SOCIO-ECONOMIC RIGHTS AND IRELAND

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“My family and I have been affected directly by the direct provision system. I am very, very much limited. I find it very difficult to manage my daily life with weekly support which is € 19.10 and no right to get a job, although I am qualified right now with five certs. I sense I am in poverty because I cannot provide for my children or ensure other family needs, and this has affected me as a parent…”

A. INTRODUCTION

Socio-economic rights are those rights, recognised under international, European and domestic law that allow “minimum conditions for welfare and well-being” to be realised by all persons. The right to work, just conditions of employment, the right to social security and social assistance, the right to health, housing, food and water, encompass core aspects of socio-economic rights. These rights have been set down in a variety of legal instruments that Ireland has legal obligations to respect, protect and fulfil. Table 1.1. below provides a select overview of the legal protection of socio-economic rights under international and European law. While the International Covenant on Economic, Social and Cultural Rights (ICESCR) focuses exclusively on socio-economic rights, it should be noted that within other UN rights treaties’ on racial discrimination, rights of women, rights of children and rights of persons with disabilities, civil and political rights, along with economic, social and cultural rights are dealt with side by side.

3 See, below, pp. 10 to 12.
Table 1.1: Select Socio-Economic Rights under International & European Law

<table>
<thead>
<tr>
<th>Right Protected</th>
<th>International Human Rights Law</th>
<th>European Convention on Human Rights (ECHR) &amp; European Social Charter (Revised) (Council of Europe)</th>
<th>European Union European Union Charter of Fundamental Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-Discrimination in the Enjoyment of SER</td>
<td>Article 26 ICCPR, Article 3 ICESCR, Article 5 CERD, Article 1 &amp; 2 CEDAW, Article 2 CRC, Article 2 CRPD.</td>
<td>Article 14 ECHR (+ substantive right) Pt. 5, Art. E ESC.</td>
<td>Arts. 20-23 EUCFR.</td>
</tr>
<tr>
<td>Right to enter employment and just conditions of work</td>
<td>Art. 23 and 24 UDHR, Arts. 6 &amp; 7 ICESCR, Arts. 5(e)(i) &amp; (ii) CERD, Art. 11 CEDAW, Art. 32 CRC, Art. 27 CRPD.</td>
<td>Pt. 2, Arts. 1-10 ESC.</td>
<td>Arts. 15-16 &amp; Arts. 27-33 EUCFR.</td>
</tr>
<tr>
<td>Right to social security and assistance</td>
<td>Art. 22 UDHR, Art. 9 &amp; Art. 10 ICESCR, Art. 5(e)(iv), CERD Art. 13 CEDAW, Art. 26 CRC, Art. 28 CRPD.</td>
<td>Pt. 2, Art.12 ESC.</td>
<td>Art. 34 EUCFR.</td>
</tr>
<tr>
<td>Right to an adequate standard of living, including food, water and shelter</td>
<td>Art. 25 UDHR, Arts. 11 &amp; 12 ICESCR, Arts 5(e)(iii) &amp; (iv) CERD, Arts. 13 &amp; 14 CEDAW, Arts. 24(2)(c) &amp; Art. 27 CRC, Art. 28 CRPD.</td>
<td>Potentially, Article 3 &amp; Article ECHR; Pt. 2, Arts. 4, 13, 30 &amp; 31 ESC</td>
<td>Art. 34(3) EUCFR (Housing only).</td>
</tr>
</tbody>
</table>

### Right to health

| Right to health | Art. 25 UDHR, Art. 12 ICESCR, Art. 5(e)(iv) CERD, Arts 12 CEDAW, Art. 24 CRC, Arts. 25 & 26 CRPD. | Potentially Article 2, Article 3 & Article 8 ECHR; Pt. 2, Art. 11 ESC. | Article 35 EUCFR. |

### Right to education

| Right to education | Art. 26 UDHR, Art. 13 ICESCR, Art. 5(e)(v) CERD, Art 10. CEDAW, Art. 28 CRC, Art. 24 CRPD. | Prot. 1, Art. 2 ECHR; Pt. 2, Arts 7(1-3), 10(1), 15(1), 17(1)(a), 17(2), 30(a) ESC. | Article 14 EUCFR. |

### Right to protection of private property

| Right to protection of private property | Art. 17 UDHR, Art. 5(d)(v) CERD, Arts 15(2) & 16(1)(h) CEDAW, Art. 13(5) CRPD. | Prot. 1, Art. 1 ECHR. | Article 17 EUCFR. |

While the table above provides some indication of socio-economic rights under the European Convention on Human Rights (ECHR), European Social Charter (Revised) and the European Union Charter of Fundamental Rights (EUCFR), as well as under other international human rights treaties, the core focus of this chapter is on the ICESCR, Ireland and domestic protection of socio-economic rights.

First, this chapter considers the debates as to whether socio-economic rights can be considered human rights. Second, consideration is provided to the

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8 See Chapter 4, “The UN human rights treaty system”
legal obligations upon Ireland under the ICESCR. Third, this chapter provides an overview of legislative provision and the debates surrounding constitutional recognition of socio-economic rights. In concluding, this chapter notes the significant difficulties that lie ahead for justiciable social-economic rights in Ireland.

B. SOCIO-ECONOMIC RIGHTS AS HUMAN RIGHTS

The controversy surrounding economic, social and cultural rights gives rise to a line of argument that these cannot be ‘rights' properly so called. Beetham argues that declarations by states of socio-economic rights as ‘rights’ confuse the “fundamental with the desirable” and insults those who are dying from deprivation to tell them they have such ‘rights’. Contrary to this argument, Eide has stated that human rights do not necessarily have to constitute positive rights, and we do not have to assume that all human rights are presently enforceable. As Craven correctly notes, the appeal to international human rights treaty law, is important to ensure a change in national law and practice, enforceability per se is not conclusive as to the existence of rights or duties within international law. Eide has noted the respectable level of signature and ratification of the ICESCR and the historical movement towards the recognition of a right to live free from poverty. Fundamental needs “should be defined as entitlements”, and not subject to

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12 Ibid.
13 Eide, A. et al. Economic, Social and Cultural Rights: A Textbook 2nd Edition (The Hague, Kluwer Law International, 2001) at p. 15, where Eide quotes President Roosevelt’s State of the Union address wherein he stated that individual freedom does not exist without economic security and independence. President Roosevelt continued noting, “[n]ecessitous men are not free men. People who are hungry and out of a job are the stuff of which dictators are made.” President Roosevelt in particular mentioned inter alia the right to work, the right to an adequate salary, the right to recreation, the right of every family to a decent home, the right for business to trade freely at home and abroad, the right to protection from infirmity, old age, unemployment and a right to education.
the whims of governmental change. However, Neier argues that while fair distribution of resources is a good to be protected, this should ultimately be left to the democratic process to decide, rather than such rights being decided upon by an unelected judiciary. Palmer notes that since the end of the Cold War, political theorists of the right have argued that the protection of economic and social rights lead to economic stagnation and individual dependency. Supposed inability of the capitalist economic model to operate where socio-economic rights are guaranteed as justiciable rights has been posited for the favouring of civil and political rights.

International human rights law has attempted to subvert many settled principles of international law. In the words of Lauterpacht, international human rights law has allowed the

“..recognition of the worth and human dignity of the individual...[and an] acknowledgement of the worth of human personality as the ultimate unit of all law...”

However, in many ways the revolution of international human rights law is incomplete, the aim of the revolution being to place “human beings at the centre of national and international values.” The primary actors and the

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14 Eide, supra fn. 13 at p. 6. Being self admittedly provocative, Eide asks the question as to what precisely was the permanent achievement of the international community in the prohibition of torture under international law, when international law did not provide for a person to be free from famine, hunger or preventable disease.
primary rights bearers and duty holders within the international system of law continues to be States.

The Committee on Economic, Social and Cultural Rights (CESCR)\(^\text{20}\) has stated that all too often States parties have ignored their obligations under the ICESCR.\(^\text{21}\) The Committee noted that if such serious violations of civil and political rights occurred, there would be expressions of ‘horror and outrage’; however responses to violations of economic, social and cultural rights are ‘muted’.\(^\text{22}\) While socio-economic rights under the ICESCR must be “progressively achieved”, no such limitation is placed on the other thematic conventions relating to Race, Women and Children.\(^\text{23}\) The CESCR has noted that ‘progressive realization’ of socio-economic rights should be achieved within a short period of time and States parties should move expeditiously to the results obligated to be achieved as a result of signature and ratification of the ICESCR.\(^\text{24}\) However, as Liebenberg notes, it is at the domestic level (and one may also argue at a regional level) wherein the normative content of socio-economic rights can be developed.\(^\text{25}\) The interrelationship between the enjoyment of civil and political rights and the protection of socio-economic rights should not be underestimated. Failure to respect or protect one set of rights may lead to the violation of the other subset of rights.\(^\text{26}\) The argument


\(^{22}\) Ibid., paras 5-7.


\(^{24}\) This issue is discussed below, see pp.13 -10. General Comment No. 3, CESC, The Nature of States Parties Obligations (Art. 2 para. 1) UN Doc. E/1991/23 (14 December 1990). Indeed the International Commission of Jurists in their Limburg Principles have noted that there may be some leeway in making all rights immediately justiciable and rights may, over time, become justiciable. See generally “The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights” (1987) 9 Human Rights Quarterly 122.


that civil and political rights are protected and respected through a State’s decision not to interfere with individuals is simplistic.  

These debates as to whether socio-economic rights deserve recognition as “human rights” can sometimes mask the fact that Ireland has positively affirmed the existence of socio-economic rights. This is evidenced through its ratification of various international and European legal instruments and domestic legislation protecting socio-economic rights. In the arena of international relations, Ireland has affirmed its commitment to the indivisible nature of all human rights, civil, political, economic, social and cultural. The ‘indivisible’ nature of civil and political rights and socio-economic and cultural rights was supported by Ireland in the Vienna Declaration and Programme of Action. The Vienna Declaration recognised that the “universal nature of these rights and freedoms is beyond question.” The Vienna Declaration confirms that

“[r]espect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law.”

C. IRELAND, ICESCR AND SOCIO-ECONOMIC RIGHTS

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27 Eide, supra. fn. 13 at pp 4-8. Eide (at p. 10) has analysed the reasoning behind the decision of the United Nations General Assembly to split the rights protected by the UDHR, into the subsets of ‘civil and political rights’ and ‘economic, social and cultural rights’. This was based on the assumption that recognition of civil and political rights was at no cost to the State; whereas provision of socio-economic rights granted a right to welfare for all individuals. See also, Eide, A. “Realization of Social and Economic Rights and the Minimum Threshold Approach” (1989) 10 Human Rights Law Journal 35 and “Economic Social and Cultural Rights as Human Rights” in Eide, supra. fn. 13 at pp 22-23.


29 ibid. para. 1

The precise content of socio-economic rights can be difficult to ascertain in the abstract.\textsuperscript{31} The UN High Commissioner of Human Rights has opined that the violation of the rights to food, health and housing usually occurs to those who are also hindered from participation within political processes and are denied the ‘normal benefits of citizenship'.\textsuperscript{32} This part of the chapter explores the legal obligations Ireland has under the ICESCR, before examining Ireland’s record before the CESC and the status of CESC determinations in Irish law.

\textbf{1. Ireland’s Obligations under ICESCR}

Under Article 2(1) ICESCR, Ireland is under an obligation to take steps to the maximum of its available resources to “progressively realize” all socio-economic rights. The Committee on Economic, Social and Cultural Rights (CESCR) has emphasised that this obligation is

\begin{quote}
“a necessary flexible device reflecting the realities…and difficulties involved for any country in ensuring full realization of economic, social and cultural rights.”\textsuperscript{33}
\end{quote}

However, the CESCR has highlighted that States parties must undertake “deliberate, concrete and targeted” \textsuperscript{34} steps to “move expeditiously and effectively as possible” to meet its legal obligations under ICESCR. \textsuperscript{35}

\textsuperscript{31} Alston, P. & Quinn, G., \textit{supra} fn. 15 at p. 161.
\textsuperscript{32} Report of the UN High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/1999/96 at para. 5. The use of the word ‘citizenship’ is a little unfortunate, but may reflect the fact that political rights are still linked to concepts of citizenship. For more on this and the difficulties of constructing human rights as citizens’ rights, see the comments of President Michael D. Higgins (Ireland): “International Human Rights and Democratic Public Ethics”, \textit{Royal Irish Academy: Summer Discourse}, University of Limerick, 06 June 2014.
\textsuperscript{33} CESCR, General Comment No. 3 \textit{The Nature of States Parties Obligations} (Art. 2 para. 1) UN Doc. E/1991/23 (14 December 1990), para. 2.
\textsuperscript{34} CESCR, General Comment No. 3 \textit{The Nature of States Parties Obligations} (Art. 2 para. 1) UN Doc. E/1991/23 (14 December 1990), para. 3.
\textsuperscript{35} CESCR, General Comment No. 3 \textit{The Nature of States Parties Obligations} (Art. 2 para. 1) UN Doc. E/1991/23 (14 December 1990), para. 9.
Retрогressive impacts on socio-economic rights within a State demand the utmost scrutiny. While the legal duty upon Ireland under Article 2(1) ICESCR indicates that socio-economic rights do not have to be respected, protected and fulfilled immediately, a decline in living standards that is directly attributable to a State’s economic policies would be “inconsistent” with ICESCR obligations. Similarly, where a significant number of individuals within a State are deprived of “essential” foodstuffs, healthcare, housing and education, then a State is “prima facie failing to discharge its obligations” under the ICESCR. In times of economic crisis, such as that experienced by Ireland since 2008, any retrogressive measures that impact on the enjoyment of socio-economic rights, should be temporary, strictly necessary and proportionate, non-discriminatory and designed so as to protect the most marginalised within societies.

The CESCR noted that the State’s response to “the unprecedented economic and financial crisis” had been

36 Ibid.
38 CESCR, General Comment No. 3 The Nature of States Parties Obligations (Art. 2 para. 1) UN Doc. E/1991/23 (14 December 1990), para. 10.
40 While the CESCR made these comments in relation to the (now in force) Optional Protocol on an Individual Complaints Mechanism, this nevertheless provides some basis for analyzing the normative obligations upon States parties to the ICESCR. See CESCR, An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant, UN Doc. E/C.12/2007/1 (10 May 2007), paras 8-10.
“[D]isproportionately focused on instituting cuts to public expenditure in the areas of housing, social security, health care and education, without altering its tax regime.”

Reminding Ireland of its obligations under the ICESCR, the CESCR recommended that a full human rights audit be undertaken by Ireland, with the intention of this audit and associated measures to gradually phase out its cuts to public services and social benefits “in a transparent and participatory manner.”

The obligations deriving from Ireland’s ratification of the ICESCR are three-fold: (i) an obligation to respect, (ii) an obligation to protect and (iii) an obligation to fulfil socio-economic rights. This tripartite method of seeking to identify the obligations on States under ICESCR has been utilised extensively by CESCR in their general comments. This tripartite approach emerged from the work of Henry Shue and others, who argue that you cannot

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47 As regards the application of the tripartite duty to respect, protect and fulfil socio-economic rights, this was applied to a degree in Eide, A., The Right to Food as a Human Right, UN Doc. E/CN.4/Sub.2/1987/23. This tripartite duties have been more recently applied by CESCR in its general comments, in particular since its first usage in General Comment
neatly categorise human rights into State obligations of ‘non-interference’ for civil and political rights, while widespread State ‘deliverance’ of socio-economic rights is mandatory. All human rights involve certain aspects of non-state interference; procedural guarantees to ensure respect for rights and remedying breaches of human rights, and ultimately, ensuring human rights are fulfilled by positive action on the part of the State. As regards socio-economic rights, the duties upon states can be understood within this tripartite division, as follows:

(i) **Obligation to respect:** A State must not disproportionately interfere with the ability of an individual to satisfy for herself, a certain socio-economic right. For example, a State should not put in place barriers to persons entering employment. However, in the case of a doctor, for example, the State is quite entitled to regulate entry to such employment on the basis of educational attainment and professional competence.48

(ii) **Obligation to protect:** A State has a duty to protect against violations of socio-economic rights by both state and non-state actors. For example, education must be accessible to children, and third parties, such as employers and/or parents, must not interfere with this right.49

(iii) **Obligation to fulfil:** Where a socio-economic right cannot be achieved through the State’s non-interference (respect) or

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48 This example would be in line with non-discriminatory basis for limiting access to employment, see generally: draft general comment on just and favourable conditions of work (UN Doc. E/C.12/54/R.2 (20 January 2015)), paras. 57-63.

regulation to ensure individual’s access to a given socio-economic right (protect), the State may have an obligation to fulfil that right. The obligation to fulfil is understood as a duty on the State to (a) facilitate individual’s access to, or enjoyment of a particular socio-economic right; (b) an obligation to promote achievement by individuals of their socio-economic rights and, finally (c) an obligation to provide that right directly where all of the other methods described above have not resulted in protecting the enjoyment of a particular socio-economic right. Focusing on the right to social security, the CESCR has emphasised that as regards the obligation to facilitate, there should be a system of social security in place that is:

“adequate, accessible for everyone and will cover social risks and contingencies.”

As regards the obligation to promote, the CESCR has emphasised that social security and assistance systems must:

“…take steps to ensure that there is appropriate education and public awareness concerning access to social security schemes, particularly in rural and deprived urban areas, or amongst linguistic and other minorities.”

Where individuals or groups cannot, through their own endeavour or otherwise be self-sufficient, then Ireland is under an obligation to fulfil the right to social security and assistance. This includes an obligation:

52 Ibid., para. 48.
“to establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection… It is important that social security schemes cover disadvantaged and marginalized groups…” 53

2. Ireland before the Committee on Economic, Social and Cultural Rights

The rights protected under the ICESCR seem broad, and indeed vague, at the conceptual level. The methods utilised by CESCR to at least attempt to provide coherency to the broad range of rights protected, include general comments and concluding observations.54 The CESCR has emphasised that the ICESCR should be enforceable within domestic legal systems.55 Seeking to place socio-economic rights on the same plane as civil and political rights, the CESCR has stressed that the socio-economic rights protected under the ICESCR “possess at least some significant justiciable dimensions.”56 To date, Ireland has had three periodic reports considered by the CESCR in 1999, 2002 and 2015. On all occasions, the CESCR has expressed concern that Ireland has not incorporated ICESCR into domestic law, and about the lack of reference and utilisation of the ICESCR by the superior courts.57 Ireland has failed to adopt rights based frameworks in areas of anti-poverty,58 disability59

53 Ibid, paras 50-51.
provision of health-care, \(^{60}\) rights of members of the Traveller community, \(^{61}\) housing \(^{62}\) and the low rate of social assistance payments. \(^{63}\)

Prior to the CESCR’s consideration of Ireland’s third periodic report, there was significant engagement by civil society organisations and others on the extent to which Ireland is meeting its obligations under ICESCR. The Irish Human Rights and Equality Commission (IHREC), Ireland’s national human rights institution, has identified core challenges to Ireland’s compliance with its socio-economic rights obligations under the ICESCR. \(^{64}\) The IHREC is legislatively tasked with \textit{inter alia} promoting human rights and equality, reviewing the adequacy of implementation by the Government of domestic, European and international legal obligations in the arena of human rights and equality. \(^{65}\) Irish civil society organisations have also mobilised to provide the CESCR with information as regards areas in which Ireland may not be meeting its obligations under the ICESCR. \(^{66}\) The core civil society report, from

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\(^{64}\) IHREC, Submission to the Committee on Economic, Social and Cultural Rights on the Examination of Ireland’s Third Periodic Report under the International Covenant on Economic, Social and Cultural Rights (May 2015) and IHREC, Submission to the Committee on Economic, Social and Cultural Rights on the Examination of Ireland’s Third Periodic Report under the International Covenant on Economic, Social and Cultural Rights: List of Issues Stage (October 2014).

\(^{65}\) Section 10(1), Irish Human Rights and Equality Commission Act 2014.

\(^{66}\) Some 11 civil society organisations provided analysis on certain aspects of Ireland’s compliance with its obligations under ICESCR by November 2014. These shadow reports are accessible at: \url{http://tb.ohchr.org/default.aspx} (last accessed, 22 June 2015). A number of these civil society organisations, and others, provided a shadow report response to CESCR’s list of issues.
the Free Legal Advice Centres (FLAC), *Our Voices, Our Rights*, provides the CESCR with key information on Ireland’s failure to fully protect socio-economic rights in a number of areas. Core themes that have emerged from the IHREC’s national human rights institution report and FLAC’s civil society report include: the need to adopt structural reforms to State budgetary processes to ensure compliance with socio-economic rights obligations under the ICESCR, the lack of equal enjoyment in socio-economic rights for vulnerable members of society including travellers and asylum seekers, fulfilment of the right to education, in particular for minorities in society, access to physical and mental healthcare for all persons in the State, and the right to enjoy fair and just working conditions.

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The CESCR had already identified some core issues with Ireland’s compliance with its obligations under ICESCR in December 2014, and the list of issues forwarded by the Committee to the state in advance of the oral dialogue bore striking similarities to concerns previously expressed by CESCR in their 1999 and 2002 Concluding Observations. In June 2015, the CESCR considered Ireland’s third periodic report. As well as the areas of concern identified above, the CESCR expressed further concerns about the limited nature of legal aid provision in Ireland; the lack of consultation Ireland engages in with rights-holders most impacted by cuts to their socio-economic rights and the poor living conditions of asylum seekers in direct provision accommodation centres and the restrictions on asylum seekers accessing employment, social security, healthcare and education. In the area of reproductive rights, the CESCR noted the “discriminatory impact” of Ireland’s abortion prohibitions on women who cannot afford to travel to access abortion. The CESCR recommended that Ireland,
“take all necessary steps, including a referendum on abortion, to revise its legislation, including the Constitution and the Protection of Life During Pregnancy Act 2013, in line with international human rights standards…”

The CESCR also condemned the “massive and systemic forced labour that occurred, with the patronage of the State, between 1922 and 1966 in Magdalene Laundries.” The Committee recommended an independent investigation be conducted, bringing “those responsible to justice” and the provision of effective remedies for victims.

3. The Status of CESCR Determinations in Irish Law

Domestic courts will interpret the scope of a State’s human rights obligations with reference to constitutional, legislative or common law norms. However, at an international level, when dealing with purported human rights violations, there is no international court of human rights to decide on whether a State is abiding by its obligations under the international treaty rights regime. Focusing on Ireland, while the CESCR’s conclusions may be of political and societal importance, questions remain about the legal value of general comments, concluding observations and the jurisprudence of treaty monitoring bodies. Buergenthal, states (in relation the Human Rights Committee, but equally applicable to the other monitoring bodies), that concluding observations “…must be viewed as authoritative pronouncements on whether a particular State has or has not complied with its obligations…”

82 Ibid.
84 Ibid.
85 In this regard, it should be remembered, that while treaty based bodies are specifically envisaged within the text of the ICCPR, CERD, CEDAW, CAT, CRC, the Migrant Workers Convention and the Disability Convention; the CESCR derives its authority by virtue of ECOSOC Resolution 1985/17, UN Doc. E/RES/1985/17 (28 May 1985). The obligation of CESCR is to assist rather than to be directly responsible for the supervision of the Covenant. See, Sepúlveda, M. The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights (Oxford: Intersentia, 2003) at pp 89-90.
However, O’Flaherty seems less than convinced, stating that there is no role for the committees in determining violations of human rights treaties by States parties.\textsuperscript{87} The text of the various treaties suggest that only ‘suggestions or general recommendations’ can be made.\textsuperscript{88} O’Flaherty categorically states that:

“Treaty bodies do not have judicial powers and in no case have they been empowered to determine violations of the treaties by states parties.”

The working methods of treaty bodies and the issuing of concluding obligations, emerge from a

“…cursory exchange of documentation and views between a State party and a treaty body, with the oral component often lasting less than one working day.”\textsuperscript{89}

Sepúlveda believes that Concluding Observations are more or less declarations of compliance or non-compliance.\textsuperscript{90} Attributing priority to recommendations of treaty bodies where such language is utilised is deemed to be “a risky one”.\textsuperscript{91} The CESCR routinely declares that States parties have not complied with or have breached their obligations under the ICESCR.\textsuperscript{92}


\textsuperscript{89} Ibid, p. 37. O’Flaherty states that it is “sufficient to query the appropriateness of according binding status to concluding observations to the outputs so limited, hurried and wide-ranging a process.” In addition, whereby concluding observations are reached by consensus, were these observations to have a more legalistic character, it would result in majority and dissenting views of treaty body members.

\textsuperscript{90} Sepúlveda\textit{ The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights} (Oxford: Intersentia, 2003) notes comments by a former Economic, Social and Cultural Rights Committee member, Bruno Simma, who has stated that “[t]he Concluding Observations as they stand now, are comprehensive and clear evaluations of a State Party’s performance. If necessary, they call a spade a spade and speak of violations of rights protected by the Covenant…”

\textsuperscript{91} O’Flaherty, M.,\textit{ supra} fn.87 at pp 45-46.

\textsuperscript{92} Illustrative examples include: Concluding Observations, ICESCR. Greece, UN Doc. CRC/C/114 (2002) 25 at para. 141; Concluding Observations, ICESCR, Sri Lanka, UN Doc.
Despite this, Foster categorises the views of the human rights treaty bodies, be it concluding observations, general comments or jurisprudence, as “interpretive guidance” of “highly persuasive value”.93

In relation to general comments94 issued by the treaty bodies, the majority of national governments and courts have not paid much heed to these.95 Individuals cannot rely on the ICESCR before Irish courts. Arguments that domestic law is invalid due to ‘generally recognised principles of international law’, which includes human rights, have been rejected.96 In Kavanagh v Governor of Mountjoy Prison, the Irish Supreme Court specifically noted that in the event of a conflict between domestic legal norms and international human rights instruments (in this case the ICCPR), domestic legal norms prevail.97 This general principle would also be applicable to the ICESCR. This may explain why in the Irish Courts, legal counsel do not, as a matter of course, rely directly upon the ICESCR or the concluding observations and general comments of the CESCR. The ICESCR has been cited on only one occasion (indirectly) before the Irish superior courts to date. In S. I. v The Minister for Justice, Equality and Law Reform98 the applicant suffered from HIV/AIDS and argued that she would face persecution in Nigeria. The High Court held that the applicant could be regarded as a member of a social group

So from a positivistic legal viewpoint, and due to Ireland’s dualist approach to the relationship between international and domestic law, there is limited scope for applying the ICESCR before the Irish superior courts. However, this does not mean that the Irish courts do not engage with questions of socio-economic rights, as they are protected under domestic law. It is to this domestic protection of socio-economic rights that this chapter now turns.

**D. SOCIO-ECONOMIC RIGHTS IN IRELAND: LAW, POLICY & POLITICS**

A striking feature of political and policy debates in Ireland on the protection of socio-economic rights is the failure to define income maintenance through the social welfare and taxation systems, health care provision, access and provision of housing, the right to education and employment rights (to identify but a few areas) as “socio-economic rights”. Instead, various actions plans and governmental policy objectives seek to identify these issues as ones of living within an “inclusive society”, or seeing the realisation of such rights as within an the political sphere. In 2015, the Central Statistics Office (CSO) found that 8.2% of the population were living in consistent poverty, 30.5% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation, while 15.2% of the population suffered from forms of enforced deprivation.  

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population were “at risk” of poverty.\textsuperscript{102} Those with disabilities, are 2.5 times less likely to be in employment than those without a disability.\textsuperscript{103} The economic recession impacted more significantly on the under-25s, the unemployed, person with disabilities, Travellers and lone parents, than other societal groups.\textsuperscript{104} The issue of access to affordable housing and homelessness has been a recent topical socio-economic rights issue.\textsuperscript{105} Asylum seekers continue to live in inadequate and poor communal accommodation, prevented from seeking work, and required to live on €19.10 per week per adult, and €9.60 per week, per child. Generally, there is no other entitlement to any other form of social welfare/social assistance benefits or payments.\textsuperscript{106} As will be discussed below, Ireland does protect to a degree socio-economic rights through legislation. It should not be assumed, however, that just because a socio-economic right is provided for in legislation, that this satisfies Ireland’s obligations under ICESCR.


While not generally framed within the parlance of “socio-economic rights”, the Irish welfare state protects to a degree, certain rights that could be defined as socio-economic in nature. The Irish social welfare system had its origins in the British Poor Law.\textsuperscript{107} Throughout the 20\textsuperscript{th} century, legislation in the areas of

\textsuperscript{102} CSO, \textit{Survey on Income and Living Conditions 2014} (Dublin: January 2015), see www.cso.ie for access to this report.
\textsuperscript{103} National Disability Authority, \textit{Disability and Work: The Picture we Learn from Official Statistics}, p. 18.
\textsuperscript{104} See, O’Connor & Staunton, TASC, \textit{Cherishing All Equally: Economic Inequality in Ireland} (2015);
\textsuperscript{105} See the Pre-Budget Submissions of a variety of homelessness and human rights organisations, available here: http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/fper-committee/2015pre-budgetsubmissions/ (last accessed: 22 June 2015).
education, health care, social assistance and social security, an Irish welfare state slowly emerged.\textsuperscript{108} Many of the considerations of socio-economic rights protection in Ireland exclude legislative protection of socio-economic rights. O’Connell, in his extensive and fascinating contribution to the broader debates on socio-economic rights,\textsuperscript{109} posits that when considering legislative protection of socio-economic rights, this can (at least in part) result from the legislature conferring socio-economic rights, \textit{for a time}.\textsuperscript{110} This, O’Connell argues, subjects legislative socio-economic rights to the whims of government and legislatures, failing to fully recognise the fundamental nature of socio-economic rights.\textsuperscript{111} Indeed, if one looks at the treatment of childless, unemployed persons under 26 years of age by the Irish legislature in our social welfare code,\textsuperscript{112} and more recently the changes introduced to one parent family payment,\textsuperscript{113} there is some truth in this argument. While the protection of socio-economic rights by the legislature and government is subject to political whims and (on occasion) allows the political establishment to create folk-devils\textsuperscript{114} and raise the spectre of the ‘feckless chancers’ getting “something for nothing”,\textsuperscript{115} legislative protection of socio-economic rights should not be so easily dismissed. In a range of different fields, there exists extensive legislation on areas that can be considered, at least to a degree, as some attempt by the State to respect, protect and/or fulfil socio-economic rights. What follows is not an exhaustive categorisation of attempts to protect socio-economic rights through legislation. It should not be taken that the legislative socio-economic rights described necessarily comply with Ireland’s obligations under the ICESCR. What the information below does seek to do is


\textsuperscript{110} Ibid., p. 6.

\textsuperscript{111} Ibid.


\textsuperscript{114} Cohen, \textit{Folk Devils and Moral Panic} (3\textsuperscript{rd} ed. London, Routledge, 2002).

to broaden understanding of how socio-economic rights are seen as capable, to some extent at least, of legislative protection.

(i) **Social Welfare and Social Assistance:** The Social Welfare (Consolidation) Act 2005 (as amended) provides that once individuals satisfy stringent legislative criteria (including the habitual residence condition), they may be entitled to a variety of social assistance payments which may include: non-contributory state pension, one parent family payment, carers’ allowance, child benefit and jobseekers’ allowance. Where a person applies for any such social assistance payment, and this is refused, there is appeals architecture in place to determine entitlement.

(ii) **Education:** The constitutional right to education is supplemented by legislation and policy as regards access to a school, the minimum age that education must continue until and the obligations on the State to provide for education. There are systems in place for challenging refusal of a school to register a student, and systems to review decisions on school discipline and expulsion of students.

(iii) **Employment:** While a right to earn a livelihood is considered a constitutional right, there is no entitlement to be provided with employment of your choice. Once in the employment relationship, then

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116 Now provided under s. 153 of the Social Welfare (Consolidation) Act 2005 (hereinafter ‘the 2005 Act’) (as amended). It should be noted that the 2005 Consolidation Act includes the ‘habitual residence’ requirement.

117 Section 173 of the 2005 Act (as amended).

118 Section 180 of the 2005 Act (as amended).

119 Sections 219-223 of the 2005 Act (as amended).

120 Section 140-148 of the 2005 Act (as amended).

121 However, see significant criticisms and an outline of core weaknesses with the Irish social welfare appeals processes, Brady/FLAC, *Not Fair Enough: Making the Case for the Reform of the Social Welfare Appeals System* (Dublin: Printwell, 2012).

122 See, Article 42.4 of Bunreacht na hEireann. In *Sinnott v Ireland* [2001] 2 IR 545 at p. 675 the Irish State recognised that the right to a primary education ends at the age of 18. This was accepted by a number of judges in both the High and Supreme Courts. For a more detailed explanation and commentary see O'Mahony, C. *Education Rights in Irish Law* (Cork, Thomson Roundhall, 2006) at pp. 166 to 174. Section 31 of the Education (Welfare) Act 2000 sets the minimum school leaving age at 16 years.


124 See below, pp. 32-33.
mechanisms exist as regards challenging unfair employment practices.125

(iv) Health: There is no right to free health care. Subject to satisfaction of a residency test and a means test, an individual may be entitled to the provision of health-care services at no or low cost.126 The State also regulates private health insurance. The Health Insurance Authority is responsible for monitoring and exercising certain powers as regards private health insurance in Ireland.127

(v) Housing: As is explored in more detail below, there is no absolute right to be provided with housing or shelter in Ireland.128 Under statute, a person has certain legislative rights to ensure the habitable nature of a private rented property.129 Dispute resolution mechanisms are in place for landlords and tenants to utilise, if disputes occur, as regards certain elements of the lease agreement.130

Socio-economic rights inspired court challenges against low rates of social assistance provision, or adequacy of medical service provision, or non-provision of housing, would, as is explored below, be unlikely to succeed in an Irish court.

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125 See, for example, Employment Equality Acts 1998-2011 (discrimination); Organisation of Working Time Act 1997 (maximum permitted working time); Safety, Health and Welfare at Work Act 2005; Protected Disclosures Act 2014 (Whistleblowing): Disputes and resolutions may be determined by Rights Commissioners (see, www.lrc.ie, [last accessed, 22 June 2015]).
127 Health Insurance Act 1994 (as amended).
128 See below, pp. 28-31.
130 See generally, the powers and functions of the Private Residential Tenancies Board, under the Residential Tenancies Act, 2004.
2. The Constitution, ECHR, the Irish Courts and Socio-Economic Rights

a. Constitutionalising Socio-Economic Rights

The Irish superior courts have dealt with the issues relating to the Constitution and the protection of socio-economic rights on a number of occasions.131 The right to earn a livelihood is protected by Article 40.3.1 of the Constitution.132 However, it is subject to limitations.133 Constitutional protection of equality, socio-economic rights, the right to work and family life are unlikely to significantly interfere with the operation of legislative schemes of social security and social assistance, housing, access to employment etc. In the past, the provision of a “deserted wives allowance”, which at the time did not extend to “deserted fathers”, survived constitutional scrutiny.134 The reason for this judicial reluctance relates to strong judicial suspicion with imposing individual judicial (or a court’s collective) views on what should be in the common good. The Constitutional Review Group (CRG)135 examined whether economic and social rights should be included in Bunreacht Na hÉireann. A majority decided against the inclusion of such rights. The main body of thought was that economic and social rights were a “political matter” and for the judiciary to recognise such rights would encroach on the ‘Separation of

133 Hand v Dublin Corporation [1991] 1 IR 409. In the recent case of N.H.V. & F.T v Minister for Justice and Equality [2015] IEHC 246, the absolute legislative prohibition on the right to work for the applicant protection seekers in Ireland, for a period of over 7 years, did not breach the right to earn a livelihood under the Constitution. In addition, McDermott J. held that there was no violation of any rights under the European Union Charter of Fundamental Rights nor the European Convention on Human Rights.
134 Lowth v Minister for Social Welfare [1998] 4 IR 321 at 325-327. This argument had already been rejected in the earlier (unreported) case of Dennehy v Minister for Social Welfare, Unreported judgment of the High Court, Barron J, 26 July 1984). This gender disparity was remedied by the Social Welfare Act 1990, with the introduction of the lone parents’ allowance.
Powers’ doctrine and lead to the transfer of power from an elected assembly to an unelected judiciary. However, in February 2014, the Constitutional Convention recommended that socio-economic and cultural rights be protected in the Constitution. The majority voted to expressly enumerate certain socio-economic and cultural rights within the Constitution. However, to date, no government action has occurred on foot of this recommendation. In May 2015, the government opposed a Private Members Bill on inserting the protection of social, economic and cultural rights into the Constitution. The Bill, if passed, would have put the following wording to the people in a referendum:

“…the State shall progressively realise, subject to its maximum available resources and without discrimination, the rights contained in the International Covenant on Economic, Social and Cultural Rights. This duty shall be cognisable by the Courts.”

The Bill was defeated by the Government parties. Séan Sherlock TD, Minister of State at the Department of Foreign Affairs and Trade, stated that while the government was committed to “economic, social and cultural development”, the Bill for a constitutional referendum on social, economic and cultural rights would not be accepted. There were concerns that if the Bill was accepted, it would “do huge damage to our economy”.

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136 A minority, Dr. Kathleen Lynch and Alpha Connolly, contended that the majority of the CRG were “ignoring the economic inequalities of Irish society”. Dr. Lynch questioned whether the judiciary would ever recognise economic and social rights and opined that the reason for not acknowledging existence of these rights is because “[t]he social world to which judges belong is not one which is shared by the majority of people.” See Dr. Kathleen Lynch “The Independence of the Judiciary” Constitutional Review Group Report (1996) pp. 584-585
139 See comments of An Taoiseach, Enda Kenny TD, Dáil Debates, 4 Nov. 2014.
140 Thirty Fourth Amendment to the Constitution (Economic, Social and Cultural Rights) Bill 2014. See also, Dáil Éireann Debate, 19 May 2015.
141 28 Dáil deputies voted in favour of the Bill; 68 Dáil deputies voted against the Bill.
142 Author’s emphasis, note the word “rights” were not mentioned by the Minister when he spoke on the Bill in the Dáil.
(Fine Gael) expressed concerns about making socio-economic rights cognisable before the courts. Deputy Buttimer stated:  

“The power to determine how State revenue will be collected and spent is reserved to the Oireachtas and more specifically to the Dáil. While it is possible for the courts to restore the legal entitlements of parties, decisions involving the redistribution of existing wealth patterns are left to us in this Chamber.”

As is explored in the next part of this chapter, similar concerns as expressed by Deputy Buttimer, around the proper division of powers between the parliament and the courts, have to a large extent, prevented any significant socio-economic rights jurisprudence developing in the Irish courts.

b. The Approach of the Irish Courts

In the case of Ryan v Attorney General  

“[w]hen dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens…”

Although the Constitution “embraces the notion that the nation’s wealth should be justly distributed”, this is for elected officials to decide, and not the Courts. Coupled with a dualist approach to international legal obligations, the Irish superior courts have shown some reluctance in interpreting the Irish

144 Dáil Éireann Debate, 19 May 2015.
145 [1965] I.R. 294
148 See above, pp. 19-20.
Constitution as protecting economic, social or cultural rights. The former Chief Justice, Mr Ronan Keane has spoken of his "gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as "socio-economic rights" to be unenumerated rights guaranteed..." in the Constitution."\(^{149}\)

Nevertheless, in *Re Health (Amendment) (No. 2) Bill 2004*, the Supreme Court did state that "in a discrete case...the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs."\(^{150}\)

Writing in 2012, O’Connell argued that "the actual likelihood of socio-economic rights being salvaged from the Constitution is very slim..."\(^{151}\)

While there may be a significant ring of truth in this, some re-assessment of this conclusion is necessary, given more recent case law. In the last number of years, legal counsel, potentially weary of making constitutional arguments, have sought to utilise the ECHR Act 2003 to make socio-economic rights arguments before the courts.\(^{152}\) In three cases: *Doherty*,\(^{153}\) *O’Donnell*\(^{154}\) and...
Ellen O'Donnell, the High Court had to consider a number of issues surrounding legislative obligations of local housing authorities, in respect of members of the Traveller community. Two of these cases (O'Donnell (2007) and Ellen O'Donnell (2008)) involved inter alia questions surrounding the local housing authorities statutory obligations under the Housing Acts 1966-2004. In both cases, some of the applicants suffered from profound disabilities. These applicants lived in over-crowded and cramped caravans. Key principles emerging from these High Court cases, on housing and socio-economic rights were:

a) There is no entitlement to free of charge accommodation under Irish law (in these cases, the Housing Acts 1966-2004).

b) Legislative obligations under the Housing Acts 1966-2004 must be interpreted in an ECHR compliant manner;

c) Where the local housing authority provides an individual with an offer of accommodation, this will usually meet any positive obligation of this authority under the ECHR;

d) Poor quality local authority accommodation, even if in breach of statutory obligations, must be tolerated on a “grin and bear” it basis;

e) In particular, and exceptional circumstances, where the failure of a local housing authority results in an actual or continued breach of the right to private and family life for an individual (or family) under Article 8 in Ireland and the European Convention on Human Rights Act 2003 in Egan, S., Thornton, L. and Walsh, J. *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014), para. 15.28.


155 Ellen O'Donnell & Others v South Dublin County Council & Others [2008] IEHC 454 (11 January 2008). Pointed reference cannot be made to page or paragraph numbers in the judgment. This case should not be confused with the other O'Donnell case: O'Donnell v South Dublin County Council [2007] IEHC 204 (22 May 2007), different applicants were involved in both cases.


157 See, Chapman v. The United Kingdom (2001) 33 EHRR 399, para. 99, where the European Court of Human Rights stated: “[w]hether the State provides funds to enable everyone to have a home is a matter of political not judicial decision…”

158 Section 3(1) of the ECHR Act 2003.


ECHR, it is open to a court to declare the local housing authority to be breaching rights under the ECHR. Edwards J. in Ellen O’Donnell (2008) declared the local authority to be in breach of Ellen’s rights under Article 8 ECHR (as regards overcrowding), and ordered the local housing authority to provide temporary accommodation, in whatever form it so chose, to Ellen and her family.

f) This may result in the award of damages. In the O’Donnell case (2007), Laffoy J. was minded to award damages of €58,000 in order to provide the Traveller plaintiffs with a wheelchair accessible caravan.  
Following the judgment, the local housing authority provided the plaintiffs with a wheelchair accessible mobile home.

In March 2015, the Supreme Court delivered its judgment in the appeal from the Ellen O’Donnell High Court decision. The decision of the Supreme Court is notable in a number of respects. The decision of McMenamin J. went much further in his condemnation of the cramped and over-crowded conditions than the High Court, finding that not only did the local housing authority breach its obligations under the ECHR Act 2003, but also the Irish Constitution. The Supreme Court held:

“…insofar as Ellen O’Donnell is concerned, this is not only a case about parental choices, rights and duties (though these arise), but also about the duty of the Council, when faced with clear evidence of inhuman and degrading [accommodation] conditions, to ensure that it carried out its statutory duty. This was to vindicate, insofar as was practicable, in the words of Article 40.3 of the Constitution, the rights of one young woman with incapacities to whom, by virtue of the evidence, the Council owed a discrete and special duty under Article 40 of the Constitution. That statutory duty is to be informed with due regard to Ellen O’Donnell’s capacity as a human person (Article 40.1 Constitution of Ireland).”

161 See, Tessa Robinson’s (case reporter) note, [2011] 3 IR 417 at 454.
The Supreme Court upheld the High Court declaration that South Dublin County Council had breached Ellen’s rights under Article 8 ECHR. The Court remitted the case back to the High Court for an assessment of damages for a breach of Ellen’s human rights.\(^\text{164}\)

As can be seen from the cases outlined above, much of the core socio-economic rights jurisprudence emerging from the Irish courts deals with individuals who are on the margins of Irish society, namely Irish Travellers. Another marginalised group, asylum seekers, have also attempted to use the Constitution and ECHR Act 2003 to realise their socio-economic rights. In two cases to date, there has been mixed success in seeking to interpret provisions of the Constitution and/or the ECHR Act 2003 as protecting socio-economic rights.

In *C.A. and T.A.*\(^\text{165}\) the applicants sought to challenge the system of direct provision for asylum seekers on a number of grounds. The applicants, a mother and child, had lived in communal accommodation for almost five years in which bed and board was provided, along with a weekly allowance of €19.10 for C.A and €9.60 for T.A.\(^\text{166}\) Mac Eochaidh J. found certain elements of the direct provision accommodation system unlawful and in breach of the applicants Constitutional/ECHR rights: i.e. the ‘house rules’ that the applicants were subject to\(^\text{167}\) and the lack of an independent complaints mechanism.\(^\text{168}\) However, on the claim that the cumulative effects of direct provision were either inhuman or degrading, or a violation of the right to private and family


\(^{166}\) *C.A. and T.A. v Minister for Justice and Others* [2014] IEHC 532, paras. 2.1-2.5.


life, Mac Eochaidh J. held against the applicants. While being unable to find for the applicants in this case, Mac Eochaidh J. dismissed the arguments of the respondents, that he should not consider socio-economic rights issues. Mac Eochaidh J. stated:

“Where State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order….in a situation where an applicant claims that ‘direct provision’ is having such adverse effects on her life as to cause harm and where such circumstances are backed up by appropriate medical and other independent evidence, a Court would be entitled to grant appropriate relief, even if the only remedy for the wrong involved the expenditure of additional resources by the State.”

That Mac Eochaidh J. did not immediately dismiss the applicants’ arguments on the basis that the courts must not impinge on governmental action, is a welcome development. Utilising the Courts, and the Constitution/ECHR as a means of realising socio-economic rights, has its clear limits. This can be illustrated in the recent decision of McDermott J. in *N.H.V. & F.T v Minister for Justice and Equality*. In this case, both applicants were present in Ireland for over 8 years as asylum seekers, seeking protection. Section 9 of the Refugee Act 1996 (as amended) prohibits asylum seekers from seeking or entering employment, including self-employment. McDermott J. rejected the

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169 *C.A. and T.A. v Minister for Justice and Others* [2014] IEHC 532, paras. 7.1-7.27 (inhuman and degrading treatment issue) and paras. 9.1-10.9 (private and family life issue).

170 Mac Eochaidh J. was critical of the applicants’ legal team for not pursuing this case as a plenary hearing, where evidence could be tested. Mac Eochaidh J. noted that there were significant contestation as to the facts of the case, and the applicants failed to prove that a breach of Convention (or Constitutional) rights had occurred, see in particular [2014] IEHC 532, paras. 3.1, 5.3 and 15.1.


applicants’ contention that they had a Constitutional right to work, holding that even if they did, “the scope and exercise of such rights may be defined and regulated pursuant to the very wide power which the State has to control aliens and their entry into the State and activities whilst present.”

In concluding, McDermott J. stated: “The real complaint in this case concerns the delay which has occurred in processing the applicants’ asylum applications to a conclusion... That delay may give rise to other grounds for relief or remedies on the basis of a claimed breach of a right to reasonable expedition under Article 40.3 of the Constitution....or a claim based on the breach of the right to good administration in respect of the processing of their applications in accordance with Ireland’s obligations under European Union Law. However, I am not satisfied that it gives rise to an entitlement as part of the right to private life to be granted permission to work in the State or to have such an application considered.”

The decision lacks any explicit proportionality analysis, and fails to fully engage in a rights analysis (that for example would be required under the ICESCR, and even arguably the ECHR), as to whether a seven year prohibition on the right to work, coupled with the failure of protection status determination procedures from assessing the applicants claims within a reasonable time frame, breaches Constitutional rights or rights under EU law or the ECHR. Overall, while there have been some (minor) successes in seeking to utilise Constitutional and ECHR arguments inremedying breaches of socio-economic rights, these successes are exceptionally limited to particular facts and extreme circumstances of individual cases. More

173 The applicants arguments under the ECHR Act 2003, and Article 8 ECHR in particular, as well as under the European Union Charter of Fundamental Rights, were also rejected, see: *N.H.V. & F.T v Minister for Justice and Equality* [2015] IEHC 246, paras. 36-46 and paras. 47-62.
substantive and piercing socio-economic rights protection from the Irish courts is unlikely to occur.

E. CONCLUSION

Debates as to whether socio-economic rights should even be defined as “human rights” continue to have a profound impact. This hinders full acceptance of socio-economic rights as legally enforceable human rights. At the international level, Ireland accepts (at least at the rhetorical level) the indivisible nature of all human rights. However, as evidenced above, there is significant reluctance at the national level in defining socio-economic rights as legal entitlements. While the Committee on Economic, Social and Cultural Rights has built up a track record of clarifying the normative content of Ireland’s (and other States’) obligations under ICESCR, significant debates remain as to the precise legal nature of concluding comments and general observations. There is a clear governmental preference, where it does recognise socio-economic rights, to keep this firmly at the level of legislative protection. At a domestic level, there are limits to successfully invoking socio-economic rights arguments before the Irish courts. Courts are reluctant (rightfully or wrongfully) to impose their decisions on matters within the realm of distributive justice. Only in the most exceptional circumstances, have courts felt it necessary to intervene, and usually where a clear statutory socio-economic right is being ignored by State institutions. For now at least, stronger legislative and Constitutional protection for socio-economic rights in Ireland, seems some way off.

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176 See above, pp. 3-8.
177 See above, p. 7.
178 See above, pp. 26-27.
179 See above, pp. 8-13.
180 See above, pp. 17-19.
181 See above, pp. 21-23 and pp. 26-27.
182 See above, pp. 27-28.
183 See above, pp. 28-33.
ADDITIONAL READING


