretation of the fundamental rights provisions, in particular when read with the Preamble and considered in the context of De Valera's concept of sovereignty.

5.3 Protection of economic, social and cultural rights in legislation in Ireland

In Ireland the manner and extent to which economic, social and cultural rights are defined in national legislation varies widely. For example, the Education Act 1998 provides that one of the objects of the Act is to give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs. In addition, the Act requires that education should be provided at a level and of a quality that is appropriate to meeting the needs and abilities of all students, and to promote equality of access to and participation in education. The Act also defines the aims and objectives of education. Therefore the 1998 Act provides some clear normative content to the right to education compared to the broadly worded provisions of the Constitution. In contrast, there is no constitutional recognition or statutory definition of the right to adequate housing or shelter in Ireland. The Housing Act 1988 provides a statutory definition of homelessness and requires the local authorities to assess the numbers experiencing homelessness on a regular basis. It also specifies that local authorities are the appropriate bodies responsible for the needs of people experiencing homelessness and requires local authorities to prioritise the needs of homeless people in the allocation of local authority schemes. However, the Act does not legally require local authorities to house people who are homeless.[332] There is a clear lack of consistency in the

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[329] The comparison between the development of the concept of directive principles in the two jurisdictions is the subject of a recent doctorate at Oxford University by John O'Dowd of University College Dublin. He traces a number of significant differences between the jurisdictions, not least the transformative and revolutionary nature of the Indian Constitution and the contrasting judicial cultures, both of which are reflected in dramatic changes to fundamental rights over the years, such as the abolition of the constitutional right to private property.

[330] Hogan *loc. cit.* at p 174.

[331] See further Casey, *Constitutional Law in Ireland,* (Round Hall, 2000), pp 378-380.

[332] The Minister of the day Padraig Flynn argued that such a statutory obligation would place an unfair legal burden on housing authorities and disrupt the orderly allocation of new houses to people in need.

manner and extent to which economic, social and cultural rights are defined in Irish legislation.

5.4 Court remedies in Ireland[333]

We have already seen that the Irish courts have tended to justify their non-enforcement of social and economic rights in the basis of a purported distinction between distributive and commutative justice.[334] In practice, the distinction between commutative cases restricted to individual circumstances and distributive cases with wider impact is often difficult to establish or to maintain. There are many cases in which the Irish courts, although not directly asked to vindicate economic, social and cultural rights, have nevertheless been tasked with significant distribution of resources.

One area where the Supreme Court does consider more general constitutional issues without specific plaintiffs is the case of referrals of legislative proposals to the Court by the President under Article 26 of the Constitution. The recent case of *In the Matter of Article 26 of the Constitution and the Health (Amendment)(No. 2) Bill 2004*[335] had a significant impact on State resources. The legislation in question proposed to amend section 53 of the Health Act 1970 to allow the Minister for Health and Children to make regulations for the charging of certain classes of persons for in-patient care and, most significantly, would make all existing and previous impositions of such charges legal. It is notable that in this case counsel on behalf of the State submitted that the cost to the exchequer of repaying all patients in the relevant category would be very great. In reply the Court stated:

> "The Court accepts that, upon discovery of an unforeseen liability to reimburse patients in the relevant categories, the State may find itself faced with a significant additional financial burden. However, while it is the opinion of the Court that the financial burden on the State of making the relevant repayments is a substantial one, it is by no means clear that it can be described as anything like catastrophic or indeed that it is beyond the means of the State to make provision for this liability within the scope of normal budgetary management."

5.5 Summary

In the previous sections we have examined the extent to which the Irish Constitution protects economic, social and cultural rights both directly and indirectly, and through its Directive Principles on Social Policy. Notwithstanding the strong communitarian influences in the Constitution, it is apparent that the manner in which the courts have interpreted the provisions of the Constitution has provided limited protection for economic, social and cultural rights. This is the case where socio-economic rights have been explicitly included in the text, and where they can be indirectly implied. The identification of unenumerated rights by the Irish courts has developed on an *ad hoc* basis and the recognition of economic, social and cultural rights that has taken

[333] See also Chapter 4, para. 4.5.
[334] See also Chapter 2, para. 2.10
[335] Unreported Supreme Court decision of 16th February 2005.

place has not been comprehensive or coherent. Meanwhile Article 45 has played a marginal role only in Irish constitutional jurisprudence.

In recent case law, the Supreme Court has demonstrated a marked resistance to both the recognition of economic, social and cultural rights, and the enforcement of these rights by the judicial branch. This resistance would appear to be grounded in a rigid view of the separation of powers doctrine and an ideological resistance to the constitutional recognition of economic, social and cultural rights as enforceable rights. At the same time this approach fails to give full expression to the communitarian elements of the Constitution. On closer examination, the distinction between commutative and distributive justice advanced by the Supreme Court is difficult to maintain when one looks at cases involving commutative justice which have had serious implications for the allocation of public resources. The approach taken also indicates a certain 'isolationism' on the part of the Irish courts. In expressing resistance to the recognition of economic, social and cultural rights as forming part of the constitutional order in the *T.D.* case, for example, no reference was made to the international human rights treaties Ireland has ratified and to developments in the constitutional recognition of socio-economic rights in numerous other jurisdictions where many of the difficulties raised by the Supreme Court have been overcome.

The rigid interpretation of the separation of powers doctrine which has been adopted gives the legislative and the executive branches a wide discretion in relation to the manner in which they uphold economic, social and cultural rights even where those rights are explicitly provided for in the Constitution. It appears that the courts will only intervene to effectively enforce the right to free primary education, for example, in extreme cases where the State clearly disregards its obligations in a conscious and deliberate way that is accompanied by bad faith or recklessness. Interestingly, Costello J, shortly after he retired as President of the High Court, addressing a conference to mark the 50th anniversary of the UDHR, called for a constitutional amendment to explicitly guarantee the social and economic rights of the underprivileged. He observed that:

> "A large minority [of the Irish population] lived below the poverty line; international capitalism and market forces increased national wealth but were indifferent to its distribution; services for some of the most deprived in our community – including the poor, the mentally handicapped, young offenders and the travelling community – were chronically inadequate. Sixty years of constitutional adjudication by the courts had shown that Article 40 was not adequate to redress that imbalance, while the consensus was that the courts had enhanced the protection of the basic rights included in the Constitution. There is no reason to assume that the enjoyment of the economic and social rights of the underprivileged and deprived would not be similarly enhanced if they too were constitutionally protected."[336]

Costello J's diagnosis resonates with the views of many academic commentators and NGOs. While the fundamental rights provisions of the Constitution have proven to be

[336] *Irish Times* 14th November 1998

successful in promoting and protecting civil and political rights, progress in fulfilling the State's international obligations in respect of economic, social and cultural rights has been limited, both in terms of the restricted application of Articles 40-44 and the refusal to apply Article 45.

In examining why the United States Constitution fails to include these rights Sunstein canvasses a number of possible factors: (i) chronology – the fact that the Constitution dates from the 18th century and reflects a more limited liberal view of rights; (ii) culture – that American culture is peculiarly libertarian and individualist to an extent that make it particularly hostile to economic, social and cultural rights; (iii) the separation of powers – the judicially-driven nature of the written Constitution in the US means that it cannot include aspirations in a way that other States' Constitutions can.[337] Sunstein also refers to a fourth factor, namely the appointments to the US Supreme Court in the 1970s which reversed a move towards recognition of economic, social and cultural rights by the Court during the 1960s. Many of these reasons also resonate in Ireland, but ultimately it is not clear why economic, social and cultural rights have not received more effective protection within the Irish constitutional order. It is probable that part of the answer lies in the text itself, part of the answer lies in the attitude of the judiciary to these rights and to constitutional interpretation, a further part may lie in wider Irish culture and in a societal or political ambivalence to these rights. International discourse on these rights, and in particular the approach taken to these rights in the United States and in the United Kingdom, may have significant influence also. Finally, it is possible that the approach taken by the current Supreme Court is contingent and that a future court may take a different approach to these questions.

Whatever the reasons, it is clear that the Irish courts have set down a marker against enforceable economic, social and cultural rights that makes the evolution of these rights at the judicial level unlikely without constitutional or legislative reform.

[337] Sunstein *loc. cit.*

Chapter 6 Towards an effective framework of protection

As indicated in the introduction to this Discussion Document, a key objective of the IHRC in the area of economic, social and cultural rights is to promote a more informed and inclusive national debate on how Ireland can meet its international obligations in the area of economic, social and cultural rights. In this chapter we review the analysis of the preceding chapters and make some tentative suggestions as to how Irish society can move forward in promoting greater respect for and protection and fulfilment of economic, social and cultural rights.

6.1 Understanding economic, social and cultural rights

One of the main purposes of this Discussion Document is to raise awareness and understanding of economic, social and cultural rights in Ireland. Chapter 1 of the Discussion Paper begins by returning to the philosophical and political origins of these rights, and traces how the present international framework of economic, social and cultural rights standards is the product of a long process of evolution. The development of the welfare state in Germany and Britain and Roosevelt's "New Deal" in the United States are shown as key stages in the development of thinking about why protections aimed toward social justice are important in a democratic society. Roosevelt's contribution to this process was to integrate the language of civil and political rights with that of economic, social and cultural rights, stemming from his strong sense that economic want must be met, not only to protect and guarantee human dignity, but also to ensure political stability and the enjoyment of political freedom.

In this historical context, the establishment of the international human rights system in the 1940s and 1950s can be seen as an attempt to bring together a diverse range of cultural and philosophical traditions, including liberal rights theory, Marxism, Christian and other religious traditions and developments within contemporary philosophy. Chapter 1 also recounts how, following the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the debate around these rights quickly became a victim of the polarised politics of the Cold War. By placing the division of the two main international human rights covenants in their historical and political context, this chapter helps to illuminate why the separation of the two covenants occurred because of particular historical and political factors rather than on any essential difference between the two sets of rights. The artificial nature of the separation of the two covenants has been recognised at the international level, most notably in the Vienna World Conference on Human Rights in 1993, which endorsed the principles of the equivalence, indivisibility and interdependence of both sets of rights.

6.2 Reconstructing debates around economic, social and cultural rights

Having established a clear understanding of where economic, social and cultural rights have come from, it is possible to begin to reinterpret some of the myths and misconceptions that have arisen around these rights. Despite the statements of governments and international bodies as to the equal status of economic, social and cultural rights as human rights, these rights remain controversial. Many of the

exciting developments in thinking around economic, social and cultural rights taking place around the world in recent years have not penetrated public debate in Ireland. Rather debate around these rights has tended to be polarised and often based on incorrect or incomplete understandings of concepts such as justiciability and the separation of powers. Certainly, modern understandings of the relationship between economic, social and cultural rights and civil and political rights are not reflected in Irish discourse on the subject. Chapter 2 sets out these arguments, *pro* and *contra*, with the hope that, by deconstructing the many misunderstandings that exist around economic, social and cultural rights, a more open and informed debate can take place on the key political, economic and legal issues that are involved.

The concept of 'justiciability' is central to many of these arguments. Chapter 2 explains how the term justiciability is used to distinguish between those rights that are capable of legal enforcement and those that are not and it is often used in a negative sense to describe certain rights as not being susceptible to legal protection. Often judges and politicians make choices about how certain rights should or should not be protected; however the fact that those choices may mean that economic, social and cultural rights receive a lower level of protection should not be taken to mean that there is anything inherently non-justiciable about economic, social and cultural rights. In other words, it is made clear that decisions to make rights enforceable must be distinguished from the argument that certain rights are so different as to be incapable of being enforced.

The contention that the two sets of rights are fundamentally different is based on a number of presumptions that are open to challenge. The first is the assertion that a clear line can be drawn between freedom rights (i.e. civil and political rights) involving "negative" obligations on the State to abstain from certain areas of life, and economic, social and cultural rights which are concerned with positive obligations on the State to provide a particular communitarian or social structure. As is shown in chapter 2, it becomes clear, upon examination, that both categories of rights can have both positive and negative dimensions. Similarly, the assertion that civil and political rights are "free", whereas economic, social and cultural rights place a continuous demand on finite public resources is easily overturned when one considers the substantial cost to the State of ensuring and protecting civil and political rights. Another asserted distinction is that between 'commutative' and 'distributive' justice, where again there are a wide range of areas in which the courts currently make decisions that have profound and wide-ranging redistributive effects. Finally, it has also been suggested that judges lack the capacity to examine issues relating to economic, social and cultural rights. However, as is pointed out, while modern welfare systems and budgetary processes are undoubtedly complex, judges already engage in consideration of many other highly complex and specialised matters in areas such as commercial law, intellectual property law and medical law.

The most resonant argument against enforceable economic, social and cultural rights in an Irish context is that the protection of these rights at law would somehow undermine the doctrine of the separation of powers. However, a commitment to the principle of the separation of powers does not preclude the legal protection of economic, social and cultural rights. At its core, the separation of powers is a doctrine designed to ensure that power does not become concentrated in any one arm of government and seeks to nurture a constructive relationship of mutual checks and

balances between the various arms of government. If we accept that economic, social and cultural rights are fundamental human rights worth protecting, then there would seem to be no reason why, within a healthy "constitutional dialogue", courts could not perform a useful role of overseeing the protection of those rights. Opponents of economic, social and cultural rights argue that these rights involve issues that are essentially 'political' and are properly contested in the political marketplace. This perspective overlooks the fact that persons suffering extreme disadvantage are largely disenfranchised from the political system and that majoritarian politics often fails to vindicate the substantive rights of marginalised groups.

Undoubtedly, a large part of the hostility to judicial protection of these rights lies in the potential redistributive effect of decisions on economic, social and cultural rights and the view that protection of these rights leads to an inefficient allocation of resources and would discourage self-sufficiency. However, economic markets, like political markets, are not infallible and they are not always effective in terms of delivering social goods. In relation to arguments about redistribution of scare resources we also reconsider what the concept of "scarcity" means within a contemporary wealthy developed economy. The key effect of such rights will be to improve accountability of government, which will improve the effectiveness and transparency of government action and induce duty-bearers within government to meet their obligations. In a system of legal protections of economic, social and cultural rights, governments are charged with balancing rights and scarce resources, and to do so in a transparent manner. Claims about the scarcity of resources and the unfettered power of the executive to distribute resources should not be beyond external examination and scrutiny and human rights standards can provide standards by which we measure the success of our democratic institutions.

From this analysis, it emerges that taking our human rights obligations seriously demands a rethink of how we structure our public services and our public financing to centre them on the need and right to respect for the basic dignity of the individual. Enforceable rights can provide a standard to examine political decisions about resources and basic commodities against the barometer of whether they meet the needs of basic human dignity. By reconstructing how we discuss and debate economic, social and cultural rights, we can move towards a truly open and inclusive dialogue on how we, as a society, intend to make effective rights that currently remain largely aspirational.

6.3 The nature of Ireland's obligations under international human rights law

The starting point for the IHRC in promoting economic, social and cultural rights is the international human rights framework of international and regional human rights conventions which Ireland has ratified and which it is legally bound to comply with in good faith. Returning to first principles, we are reminded of the key imperative underlying all human rights standards, as contained in the following words from the UDHR: "[a]ll human beings are born free and equal in dignity and in rights". International human rights law clearly provides that, if we are to uphold human dignity, we need to protect not only political freedoms, but we also need to promote freedom from economic, social and cultural deprivation.

Chapter 3 sets out the many international human rights instruments protecting economic, social and cultural rights which Ireland has ratified and also examines the soft law standards that have been developed to add more specific normative content to those instruments. The chapter focuses on both United Nations and regional systems of protection for economic, social and cultural rights, specifically the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Social Charter (ESC), the Revised European Social Charter (RESC) and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).

Many of these international treaties have accompanying enforcement mechanisms that have potential to make a direct impact on the protection of economic, social ad cultural rights in Ireland. The development of a system of complaints or petition through an optional protocol to the ICESCR could have a profound impact on the question of justiciability in all States party to that treaty. More immediately, the collective complaints mechanism under the RESC offers a valuable and innovative method of protecting rights within Europe. This system has grown rapidly in recent years and could well make a major contribution to the development of a strong body of jurisprudence around economic, social and cultural rights in Europe in the coming years. The European Court of Human Rights has also greatly expanded its interpretation of some civil and political rights in recent years to the point where the ECHR is now held to indirectly require States to protect certain important economic, social and cultural rights. Increased awareness in Ireland about these systems of enforcement will hopefully stimulate a greater reliance on these standards by Irish citizens both nationally and internationally.

6.4 Models of enforcement – steps towards developing a framework

By exploring a range of different tools at the constitutional, legislative and the administrative levels, the intention is to pave the way for drawing up proposals for an appropriate matrix of protection for Ireland. While international systems of protection are important, they will always play a subsidiary role and, in general, the sanctions and remedies available at the international level are weak. Chapter 4 focuses on the various forms of protection mechanisms for economic, social and cultural rights at the domestic level starting with the question of the status of international treaties in domestic legal systems. The analysis contained here borrows from the experience in other jurisdictions of developing new means of protecting rights.

In examining means of protecting rights, perhaps the most important area for consideration is the potential role of national constitutions. Chapter 4 looks first at the general characteristics and forms of constitutional protection of rights. As the fundamental law of the State, combined with the tool of judicial review, constitutions are particularly strong instruments for protecting rights. We then examine various jurisdictions where economic, social and cultural rights have been given both direct and indirect protection in national constitutions and where directive principles of social policy have been used in a dynamic way to protect these rights under the constitution. We focus in particular on the Constitutions and jurisprudence of South Africa and India. Based on the experience of these and other jurisdictions, in the view of the IHRC there is a strong argument, from both a legal and political perspective, for updating the language of the Irish Constitution to reflect contemporary understandings of the proper place of these rights in the constitutional order.

Chapter 4 also explores the role that legislation and legislative proofing processes can play in protecting economic, social and cultural rights. A sound legislative framework giving effect to these rights has many advantages and is perhaps the most accessible and direct way of enforcing rights. Providing for rights through legislation can circumvent many of the arguments that are raised against the enforceability of economic, social and cultural rights such as the separation of powers argument and the argument that these rights are too vague and imprecise to give rise to enforceable legal obligations. Legislative-proofing processes and parliamentary committee systems can also play a role in ensuring that new legislation complies with States' obligations in relation to economic, social and cultural rights. If these mechanisms are taken seriously and are given the adequate resources, powers and expertise, they have enormous potential to make these rights real.

The role of the courts and the various types of court orders that can be made to enforce and protect economic, social and cultural rights is another important area for consideration. In respect of each type of order, the nature of the order; whether such orders have existing or analogous precedent in Irish law; and the strengths and weaknesses of this type of order are analysed. Quasi-judicial means of adjudicating and enforcing rights, focussing particularly on the mandate of the South African Human Rights Commission, is a more novel form of protection, and the use of benchmarks and indicators as tools for measuring the progressive realisation of rights has a crucial role to play at the level of delivering public services.

A theme running through the chapter is the belief that judicial and administrative systems of protection are not mutually exclusive; rather, an optimum system for the protection of rights involves a combination of these forms of systems amongst others. By understanding justiciability in a broad sense, the objective of developing a system or matrix of protection mechanisms becomes clearer. In chapter 4 we explore the possibilities which are open to us to create such a matrix, borrowing from international best practice in order to equip us to make informed choices about the models which can be adopted for use here.

6.5 Creating a framework of protection in an Irish context

Before prescribing a system of rights protection appropriate to Ireland, we must have a clear picture of the particular legal and political context of this jurisdiction. Chapter 5 examines the extent to which the Irish Constitution and Irish law and policy structures already provide for the protection of economic, social and cultural rights.

Starting with the status of international law in the Irish legal order, the position of successive Irish Governments on the question of incorporating treaties is analysed, particularly their claims that the dualist nature of the Irish legal system constitutes an obstacle to incorporating any international human rights treaty except where domestic law already conforms to the relevant standards. In the view of the IHRC this position is based on a mistaken interpretation of the *facilitative* nature of Article 29.6 and is undermined by the fact that other countries with dualist legal systems have incorporated international human rights treaties and Ireland itself has given direct legal effect to a number of international treaties, most notably the ECHR. The continuing failure of the Irish Government to give domestic effect to international

human rights treaties generally is a matter of serious concern to the IHRC and to the international treaty monitoring bodies.

In its analysis of the Irish Constitution, chapter 5 begins by examining some of the key philosophical influences on the Constitution – those of liberal democracy and Christian democracy. Tracing the impact of these two political models, it appears that while the Constitution is primarily a liberal document which prescribes a strict view of the separation of powers and a robust system of judicial review, it also promotes a view of a just society, underpinned by the idea of a communitarian philosophy of Roman Catholic social teaching. It can be argued that this communitarian philosophy is consistent with a strong system of protection of economic and social rights. In relation to the operative parts of the Constitution, the protection afforded to economic, social and cultural rights in the Irish Constitution falls into three categories: direct protection through express inclusion of these rights; indirect protection through the interpretation of other rights; and recognition of economic, social and cultural rights as norms within the constitutional order as directive principles of social policy.

Both the right to education and the right to property are given direct protection in the Irish Constitution. Much of the wider judicial debates around the protection of economic, social and cultural rights have been played out in the courts in the context of the right to free primary education, particularly in relation to accommodation and educational needs of children with special needs. In relation to Article 42.4 for example the courts have taken quite a minimalist interpretation of the State's constitutional obligations to "provide for" free primary education. Where other fundamental rights are interpreted by the courts in an expansive manner, this can lead to indirect protection of economic, social and cultural rights. The right to life, which has been construed in an expansive manner to encompass basic socio-economic rights by the Indian courts, has not enjoyed such an expansive interpretation in Ireland. However, jurisprudence around the guarantee of equality before the law in Article 40.1 and around the doctrine of unenumerated rights has led the Irish courts to provide protection of economic, social and cultural rights in certain limited circumstances. The prospects for further expansion of the role of the courts in this area would appear to be limited as members of the judiciary have recently expressed the view that judicial restraint is required in the recognition of new unenumerated rights, particularly in relation to economic, social and cultural rights.

The Directive Principles of Social Policy contained in Article 45 have played a very limited role in Irish constitutional jurisprudence. In general, the courts have taken a minimalist approach to the application of these Principles which lies in stark contrast to the jurisprudence of the Indian Constitution where the Directive Principles have taken a central and dynamic role in constitutional jurisprudence. There are alternative interpretations of Article 45 available to the courts which support greater judicial notice to be taken of Article 45. In relation to other forms of protection of rights, it is observed that there is a clear lack of consistency in the manner and extent to which economic, social and cultural rights are defined in Irish legislation with some rights, such as the right to adequate housing, finding no statutory recognition. Ireland has not utilised the models of legislative-proofing that have been developed in the United Kingdom and elsewhere. In relation to the role of court remedies in protection of economic, social and cultural rights, there is potential to import some of the innovations that courts in other jurisdictions have developed in recent years.

Finally, by way of conclusion the IHRC would like to reiterate that any concerted effort to take economic, social and cultural rights seriously requires engagement with the full spectrum of law, politics and administrative practice. This Discussion Document is intended as only one step in a long process of building a comprehensive system of protecting these fundamental human rights in Ireland. The IHRC hopes that the next step will be a process of dialogue and debate from all interested parties around the points raised here with the goal of developing a 'roadmap' of concrete measures that can be taken to make the objective of effective protection of economic, social and cultural rights a reality.