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The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in Ireland: Will it Make a Difference?

Claire-Michelle Smyth

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THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN IRELAND: WILL IT MAKE A DIFFERENCE?

Claire-Michelle Smyth*

Abstract:
The divide between the protection and recognition of Civil and Political Rights compared with Social and Economic Rights is a stark one. In response to this divide the United Nations in June 2008 adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which for the first time allows for an international forum to determine breaches of social and economic rights within domestic systems. The task of bringing such an Optional Protocol to fruition was one fraught with opposition, particularly from states who grant little or no judicial protection to social and economic rights. Ireland is one of those states where the fight to judicially protect social and economic rights has been met with fierce resistance. The status of Social and Economic Rights in Ireland determined by the Supreme Court is that they do not warrant judicial protection and are solely within the ambit of the Executive arm of the state, a view which is consistent with many other opponents to the Optional Protocol. Having signed the Optional Protocol in 2012 Ireland made a political commitment to the furtherance and protection of these rights within the domestic system. Given the opposition to the Optional Protocol, the content was significantly diluted and its potential impact on the Irish jurisdiction is questionable.

Keywords: Social and economic rights, Optional Protocol, International Covenant on Economic, Social and Cultural Rights, Ireland

A THE INTERNATIONAL DEVELOPMENT OF SOCIAL AND ECONOMIC RIGHTS

Following World War II there was impetus on the international community to codify human rights. The barbarism inflicted upon victims of the Nazi regime resulted in the International Military Tribunal in Nuremberg to prosecute those responsible. Shattuck comments on the irony that the place most associated with Nazi Germany would become the birthplace for the human rights movement.[1] Justice Jackson's opening speech in November 1945 declared that "the wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated".[2] On 9th December 1948 the Tribunal collectively declared "Never Again" and the next day on 10th December 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR).

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[1] J Shattuck, 'The Legacy of Nuremberg: Confronting Genocide and Terrorism Through The Rule of Law' (2006) 10(1) Gonzaga Journal of International Law.

[2] Robert H Jackson's opening statement to the IMT Nuremberg, 21 November 1945 <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal> (26 November 2012).

The Universal Declaration of Human Rights 1948 speaks in its preamble of the dignity and worth of the human person and encourages that human rights should be protected by the rule of law. The Declaration does not make any distinction between civil and political rights and social and economic rights. The right to social security,[3] the right to rest and leisure,[4] the right to an adequate standard of living,[5] sit side by side with the classic civil and political rights such as the freedom from torture contained within Article 5 and the right to a fair trial contained within Article 10. This is evidence that at the commencement of the human rights movement social and economic rights were recognised as being equally as important as civil and political rights and that the international community did not consider any divide between them.

Brodsky and Day use this as their starting point to argue that international law does not support a division of the rights and such division is based in national law perspectives which cling to a negative model of human rights.[6] Unfortunately the Universal Declaration of Human Rights was not a legally binding document and was merely a guide which states have regard to when implementing their national law provisions, so it did not require that any of the rights contained therein actually be transposed into national law.

The divide between the categories of rights came to the forefront during the transposition of the Universal Declaration of Human Rights into legally enforceable Covenants. Despite the official position that the two sets of rights are universal, interdependent, interrelated and indivisible,[7] Steiner, Goodman and Alston observe that there was a deep disagreement regarding the proper status of social and economic rights which were both extreme views.[8] One side of the argument believes that social and economic rights are superior to civil and political rights in chronological terms, meaning that without the fulfilment of social and economic rights the civil and political rights cannot be realised.[9] The other side of the argument states that social and economic rights are not rights in the traditional and classic sense of the term rights and to treat them as such undermines individual freedoms and distorts the free market.

Negotiations began in 1949 to transpose the rights contained within the UDHR into legally binding treaty obligations, and the negotiations concluded in 1966. One of the many reasons for the delay in transposing the rights was the debate over the status of social and economic rights and whether they were in fact rights to be judicially protected and enforced. The western states, led by America were opposed to their inclusion and expressed concern over the scope of the obligations while many eastern nations strongly advocated for the inclusion of these rights. When drafting began it was initially the position that all of the rights contained within the UDHR would be transposed into one treaty which had legal enforceability. However in 1951 the

[3] Art 22 of UDHR states: "Everyone as members of society has the right to social security and is entitled to realisation through national effort and international cooperation and in accordance with the organisation and resources of each state, of the economic, social and cultural rights indispensable for his dignity..."

[4] Art 24 of UDHR states: "Everyone has the right to rest and leisure, including reasonable limitations of working hours with periodic holiday with pay."

[5] Art 25(1) of UDHR states: "Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family including food, clothing, housing and medical care and necessary social services." Art 25(2) "motherhood and childhood are entitled to special care and assistance."

[6] G Brodsky & S Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty' (2002) 14 *CJWL*.

[7] Vienna Declaration para 5; 1993 Second World Conference on Human Rights.

[8] H Steiner, R Goodman & P Alston, *International Human Rights in Context; Law, Politics, Morals* (3rd ed, Oxford University Press, Oxford 2007) 263.

[9] Examples of such given by Steiner, Goodman & Alston include: what use is free speech to the starving and illiterate and that the homeless cannot register to vote. ibid 8.

General Assembly agreed to draft two separate covenants following pressure from the Western dominated Commission.[10]

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) were adopted by the General Assembly and opened for signature, ratification and accession on 16 December 1966.[11]

The difference between the two Covenants could not be starker. The ICCPR places obligations on states to safeguard the rights contained therein and creates a legal obligation between states and also between a state and its citizens. The original draft of the ICCPR included a mechanism whereby states could bring a petition against other states, and the Optional Protocol to the ICCPR entered into force on 23 March 1976 made it possible for individuals to bring a petition against states for breaches of their Convention Rights. The petition is taken to the United Nations Human Rights Council (UNHRC) against states who have ratified the Optional Protocol.[12] However, the UNHRC is mainly a reporting and advisory body and has no powers to enforce judgements against states. This position was further clarified in *Ahani v Canada (Attorney General)* where the Commission stated that it could only give its views on human rights matters and such views are not binding.[13] Raluca is highly critical of the petition system for the ICCPR in that it is only available to individuals where their home state has ratified the Optional Protocol, the decisions are not binding and there is an option to opt out of the Optional Protocol at any time leaving the Committee with limited jurisdiction.[14]

While Raluca's criticism is well founded, there was at least the inclusion of a forum in which violations of the ICCPR can be heard and as such recognition of the need for international protection where domestic protection failed. In contrast the ICESCR contained no provisions for state or individual petitions for violations of the rights therein, nor does it place a legal obligation on states to ensure fulfilment of the rights. The rights, according to the Covenant are to be recognised subject to the availability of resources and rather than an immediate obligation to ensure rights, this category of rights are to be progressively realised.[15] The Covenant does not elaborate on what steps should be taken or what portion of resources should be used to fulfil these rights. Steiner, Goodman and Alston comment that the Covenant imposes a "programmatic" obligation on states in that the obligation is fulfilled if a programme is in place.[16]

The Committee on Economic, Social and Cultural Rights was established in 1985 to carry out the function of monitoring compliance with the Covenant.[17] States are obliged to provide reports to the Committee at regular intervals who in turn report on the state's progress on implementation and fulfilment of social and economic rights. The Committee can make recommendations and criticisms of states, but has no power to compel compliance as their reports are non-binding in nature. The Committee has also been active in producing General Comments which clarify the contents of rights contained within the ICESCR and direct how the rights should be interpreted and which recommend the minimum core of the right which every state is

[10] UN Doc A/2929 (1955) 7.
[11] UN Resolution 2200A (XXI). The ICESCR entered into force on 3 January 1976 and the ICCPR entered into force on 23 March 1976.
[12] ICCPR Optional Protocol GA Res 2200A (XXI) 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966) UNTS3.
[13] (2002) 58 O.R (3d) 107, 32.
[14] D Raluca, 'Comparative Study of Three International Human Rights Systems and Their Enforcement Mechanisms' 11 December 2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1566495> (26 November 2012).
[15] Part II article 2 of ICESCR.
[16] Steiner, Goodman & Alston (n 8) 275.
[17] ECOSOC Resolution 1985/17 of 28 May 1985.

encouraged to implement.[18] These general comments again are of a non-binding nature and do not create a legally enforceable right, they are merely an authoritative interpretation of the rights contained within Convention. They set out the obligations on the state and what steps should be taken in order to ensure that they respect, protect and fulfil the rights. However given that the ICESCR is a Convention which contains rights which are to be progressively realised, the General Comments are of limited use unless the right is contained elsewhere in a legally binding treaty.[19] They are published with a view to assisting states in implementing the Convention.

Therefore there is no clear international obligation on states to give judicial protection within their domestic courts to social and economic rights. States have a duty only to progressively realise these rights, and this obligation is not sufficiently clear to place any positive obligation on the state. Even where a state does not have a programme in place to progressively realise these rights there is little than can be done about it. The only power that the Committee has is to 'name and shame' the violators through publishing their reports, but without a clear international consensus that these rights should be given the status of rights, the reports do little to sway the position. Given that the international community has historically been dominated by western powers who opposed the inclusion of these rights from the beginning, it is unsurprising that the position has been slow to change.

While the United Nations formally recognise the interdependent nature of the two sets of rights, the Committee on Economic, Social and Cultural Rights notes that 'the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they incurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action.'[20]

Part of the reason for social and economic rights being classed as lesser rights is the wording and non-enforceability of the Covenant. The only obligation which is placed on states is that they take steps 'with a view to achieve progressively the full realisation of the rights' and thus leaves states with a wide margin of appreciation on how to implement the right.[21]

When the Committee was established in 1985 it had three main objectives: to develop the normative content of the rights, to develop state benchmarks, and to hold states accountable. States are required to submit reports to the Committee every five years which should document the steps taken to progressively realise the rights. Recognition of the Committee that such reports were at risk of being tainted by political bias led the Committee to allow shadow reports from NGO's which may help the Committee obtain a fuller picture. Once a report is submitted to the Committee, the Committee makes concluding remarks to the state which contains recommendations on further implementation. The Committee has no power to enforce any of its recommendations.

As a result of the lack of any enforcement mechanism and the emerging trend in national jurisdictions to protect social and economic rights, from 1990 the Committee began calling for the introduction of an

[18] To date the Committee has released 33 General Comments.

[19] For example, General Comment 8 on the Right to Water is strengthened by a number of other conventions aside from the ICESRC, including: the Watercourse Convention 1997, the Convention on Biological Diversity 1992, the Convention on the Rights of the Child 1990, the Convention on the Elimination of all forms of Discrimination against Women 1979, and the Geneva Convention relative to the Treatment of Prisoners of War 1949.

[20] Committee statement to the World Conference, UN Doc E/1993/22 83.

[21] Article 2(1) of ICESCR.

Optional Protocol which would allow individuals to bring a claim against states for breaches of social and economic rights. Melish argues that this would allow the Committee to offer more effective protection in instances of concrete abuse, offer more definitive guidance on interpretation of rights and increase the stature afforded to the Covenant.[22]

Following over a decade of discussions and negotiations, in June 2008 the Protocol in its current form was approved by the Human Rights Council and was adopted by the General Assembly and opened for signature in December 2008. The Protocol establishes a right of individual petition to the Council where a state which has signed the Protocol has breached the rights contained within the Covenant. The Protocol expressly provides that the Council may request interim measures to protect individuals and obliges states to ensure that the individual is not subjected to any form of adverse treatment as a result of the complaint. It allows for petitions from individuals, groups and other states who consider a state to be in breach of their obligations. It does require that all domestic remedies be exhausted before communication is sent to the Council. The Council however is not a court. It makes a determination, following an enquiry in certain instances, and makes recommendations on its decision. It invites the state to engage with the process and requests that the state take measures to comply with its recommendations. There are no sanctions which can be meted out against a state for failure to comply with either its obligations or the recommendations of the Council on a consistent basis. The Optional Protocol will come into force three months after the tenth ratification. To date 40 states including ten European countries have signed the Protocol but only eight have ratified.[23]

In Ireland the previous Government took a stance of steadfast refusal when the issue of signing and ratifying the Optional Protocol was initially raised. This is reflective of the stance taken in Ireland to deny judicial protection to social and economic rights and the preference to determine issues relating to the distribution of resources within the exclusive competence of the Executive.[24] However following pressure from the Irish Human Rights Council among others, on 21 February 2012 Tánaiste Eamon Gilmore announced Ireland's intention to sign the Optional Protocol.[25] The Optional Protocol was signed on 23 March 2012. There was no mention of the ratification of the Optional Protocol into Irish law.

Melish believes that the Optional Protocol's most significant contribution will be opening the door to a more concerted public debate over the protection of social and economic rights and the public policies that affect them.[26] This may result in a more comprehensive public debate taking place bringing the protection of social and economic rights to the fore.

B SOCIAL AND ECONOMIC RIGHTS IN IRELAND

The Optional Protocol is particularly significant in Ireland as it has been one of the nations which have to date vehemently resisted any attempt to make social and economic rights justiciable within the domestic courts and refuse to grant them any form of constitutional or judicial protection. The only mention of social and

[22] T Melish, 'Introductory Note to the Optional Protocol to the International Covenant on Economic Social and Cultural Rights' (2009) 48 ILM 256.

[23] Details available at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en> (26 November 2012).

[24] *TD v Minister for Education* [2001] IESC 101.

[25] Details of announcement available at <http://www.dfa.ie/home/index.aspx?id=87596> (26 November 2012).

[26] Melish (n 22).

economic rights in the Irish Constitution can be found within Article 45, the Directives of Social Policy. This is the non-justiciable article of the Constitution which means that one cannot seek a remedy for a breach of any right contained within this article. The High Court has stated that while the article itself is not justiciable, it can have regard to its provisions in interpreting another right.[27] Despite this assertion, the use of Article 45 as an interpretive tool has been restricted principally to cases which involve employment and property rights.

O'Dowd believes that despite the fact that there are no explicit provisions for the protection of social and economic rights that there is a wide scope for indirect protection.[28] This indirect protection could have been given by the courts linking a socio-economic right as a corollary to an existing protected right as has been done in the Indian courts and Canadian courts, which have effectively expanded the right to life to include social and economic rights.[29] Cases such as *Peoples Union of Civil Liberties v Union of India* have taken the non-justiciable social and economic rights and made them justiciable by expansively interpreting the right to life, thus making the right to food a corollary to the right to life and as such justiciable.[30]

However despite the fact that such a scope that may exist, the courts have resisted expanding the constitutional protection to encompass social and economic rights. In *O'Reilly v Limerick Corporation* Costello J held that these rights involved distributive justice which is concerned with distributing and allocating common goods and burdens and that distribution can only be made by those charged with furthering the common good.[31] Essentially Costello J was setting the precedent that any claim which would involve the distribution of resources was a matter for the Government and not the Courts. While Costello J eventually over-ruled this position in a later judgement in *O'Brien v Wicklow UDC*, the majority of the Supreme Court have echoed his earlier position in their decisions relating to the enforceability of social and economic rights.[32]

The place of social and economic rights within the Irish Constitution and the protection which the courts will and can afford to these rights has been at the forefront of a litany of cases. The High Court in *DB v Minister for Justice* Kelly J considered social and economic rights in a case involving the need for secure accommodation for minors.[33] The High Court considered that it had jurisdiction to order the Government to implement policy where it was necessary to vindicate the personal rights of the citizen. The Court stated that they would not undertake making such an order unless absolutely necessary with respect to the separation of powers doctrine. Kelly J referred to the previous case of *FN v Minister for Education* where Geoghegan J held that the State had a responsibility to ensure as soon as practicable that arrangements were made for secure accommodation[34] and also on the dicta of Hamilton CJ in *DG v Eastern Health Board* where it was stated that the Court had jurisdiction to take all measures to ensure that rights are vindicated.[35] The Court in

[27] *Murtagh Properties v Cleary* [1972] IR 330 (Kenny J).
[28] JT O'Dowd, 'Economic Social and Cultural Rights', Irish Human Rights Commission 9 December 2005.
[29] The directives of social policy in the Indian Constitution (Art 37) were inspired by Art 45 of the Irish Constitution.
[30] *PUCL v Union of India* 1997 AIR (SC) 568.
[31] [1989] ILRM 181.
[32] Unrep, High Court June 10 1994. Costello J confirmed that his original decision in O'Reilly was based on law that was not in force at the time of his Judgement. He concluded that similar conditions in O'Brien breached the right to bodily integrity.
[33] [1999] 1 ILRM 93.
[34] [1995] 1 IR 409.
[35] [1997] 3 IR 511.

FN did not grant the injunction on the basis that once it had been identified as breaching the constitutional rights that it was expected that other organs of the State would respond in a timely fashion.[36]

Having regard to the previous decisions in FN and DG, Kelly J held that the obligation on the part of the State had been identified previously and the Minister had still not made provision for secure places for minors. His decision incorporates the fact that the right had been declared in previous cases, as had the responsibility of the Government to vindicate that right and that the failure on the part of the Government to vindicate the rights of the plaintiff and those others affected by the failure, resulted in an order compelling the Minister to complete the facilities within a certain timeline.

This case represented what seemed like a turning point in the vindication of social and economic rights. Ruane observes that without the order made by the High Court and in the face of on-going procrastination it is difficult to see how the Plaintiffs and others in their situation would have obtained any meaningful relief.[37] The decision was welcomed greatly by many supporters of social rights being made justiciable as it essentially created the position whereby courts could and would order the Government to take positive measures to remedy a breach of rights even where these rights could be classed as social and economic rights.

The impact of this decision however was short lived. In *TD v Minister for Education* the Supreme Court were charged with deciding an appeal from the High Court where an Order was given compelling the Government to build and open residences for troubled children.[38] The majority of the Court held that by granting such an order it was breaching the separation of powers. Notwithstanding that Costello J recanted his position in *O'Donnell v Limerick County Council* that the courts should not be involved in distributive justice and as such resource based issues were a matter solely for the Oireachtas, the majority of the Supreme Court upheld his previous reasoning.[39] Keane CJ doubted as to whether the courts should declare 'what are frequently described as socio-economic rights' as unspecified rights under Article 45.[40]

Murray J also confirmed that there is no obligation on the State to provide, or on a citizen to receive, medical and social services as a constitutional obligation. Murray J went further to state that the failure to include social and economic rights in the various referenda showed a conscious decision to exclude them from constitutional protection.[41] Murray J reaffirmed his position in relation to social and economic rights in *North Western Health Board v HW* where he stated that 'there are no provisions of the Constitution cognisable to the Courts expressly requiring or permitting the State to provide medical services or social welfare of any kind.'[42]

The decision in *TD v Minister for Education* was not unanimous and in her dissenting judgement Denham J took the position that just because it had policy considerations and would require the Executive spending money is not a reason to abdicate the responsibility of the Court in deciding the constitutionality of an issue.[43] The Supreme Court is therefore saying that we do not think that these rights exist as rights in the classic

[36] Geoghegan J based this on the Judgement of the Supreme Court in *McMenamin v Ireland* [1996] 3 IR 100 where the Court declined to grant the order on the basis that as the injustice had been recognised the Government would rectify such timeously.
[37] B Ruane BL, 'Grant of Mandatory Orders to enforce Constitutional Rights', (June 2000) *The Bar Review*.
[38] [2001] 4 IR 259.
[39] [1989] ILRM 181. Recanted in *O'Brien v Wicklow UDC*, unrep, High Court 10 June 1994.
[40] *TD* (n 38). [2001] 4 IR 259.
[41] ibid 316-317.
[42] [2001] 3 IR 622, 729.
[43] [2002] 4 IR 259.

sense, but even if they do, they have no place within the Court and are matters for the Executive as they involve the distribution of funds.

The position then becomes that the courts will not enforce socio-economic rights due to the separation of powers doctrine and, that in essence, the Courts cannot tell the Government how to spend its money. This becomes somewhat of a loose argument, as if the state recognises socio-economic rights as rights, albeit in the international sphere, then the Courts have a duty to 'defend and vindicate the personal rights of the citizen.'[44] Recognition should not differ from the national and international spheres. If the state recognises rights as rights internationally then it should follow that those rights be protected internally.

Gerard Whyte argues that it is both constitutionally and politically acceptable for the Courts to adjudicate on social and economic rights as it forces the Government to deal with issues of social exclusion which may otherwise remain ignored.[45] A competing view was espoused by the Constitution Review Group who rejected calls to explicitly include socio-economic rights as it would require judges to rely on their own subjective views of poverty.[46] Wall observes the absurdity of this argument as interpretations based on the "reasonable man" are left to judges to determine on a daily basis, yet the Review Group does not believe that a judge is capable of defining an unacceptable level of poverty.[47] Wall's observation is particularly astute, and it appears to be another excuse for not granting adequate legal status to social and economic rights.

The position espoused by certain Supreme Court judges that judicial activism in the realm of social and economic rights is undemocratic in nature and breaches the separation of powers has been met with much criticism. Firstly, as noted above, the Court has been activist in developing the unspecified rights in Article 45. Further as Langwallner observes, this argument is misplaced as the Supreme Court is vested with the power of supreme legislator in all matters constitutional and can therefore be enforced against state action or inaction as the case may be.[48] Langwallner's argument is the more logical and persuasive and compounds the view that the decisions are being taken on a policy basis and that the separation of powers doctrine is used as nothing more than an excuse to continue to deny the protection of social and economic rights. Speaking of the role of the judiciary in protecting human rights, Barak in the Israeli Supreme Court believes that judicial activism is necessary as human rights are too important and precious to be left to the Executive and legislature alone.[49]

Further, as Wall notes, if one takes the separation of powers doctrine to its most extreme, none of the rights contained within the constitution can be guaranteed as they all require an element of judicial examination of Executive spending.[50] This doctrine is not invoked when one is dealing with breaches of civil and political rights and rather is only used for a legitimate dismissal of social and economic rights. Given that the distinction between the two sets of rights is political and not judicial in nature, the position taken by the Court is illogical.

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[44] Art 40.3.1 of the Irish Constitution.

[45] G White, 'Socio-Economic Rights in Ireland: Judicial and non-judicial enforcement', IHRC Conference on Social Economic and Cultural Rights 9 December 2005.

[46] Constitution Review Group 1994, 235.

[47] I Wall, 'The Aspirational Nature of Social and Economic Rights: An examination of an unsound case, the logistical and factual misconception of rights' [2004] Cork Online Law Review 1.

[48] D Langwallner, 'Separation of Powers, Judicial Deference and the Failure to Protect the Rights of the Individual' in E Carolan & O Doyle (eds), *The Irish Constitution: Governance and Values* (Thompson Round Hall, Dublin 2008).

[49] A Barak, 'A Judge on Judging: the Role of a Supreme Court in Democracy', (2002-2003) 116 Harvard Law Review 19.

[50] Wall (n 46).

In the majority of the cases cited above, the judges refer to the fact that the only socio-economic right that is given constitutional protection is the right to education as it is expressly provided for.[51] There is doubt whether the framers of the Constitution realised the importance of providing for education and whether it was included based on historical reasons that while Ireland was a colony of England there was severe restrictions on the Irish being educated. Regardless of the reasoning behind the inclusion, the courts have accepted that the right to education is one that is capable of being protected and enforced by the courts.[52] Having noted that the courts accept the right to education as the only socio-economic right in which it can intervene, the level of protection which it has been given by the courts warrants an examination.

In *O'Donoghue v Minister for Health* the Government argued that it was not obliged to provide primary education for mentally disabled children and that the obligation conferred by the Constitution was for scholastic primary education and not special needs education.[53] The Court disagreed and O'Hanlon J held that the obligation was to provide basic elementary education to all children to enable them make the best use of their inherent potential capabilities, however limited they may be. The learned judge made a number of recommendations to the State in relation to their obligation to provide for primary education to those suffering from severe disabilities, one of which being that the right to free primary education may persist beyond that of children who do not suffer from such disabilities.[54]

It was the extent of the obligation that was at the core of the case of *Sinnott v Minister for Education.*[55] Mr Sinnott was an autistic man who claimed that he was entitled to free primary education for as long as he could benefit from it. Barr J in the High Court agreed and held that the right to education was need based and not age based. The State appealed this ruling to the Supreme Court.[56] The majority of the Supreme Court found in favour of the State with Hardiman J concluding that by reading the education clause which provides that the parents be the primary educator of the child and concludes that 'this appears to me plainly to involve the consequence that the recipient of primary education would be a person who is not an adult and in respect of whom the primary educator, according to the natural order, is his family.'[57] Accordingly the entitlement to free primary education ends when one reaches the age of 18. Doyle is critical of Hardiman's reasoning and states that a parent does not stop being a parent, nor a child stop being a child once the age of 18 is attained and further that there is nothing to support the contention that a child must be interpreted to mean a non-adult.[58]

Keane CJ was the only judge in the Supreme Court who dissented on this case and expressly approved of the High Court reasoning that education was need related and not age related. The judgment took account only of the chronological age of the Plaintiff and not his mental age. As he was, for all intents and purposes, still a child dependent on his parents to meet his daily needs and the education which he sought was equated to that of primary education it would appear that the State has failed to vindicate his rights. Doyle observes that the lack of consistent interpretation of the Constitution by the Court resulted in a policy decision being made

[51] The right to education is provided for in Article 42 of the Constitution.
[52] The right was first mentioned as being judicially enforceable in *Byrne v Ireland* [1972] IR 241.
[53] [1996] 2 IR 20.
[54] Hogan & Whyte, *JM Kelly: The Irish Constitution* (4th ed, Tottel Publishing 2004) 1955.
[55] [2001] 2 IR 545.
[56] The State did concede that the Mr Sinnott's rights up to the age of 18 had been violated and they did not appeal the award of damages. Their appeal was solely based on the aspect which would require them to provide lifelong primary education in certain circumstances.
[57] *Sinnott* (n 55).
[58] O Doyle, 'The Duration of Primary Education; Judicial Constrain in Constitutional Interpretation' (2002) 10 Irish Student Law Review.

whereby the judges interpreted it to the way that they felt the outcome should be and that by taking another interpretation could have afforded legitimacy to Mr Sinnott's claim.[59]

Despite the courts having referred multiple times to the fact that education is the only socio-economic right which the court can and will protect and vindicate, the position as set out in the *Sinnott* case is that education, despite what disabilities a person may be suffering from which may render them in a childlike state for life, will cease to be an obligation on the State from the age of 18. This position is clearly unsatisfactory for those with special needs who still require primary education after the age of majority. Further, despite the protection given to education in the Constitution its protection is implemented depending on available resources. The Education for Persons with Special Needs Act 2004 was passed but still has not been fully implemented and with the economic downturn three successive budgets have seen cuts which impact severely upon the quality of education being received by those with special needs.

In discussing the discrimination which exists in the Irish education system, Friel asks what lessons Ireland can learn from the case of *Brown v Board of Education*[60] and concludes that despite no overt signs of discrimination, covert discrimination is ever present and, further, he cautions that until there is a case of comparable magnitude in the Irish jurisdiction the full impact of it will not be felt.[61] This is an interesting comparison to draw, but an apt one nonetheless. Ireland had an opportunity to do more than pay mere lip service to the concept of non-discrimination but instead created discrimination in more covert ways than based on race. Education was from the beginning at the heart of this discrimination. Friel observes that from the beginning of the Constitution the strong hand of Catholicism can be seen 'curled into a fist of oppression against those who disagree with it.'[62] As the church had been the main educator and provider of schools in the Ireland those who were not Catholic did not receive the same level of education. This position has evolved where religion is not a bar to entering most schools, however disability has taken its place and the courts are not willing to entertain substantive equality for persons with disability in education.

It can be seen from the cases above that the right to education, as the sole social and economic right upon which the courts can adjudicate on, has been interpreted in the most restrictive manner whereby substantive protection is not afforded and has resulted in becoming fraught with discrimination. Thus the position in Ireland is that there is a basic right to primary education which ends at the age of 18 and which in many cases is not suitable to those with severe mental disabilities.[63] The remainder of social and economic rights are not justiciable and the courts will not entertain any claim to have them enforced or vindicated. The right to housing, food, clothing, healthcare, shelter, warmth, social security and the all-encompassing rights to an adequate standard of living and to live with dignity are left to the policy makers to be implemented progressively, subject to resources.[64]

The UN OHCHR report, working group on the Universal Periodic Review, Twelfth Session of July 2011 was critical of Ireland's regressive approach to social and economic rights and urged the State to incorporate into

[59] ibid.
[60] 347 US 483 (1954).
[61] R Friel, 'Brown v Board of Education: an Irish Perspective, The Better Angels of our Nature' (2003-2004) 43 Washburn L. J. 225.
[62] ibid 233.
[63] *Sinnott* (n 55).
[64] There are very limited circumstances where these rights may be justiciable such as in the case of *Ryan v AG* [1965] IR 294 where the right to bodily integrity meant that the plaintiff could not have her health adversely affected by acts of the State.

its domestic legislative framework protection for these rights.[65] With an estimated 14% of the Irish population living in poverty it is clear that the decision to leave social and economic rights within the exclusive remit of the Executive is one that is not working.[66] The preliminary findings of the Survey of Income and Living Conditions (SILC) report for 2010 show an increase in those living in consistent poverty, living at risk of poverty and that an overwhelming 23% of the population experience deprivation.[67]

The statistics show a widening gap between the rich and the poor and the inequality which exists in society. The policy decisions serve only to compound marginalisation of the already marginalised members of society. The need to give meaningful protection to social and economic rights is highlighted in the extreme by the statistics released from the Central Statistics Office which show a rising number of people living poverty. With the Courts thus far resisting any attempt to make the rights justiciable through the Constitution and deferring to the Doctrine of Separation of Powers, is the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights the way forward for meaningful protection in Ireland?

C THE OPTIONAL PROTOCOL AND IRELAND

Ireland signed up to the Covenant in 1973 and ratified it in 1989. Ireland entered only two reservations to the Covenant, in relation to fostering policy to promote the Irish language and to safeguard parents' rights to educate their children in the home.[68] Despite this, the wording of the Covenant, as already discussed is problematic. It does not place immediate and positive obligations on the State to vindicate breaches of social and economic rights. The concept of progressive realisation subject to resources of the State renders the provisions effectively meaningless and devoid of impact. Steiner, Goodman and Alston observe that such wording gives states the opportunity to present themselves as defenders of social and economic rights without any precise constraints over their behaviour.[69]

The Committee on Economic, Social and Cultural Rights were tasked with monitoring compliance with the Covenant by way of periodical reporting facilities. It makes recommendations and criticisms of the way the rights have been implemented but have no power to enforce their decisions. As a result of the widespread criticism of the place of social and economic rights within international law, preparations for the Optional Protocol began. The reasons behind the Optional Protocol are multifaceted and centre on the impetus of the international community recognising the severity of the breaches of social and economic rights which existed outside third world countries. Further, the fact that many nations are beginning to expressly include judicial protection for social and economic rights, such as the South African Constitution[70] and the African Charter

[65] Full text of the report available at <http://www.upr.ie/Clients/CEGA/UPRWeb.nsf/page/reports-en> (26 November 2012).

[66] Full breakdown of poverty figures and income distribution is available at <http://www.socialjustice.ie/sites/default/files/file/SER%202011/2011-05-16%20-%20chapter%203_1%20Income.pdf> (26 November 2012).

[67] Full text is available at <http://www.cso.ie/en/media/csoie/releasespublications/documents/silc/2010/prelimsilc_2010.pdf> (26 November 2012).

[68] Articles 2 and 13 respectively.

[69] Steiner, Goodman & Alston (n 8) 275.

[70] Article 26 recognises the right to housing and Article 27 recognises the right to healthcare, food, social security and water.

on Human and Peoples Rights[71] and other nations who had hitherto not expressly protected them were beginning to expansively interpret other rights to give meaningful protection.[72] The combination of these factors among others left the international community with no option but to increase the protection of social and economic rights and elevate their status in international law terms.

The divide between the two sets of rights was apparent at the outset of negotiations where delegates argued that a complaints mechanism would be impractical given the imprecise nature of the rights contained within the Covenant, expressed concerns that poorer states would be targeted for these claims and that such a complaints procedure would undermine democracy in policy and budgetary matters.[73] By the fourth meeting of the Committee on the Optional Protocol some nations were still against the concept of a complaints mechanism stressing that social and economic rights were rights to be implemented progressively and as such it was not appropriate to grant them legal or quasi-legal status.[74] The lack of clear international consensus on the precise extent of protection which should be afforded, and the legal status of social and economic rights have led to a somewhat weak Optional Protocol being adopted. As a result of this, the final draft of the Optional Protocol gives very little practical enforceability to social and economic rights. There are three main reasons why the Optional Protocol will result in little meaningful change to the status of social and economic rights within the Irish jurisdiction.

Firstly the wording of the treaty itself remains the same, that the rights, according to the Covenant are to be recognised subject to the availability of resources and rather than an immediate obligation to ensure protection. This category of rights is still to be progressively realised.[75] Neither the treaty nor the Protocol has been expanded on what the definition of this is to mean. Therefore as there is no definitive definition on what the obligations are, it will be an exceedingly difficult task to show that a state has breached these obligations. It would appear that once a state can show that it has a plan or has done some work in some way to implement and protect the right then it will not be found to have breached its obligations. It would seem that only where there is a complete denial of one of the rights that the Committee will be able to definitively say that the state has breached its obligations. As the Optional Protocol has not yet come into force it is unclear just how the Committee will interpret the Convention and to what extent the General Comments will impact on this interpretation.

The second issue relates to the powers conferred by the Optional Protocol on the Committee. The Commission is empowered to receive communications from individuals and make a determination on the case. The Commission however is not a court and as such does not have the same enforcement powers of a court. The Commission's powers extend to making recommendations; they have no power to enforce their decisions or to impose sanctions on the offending state. For example, the Optional Protocol allows the Commission to take interim measures after the communication has been received. This extends to the

[71] Article 16 protects the right to health, Article 17 the right to education, and Article 22.1 expressly notes that '[a]ll peoples shall have the right to their social economic and cultural development', with Article 22.2 demanding that '[s]tates shall have the duty, individually or collectively to ensure the exercise of the right to development'.

[72] For example the approach taken in the Indian Courts where the Supreme Court has expansively interpreted the right to life as having social and economic connotations. See *Peoples Union for Civil Liberties v Union of India 1997 AIR* (SC)568, and *Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor (*1996) AIR SC 2426.

[73] UN Economic and Social Council, report of first session E/CN.4/2004/44 <http://www.unhchr.ch/huridocda/huridoca.nsf/2848af408d01ec0ac1256609004e770b/d68c855b7af03514c1256e61003fdeda?OpenDocument&Highlight=2,optional,protocol> (26 November 2012).

[74] UN Economic and Social Council, report of fourth session A/HRC/6/8 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/138/89/PDF/G0713889.pdf?OpenElement> (26 November 2012).

[75] Part II, article 2 of ICESCR.

Commission transmitting a request for the urgent attention of the state to put measures in place.[76] They then invite the parties to reach a friendly settlement.[77] Should friendly settlement not be reached the Commission will examine the complaint and make recommendations on same, requiring only that the state party give due consideration to the views of the Commission.[78] At no point is the Commission given any enforcement power and it does not place any positive obligations on the state.

While it is undoubtedly a positive move to create an international forum where breaches of social and economic rights can be decided upon, the failure to change the wording of the initial treaty coupled with the weak powers conferred on the Commission result in little practical change. The system relies on political cooperation and pressure to protect the rights; however where a state fails to comply with the views of the Commission there is nothing that can be done to enforce those views. The Optional Protocol also allows states to denounce it at any time by giving notice in writing.[79] Thus where a state does not wish to implement the recommendations of the Commission it may simply opt out of the Protocol.

The third issue which arises is the dualistic nature of Ireland's system. International law does not become part of domestic law unless and until it has been transposed into national law either by way of legislation or constitutional amendment. A constitutional amendment was inserted in order that laws of the European Union could have direct effect in Ireland without the need for a new referendum or legislation each time. This amendment is specific to European Union law only and does not have applicability to the wider area of international law. Therefore in order for international law to become part of domestic law and to be relied upon in domestic courts it must have been transposed into national law. Any international law or treaty to which the state signs up only binds them internationally and not domestically and as such cannot be relied upon in Irish courts. This position was made clear in the case of *Kavanagh v Governor of Mountjoy Prison* where the Supreme Court stated in no uncertain terms that the provisions of the ICCPR bound the State internationally and could not be relied on in domestic courts without explicit incorporation into national law.[80] This therefore creates a situation whereby an individual could potentially bring a complaint against Ireland to the Commission, which finds that the state has breached their obligations under the Convention and then be faced with the reality that the state does not change its policy and ignores the recommendations of the Commission and further cannot bring the recommendations to the domestic courts to have their rights vindicated.

It would appear that due to these reasons the impact of the Optional Protocol will have very limited effect on the domestic position taken within Ireland. Becoming a signatory to the Protocol is nothing more than paying lip service to the rights without garnering any real protection for them. The fact remains that these rights cost money and at a time where money is tight and budgets are severely restrained the last thing that the Irish Government wants is social and economic rights to be made enforceable.

D CONCLUSION

While the Optional Protocol is to be welcomed as a significant step forward for the recognition and protection of social and economic rights internationally, the provisions of the Protocol are of such a weakened nature

[76] Article 5(1).
[77] Article 7(1).
[78] Article 9 (2).
[79] Article 20 (1).
[80] [2002] IESC 13.

that they have little effect on the national systems which do not protect these rights. In order for meaningful protection for social and economic rights to become a reality, the first issue that needs to be addressed is the precise parameters of the rights. Without such a definitive description of the contents of the rights and the obligations on the part of the state it is practically impossible, save in the most blatant cases, to show that the state has breached its obligations under the Convention. Secondly the international community needs to establish an International Court where definitive rulings and sanctions can be meted out against states who breach their obligations. Where no sanctions can be meted out it feeds the perception that social and economic rights are not as important as civil and political rights and as such do not deserve the same level of protection. Cases involving the breach of a civil and political right which are taken to the European Court of Human Rights or the International Court of Justice can result in financial penalties against the state in question. While this does not always alleviate the breach it endorses the position of civil and political rights. The perception that social and economic rights do not deserve the same level of protection is one that needs to be abolished and the opinion of the United Nations which espouses the interdependent nature of the rights needs to be promulgated.

The situation at present simply put is that the State has an obligation to respect, protect and fulfil social and economic rights, although it does not have any definitive parameters or legally enforceable guidelines as to what that obligation actually entails. Should it refuse to grant meaningful protection and refuse to make social and economic rights justiciable, as in Ireland, hitherto there has been absolutely nothing that a person could do to vindicate their rights. The Optional Protocol does change that position by providing a forum whereby a person can bring their petition, but the lack of enforceability and sanctions renders the process almost worthless.

The diluted powers contained within the Optional Protocol are evidence of the fact that social and economic rights are still viewed as second generation rights which do not deserve the same protection as civil and political rights. Until this divide between the rights is bridged it will be an exceedingly difficult task for social and economic rights to garner meaningful protection within the international community.