

# BRINGING ESC RIGHTS HOME

THE CASE FOR  
LEGAL PROTECTION  
OF ECONOMIC,  
SOCIAL AND  
CULTURAL RIGHTS  
IN IRELAND

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# FOREWORD

**Justice Albie Sachs**

**Former Justice of the Constitutional Court of South Africa**

The first shall be the last, and the last shall be the first. Ireland was the first amongst the common law countries to constitutionalise social and economic rights. At the same time, the constitution expressly declared that these rights would serve merely to guide government policy and not be enforceable by the courts.

The country that followed was India. Here too the independence constitution included social and economic rights but expressly made them non-justiciable. In the case of India, however, astute judges in the Supreme Court found a way to dissolve the strict separation between justiciable civil and political rights and non-justiciable social and economic rights.

In the famous *Olga Tellis (Bombay pavement-dwellers)* case, the court held that the concept of life should be informed by the terms of the non-justiciable social and economic rights so as to embrace a right to a dignified and decent life. In a country of enormous social disparities, where the legislature and executive were seen as failing to secure the full promise of the Constitution, decisions like these were to give the Indian Supreme Court unique prestige, both in India itself and internationally.

When the Universal Declaration of Human Rights was adopted in 1948, no distinction was made between civil and political rights on the one hand and economic, social and cultural rights on the other.

South Africa was the last and became the first. Even before Nelson Mandela was released we advanced the notion of a Bill of Rights being an emancipatory document that would take account of the manner in which apartheid had deprived the great majority of access to the basic entitlements of a decent life. When it came ultimately to drafting the final text of our new democratic constitution, the people on the ground could not understand why the rights to health, education and housing should be any less important than the right to vote and speak your mind.

The slogan was: We don't want freedom without bread and we don't want bread without freedom, we want freedom and we want bread.

The separation of mind and body seemed to be absurd and unrealistic.

By a huge majority, the first democratic Parliament acting as a Constitutional Assembly, included as expressly justiciable rights in the body of the Bill of Rights, the rights to access to health, housing, welfare, food and water and education. The

basic format was to declare that every person possessed these rights and then to provide that the State should take reasonable legislative and other measures progressively to realise these rights within its available resources.

Basing itself on this text and responding to South African conditions, the Constitutional Court of South Africa incrementally developed what it considered to be an appropriate jurisprudence.

In the landmark *Grootboom* case dealing with a thousand homeless people sleeping out in the open as a result of eviction, the Court focussed on the concept of reasonableness as the foundation for its judicial review of the housing programme of the government.

Acknowledging the importance of separation of powers, the Court stated that it would grant a wide discretion to the State as to what would be reasonable. Nevertheless, an otherwise admirable housing programme was unreasonable to the extent that it made no provision for emergency shelter for people in crisis situations. Again, respecting separation of powers, having made the declaration of unconstitutionality, the Court left it to the State to decide precisely how it should remedy the defect and where it should find its resources.

Similarly, in the *Treatment Action Campaign* case, it held that it was unreasonable for the Ministry of Health to limit the provision of the anti-retroviral drug, Nevirapine, to women living with HIV who were about to give birth, to two sites only in each of the nine Provinces. The evidence showed that the drug was safe, it was being provided free, and it would only be given with informed consent and under medical supervision. Commentators have suggested that this decision marked a turning point away from HIV-denialism in the country, which now has the largest anti-retroviral programme in the world.

Another conceptual breakthrough emerged from litigation brought on behalf of desperately poor people facing eviction in order to allow for housing upgrades or urban regeneration. Rather than attempt to decide the cases on the basis of pure application of land law, the Court held that there were competing constitutional rights involved, and developed the notion of 'meaningful engagement' between the occupants and the local authorities to help resolve this tension. Bearing in mind the importance of giving individualised attention to the occupants facing eviction, and focussing on the question of alternative accommodation, the parties were to report back to the Court by a specified date. It would seem that the concept of meaningful engagement, now well-entrenched in our economic, social and cultural rights jurisprudence, could well be extended to other areas of enforcement of economic, social and cultural rights, such as education.

As this report indicates, the Irish public also broadly support the indivisibility of rights. Ireland has produced many great judges and noteworthy legal scholars. I have no doubt that should economic, social and cultural rights be included in the Constitution as justiciable rights, appropriate modes of enforcement will be found, taking account of Ireland's specific social character and needs.

Increasingly, economic, social and cultural rights are being granted legal protection in states around the world. The Constitutional Convention recommendation presents an opportunity for the current Government to become the first to give serious consideration to this issue. In doing so, the Irish Government has the golden opportunity to ensure that the first common law country to constitutionalise these rights, and inspire others to go further, takes the next obvious step and doesn't become the last to follow a growing international trend.

# PREFACE

**Colm O’Gorman**  
**Executive Director**  
**Amnesty International Ireland**

This Republic was founded upon the principle that the State exists to serve its people. That the Government, elected by the will of the people, is charged with serving the common good and the protection of the welfare of the people.

As Ireland exits its bailout and some tentative signs of economic recovery emerge, Ireland has yet to address a number of issues of grave public concern, not least among them, a widely held belief that decisions are made to balance the books whatever the impact on sections of society, to protect those vested interests able to shout loudest to protect their turf, to focus on the economy – and the economy alone – at any cost.

Much of the political discourse in recent years has, perhaps understandably, been focused on dealing with the immediate fiscal crisis faced by the State, with not nearly as much attention focused on the resultant social crisis. It is now time to rebalance that focus and consider the reforms necessary to ensure we build a better, fairer and more equitable republic. A republic in which this founding principle is a genuine reference point for the State and its political leaders when making ethical and moral decisions or solving societal or social issues. Where economic policy and social policy are linked and mutually reinforcing.

Since 1990, Ireland has been bound by the International Covenant on Economic, Social and Cultural Rights. Devised not by special interest groups, this treaty was conceived of, negotiated by and agreed to by States, including Ireland. Its provisions are legally binding and meant to be enforceable. This treaty protects fundamental human rights like the right to health, the right to social security, and the right to an adequate standard of living for you and your family, including housing.

These are fundamental human rights which this State undertook to protect, but which have never been given domestic legal effect. They require simply that the Government provides a basic level of each right – and then take steps, over time, using the resources that are available, to achieve the full enjoyment of these rights for people, in line with the international commitments it has made.

Some suggest that such rights have no place in Ireland’s Constitution. But such a view is not reflective of practice across Europe and the wider world. Of our 27 fellow EU States, 26 make some form of constitutional provision for economic, social and



cultural (ESC) rights. Around the world, 106 constitutions protect the right to work. And 133 provide for the right to healthcare. Constitutional protection of these rights and their oversight by courts in other States, shows that governments can operate within this enforceable ESC rights framework. They can be, and are, pressed to deliver outcomes for people and to demonstrate systems of transparent, evidence-based, decision-making.

Giving greater protection to ESC rights in Bunreacht na hÉireann will not cure all our ills. It will not provide a magic tonic for our failure to design systems based upon accountability and transparency that prioritise good, evidence-based decisions. But it can play a solid and vital role in addressing those well-identified deficits in our current system.

In the coming years, Ireland will mark the centenary of the birth of its Republic. Such an important commemoration offers us an opportunity not only to look back in history, but also to consider our present and shape our future. In doing so we all must consider the vision that underpinned the birth of our Republic. A vision of an Ireland built upon the principles of equality, human rights and social solidarity. This must be the standard against which we measure ourselves today.

If we are to realise finally that vision, we need fundamental change.

We need greater constitutional protection of human rights to put people's rights at the centre of decision-making, promote good governance and foster greater accountability. We need to increase trust in the Government and in our political system.

In February of this year, the Constitutional Convention decided that the limited protection of ESC rights in our Constitution is inadequate.

They recommended vital change – that Bunreacht na hÉireann be amended to strengthen the protection of ESC rights.

This paper sets out how the legal protection of ESC rights might be strengthened in Ireland. It outlines how this has been achieved by other States, both in Europe and beyond. It makes clear the significant added value of the legal protection of ESC rights – better planning processes and outcomes, greater accountability and transparency, and evidence-based decision-making. Published half way through the four-month period during which the Government considers the Constitutional Convention's recommendation, we hope it will serve as a useful tool for the Government and Oireachtas in their deliberations. We further hope it will be a valuable contribution to wider political and public debate on how ESC rights might be better protected in Bunreacht na hÉireann.

# INTRODUCTION

This paper is designed to inform and guide law and policy makers in Ireland, in considering how the legal enforceability or justiciability of economic, social and cultural (ESC) rights can be strengthened.

Many civil and political rights are protected in Irish law, including in Ireland's Constitution, Bunreacht na hÉireann. However, ESC rights such as the rights to health, housing and social security, have for the most part been excluded.

At an international level Ireland has emphasised the indivisibility and equal importance of all human rights, civil and political as well as economic, social and cultural, but this is not reflected at a national level.

**Making ESC rights legally enforceable in Ireland would address the current imbalance in the protection of rights.**

**Moreover, it would strengthen accountability and would mean that people have access to a remedy if their rights are not upheld. The right to a remedy is a fundamental concept of human rights law.**

**However, legally enforceable ESC rights are about much more than that. They should not be seen merely as a way of holding the Government to account. Rather, the international human rights system provides a robust framework on ESC rights that can guide law and policy makers in delivering on their duties, helping to develop better and more transparent processes and contributing to fairer outcomes for all.**

**Human rights law recognises that no Government has infinite amounts of resources and that often the full enjoyment of these rights cannot be achieved overnight. It therefore puts in place important checks and balance to guide the State, when it comes to the fulfilment of its ESC rights duties.**

**It is time that serious consideration be given to providing greater legal protection to ESC rights in this country, with particular regard to the Constitution. This is so particularly in light of the recommendation of the Constitutional Convention in February 2014. An overwhelming 85 per cent of the Convention members voted in favour of strengthening the protection of ESC rights in the Irish Constitution.**



Polling carried out by Red C for Amnesty International Ireland has also shown time and time again, that clear public support exists for these rights. In our most recent polling, 71 per cent of people polled believed that the Constitution should be amended to protect additional human rights like the right to health, housing and an adequate standard of living.

The Government was given four months to respond to the Constitutional Convention recommendation. This paper is offered as a tool to help guide the Government in its deliberations before and after its response, but is also designed to inform broader discussions on these rights in Ireland.

This is not an empirical analysis of the enjoyment of individual ESC rights, apart from limited illustrative examples on the rights to health and adequate housing. Rather, the paper addresses some of the broad questions that often arise around ESC rights.

This paper provides an introduction to ESC rights and outlines Ireland's obligations when it comes to these rights. It considers some of the most common myths and misconceptions around ESC rights, particularly in Ireland, which have hindered their application to date.

The paper highlights the different approaches adopted by courts in other States when adjudicating ESC rights cases.

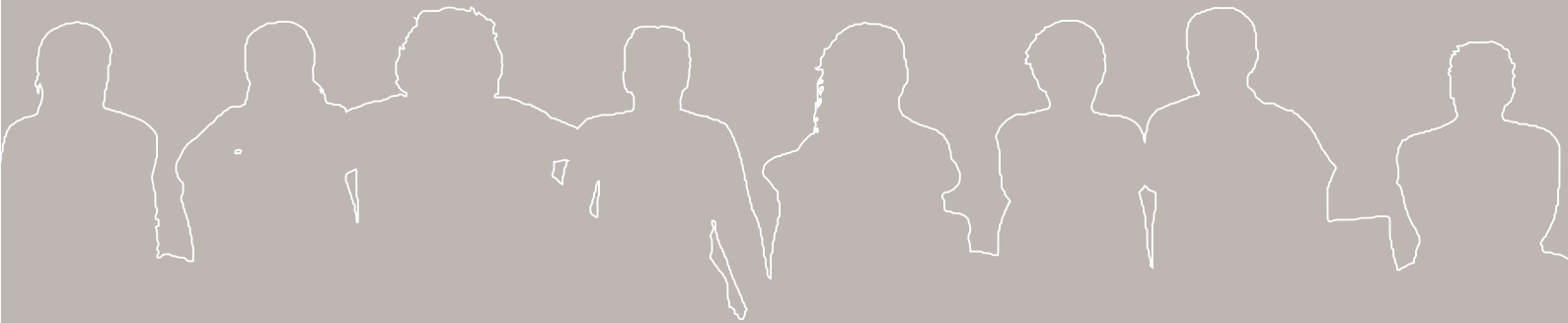
It outlines what provision is already being made for ESC rights in the Irish Constitution, law and policy, highlighting gaps and resultant impacts, and highlighting the added value of a human rights based approach.

The paper maps some of the existing mechanisms in Ireland which can help to ensure accountability on ESC rights delivery, but draws attention to the fact that there is no robust overarching accountability framework in place.

Referring to a number of other European States, it outlines how ESC rights have been protected in those jurisdictions and the impact this has had. The paper ends by making a number of recommendations on how the protection of ESC rights in Ireland can be strengthened. The net conclusion is that the best form of ESC rights protection is justiciable Constitutional status.

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# **CHAPTER 1:**

## **AN OVERVIEW OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**Economic, Social and Cultural (ESC) rights cover a range of rights which are protected at both a regional and international level in treaties to which Ireland has signed up. Ireland has a number of different legal obligations when it comes to ESC rights. International bodies and procedures have, on several occasions, recommended that ESC rights be made legally enforceable (justiciable) in Ireland. There are several reasons why these rights should be made justiciable.**

## **WHAT ARE ECONOMIC, SOCIAL AND CULTURAL RIGHTS?**

Economic, social and cultural (ESC) rights are those human rights relating broadly to issues such as healthcare, education, housing, standard of living, food, water and sanitation, education, social security, the workplace, family life and participation in cultural life. Along with civil and political rights,<sup>1</sup> they are part of the international body of human rights.

ESC rights, and human rights law more broadly, are outcomes focused, but are also concerned with the process by which these outcomes are achieved. For example, ESC rights require the Government to take steps, over time, to deliver on those ESC rights outcomes identified in international law. They do not specify the specific policies which must be pursued to deliver on these rights but they require that the Government adopts appropriate processes for planning and decision-making and that decisions are made in a transparent, participatory manner, using reliable evidence.

Ireland has legal obligations to uphold ESC rights because it has ratified a range of both international and regional treaties which protect these rights.

## **INTERNATIONAL**

International protection was first given to ESC rights in the Universal Declaration of Human Rights (UDHR) in 1948. Although it is not a binding treaty, the UDHR has significant status in international law and has been widely accepted as representing the fundamental norms of human rights.

In 1966, ESC rights were given specific protection in the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is now the main United Nations human rights treaty which protects these rights, and is legally binding. Together with the International Covenant on Civil and Political Rights (ICCPR) and the UDHR, it forms the International Bill of Human Rights. Ireland signed the ICESCR in 1973 and ratified it in 1989, thereby agreeing to be legally bound by its provisions.

The ICESCR protects the following ESC rights:

### **Economic Rights**

- The right of everyone to the opportunity to gain their living by freely chosen or accepted work and to just and favourable conditions of work
- The right of everyone to form trade unions, join a trade union of her/his choice and the right to strike

### **Social Rights**

- The right to social security
- Protection and assistance of the family
- The right of everyone to an adequate standard of living for them and their family, including food, clothing and housing, the continuous improvement of living conditions and the right to be free from hunger
- The right of everyone to the highest attainable standard of physical and mental health
- The right of everyone to education

### **Cultural Rights**

- The right of everyone to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he/she is the author.

The UN Committee on Economic, Social and Cultural Rights (CESCR) is mandated to oversee States Parties' compliance with the provisions of the ICESCR. It examines periodic reports submitted by States on their compliance with the ICESCR and thereupon makes concluding observations and recommendations to States.<sup>2</sup>

The Optional Protocol to the ICESCR entered into force on 5 May 2013, following its ratification by ten UN Member States. The Protocol allows for individuals and groups of individuals to make complaints to the CESCR if they believe that their rights under the ICESCR have been violated and if they have exhausted all available remedies in their own country. Upon the examination of a complaint, the CESCR makes its findings and can make recommendations to the State. Ireland signed the Optional Protocol on 23 March 2012 but has not yet ratified it, so this recourse is not yet available to people in Ireland.

Ireland has ratified a number of other international human rights treaties which include provisions on ESC rights. These include the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>3</sup> and its complaints procedure, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>4</sup> and its complaints procedure and the Convention on the Rights of the Child (CRC).<sup>5</sup> Ireland has signed and promised to ratify shortly, the UN Convention on the Rights of Persons with Disabilities (CRPD) which also protects ESC rights.<sup>6</sup> The CRC and CRPD both have complaints procedures to which Ireland has not yet signed up.

Other international treaties also protect elements of ESC rights. For example, the Fundamental Conventions of the International Labour Organisation (ILO), which Ireland has ratified,<sup>7</sup> protect the rights of workers covering issues such as the rights to organise and collective bargaining, equal remuneration, protection against discrimination, protection against forced labour and child labour, and freedom of association.<sup>8</sup>

Other relevant treaties include the UNESCO conventions relating to areas such as education and culture.<sup>9</sup>

## REGIONAL

### EUROPEAN SOCIAL CHARTER (REVISED)

At a regional level, the European Social Charter adopted in 1961 and revised in 1996, guarantees ESC rights such as the right to health, housing, employment, legal and social protection including against poverty and social exclusion, free movement of persons and non-discrimination.

The European Committee of Social Rights is mandated to oversee States Parties' compliance with the provision of the Charter. It adopts conclusions on national reports submitted by States Parties on an annual basis.<sup>10</sup> Under the Collective Complaints Protocol to the Charter, which Ireland has ratified, certain organisations may lodge complaints with the Committee alleging violations of the rights in the Charter. The Committee then adopts decisions on these complaints. Where the Committee finds a violation of the Charter, the Council of Europe Committee of Ministers invites the respondent State to indicate the measures taken to bring the situation into conformity with the Charter. It adopts a resolution and if appropriate, may recommend the State concerned to take specific measures to bring the situation into line with the Charter. These recommendations are non-binding on the State but carry strong moral and political weight.

Through its decisions, the Committee has elaborated what the rights in the Charter



entail. For example, on the right to housing for the family, the Committee in *ERRC v Bulgaria*<sup>11</sup> held:

**“Article 16 guarantees adequate housing for the family, which means a dwelling which is structurally secure; possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity; is of a suitable size considering the composition of the family in residence; and with secure tenure supported by law. The temporary supply of shelter cannot be considered as adequate and individuals should be provided with adequate housing within a reasonable period. Furthermore, the obligation to promote and provide housing extends to security from unlawful eviction.”**<sup>12</sup>

Ireland ratified the Charter in 1964 and the revised Charter in 2000. Provisions not accepted by Ireland are Article 8(3) (regarding entitlements to maternity leave), Article 21 (dealing with the right to information and consultation of workers), 27(1)(c) (dealing with the development or promotion of child day care services and other childcare arrangements), and Article 31(1), 31(2) and 31(3) (Article 31 deals with the right to housing).<sup>13</sup>

To date, there have been two decisions on collective complaints against Ireland. In *World Organisation Against Torture v Ireland*,<sup>14</sup> the Committee found a violation of Article 17 of the revised Charter (the right of children and young persons to social, legal and economic protection). It stated that the prohibition of all forms of violence must have a legislative basis. No such legislation existed in Ireland and the common law defence of reasonable chastisement had not been repealed. To date, there has been no legislation enacted to address this issue and no reform of the defence of reasonable chastisement in Ireland.

In *International Federation of Human Rights Leagues (IFHR) v Ireland*,<sup>15</sup> the Committee found that a distinction between residents of Ireland and non-residents relating to access to the Free Travel Scheme was justified and so there had been no discrimination under Article 23 (the right of older persons to social protection) taken together with Article E (non-discrimination).<sup>16</sup>

A third collective complaint, *European Roma Rights Centre v Ireland*,<sup>17</sup> was registered in April 2013. The complaint alleges that the Government of Ireland has violated Article 16 (the right of the family to social, legal and economic protection) and Article 30 (the right to protection against poverty and social exclusion) of the revised Charter, particularly with respect to accommodation for Travellers in Ireland. It also alleges that acts and omissions of the Government have violated the rights of Traveller children to social, legal and economic protection (Article 17). The collective complaint argues that these alleged violations should also be read in conjunction with Article E of the Charter which guarantees that the rights are to be secured

without discrimination on the ground of association with a national minority/ethnic background. A decision on this case is currently pending.

Other Council of Europe conventions which Ireland has ratified give protection to a number of ESC rights, such as the Framework Convention for the Protection of Minorities which includes provisions on culture, language, tradition and education.<sup>18</sup>

## CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Charter of Fundamental Rights of the EU enshrines the fundamental rights protected in the EU.<sup>19</sup> It contains many of the rights in the European Convention on Human Rights (ECHR). However, unlike the ECHR, the Charter also protects explicitly a number of economic and social rights such as the right to education, the right of collective bargaining, the right to work, the right to social security and social assistance, and the right to healthcare.<sup>20</sup>

The Charter applies to EU institutions and bodies, and to Member States **when they are implementing EU law**. For example, the Charter will apply when EU countries adopt or apply a national law which implements an EU directive or when their authorities apply an EU regulation directly. Examples include implementation of EU law around communicable diseases<sup>21</sup>, social security<sup>22</sup> and worker's rights.<sup>23</sup> The European Commission monitors the implementation of the Charter.<sup>24</sup> It can also initiate infringement proceedings before the Court of Justice of the European Union (CJEU) where the fundamental rights issue concerns the implementation of EU law. Under Article 29.4 of the Irish Constitution, EU treaties form part of Irish law, including constitutional law. The Charter became legally binding on the EU and Member States with the entry into force of the Lisbon Treaty in 2009. The Charter has the same legal standing as the EU treaties themselves.<sup>25</sup> The Charter like EU Treaties prevails over any conflicting secondary EU legislation and over conflicting national law.<sup>26</sup> The Charter can be applied in national courts if cases involve the application of EU law.<sup>27</sup> National courts can in turn refer cases to the CJEU. Its rulings are binding on Member States.<sup>28</sup> There are a number of examples of Irish courts referring a case to the CJEU vis-à-vis the Charter. This includes the case of *Digital Rights Ireland v The Minister for Communications, Marine and Natural Resources and Ors*.<sup>29</sup> This case raised questions around the extent to which national courts are required under EU law to inquire into and assess the compatibility of measures adopted to implement an EU Directive with the Charter, in a case which concerned the right to privacy. Another case involved a referral by the High Court to the CJEU involving questions around minimum standards on procedures in Member States for granting and withdrawing refugee status.<sup>30</sup>

It has been noted that “the Charter represents an important contribution to the

protection of economic, social and cultural rights in the wider Irish constitutional framework. However, whether or not an Irish citizen can invoke these rights and principles depends on whether their situation falls within the scope of EU law.”<sup>31</sup>

## THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

### ESC rights in the ECHR

Apart from some exceptions such as the right to property (which has included cases on social security and pension related cases)<sup>32</sup> and the right to education,<sup>33</sup> the ECHR does not explicitly protect ESC rights. However, the European Court of Human Rights (ECtHR) has held that ESC rights may be indirectly protected through other rights in the ECHR. This has included cases against Ireland.

For example, the case of *Airey v Ireland*<sup>34</sup> affirmed that an interpretation of the ECHR may extend into the sphere of social and economic rights and that there is no watertight division between civil and political rights and economic and social rights.

In the case of *Moldovan and others v Romania* (No. 2),<sup>35</sup> the ECtHR found a violation of Articles 3 (prohibition of torture, inhuman or degrading treatment) and 8 (right to respect for private and family life) on the basis of the unacceptable living conditions of Roma following the destruction of their homes.

Similarly, in the case of *López Ostra v Spain*,<sup>36</sup> the ECtHR held that the State had violated the right to respect for the home and private life, since serious pollution can impact on an individual’s well-being and prevent her/him from enjoying her/his home in such a way that her/his private and family life is damaged. The case involved the failure of the State to take any measures against the smell, noise and contamination arising from a waste treatment plant close to the applicant’s home. The Court held that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely”.<sup>37</sup>

The above cases and many others similarly decided by the ECtHR demonstrate the interrelatedness of civil and political and ESC rights.

### Application of the ECHR in Ireland

The European Convention on Human Rights Act 2003 is the Irish domestic legislation which incorporates the provisions of the ECHR into Irish law. According to the Act, Irish courts must interpret and apply Irish law in line with the ECHR insofar as possible.

For example, in the case of *Donegan v Dublin City Council and Ors*,<sup>38</sup> the High Court found that Section 62 of the Housing Act 1966 (which allows for the summary eviction of local authority tenants in the District Court) was incompatible with Article 8 of the ECHR (right to private and family life) and Article 6 (right to a fair hearing).<sup>39</sup> This case again shows the link between civil and political rights and ESC rights such as the right to adequate housing which protects against forced evictions.

However, it is important to note the limitations of indirect protection of ESC rights through the ECHR, which often only addresses certain aspects of the relevant right, rather than applying the full meaning of the right under international human rights law. Moreover, failure to explicitly protect ESC rights and relying solely on indirect protection means that there is a high level of uncertainty about the level of protection of these rights and how they may be interpreted.

In addition, in enacting the 2003 Act, the method of incorporation chosen was minimalist, establishing the ECHR as simply an interpretive tool. Section 2 of the Act creates an obligation – where possible and subject to any countervailing rule of interpretation – to interpret any “statutory provision or rule of law” in a manner that is compatible with the obligations created by the ECHR and its incorporated protocols. This indirect or interpretative model reduced the Act’s potential effectiveness. For example, under the Act, the courts do not have the power to strike down legislation which they find to be incompatible with the ECHR. Instead, they can only make a declaration of incompatibility, and only “where no other legal remedy is adequate or available”, which does not affect the continued operation of the legislation.

**In conclusion, at both an international and regional level, Ireland has agreed to be bound by a number of treaties protecting ESC rights. Even where ESC rights are not explicitly protected in the ECHR, the ECtHR as well as the courts in Ireland have issued judgments impacting upon the enjoyment of ESC rights. However, such indirect protection of ESC rights carries with it certain limitations and uncertainty.**

## WHAT ARE IRELAND’S MAIN OBLIGATIONS?

The three main obligations of States under human rights law are characterised as the obligations to **respect, protect and fulfil** human rights:

- The obligation to **respect** means that the State must not interfere directly or

indirectly with the enjoyment of rights. For example the State must not carry out forced evictions without due process of law or providing alternative accommodation. (The right to an adequate standard of living, including adequate housing, Art 11)

- The obligation to **protect** requires the State to prevent, investigate, punish and ensure redress for harm caused by abuses of human rights by third parties, such as private individuals, commercial enterprises or other non-state actors. For example, the State must regulate and monitor the treatment of workers by their employers.<sup>40</sup> (The right to just and favourable conditions of work, Art 7 ICESCR)
- The obligation to **fulfil** requires the State to stake steps towards the full realisation of human rights. This may require the State to adopt legislative, administrative, budgetary, judicial and other measures to achieve this aim.

For example, the State should give recognition to the right to health (Art 12 ICESCR) in the national and political legal system and adopt a national health strategy with a detailed plan for realising the right to health.

It is important to note that the adoption of such measures is not limited to the obligation to fulfil but may also be necessary in order for the State to meet its obligation to respect and protect human rights.



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## SPECIFIC OBLIGATIONS UNDER THE ICESCR

Article 2 of the ICESCR lays out the specific obligations of States Parties regarding the domestic implementation of the rights in the ICESCR.

### Article 2

- (1) Each party to the present Covenant undertakes to take steps, individually and through international assistance and co operation, especially economic and technical, to the **maximum of its available resources**, with a view to **achieving progressively** the full realisation of the rights recognised in the present Covenant, by all appropriate means, including particularly the adoption of legislative measures.
- (2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised **without discrimination** of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

### Progressive realisation

Recognising that many of the rights in the ICESCR cannot be achieved overnight, Article 2 of the ICESCR allows for the **progressive realisation** of these rights over time.

The ICESCR itself does not set out the specific means by which it should be implemented in the national legal order. There is also no provision in the ICESCR that obliges a State Party to ensure its comprehensive incorporation into law, or for it to be accorded any specific type of status in national law.<sup>41</sup> It is therefore open to the State to adopt a number of different measures in order to give effect to the provisions of the ICESCR. However the CESCR, in its General Comment No. 3 outlining the nature of States' obligations under the ICESCR, "recognises that in many instances legislation is highly desirable and in some cases may even be indispensable".<sup>42</sup>

The ICESCR therefore adopts a flexible and broad approach allowing for the particularities of the legal and administrative systems of each State as well as other relevant considerations to be taken into account.<sup>43</sup> For example, the ICESCR does not favour a monist legal system over a dualist one such as that used in Ireland (see explanation further below in this chapter), but whatever the system in place, the State must take the appropriate steps to fulfil its obligations under the ICESCR.



## Immediate obligations

States Parties also have a number of **immediate obligations**. These include:

- **The obligation to take steps**  
States are obliged to take concrete and targeted steps towards the full achievement of these rights, which may include the adoption of legislative and other measures.
- **Minimum core obligations**  
Another immediate obligation of the State is the “**minimum core obligation**”. This means that the State must ensure at the very least, the minimum essential levels of each right. In the context of the right to health for example, the minimum core obligations include the provision of essential primary healthcare; access to health facilities, goods and services on a **non-discriminatory basis**, especially for vulnerable or marginalised groups; and the provision of essential drugs as from time to time defined under the WHO Action Programme on Essential Drugs.<sup>44</sup>
- **Equality and Non-discrimination**  
Non-discrimination is an immediate obligation under the ICESCR but it is also a broader concept which, together with the principle of equality before the law and equal protection of the law, underpins the entire international human rights system.<sup>45</sup> Article 2(2) of the ICESCR proscribes discrimination in the guarantee of ESC rights on a number of non-exhaustive grounds. In its General Comments, the CESCR has elaborated on the grounds of non-discrimination. For example, discrimination is also prohibited on grounds of physical or mental disability, health status (including HIV/AIDS or mental health status), sexual orientation or for reason of a person’s social or economic situation.<sup>46</sup>

Discrimination may take different forms.

**Direct discrimination** is unfavourable treatment that is, on the face of it, based on prohibited grounds.

**Indirect discrimination** occurs where a law, policy or practice appears neutral but results in a disproportionate disadvantage or negative impact on the exercise of rights by a particular group. Indirect discrimination on the basis of age, could for example arise in the context of employment, if the employer insisted on an academic degree of recent origin as a requirement for a post.

The CESCR has outlined different ways in which the State should combat discrimination in the enjoyment of ESC rights. This includes the adoption and review of legislation to address discrimination; and putting in place and implementing policies, plans of action and strategies to address discrimination by public and private actors.<sup>47</sup>

### Non-retrogression

States should also not take any **retrogressive measures (steps backwards)** in realising ESC rights. The CESCR has stated that any retrogressive measures which are adopted, for example in a time of economic crisis, must be given the most careful consideration and must be fully justified by the State by reference to the totality of the rights in the ICESCR. The State must also show that it has used the maximum amount of resources available to it both inside the State and through international assistance and cooperation.<sup>48</sup>

For Ireland this would mean that the State must show that all fiscal policies are in line with Ireland's obligation to use its maximum available resources towards progressively fulfilling ESC rights and ensuring that the rights of the most vulnerable are protected, even in times of severe resource constraints and cutbacks.<sup>49</sup> Any steps back in the protection of rights are a retrogression and on the face of it, considered a violation of ESC rights unless they can be fully justified by the Government. This is so regardless of whether the step back was an intended or unintended outcome of measures adopted.<sup>50</sup> Retrogressive measures may include but are not limited to social spending cuts and funding cuts to organisations and institutions working to protect the rights of vulnerable groups.<sup>51</sup>

## GUIDANCE ON HOW TO IMPLEMENT OBLIGATIONS: GENERAL COMMENT NO. 9 OF THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In its General Comment No. 9, “the domestic application of the Covenant”,<sup>52</sup> the CESCR provides further guidance to States Parties on the enforcement of ESC rights at a national level. It sets out the principles that govern the domestic application of the ICESCR, irrespective of the legal system of the particular State Party.

In General Comment No. 9, the CESCR makes clear that alongside the flexibility that exists within the ICESCR, a State Party nonetheless has the obligation **“to use all the means at its disposal to give effect to the rights recognised in the Covenant”**. In this regard, the CESCR states that the fundamental requirements of international human rights law must be kept in mind. This means:

- 1) The norms in the ICESCR must be recognised in appropriate ways within the domestic legal order;
- 2) appropriate means of redress, or remedies, must be available to aggrieved individuals and groups; and
- 3) appropriate means of ensuring governmental accountability must be put in place.<sup>53</sup>

According to General Comment No. 9, whatever the preferred methodology, three principles follow from the duty to give effect to the ICESCR:

- 1) First, the means chosen to implement the ICESCR must be adequate to ensure the fulfilment of the obligations under the ICESCR. **The need to ensure legal enforceability (justiciability)** is an important consideration when determining the best way to give domestic legal effect to the rights in the ICESCR.<sup>54</sup>
- 2) Second, the State Party should **take account of the means which have proved most effective in the country in ensuring the protection of other human rights**. The CESCR notes that where the means used to give effect to the ICESCR “differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this”.<sup>55</sup>
- 3) Third, while the ICESCR does not formally oblige States Parties to incorporate its provisions into domestic law, such an approach is desirable, since, according to the Committee, “[d]irect incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts”.<sup>56</sup> For that reason, the Committee strongly encourages States Parties to formally adopt or incorporate the ICESCR into national law. This can be done by giving constitutional and/or legislative protection to ESC rights.

### Monism and Dualism

In any discussion of ESC rights in domestic law it must be noted that Ireland has a dualist as opposed to a monist system of law.

This means that when Ireland ratifies a treaty (other than an EU treaty) it is not directly enforceable before the courts. The Government must pass specific legislation in order for a treaty to become enforceable. For example, the European Convention on Human Rights Act 2003 incorporated the ECHR into Irish law and it can now be relied on in cases before the courts.

## WHAT HAS IRELAND BEEN ADVISED TO DO?

The ICESCR has not been incorporated into Irish law meaning that it remains unenforceable in Ireland.

**On 17 December 2013, the Constitutional Convention established by the Government chose ESC rights as an additional item, beyond the list of items it was mandated to review, for its consideration at its final session. Following that final session, on 23 February 2014, 85 per cent of the Constitutional Convention voted in favour of strengthening the protection of ESC rights in the Irish Constitution. 80 per cent voted in**

**favour of giving constitutional protection to the full range of rights within the ICESCR. A majority also favoured including a provision in the Constitution “that the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts”.<sup>57</sup>**

The incorporation of the ICESCR into Irish law has also been urged on numerous occasions by a number of different UN bodies.

**“Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation.. and strongly recommends that the State Party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as in other domestic legislation.** The Committee points out that, irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), **following ratification of an international instrument, the State Party is under an obligation to comply with it and to give it full effect in the domestic legal order.** In this respect, the Committee would like to draw the attention of the State Party to its General Comment No. 9 on the domestic application of the Covenant.”

Concluding Observations of the UN Committee on Economic, Social and Cultural Rights, Ireland, E/C.12/1/Add.77, 5 June, 2002, para 23.

In its 2002 concluding observations on Ireland’s second periodic report, the CESCR noted **“with regret that, despite its previous recommendations in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State Party could not provide information on case law in which the Covenant and its rights were invoked before the courts”.**<sup>58</sup> In its recommendations to Ireland, the CESCR made clear that Ireland has an obligation to give the ICESCR full effect in domestic law.<sup>59</sup>

A number of other UN treaty bodies have also highlighted Ireland’s failure to incorporate the provisions of treaties with relevance for ESC rights into national law.

Other UN mechanisms and procedures have also addressed the question of enforceability of ESC rights in Ireland, such as:

- Following her mission to Ireland in 2011, the **UN Special Rapporteur on Extreme Poverty and Human Rights**<sup>60</sup> called “on the Government to ensure that all rights protected under international human rights treaties, in particular economic, social and cultural rights, are given full effect in domestic law”.<sup>61</sup>

- Several recommendations on the domestic protection of ESC rights were made by a number of UN Member States during Ireland's examination under the **Universal Periodic Review (UPR)** mechanism of the UN Human Rights Council in 2011.

In respect of Ireland's UPR, these included the recommendation to "take measures required to respect economic, social and cultural rights"<sup>62</sup> which was accepted by Ireland, the recommendation to "consider incorporating the right to health and the right to housing" and the recommendation to "ratify the Optional Protocol to the Covenant on Economic, Social and Cultural Rights".<sup>63</sup> The latter two were both partly accepted.<sup>64</sup> This means that certain aspects of the recommendations were accepted but not the recommendation in full. For example, with regard to the recommendation to ratify the Optional Protocol to the ICESCR, Ireland committed to signing it but did not make a similar commitment regarding ratification. Similarly, regarding the recommendations on health and housing, Ireland's response noted the commitment to reform the health system and aims of the Government's Housing Policy but did not commit to incorporating these rights in law.

Ireland signed the Optional Protocol to the ICESCR shortly after its examination under the UPR. Ratification of the Optional Protocol will require an inter-departmental consultation process as a first step. At the time of writing there has been no indication of when this consultation process will commence.

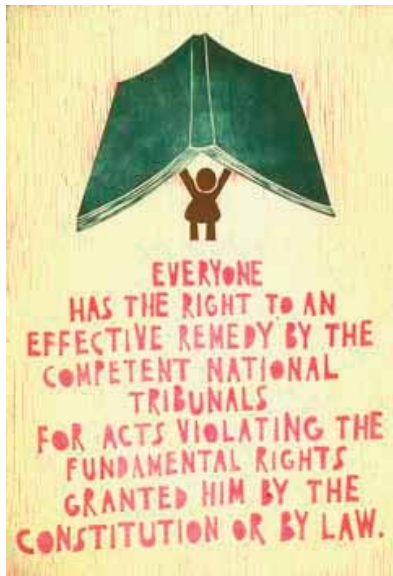
## WHY MAKE ESC RIGHTS LEGALLY ENFORCEABLE?

"Socio-economic rights<sup>65</sup> should be made legally enforceable in principle, as they are rights that protect the necessities of life and provide for the foundation of an adequate quality of life and the conditions for the pursuit of human dignity and equal opportunities ... they reflect the social aspect of our existence as citizens and members of a common humanity, representing an important counterpart to civil and political rights. As a form of protection for individual citizens and a form of accountability for government, they can act as an anchor for a just democratic society, assisting and complementing legislative policy development on socio-economic issues."

Wiles, E., "Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law", (2006) 22:1 American University International Law Review, 35 at 64.

### **The right to an effective remedy**

The right of every person an effective remedy is a core principle of human rights law and is fundamental to the rule of law. This was expressly stated in Article 8 of the



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Universal Declaration of Human Rights, which says: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law.”

Ireland has accepted the enforceability of the rights protected in the International Covenant on Civil and Political Rights through the relevant Optional Protocol, the European Convention on Human Rights, through the European Convention on Human Rights Act 2003, and other treaties<sup>66</sup> but this is not the case for ESC rights as protected in the ICESCR.

The lack of enforceable ESC rights in Ireland together with a lack of access to a remedy at an international level,<sup>67</sup> means that there are only limited or no remedies at all available to individuals or groups when their ESC rights are breached. Without access to a potential remedy, ESC rights are of little value to the rights holder.

**“In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.”**

UN Committee on Economic, Social and Cultural Rights, General Comment No. 9: the domestic application of the Covenant, 1998, UN Doc. E/C.12/1998/24, para 10.

The right to an effective remedy has been reaffirmed by the CESCR in its General Comment No. 9.<sup>68</sup> According to the CESCR, it would be difficult for a State Party to the ICESCR to justify its failure to provide any domestic legal remedies for the violation of ESC rights.<sup>69</sup>

One of the reasons for this is because national remedies are supreme under human rights law. This means that an individual or group of individuals must exhaust national remedies before turning to regional or international human rights complaints mechanisms such as for example, the European Court of Human Rights or the UN Treaty Bodies.

As stated in General Comment No. 9, the right to an effective remedy does not necessarily always require a judicial remedy. Quasi-judicial and administrative



remedies will in many cases be adequate. There are many institutions and procedural mechanisms which are vital to the implementation of ESC rights and which must supplement the critical role of the courts.<sup>70</sup>

These may include for example the Office of the Ombudsman, the Irish Human Rights Commission (Ireland's National Human Rights Institution, which is soon to be merged with the Equality Authority to form a new NHRI, the Irish Human Rights and Equality Commission) or Equality Tribunal, discussed further in Chapter 6. Other mechanisms are also outlined in Chapter 5 specifically on the rights to health and to housing. Ireland's updated 'common core document' for UN treaty body reporting also provides information on such mechanisms.<sup>71</sup>

Such remedies should however be accompanied by an ultimate right of judicial appeal to the courts, as a last resort.<sup>72</sup>

**By making ESC rights enforceable, Ireland would be taking an important step towards fulfilling its obligation under international human rights law to ensure access to an effective remedy for violations of all human rights.**

Apart from the right to an effective remedy, there are a range of other arguments in favour of making ESC rights enforceable, reflected throughout this paper and also summarised here.

**1) The lack of enforceable ESC rights in Ireland contributes towards weak accountability when it comes to Government decision-making around these rights.**

Making ESC rights enforceable would promote greater accountability and transparency in Government, obliging it to justify decisions according to human rights standards concerning the allocation of resources and in particular policy approaches that affect the most vulnerable. This is especially important in times of economic crisis. Putting ESC rights into the Constitution would require that successive governments make decisions and allocate resources in line with those rights, as a framework for accountability. Constitutional ESC rights would grant a higher level of protection to these rights, unlike legislation and policy which could be more easily eroded by successive administrations.

**What does accountability really mean?**

Accountability is not simply a means through which we react to or repair failure or wrongdoing. It is a **vital tool** for those charged with making complex and difficult decisions; one that **can guide and strengthen decision-making** and the

development of law, policy and practice. Real accountability requires for instance that those in positions of authority who make decisions which impact significantly on the lives of others should **consult with** and be accountable to those same people in making such decisions and implementing them. In this way accountability becomes a vital tool to **inform good decision-making** and **ensure that policy decisions serve the very people they most affect**.

**2) Because ESC rights are not justiciable in Ireland, there are few ways for the most vulnerable members of society to have their voices heard when their ESC rights are violated.**

Making these rights enforceable would provide individuals and groups with a means to hold the Government to account as well as the potential of shining a light on violations and presenting their grievances. ESC rights litigation combined with accompanying social mobilisation and advocacy<sup>73</sup> can function as a corrective mechanism for the political system, requiring the system to address issues of social exclusion that might otherwise be ignored.<sup>74</sup> The most vulnerable groups in society often do not have the necessary political cachet and therefore the political system does not deliver for them. This is so despite the fact that vulnerable groups are given express protection in international human rights law and governments have particular obligations towards them.

**3) The lack of enforceable ESC rights in Ireland means that, in effect, ESC rights are not seen by the Government as equally important as civil and political rights.**

At an international level, in its pledges and commitments made as part of its campaign for election to the UN Human Rights Council, Ireland declared itself “strongly committed to the full promotion of human rights in both its domestic and foreign policies”.<sup>75</sup> Ireland has advocated for ESC rights and has also stated the need to strengthen ESC rights “as an indispensable dimension in the full enjoyment of human rights”.<sup>76</sup> However, the same importance has not been afforded to strengthening ESC rights at a national level.

Making ESC rights enforceable would show that the Government attaches the same importance to all human rights – civil, political, economic, social and cultural – and would **reinforce the indivisibility and interdependence of these rights**.<sup>77</sup> Indivisibility and interdependence means that civil, political, economic, social and cultural rights are all equal in importance and none can be fully enjoyed without the others. For example, it may not be possible for a person to fully enjoy their civil right to privacy without their social right to housing; access to education can impact on our ability to effectively participate in the democratic process; treatment and supports available for people experiencing mental health

problems (mental health forming part of the social right to health) can be linked to the civil right to liberty and to be free from cruel, inhuman and degrading treatment.

**4) The failure to make ESC rights justiciable means that the Government is continually ignoring specific recommendations of the UN to enshrine these rights in Irish law.**

As outlined above, recommendations have been made to Ireland on numerous occasions by the CESCR, other UN treaty bodies, the UN Special Rapporteur on Extreme Poverty and Human Rights, and under the UPR to enshrine these rights in Irish law. The number of recommendations made in this regard indicates the importance human rights law attaches to providing for these rights in national law.

**5) Making ESC rights enforceable and holding the Government accountable for its human rights obligations would enhance participative democracy.**

It would mean that the Government would be required to be accountable to the people over aspects of its policies in between elections and not just at election time.<sup>78</sup> As pointed out by the South African Constitutional Court:

**“Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions.”<sup>79</sup>**

As demonstrated by ESC rights case law from many other jurisdictions (see examples in chapter 7), the role of the courts is to review whether the State has adopted reasonable measures to meet its obligations<sup>80</sup> – a similar approach to the process of judicial review in common law jurisdictions including Ireland.<sup>81</sup>

**6) It would bring Ireland in line with a growing trend among many countries to legally recognise ESC rights as enforceable.**

The majority of the world’s constitutions contain at least some ESC rights. For example, countries from all regions – Asia, the Americas, Africa and Europe – and at various levels of development now guarantee the protection of ESC rights

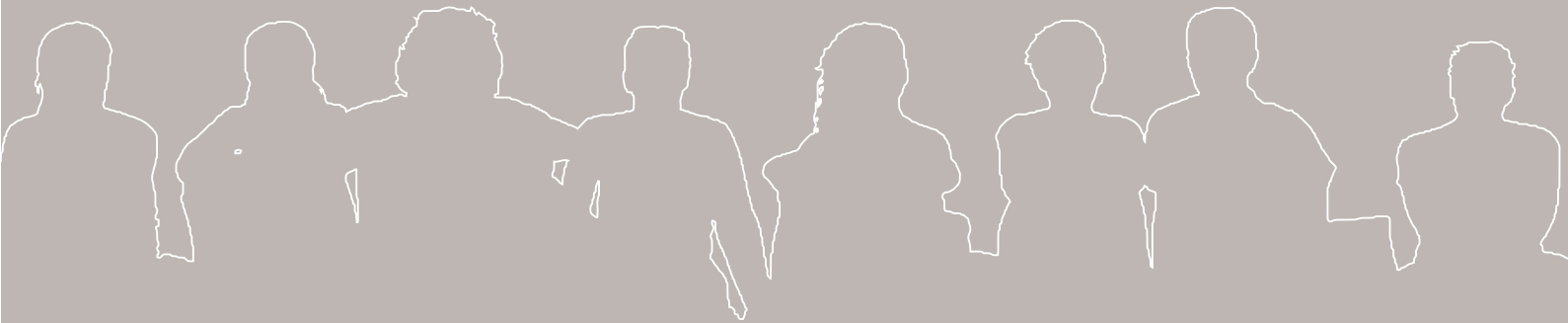
in their constitutions.<sup>82</sup> Out of 28 EU Member States, 27 make some form of provision for ESC rights in their constitutions. The level of protection, degrees of enforceability<sup>83</sup> and coherence with ICESCR varies considerably between different constitutions.<sup>84</sup>

#### Around the world:

- The right to healthcare is included in 133 constitutions
- The right to join trade unions is included in 152 constitutions
- The right to work and/or the State duty to provide work is included in 136 constitutions
- The right to culture is included in 141 constitutions
- The right to housing is included in 81 constitutions
- The right to choose one's occupation is included in 111 constitutions

For a full list see [www.constituteproject.org](http://www.constituteproject.org)

Making ESC rights enforceable would not only ensure that individual victims will be able to obtain **redress** for violations of their ESC rights but that important judicial precedents with a potentially wider public impact can be set which, in turn, **can help to spur legislative and policy changes**.<sup>85</sup> In Ireland, this can be seen to a certain extent as a result of a number of court cases dealing with children with special educational needs.<sup>86</sup> The adjudication of ESC rights in other jurisdictions has also helped to spur such changes. Just some examples are: the *TAC* case<sup>87</sup> in South Africa, following which a national programme for the prevention of mother-to-child transmission of HIV was adopted by the Government;<sup>88</sup> the *Unnikrishnan* case in India which influenced changes in law and policy relating to education in general and primary education in particular, including the provision of the right to education in the Constitution;<sup>89</sup> and the *Hartz IV* judgment<sup>90</sup> in Germany (discussed further in Chapter 7) following which the State enacted a new law for estimating the social security benefits required by the person concerned.<sup>91</sup>



## **CHAPTER 2:**

# **DISPELLING THE MYTHS AND MISCONCEPTIONS AROUND ESC RIGHTS**

**In Ireland, as sometimes in other countries, myths and misconceptions around ESC rights have hindered their application in the domestic legal system. They often relate to the nature and definition of ESC rights, the resources involved, and the separation of powers between different branches of the Government. This chapter addresses some of the most common myths and misconceptions that shroud these rights.**

Despite their fundamental importance in everybody's daily lives and their long history in the West prior to their inclusion in the Universal Declaration on Human Rights in 1948,<sup>92</sup> the nature of ESC rights is still misunderstood. At times they are still seen by some as not being 'real rights' or referred to as 'second generation rights' implying that they are of lesser importance than civil and political rights.<sup>93</sup>

The UN Committee on Economic, Social and Cultural Rights has criticised this distinction:

**"The shocking reality [is] that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights, which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights."**<sup>94</sup>

ESC rights are misunderstood for a number of reasons, including the fact that there has been little adjudication of these rights in Ireland, lack of legal training in these rights, and lack of political will to enforce them.

Some claim that these rights are only aspirations or too vague to be justiciable. In Ireland, much of the debate has centred around the separation of powers. It has been argued that supporters of judicial activism on ESC rights are characterised by a distrust of the political process. Others argue that when adjudicating ESC rights, judges are not necessarily making political decisions. Rather they are saying, for example, that there is a bottom line of constitutional justice that must be met by the political branch, but the courts do not have to prescribe how this bottom line should be met.<sup>95</sup>

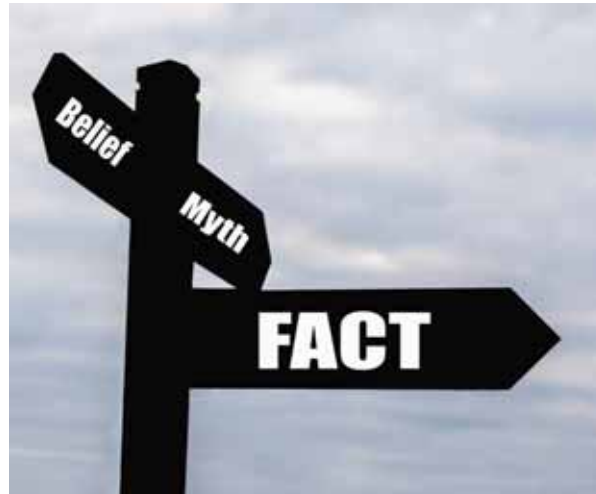
Misconceptions around ESC rights act as a barrier against political and legal support for these rights and their enforceability.

This chapter addresses a number of these misconceptions.

## 1) JUSTICIABILITY/LEGAL ENFORCEABILITY

### **The Myth: ESC rights are not intended to be justiciable; they are only aspirations**

While civil and political rights are widely accepted as being justiciable, meaning that they are enforceable by courts and other bodies,<sup>96</sup> some still claim that ESC rights are political aims and aspirations rather than enforceable rights.



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The UN Committee on Economic, Social and Cultural Rights has emphasised that “[t]his discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions”.<sup>97</sup> It noted that “[w]hile the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the vast majority of systems, be considered to possess at least some significant justiciable dimensions.”<sup>98</sup>

In the 1993 Vienna Declaration and Programme for Action, States affirmed that all human rights must be promoted and protected and that they must be treated “in a fair and equal manner, on the same footing, and with the same emphasis”.<sup>99</sup>

ESC rights are legal rights based in international law. When States drew up the ICESCR they clearly intended for ESC rights to be enforceable; and when ratifying international human rights treaties such as the ICESCR, States understand that they are taking on legal obligations to respect, protect and fulfil these rights.

“Under international law, states have immediate obligations, as well as long-term duties. Regardless of their stage of development, states must take action to fulfil economic, social and cultural rights (including reviewing their laws and policies), and must refrain from violating these rights. States must ensure that there is no discrimination, whether direct or indirect, in the realisation of these rights. Governments must also regulate the behaviour of private individuals, business and other non-state actors to ensure respect for human rights.”

Amnesty International, *Human rights for human dignity: A primer on economic, social and cultural rights* (2005), p 68, (2nd edition forthcoming POL 34/001/2014)



ESC rights are enforced by international and national tribunals as demonstrated by an increasing body of case law.<sup>100</sup> Decisions of courts in countries around the world covering ESC rights demonstrate that these rights are legally enforceable rather than mere aspirations.<sup>101</sup> Judicial review of ESC rights can be seen in an increasing number of countries including, but not limited to, Germany, Finland, Portugal, Latvia, South Africa, Kenya, India, Brazil, Argentina, Colombia and Mexico. Furthermore, complaints procedures for ESC rights have been developed at the international and regional level, including the Collective Complaints Procedure under the European Social Charter to which Ireland is a State Party, and the Optional Protocol to the ICESCR which Ireland has signed. Regional and domestic courts have adjudicated cases related to ESC rights as a result of which a body of case law has emerged.<sup>102</sup>

### **The Myth: ESC rights are not justiciable because they are too vague**

It has been argued that ESC rights are too indeterminate or too vaguely worded to be enforceable.

Firstly, it should be noted that some civil and political rights are no more determinate than ESC rights. For example, rights such as the right to freedom of expression, not to be tortured or the right to privacy are framed in general terms, but this has not prevented the courts from adjudicating these issues.<sup>103</sup> As commentators have noted, the courts have probed “their meaning and contemporary application”.<sup>104</sup>

Secondly, the content of ESC rights and the obligations arising from them have been clarified by various actors, including the UN itself, courts, legal practitioners, academics and others.

At an international level, the General Comments of the **UN Committee on Economic, Social and Cultural Rights** (CESCR) give guidance to States on their obligations under the ICESCR. These General Comments have given further content to a range of individual rights such as health, housing, education, work, food, water, social security and cultural rights,<sup>105</sup> and have also elaborated on the overarching obligations on States arising under the ICESCR.<sup>106</sup>

Each State Party to the ICESCR also has a duty to report to the CESCR on a periodic basis outlining the steps it has taken to deliver on the rights in the ICESCR. In drafting their periodic reports, States follow detailed guidelines produced by the CESCR which further unpack each right.<sup>107</sup> After examining the State report, the CESCR issues concluding observations and makes recommendations to States on how to better implement obligations arising from the ICESCR. This has also given greater clarity to States on what they are required to do – both the State under review and other States.

The numerous **UN Special Rapporteurs** working on ESC rights issues have also provided a wealth of detailed reports outlining the content of rights in the ICESCR, and States' obligations arising from those rights. This includes but is not limited to the work of the Special Rapporteurs on the right to health, the right to adequate housing, the right to water and sanitation, the right to food, on extreme poverty and human rights, and the right to education. In this respect, Special Rapporteurs have addressed issues such as security of tenure (housing); freedom of artistic expression and creativity (culture); equality of opportunity in education (education); unpaid care work and women's human rights (extreme poverty and human rights); the impact of biofuels on the right to food (food); the impact of foreign debt and other international financial obligations of States on the full enjoyment of human rights, especially ESC rights (Independent Expert on this issue); health financing in the context of the right to health (health); and sustainability and non-retrogression regarding water and sanitation (water and sanitation).<sup>108</sup>

The **adjudication of ESC rights at both a regional and national level**, out of which a body of jurisprudence has been built up, also refutes the assertion that ESC rights are too vague to be enforceable through the courts.<sup>109</sup> Jurisprudence on ESC rights has emerged from countries all around the world and from a range of legal systems. These include Finland, Germany, Latvia, Portugal, Argentina, Bangladesh, Brazil, Colombia, Costa Rica, Egypt, India, Indonesia, Mexico, Pakistan, South Africa and Venezuela.<sup>110</sup> At a regional level, individual and inter-State complaints procedures have been developed for violations of ESC rights including the collective complaints procedure under the European Social Charter to which Ireland is a State Party, the African Charter on Human and Peoples' Rights, and the Inter-American system.<sup>111</sup>

ESC rights have been further clarified by **the work of academics and other experts**, particularly through the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* and the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*.<sup>112</sup>

**National Human Rights Institutions**, such as the Irish Human Rights Commission, have also played an important role in deepening the understanding of ESC rights both in the context of their own political and legal system and more broadly.<sup>113</sup>

Lastly, the entry into force of the **Optional Protocol to the International Covenant on Economic, Social and Cultural Rights** on 5 May 2013 means that the UN Committee on Economic, Social and Cultural Rights can now receive and make recommendations on individual complaints. The jurisprudence which will emerge from the Committee as a result, will further enhance the understanding of the rights and obligations under the ICESCR. Ireland signed the Optional Protocol in March 2012 but has not yet signed it.<sup>114</sup>

## 2) SEPARATION OF POWERS

### The Myth: ESC rights are not within the proper role of the courts and should be left to the legislature and executive

“[T]he question is no longer whether ESC rights are or can be justiciable. They clearly are and can ... the question now is rather how the contours and limits of that justiciability are to be defined: where does the work of the judge end and that of the policy maker and the administrator-or the legislator-take over? How far should a court retain oversight of any programme or instruction which it may have specified? How detailed should the court’s recommendations be as to the allocation of resources?”

Bedggood, M., “Progress and Politics of Economic, Social and Cultural Rights”, [2012] Taiwan Human Rights Journal, 37.

A particularly prominent argument against justiciable ESC rights in Ireland has been based on the separation of powers. Some argue that ESC rights should not be enforced through the courts as this is “an inappropriate interference with the discretion of elected governments and parliaments to allocate resources as they see fit”.<sup>115</sup> The basic framework of the Irish Constitution is based on the separation of powers doctrine.

There is a tripartite separation of powers in Bunreacht na hÉireann which involves:

- The legislature
- The executive
- The judiciary

The Oireachtas or legislature makes the law (Article 15.2.1), the Government or the executive implements the law (Articles 28.2 and 29.4.1) and the courts or the judiciary interpret the law (Articles 34.1 and 37).

It is sometimes claimed that justiciable ESC rights distort democracy, based on the fact that the judiciary are unelected decision-makers. This argument was made in the Report of the Constitution Review Group in 1996.<sup>116</sup> There is a fear that if ESC rights were to be enshrined in the Constitution, decision-making powers would be taken away from the Oireachtas and the legislature would be left with no choice but to discharge the cost, whatever it might be, as determined by the judiciary.

The question of whether ESC rights should be included as fundamental rights in the new Constitution of South Africa was debated at length during the drafting process. As part of that process the Constitutional Court concluded:

**“In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred on the courts so different from that ordinarily conferred**

**upon them by a bill of rights that it results in a breach of the separation of powers.”<sup>117</sup>**

In Ireland, it has been argued by one prominent member of the judiciary that “if judges were to become involved in ... designing the details of policy in individual cases or in general, and ranking some areas of policy in priority of others, they would step beyond their appointed role”.<sup>118</sup>

Concern has also been raised about the risk of giving judges uncontrolled discretionary powers if Ireland were to move away from the traditional role of the judiciary.<sup>119</sup> In a speech delivered in 2002, the then Minister for Justice, Equality and Law Reform noted that this would carry with it a danger that the judiciary “will become ever more politicised in carrying out their functions”.<sup>120</sup> Similar arguments were made by the same former Minister for Justice, Equality and Law Reform during the deliberations of the Constitutional Convention on ESC rights in February 2014.

**However, 85 per cent of the members of the Constitutional Convention, including both political and non-political delegates, voted in favour of giving greater protection to ESC rights in the Irish Constitution. The Report of the Constitutional Review Group and arguments made by others on the separation of powers in the context of ESC rights, must be viewed in this new light.**

Moreover, the large body of case law on ESC rights which has emerged from numerous jurisdictions shows that courts have remained conscious of their role when adjudicating ESC rights claims. This can be seen, for example, in the approach taken by the South African Constitutional Court in applying the ‘reasonableness’ doctrine, and approaches by other courts in focussing on the minimum obligations or on the procedural obligations of the State. These are discussed further in Chapter 3. There is no reason why Irish courts would not be capable of doing the same.

### 3) RESOURCES

#### **The Myth: ESC rights cost a lot of money but civil and political rights do not**

Civil and political rights are sometimes presumed to be cost-free while ESC rights are presumed to be costly involving the expenditure of resources.<sup>121</sup> This presumption has been used as a basis for arguing against the justiciability of ESC rights, saying that they should be left to the political branches of the State and are not appropriate for courts to adjudicate.

However, such a distinction is both over-simplistic and misleading. Many civil and political rights may require expenditure of resources in order to achieve them. **This includes the court, policing and voting systems to ensure for example the right to a fair trial, the right to vote, the right to liberty and security of the person, and the provision of legal aid.**

**At the same time ESC rights do not always cost money, for example stopping forced evictions (right to adequate housing).**

“It is true that the inclusion of some socio-economic rights may result in courts making orders which have implications for budgetary matters. However, **even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not the beneficiaries of such benefits.** In our view, it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the court so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers.”

Ex Parte Chairperson of the Constitutional Assembly of South Africa: *in re Certification of the Constitution of the Republic of South Africa* 1996, para 77.

### The example of legal aid:

There have been a number of cases on the right to legal aid in Ireland. These cases show that civil and political rights, like economic, social and cultural rights, may at times have resource implications.

In the case of *The State (Healy) v Donoghue*<sup>122</sup> the Supreme Court held that implied in the Constitution is the obligation on the State to provide state-funded legal assistance for persons facing a serious criminal charge and who cannot afford a lawyer.

“A person who has been convicted and deprived of his liberty as a result of a prosecution which, because of his poverty, he has had to bear without legal aid has reason to complain that he has been meted out less than his constitutional due.”

Henchy J *The State (Healy) v Donoghue*, [1976] IR 325 at 354.

The European Court of Human Rights (ECtHR) case, *Airey v Ireland*,<sup>123</sup> also involved the provision of legal aid. Furthermore, the Court highlighted that civil, political, economic, social and cultural rights are often intertwined. In this case, Ms Airey sought judicial separation from her abusive husband. At that time, legal aid was not available in Ireland for any civil matter. In the absence of legal aid Ms Airey was unable to find a solicitor. The ECtHR found that Ms Airey's right to a fair trial (Article 6(1) ECHR) and her right to private and family life (Article 8 ECHR) had been violated.

The State had argued that the European Convention on Human Rights (ECHR) should not be interpreted so as to achieve social and economic developments in a State, that such developments can only be progressive. However, in its judgment, the Court acknowledged the inter-dependent nature of civil and political rights and ESC rights and that there is not clear division between them.

“The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions ... and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals .... **Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature.**

The Court therefore considers ... that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; **there is no water-tight division separating that sphere from the field covered by the Convention”**.

*Airey v Ireland*, (1979) 2 EHRR 305, para 26.

#### 4) POSITIVE AND NEGATIVE OBLIGATIONS

##### **The Myth: Civil and political and ESC rights impose different sets of obligations**

Traditionally, civil and political rights have often been categorised as negative rights, meaning that the State should not interfere with the enjoyment of these rights. ESC rights on the other hand have frequently been described as positive rights, requiring the State to act in order to achieve the enjoyment of these rights.

Again, such a rigid distinction is not accurate.

As demonstrated by case law at both a regional and national level, civil and political rights may carry with them positive as well as negative obligations.

In *Airey v Ireland*, the ECtHR, referring to the right to private and family life (Article 8 ECHR), held that:

“although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: **in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life**”.

*Airey v Ireland*, (1979) 2 EHRR 305, para 32.

Cases from other jurisdictions also demonstrate the positive obligations which can arise from civil and political rights. In the case of *R v Askov*,<sup>124</sup> the Canadian Supreme Court found that the government had failed to try individuals within a reasonable time and that it was legally bound to expend resources to reduce trial delay.

In another Canadian case, *Eldridge v British Columbia*,<sup>125</sup> the Supreme Court held that the right to equality required the government to provide sign language interpretation in hospitals for patients with hearing impairments.<sup>126</sup>

Similarly, ESC rights do not only consist of positive obligations.

As outlined in more detail in Chapter 1, States have an obligation to **respect, protect and fulfil all human rights**, including ESC rights.

The obligation to **respect** is primarily a negative obligation requiring the State not to interfere with rights. For example, the obligation to respect in the context of the right to health requires the State not to deny access to health facilities on a discriminatory basis.

The obligation to **protect** and particularly the obligation to **fulfil** on the other hand can be characterised as mainly positive obligations. For example, the obligation to protect in the context of the right to work requires the State to ensure that employers, both in the public and private sector, pay the minimum wage. The obligation to fulfil in the context of the right to work requires the State to adopt legislative, administrative and budgetary measures to realise the right to work. It must also formulate and implement employment policies, and technical and vocational education plans, to facilitate access to employment, along with promoting the right to work through awareness raising programmes.<sup>127</sup>



This demonstrates that civil and political rights and ESC rights consist of a myriad of both positive and negative obligations and have much more in common than some ESC rights sceptics assert. At times both sets of rights require the State to act and other times they require the State not to interfere. Characterising one set of rights as negative and the other as positive is therefore an over-simplification of these rights and a misconception.

## 5) COMMUTATIVE AND DISTRIBUTIVE JUSTICE

### The Myth: Questions involving the distribution of resources should not be dealt with by courts

The separation of powers and the claim that ESC rights should not be adjudicated by the courts, are linked to the concepts of commutative and distributive justice.

**Commutative justice** concerns the relations between individuals. This may involve one person acting against another by, for example, assaulting them. In that case there is a crime, a perpetrator and a victim. Commutative justice issues are usually dealt with by the judicial system.

**Distributive justice** relates to the distribution of resources, goods and services in society. Responsibility for distributive justice usually falls to the legislature and executive.

The distinction between commutative and distributive justice and the role of the courts in that context, was examined by Costello J in *O'Reilly v Limerick Corporation*.<sup>128</sup> In this case the plaintiffs were members of the Traveller community who lived in caravans on unofficial halting sites. The sites lacked basic sanitary services such as running water, toilet facilities and refuse collection and they were living, as stated by the court, in “conditions of great poverty and deprivation”. They claimed that under Article 40.3 and/or Article 41.2 of the Constitution they had a right to be provided with a minimum standard of basic material conditions. The plaintiffs sought a mandatory injunction directing the local authority to provide them with adequate halting sites.<sup>129</sup>

Costello J held that the court did not have the jurisdiction to award the damages sought.<sup>130</sup> According to Costello J, the claim involved the proposition that there had been “a failure to distribute adequately in the plaintiffs’ favour a portion of the community’s wealth”.<sup>131</sup> To admit the claim would be to involve the courts in supervising the allocation of resources he said.<sup>132</sup>

In what became known as the “O’Reilly Doctrine”, Costello J held:

“In exercising this function the court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise, namely, an adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources ... the manner in which justice is administered in the courts, that is on a case-by-case basis, makes them a wholly inappropriate institution for the fulfilment of the suggested role. **I am sure that the concept of justice which is to be found in the Constitution embraces the concept that the nation’s wealth should be justly distributed (that is the concept of distributive justice), but I am equally sure that a claim that this has not occurred should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts”**.

*O’Reilly v Limerick Corporation*, [1989] IL.RM 181 at 195.

However, as highlighted by the Irish Human Rights Commission, in reality a number of judgments from the Irish courts have had redistributive effects.<sup>133</sup>

For example, in the case of *Blake v Attorney General*<sup>134</sup> the validity of the Rent Restrictions Acts 1960 and 1967 were challenged. The Acts restricted rents and recovery of possession and had the effect of restricting the rents of controlled dwellings to the rents applicable on 8 June 1966. The evidence showed a large disproportion between these rents and the market rent. The legislation took no account of tenants’ needs or the financial resources of the landlord, and was not limited in duration.<sup>135</sup> The Supreme Court held that this was an unjust attack on the property rights of landlords under Article 40.3.2 of the Constitution. The Supreme Court was also conscious of the impact that the judgment would have on tenants.<sup>136</sup>

According to O’Higgins CJ:

“The removal from the affected tenants of the degree of security of possession and of rent control which they hitherto enjoyed will leave a statutory void. **The Court assumes that the situation thereby created will receive the immediate attention of the Oireachtas and that new legislation will be speedily enacted. Such legislation may be expected to provide for the determination of fair rents, for a degree of security of tenure and for other relevant social and economic factors.**”

*Blake v Attorney General*, [1982] IR 117 at 141-142.

The Oireachtas then passed the Housing (Private Rented Dwellings) Bill 1981 which was referred by the President to the Supreme Court and was found by the Court to be invalid, as again perpetrating an unjust attack on the property rights of landlords. Taking into account the need for a fair distribution of burdens, the Supreme Court also considered the hardship that may be caused to tenants required to pay even the abated rents as provided for in the Bill.

“On the assumption that undue hardship is likely to be caused in some instances, a question may arise whether such hardship would amount to an unjust attack upon the property rights of a tenant ... or ... to an unjustifiable treatment of such tenant in contravention of Article 40, s. 1 of the Constitution .... **Having regard to the obligation imposed on the State by the Constitution to act in accordance with the principles of social justice, the Court recognises the presumption that any such hardship will be provided for adequately by the State.**”

*Blake v Attorney General*, [1982] IR 117 at 191-192.

The Bill was then replaced by The Housing (Private Rented Dwellings) Act 1982. The Act “established a system whereby tenancies were subsidised via the social welfare system”.<sup>137</sup> Casey notes: “Rarely has the legislature’s range of policy options been so narrowed by judicial decisions.”<sup>138</sup>

Another example is the case of *Murphy v Attorney General*.<sup>139</sup> Here the plaintiffs claimed that the provisions of the Income Tax Act 1967, which dealt with the taxation of married couples, treated such couples less favourably, than people who only lived together, based on changes in the tax rate since 1967 and the impact of inflation. The Supreme Court found in favour of the plaintiffs on the basis of Article 41 which guarantees protections to the family based on marriage.<sup>140</sup> While the Court limited the application of its judgment so it avoided excessive disruption to the public finances, the State nonetheless was obliged to refund sums for certain time periods by which it had been unjustly enriched through the collection of the unconstitutionally imposed taxes.

In *O’Brien v Wicklow UDC*,<sup>141</sup> the facts were similar to that of *O’Reilly v Limerick Corporation* which had come before Costello J six years previously. As noted by the Irish Human Rights Commission, in the *O’Brien* case “Costello J ... resiled somewhat from the position he adopted in the *O’Reilly* case”.<sup>142</sup>

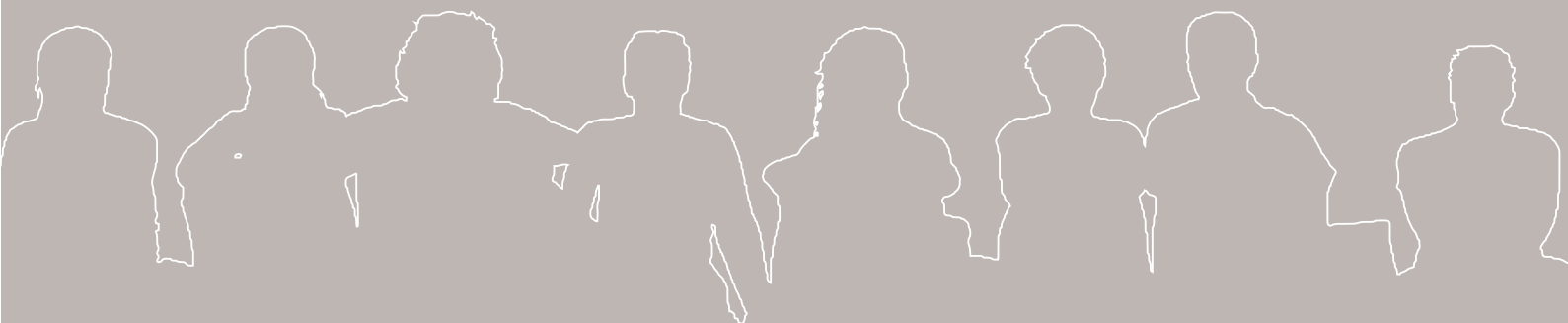
*O’Brien* involved members of the Traveller community living at a halting site where conditions were described in evidence before the court, as “unfit for human habitation”. The claimants argued that Wicklow Urban District Council had a duty to

provide for basic sanitary requirements. While Costello J based his judgment on a provision of law not in force at the time of *O'Reilly*, he went on to state that **the conditions in which the claimants were living, infringed their constitutional right to bodily integrity.**

He inferred a duty to provide halting sites from the Housing Act 1988 once a need for halting sites had been established and there was no valid reason why they should not be provided. He ordered the local authorities to provide at least three halting sites, two within a twelve month period. In the interim, he ordered that the two halting sites at which the Travellers were located be provided with a hard surface, electricity, drainage and sewage facilities. He held that it was for the housing authority to determine the priorities in the allocation of accommodation at the sites.<sup>143</sup>

**These cases show that it is often difficult to draw a hard and fast line between the concepts of commutative and distributive justice. In reality, many court judgments may have a redistributive effect. This does not mean that the courts are taking over the role of the executive. Rather, court judgments should be viewed as providing guidance for policy makers who then make the final decisions about the exact allocation of resources.<sup>144</sup>**

**The case law discussed also demonstrates that, although not framed in those terms, it is not unusual for the Irish courts to deal with ESC rights issues such as an adequate standard of living, including housing. Enshrining these rights in the Constitution would provide useful guidance to the judiciary on the content of, and obligations arising from, these rights and help to alleviate any uncertainty as to their enforceability.**



## **CHAPTER 3:**

# **APPROACHES BY COURTS IN OTHER STATES, TO THE ENFORCEMENT OF ESC RIGHTS**

**Human rights law does not dictate any precise method that should be applied when adjudicating on ESC rights. A number of different approaches have been adopted by courts in different jurisdictions when adjudicating ESC rights claims and in terms of what they order the State to do. However, all approaches have been mindful of the appropriate role of the courts and the other branches of the government. The different approaches help to inform how the Irish courts could consider ESC rights related cases.**

Some courts in other countries have focussed on the obligation of the State to ensure a minimum level of ESC rights; others have based their judgments on the procedural obligations of the State; and others still have considered the reasonableness of the measures adopted by the State.

## **MINIMUM LEVEL**

Swiss case law provides a good example of the courts focussing on the entitlement to a basic minimum level of ESC rights, similar to the core obligation in the ICESCR to ensure at the very least minimum essential levels of rights

In *V v Resident Municipality X and Bern Canton Government Council (Constitutional Complaint)*,<sup>145</sup> the Swiss Federal Court held that there was an unwritten constitutional right to a **basic minimum subsistence** derived from various constitutional bases such as the principle of human dignity, the right to life and the principle of equality.<sup>146</sup> The Court found that the guaranteeing of elementary human needs such as food, shelter and clothing is the condition for human existence and development.<sup>147</sup> It found that “what constitutes an infeasible prerequisite for a humanly dignified life is adequately clearly recognisable and accessible to determination in judicial proceedings”.<sup>148</sup> However, the Court also held that in “view of the scarcity of State resources” judges do not have the competence to set priorities for the allocation of resources and that “**only a minimum of State benefit could be directly required as a fundamental right and be implementable by the judge.**”<sup>149</sup>

The Federal Court therefore showed itself to be acutely aware of the need for judges to work within their sphere of competence<sup>150</sup> whilst at the same time protecting the enjoyment of a certain minimum level of rights.

In the sphere of education, the Brazilian courts have also considered the minimum core of the right to education for children. The courts there have held that as part of the constitutional right to education for children, the State has an obligation to ensure access to day-care and kindergarten for children up to the age of six. The State must equip itself for unrestricted compliance with this obligation and cannot use the excuse of lack of funding.<sup>151</sup> Also, the obligation of the State cannot be delegated to private institutions, thereby leaving children on waiting lists.<sup>152</sup>

In the context of the right to health, the Supreme Court of Argentina has held that statutory regulations which grant access to medical services must be read as requiring healthcare givers to provide essential medical services in case of need, in light of the right to health in the Argentinian Constitution and in international human rights treaties.<sup>153</sup>

## PROCEDURAL OBLIGATIONS

Along with focussing on basic minimum subsistence rights like the Swiss courts,<sup>154</sup> the German Constitutional Court has also focussed on the procedural obligations of the State when adjudicating ESC-rights-related claims.

While ESC rights are not directly justiciable in Germany, the German Constitutional Court has interpreted the concept of human dignity as placing a number of positive obligations on the State within the ESC rights sphere.

In the *Hartz IV* case,<sup>155</sup> concerning unemployment benefits, the German Constitutional Court recognised the fundamental right to guarantee a subsistence minimum which ensures every person in need the material conditions that are indispensable for her or his physical existence and for a minimum participation in social, cultural and political life.

The Court held that this fundamental right is derived from Article 1(1) of the German Basic Law (human dignity), together with Article 20(1) of the Basic Law, on the Social State Principle.

**The Court stipulated procedural requirements for the legislature in order to determine *Hartz IV* benefits. Such a procedure should be needs-oriented and realistic, transparent and based on reliable data.**



The Court held that the *Hartz IV* legislation (relating to unemployment benefits) did not meet these procedural requirements and was therefore unconstitutional.

It also **held that the Court itself did not have the competence to determine a certain amount of benefits on the basis of its own assessments and evaluation, and that this was within the role of the legislature.** It held that the legislature must conduct a procedure to ascertain the benefits necessary for securing a subsistence minimum that is in line with human dignity, which is realistic and takes account of actual need. The results of such a procedure must be anchored in law as a claim to benefits.<sup>156</sup>

This and other German cases are discussed further in Chapter 7 of this paper.

Similarly, in a case concerning an alleged violation of the right to social security and articles 9 and 11 of the ICESCR, **the Latvian Constitutional Court held that while the State had discretion to choose the manner of implementation of the right to social security (in Latvia this consisted of a system of social insurance and social assistance), it must develop an efficient mechanism for the implementation of the norms in order to guarantee the right to social security.**<sup>157</sup> The Court referred to General Comments No. 3 and No. 9 of the CESCR in its judgment.

## REASONABLENESS

Another approach involves the courts adjudicating on the reasonableness of the State's actions. This approach has been particularly prominent in the case law of the South African Constitutional Court.

For example, in the case of *Grootboom*,<sup>158</sup> on the right to adequate housing, the South African Constitutional Court applied what is now known as the “reasonableness test”. In this case, the respondents had been living in intolerable conditions in an informal squatter settlement. They moved onto vacant land from which they were evicted and at the time of the case were living in temporary shelters on a sports field. The group brought an action under sections 26 (the right of access to adequate housing) and 28 (children's right to basic shelter) of the South African Constitution.

On appeal, the Constitutional Court considered whether the measures taken by the Government to realise the right to adequate housing had been reasonable. The Court held that when considering whether measures are reasonable, they should be scrutinised within their social, economic and historical context. The Court held that section 26 obliges the State to devise and implement a coherent, co-ordinated housing programme and that in failing to provide for those in most desperate need



Picture: Ambrose Peters/© Sunday Times

the Government had failed to take reasonable measures to progressively realise the right to housing.<sup>159</sup>

The Constitutional Court held: **“A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures they have adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.”**

Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000, para 41.

In the *Soobramoney* case,<sup>160</sup> the South African Constitutional Court also applied the reasonableness test, but in this case found in favour of the State.

Here the applicant was in the final stages of chronic renal failure and required dialysis treatment. He sought an order from the Court directing the provincial hospital to provide him with ongoing dialysis treatment. Without this treatment Mr Soobramoney would die as he was not able to afford treatment in a private clinic. In an effort to rationalise the use of scarce resources, he was declared to be ineligible for treatment by the medical authorities. The Court applied the reasonableness test to the guidelines set by the hospital authorities on the admission to dialysis services.

The Court found that the right of access to healthcare services<sup>161</sup> in the Constitution had not been breached, as Mr Soobramoney had not shown that the guidelines were unreasonable. It held that the applicant's claim had to be evaluated in the broader context of the needs which had to be met by the health services. If the same principles were to be applied to other patients then the health budget would have to be increased dramatically at the cost of other needs which the State has an obligation to meet.

The Court noted: “[A] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters”.

*Soobramoney v Minister for Health (KwaZulu-Natal)*, 1998 (1) SA 765 (CC), November 27, 1997, para 29.

The *Grootboom* and *Soobramoney* cases show two varying outcomes, whilst both were applying the reasonableness test.

**The above cases are just some examples of the different ways in which the courts can approach the adjudication of ESC rights, such as a reasonableness approach, focussing on the realisation of the minimum level of a right or basing decisions around procedural obligations.<sup>162</sup>**

## THE ROLE OF THE COURTS

Some have argued against the protection of ESC rights in the Irish Constitution on the ground that “[j]udicial activism is no substitute for according primacy, in our democracy, to democratic politics” and that “[l]aw cannot become a substitute for politics”.<sup>163</sup> It is important to note that advocating for Constitutional protection of ESC rights does not mean arguing that one branch of government should replace the role of the other. The cases discussed above show that the measures adopted to fulfil ESC rights are primarily a matter for the legislature and the executive, and that the courts are mindful of the separation of powers. However there is a clear role for the courts to determine whether certain conditions have been satisfied in line with Ireland's international legal obligations.

**As has been argued, “the legal vindication of rights is a necessary last resort when politics fails”.<sup>164</sup>**

There are a range of remedies which may be available to the courts, were the Irish courts to engage more robustly on the adjudication of ESC rights. These have been

outlined in detail by the Irish Human Rights Commission and are summarised as follows:<sup>165</sup>

**Declaratory orders:** the court makes a declaration that a piece of legislation or policy is unconstitutional. The court leaves it to the executive to ensure that legislation and policy comply with the order.

**Mandatory orders:** the court makes an order for the Government to take specific action.

**Supervisory/structural orders:** the court orders the Government to undertake structural reform. Other bodies may be put in charge of supervising the implementation of the order.

**Compensatory damages:** the court awards a sum of money to indemnify a person for the loss and damage suffered by them. Compensation is a suitable remedy in cases where the damage is economically assessable.

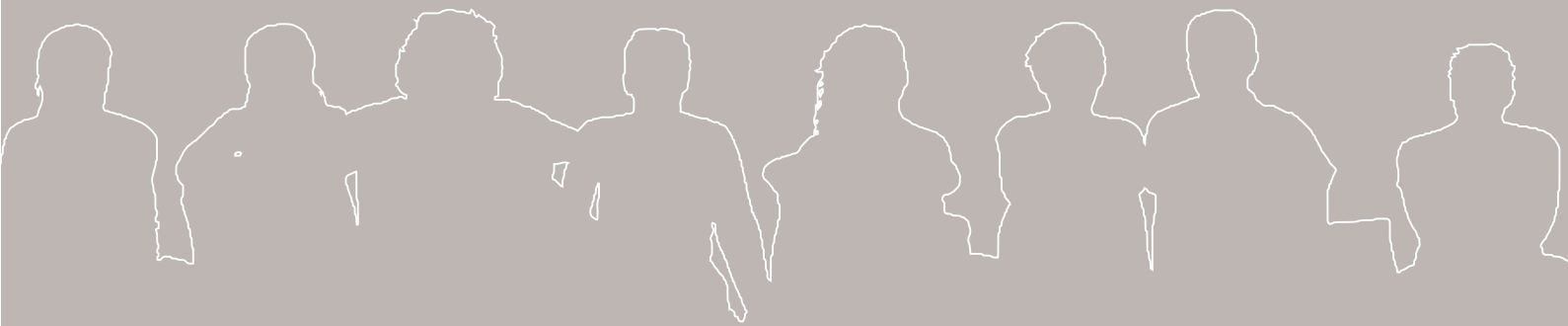
**Restitution:** the court orders the re-establishment of a situation that existed prior to the violation of the right. For example, this could involve the amendment of legislation or policy limiting the enjoyment of certain rights.

**'Reading in' excluded groups:** some courts may have the option of 'reading in' specific groups or words to rectify the defect in the legislation.

**Reparation in kind / rehabilitation:** the court orders the State to provide remedial services for the class of victims as a whole.

The courts in Ireland, particularly the Supreme Court, have been reluctant to grant mandatory orders compelling the executive to take certain action. This is discussed in more detail in Chapter 4.

CHAPTER  
**3**

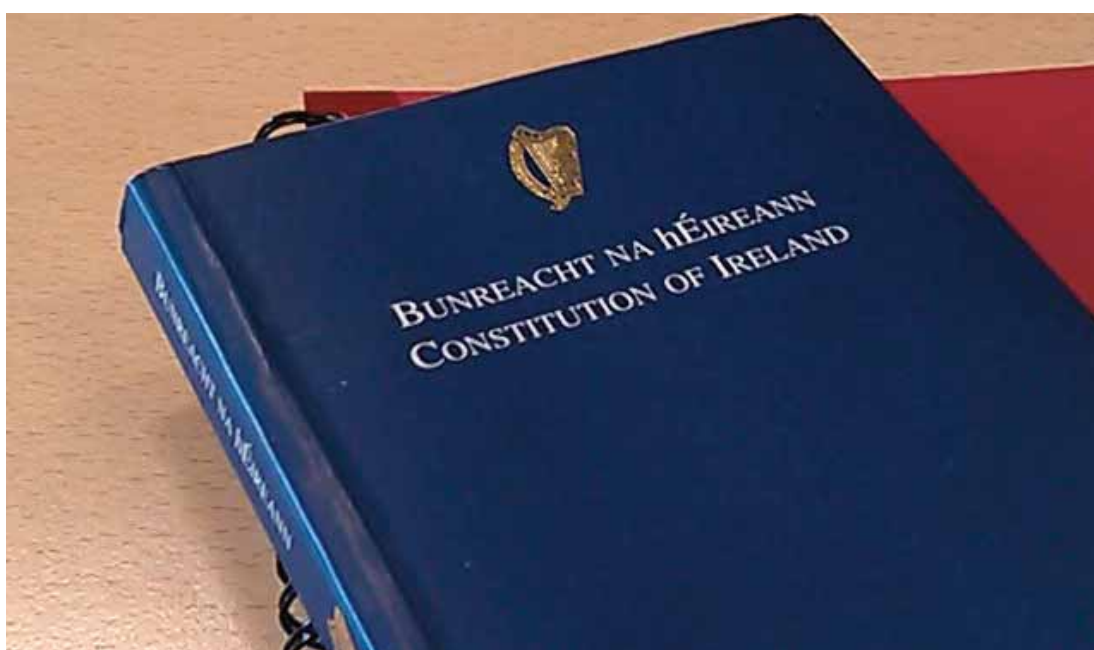


## **CHAPTER 4:**

# **CURRENT PROVISION FOR ESC RIGHTS IN THE IRISH CONSTITUTION AND INTERPRETATION TO DATE**

**Very limited protection is given to ESC rights in the Irish Constitution. Where cases have involved ESC rights, the courts, and in particular the Supreme Court, have taken a conservative approach. There has been some divergence in how the High Court and the Supreme Court have approached cases relating to ESC rights and their role in that regard. This can be seen particularly in cases on the education rights of children with disabilities.**

The Irish Constitution does not make explicit provision for the majority of ESC rights. Articles 40-44 of the Constitution deal with fundamental rights which are mostly of a civil and political nature and are enforceable before the courts. Article 42 dealing with education and of a social nature is a major exception in this regard. Certain protections are also afforded to property rights. The right to form associations and unions is protected in Article 40.6.1 (iii) of the Constitution. While the language of this article resonates more closely with the right to freedom of association in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), there is also some overlap with Article 8 of the ICESCR, which protects the right to form and join trade unions. Article 45 of the Constitution, “Directive Principles of Social Policy”, contain principles for the guidance of the State but are not enforceable by the courts.



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The limited protection that is afforded to ESC rights falls under three main headings:

- 1) Direct protection
- 2) Directive Principles of Social Policy
- 3) Indirect protection

## DIRECT PROTECTION OF ESC RIGHTS IN THE CONSTITUTION

- **The right to education**

The right to free primary education in Article 42 is the main ESC right which is given direct protection in the Irish Constitution. It reflects some of the core obligations of the State under the right to education in the ICESCR and the Convention on the Rights of the Child, such as the provision of free and compulsory primary education. It also reflects Article 13(3) of the ICESCR in which States undertake to respect the liberty of parents to choose schools for their children other than those established by public authorities. However, the formulation of Article 42 is weaker than the protection granted to the right to education in international human rights law which also outlines further obligations of States, including in relation to secondary, higher, fundamental and vocational education.<sup>166</sup>

Article 42 of the Constitution recognises the ‘Family’ as the primary educator of the child and grants broad freedom to parents to provide education in their homes, private or State schools. Parents are not obliged to send children to State schools or other types of schools designated by the State.<sup>167</sup> However, Article 42.3.2 stipulates that the State requires that children receive a certain minimum education.

The two parts of Article 42 which are of most interest here are Article 42.4 and Article 42.5. They have generated the most case law which is illustrative of the courts’ overall approach to adjudicating on ESC rights.

### Article 42.4

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

#### Article 42.5

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

#### Article 42.4

In *Crowley v Ireland*,<sup>168</sup> the Supreme Court held that Article 42.4 imposes a **duty on the State regarding the provision of education and a right to receive such education**. The Court also made clear that the obligation of the State under Article 42.4 is to **provide for free primary education**,<sup>169</sup> rather than to provide education. As held by the Court, “the State is under no obligation to educate”.<sup>170</sup> This means that the State has the responsibility to make arrangements for the provision of education, such as buildings, remuneration of teachers and setting the curriculum, but, as noted by commentators is “at one remove from the actual provision of education”.<sup>171</sup>

The extent of the State’s obligations under Article 42.4 has been discussed in a number of cases in both the High Court and the Supreme Court, mainly in the context of the right to education of children with disabilities.

In *O’Donoghue v Minister for Health*,<sup>172</sup> O’Hanlon J, borrowing from the language of the UN Convention on the Rights of the Child, held that:

**“[t]here is a constitutional obligation imposed on the State ... to provide for free basic elementary education of all children and ... this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be”.**<sup>173</sup>

The case involved a child with profound disabilities whose mother claimed that by failing to provide suitable education for him, the State had failed in its obligation to provide for his free primary education. The State argued that the applicant, due to his profound disability, was ineducable<sup>174</sup> and that primary education in Article 42.4 was of a scholastic nature and therefore would not benefit the applicant. It claimed that the type of training in the basics of bodily function and movement which could be given to the applicant could not be described as primary education. Both arguments were rejected by O’Hanlon J who adopted the definition of education as quoted above.<sup>175</sup>

On the basis of expert and documentary evidence, O’Hanlon J also stated that **“a much greater deployment of resources”** was necessary in order to fulfil the education needs of children. This included changes to the pupil-teacher ratio, the age of commencement, and the continuity and duration of education.<sup>176</sup> No mandatory order

was made but the judge made a declaration that the child's rights under Article 42 had been breached. He also granted damages.

In *Sinnott v Minister for Education*,<sup>177</sup> the first plaintiff, Jamie Sinnott who had severe autism, was 23 years old. The State had failed to provide him with any consistent and suitable education. It was argued that Mr Sinnott had a lifelong entitlement to free primary education in accordance with his needs and not dependent on age.<sup>178</sup> In the High Court, Barr J held that Article 42.4 does not impose an age limit on the obligation of the State to provide for free primary education. The criteria to be applied was **need not age**.<sup>179</sup> The High Court made a mandatory order to provide for Mr Sinnott's future education and granted damages.<sup>180</sup>

In deciding to appeal the judgment, the then Minister for Education claimed that further points of law needed to be clarified and in a press statement the Department of Education depicted the judgment as too far ranging, noting that it was broad and unqualified.<sup>181</sup> The Minister also stated that the ruling had upset the separation of powers between the Oireachtas and the judiciary.<sup>182</sup> At the time of the appeal there were 58 other legal actions against the Department of Education, from parents of children with disabilities.<sup>183</sup>

The decision to appeal the judgment of the High Court was heavily criticised by both advocacy groups and politicians, and calls were made for the appeal to be dropped.<sup>184</sup>

Political opinion at the time is further illustrated when, in May 2001, two months before the judgment of the Supreme Court in *Sinnott*, the then Attorney General



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delivered a speech on “Economic and Social Injustice-Legal Remedies”, arguing against the explicit provision of ESC rights in the Constitution. He suggested that those making the case for ESC rights were motivated by ideological agendas, “coming from the ground formerly occupied by the old left”.<sup>185</sup>

On appeal of the *Sinnott* case, the Supreme Court considered, firstly, the extent of the right to free primary education and, secondly, the power of the High Court to grant mandatory injunctions. The Court found in favour of the State on both points.

On the first point, the majority of the Court held that the State’s obligation to provide for free primary education concluded at the age of 18.<sup>186</sup> On the second point, the majority of the Court expressed its reluctance to make mandatory orders save in very extreme circumstance. This reluctance was based largely on the separation of powers doctrine. Hardiman J quoted extensively from Costello J’s judgment in *O’Reilly* on the distinction between commutative and distributive justice, as outlined in Chapter 2.

He stated that the courts should refrain from making mandatory orders, save in extreme circumstances, for a number of reasons:

- 1) It would be contrary to the separation of powers doctrine
- 2) The courts would be making decisions in areas in which they have no specialist expertise or qualification
- 3) The courts would be making decisions for which they are not democratically responsible
- 4) The procedures of the court are not suitable for deciding on issues of policy<sup>187</sup>

During the appeal, Senior Counsel for the State had argued that the Constitution was not a repository of need and could not be “some kind of glorified agency meeting needs”.<sup>188</sup> While the Constitution was inclusive and everyone had rights under it, including Mr Sinnott, it could not provide for meeting the needs of all.

Despite the ruling, the Government pledged to pay damages awarded by the High Court to both Mr Sinnott and his mother, to provide for his life-long education and to cover all legal costs.

**Commentators in the media criticised the judgment, noting that the case demonstrated that “individual social and economic rights are granted at the Government’s pleasure, not because they are innate” and that, contrary to the then Attorney General’s argument, “the Supreme Court’s ruling confirm[ed] that such rights are neither implied nor assumed and will only be addressed by making separate legal or Constitutional provision”.<sup>189</sup>**

### Article 42.5

In a number of cases concerning the obligation of the State to provide for the educational and accommodation needs of children with behavioural conditions, the High Court took a more progressive stance in terms of enforcing ESC rights related cases. However, like in the *Sinnott* case the Supreme Court again showed itself to take a more conservative approach to the separation of powers.

In *FN v Minister for Education and Ors*,<sup>190</sup> involving a child with ‘hyperkinetic conduct disorder’, the High Court held that the failure to provide specialist treatment in a secure unit breached the applicant’s rights under Article 42.5. It held that “where there is a child with very special needs which cannot be provided by the parents or guardian there is a constitutional obligation on the State under Article 42.5 ... to cater for those needs”.<sup>191</sup> The Court rejected the argument that the State could not be expected to provide such facilities on the grounds of costs. As temporary arrangements had been made for FN no immediate order was made other than to direct that the case stand adjourned.

Following the judgment the Department of Health made proposals for the provision of such facilities. In later cases it emerged however that there would be substantial delay in realising these plans, of which the High Court had not been informed.

This eventually culminated in the judgment of Kelly J in *DB v Minister for Justice and Ors*,<sup>192</sup> where the applicant sought an order directing the State to provide sufficient funding for the building and maintenance of a 24-bed high secure unit. Kelly J characterised the delays since the *FN* case as “a scandal”.<sup>193</sup> He stated that **the court’s jurisdiction in such cases stems from its obligation to vindicate and defend constitutional rights**. He also noted that such jurisdiction would not be exercised lightly due to the separation of powers doctrine. He ordered the Minister to provide resources and take the necessary steps to ensure that the unit be opened within three years.

Kelly J did not consider the court to be involving itself in questions of policy, stating that the order he would make would “merely ensure that the Minister who has already decided on the policy lives up to his word and carries it into effect”.<sup>194</sup>

In the subsequent case of *TD v Minister for Education*,<sup>195</sup> the Government had formulated a policy to deal with the accommodation needs of the children in this case, but had failed to implement the policy in a timely manner. Kelly J granted a number of injunctions directing the State to provide, within a set timeframe, secure and high support units in various locations throughout the country.<sup>196</sup>

**It is important to note that the orders in *DB* and *TD* were made after long delays by the State in implementing its own policy. Four years had passed following the judgment in *FN* when *DB* came before the courts.**

In her dissenting judgment in *TD*, Denham J. (now Chief Justice of the Supreme Court) concluded:

“it is clear from the case law that in rare and exceptional cases, to protect constitutional rights, a court may have a jurisdiction and even a duty to make a mandatory order against another branch of government. The separation of powers..is not absolute..[it] has to be balanced with the role given to the courts to guard constitutional rights”.

*TD v Minister for Education*, [2000] 2 ILRM 321, at 545.

**As seen by the approach of the High Court in these cases and as already pointed out in Chapter 2 and Chapter 3, the role of the court is not to take over Government policy-making when it adjudicates on ESC rights. Rather as commentators have noted, its role “is to remedy violations of rights”.<sup>197</sup> As others have observed, it is an issue of remedying “a wrong committed by the State against its citizen”.<sup>198</sup>**

The State appealed the High Court judgment in the *TD* case and the Supreme Court in a four to one majority overturned the judgment. As in *Sinnott* the Supreme Court again displayed its reluctance for the courts to become involved in matters of distributive justice. In the Supreme Court’s view, mandatory orders directing the executive to fulfil its constitutional obligations could only be granted in the rarest of cases involving “a conscious

and deliberate decision by the organ of State to act in breach of its constitutional obligations to other parties accompanied by bad faith or recklessness”.<sup>199</sup>

A number of the judges expressed their doubts about the existence of any ESC rights, apart from the right to education, in the Constitution, and as to whether the courts should assume the function of declaring ESC rights to be unenumerated rights. Hardiman J also reiterated his concerns about judicial involvement in areas more obviously within the remit of the legislature and executive.<sup>200</sup>

**The judgments of the High Court in the above mentioned cases are more in line with a pro-ESC rights approach. However, the divergence in judgments between the High Court and the Supreme Court only reinforces the point that there is a need for legal clarity when it comes to domestic ESC rights protection.**

- **Private property and its impact on the right to adequate housing**

A brief overview is provided here of the interpretation of property rights under the Constitution. For a more detailed analysis see the Irish Human Rights Commission Discussion Document on ESC rights.<sup>201</sup> The right to private property is distinct from the right to adequate housing as protected by the ICESCR and discussed in more detail in Chapter 5 of this paper. While the constitutional provision on “the common good”, as discussed below, acts as a certain clawback on right to private property, the lack of explicit protection of the right to adequate housing in the Constitution has meant that there is an imbalance of rights. For example, it has been argued that the right to private property in the Constitution has militated against the right to adequate housing, and has prevented adequate State control of housing and land



prices. Concerns over housing inequalities between those dealing in private property and those struggling to access basic accommodation have also been raised in this regard.<sup>202</sup>

The right to private property is protected in Article 43 of the Constitution. It is qualified by Articles 43.2.1 and 43.2.2 which state that the exercise of this right “ought, in civil society, to be regulated by the principles of social justice” and may be delimited by law for the “exigencies of the common good”.<sup>203</sup>

In Article 40.3, under the personal rights section of the Constitution, the State has the obligation, particularly by its laws, to protect from unjust attack, and in the case of injustice done to vindicate, the property rights of every ‘citizen’.

The courts have confirmed that Article 43 and 40.3 inform each other. When determining whether an unjust attack on property rights has taken place the courts will consider the principles of social justice and the exigencies of the common good.<sup>204</sup>

With regard to Article 43, at first the courts took the position that the principle of social justice should only be defined by the Oireachtas and that it was not within the jurisdiction of the courts to do so.<sup>205</sup> The indeterminate language of Article 43 influenced the courts in taking this position.<sup>206</sup> However, in the *Sinn Féin Funds* case, the Supreme Court established that the courts have the jurisdiction to examine whether a restriction on private property is justified by reference to the common good and whether it conforms with the principles of social justice.<sup>207</sup>

The courts have adopted the proportionality test when considering the means used to restrict private property.<sup>208</sup> In *Iarnród Éireann v Ireland*,<sup>209</sup> the Supreme Court held that the function of the court is not to substitute its views of the correct or desirable balance for that of the Oireachtas in determining the constitutionality of legislation which seeks to balance constitutional rights and duties.<sup>210</sup> Rather the role of the court “is to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual’s constitutional rights”.<sup>211</sup>

There are certain parallels which can be drawn between the proportionality test and the reasonableness test adopted by the South African Constitutional Court in *Grootboom* as discussed in Chapter 3, as well as the approach taken by the ECtHR.<sup>212</sup> As noted in *Grootboom*, the Court will not enquire whether other more desirable or favourable measures could have been adopted by the Government but will consider whether those measures actually adopted are reasonable. This objective consideration is similar to the approach taken by the Irish High Court in the *Iarnród Éireann* case.

As noted by the Irish Human Rights Commission, “[t]he approach of the courts in applying the [the proportionality test] to broad concepts such as ‘social justice’ and ‘the exigencies of the common good’ presents a strong counter argument to suggestions that the same courts might be prohibited from enforcing economic, social and cultural rights by reasons of competence”.<sup>213</sup>

Nevertheless, as noted by Focus Ireland in its submission to the Constitutional Convention, the right to adequate housing as “the most specific counterbalance” to the right to private property is absent from the Irish Constitution. The right to adequate housing would help to provide a more definitive framework within which the right to property is to be understood and the limitations on exercising that right. The core elements of, and obligations arising from, the right to housing are discussed further in Chapter 5.

## DIRECTIVE PRINCIPLES OF SOCIAL POLICY<sup>214</sup>

The Directive Principles of Social Policy (Directive Principles), are contained in Article 45 of the Constitution. Article 45 lays out guiding principles for the State in promoting the welfare of the people in the socio-economic field.

The Directive Principles deal with issues such as the right to earn a livelihood, the distribution of the ownership and control of material resources to subserve the common good, ownership and control of essential commodities, economic security, conduct of private enterprise to ensure protection against unjust exploitation, safeguarding the economic interests of the weaker sections of the community, “support of the infirm, the widow, the orphan, and the aged”, protection of health, and protection against entering into unsuitable work due to economic necessity.

**The Directive Principles are not enforceable before the Irish courts. While visionary at the time of their drafting, there is little evidence of them being used or referred to by the Oireachtas or executive in their decision-making. Moreover, in February 2014, the Constitutional Convention voted for strengthening the protection of ESC rights in the Irish Constitution and making these rights enforceable before the courts. The Convention did not favour an alternative option posed to them, of updating the language in Article 45 to include ESC rights but leaving them as guiding principles only.**

In terms of the courts, the general approach has been that the principles in Article 45 are excluded from judicial consideration.<sup>215</sup> The courts have noted that: “the directive principles of social policy, which are inserted for the guidance of the Oireachtas ... are expressly removed from the cognisance of the Courts”.<sup>216</sup>



However, there are occasional examples of a somewhat broader approach taken by the High Court. This is evident in *Murtagh Properties v Cleary*,<sup>217</sup> which involved a claim that the Constitution recognised the right to earn a livelihood without discrimination of sex. Here the High Court held that because Article 45 was not enforceable, the Courts did not have the power to consider the application of the principles in Article 45 in the making of laws. However, the Court could have regard to Article 45 when deciding whether a claimed unenumerated right exists.

In the case of *Rogers v ITGWU*,<sup>218</sup> the High Court also relied on Article 45. The case involved a claim that the enforcement by the relevant trade union of a compulsory retirement age breached the plaintiff's right to earn a livelihood under Article 40.3. In his judgment, Finlay J<sup>219</sup> held the enforcement of this compulsory retirement age together with pension rights were not in conflict with Article 45 which required and acknowledged the right of persons to earn a livelihood.<sup>220</sup>

The Supreme Court has not yet given a definitive ruling on the extent to which the courts can have regard to Article 45.<sup>221</sup>

As noted by the Irish Human Rights Commission, **the Irish courts have taken a minimalist approach to Article 45 when compared to other jurisdictions such as India where the Directive Principles of Social Policy in the Indian Constitution have been central to the jurisprudence of the Supreme Court.**<sup>222</sup> Like in Ireland, the Directive Principles in the Indian Constitution are not enforceable before the courts. However the Supreme Court has used the Directive Principles in interpreting the right to life in the Indian Constitution to include ESC rights such as the rights to health, to education, to earn a livelihood and to 'shelter'.<sup>223</sup>

For example, in the *Paschim Banga*<sup>224</sup> case, the Indian Supreme Court held that the failure to provide timely medical treatment necessary to preserve human life breached the constitutional right to life as protected in Article 21 of the Indian Constitution.<sup>225</sup> As part of its judgment, the Court ordered the Government to formulate a blueprint for primary healthcare with particular reference to treatment of patients in an emergency.

As has been noted, while using Directive Principles to read ESC rights into civil and political rights can be "a valuable legal tool ... it does not make for clear and accessible citizens' law. In preference to stretching existing rights, it makes more sense to place a specific duty on the government – an obligation to implement the right of everyone to the highest attainable standard of health."<sup>226</sup>

Moreover, in the Irish context, there is little prospect of the courts expansively interpreting Article 45 when one considers the conservative approach taken by the courts to date. This makes the need for enforceable ESC rights in the Irish Constitution all the more pressing.

## INDIRECT PROTECTION OF ESC RIGHTS IN THE CONSTITUTION

Although not explicitly protected in the Constitution, the courts have held that certain rights do have indirect protection in Bunreacht na hÉireann. Rights can be given indirect protection in different ways, such as unenumerated rights arising from general provisions in the Constitution, or through other rights in the Constitution.

- **Unenumerated rights**

The Irish courts have recognised a number of unenumerated rights in the Constitution arising from Article 40.3 in which the State guarantees to respect, defend and vindicate the personal rights of ‘citizens’.<sup>227</sup> (The courts have interpreted references to ‘citizen’ in the Constitution as applying more broadly to all persons in the State).

### **The right to bodily integrity and the right to health**

In *Ryan v Attorney General*,<sup>228</sup> the Supreme Court upheld an earlier judgment of the High Court that one of the unenumerated rights protected in Article 40.3 is the right to bodily integrity. The Supreme Court did not define this term in detail but did state that the State had “the duty of protecting the citizens from dangers to health in a manner not incompatible or inconsistent with the rights of those citizens as human persons”.<sup>229</sup>

In the case of *State (C) v Frawley*,<sup>230</sup> the High Court held that the right to bodily integrity operated to prevent an act or omission of the executive which without justification exposed the health of a person to risk or danger. In the particular context of the case, the duty was held to apply to prisoners.<sup>231</sup>

The right to health has also been referred to by O’Flaherty J in the Supreme Court, when he stated that “it was beyond debate that there is a hierarchy of constitutional rights and at the top of the list is the right to life, followed by the right to health and with that the right to the integrity of one’s dwelling house”.<sup>232</sup> The parameters of the constitutional right to health are however unclear.<sup>233</sup>

The approach taken by the Supreme Court in *In re Article 26 and the Health (Amendment) (No.2) Bill 2004*<sup>234</sup> is interesting in the sense of how the Court might interpret the ESC rights obligations of the State should they be given constitutional status. This case involved the constitutionality of a Bill which purported to provide a lawful basis for unlawful charges applied for 30 years by the health authorities to medical card holders for the provision of in-patient services in public nursing homes. It was argued that persons who could not look after themselves independently had a constitutional right to care and maintenance by the State arising from the right to life and the right to bodily integrity in Article 40.3 and that therefore they could not be

charged for such care and maintenance. An alternative argument proposed was that the charges proposed by the Bill unduly restricted the constitutional right of access to relevant services of persons of limited means.

These arguments were rejected by the Supreme Court, but it did not dismiss the argument that such a constitutional right to care and maintenance by the State existed. The Court stated that: “[i]n a discrete case in particular circumstances an issue may well arise as to the extent to which 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”.<sup>235</sup>

The Court also held that it could not be an inherent characteristic of any right to in-patient services that they be provided free of charge, regardless of the means of those receiving them.<sup>236</sup>

Such an interpretation is not necessarily at odds with the State’s obligations under international human rights law. The right to health as protected in the ICESCR has been interpreted to include the obligation on States to ensure that healthcare services are affordable. The right to health does not impose an obligation to provide services for everybody free of charge.

However, as stated by the CESCR, “health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.”<sup>237</sup>

### **The right to earn a livelihood**

The right to earn a livelihood was recognised by the High Court in *Murtagh Properties v Cleary*.<sup>238</sup> In this case, as already discussed above, Kenny J held that the courts could rely on Article 45 of the Constitution in determining whether claimed unenumerated constitutional rights existed. He concluded that Article 45.2.1<sup>239</sup> logically meant that each person, whether male or female, had the right to earn a livelihood. The High Court has also accepted a claim that the right “to prepare for and follow a chosen career” is an unenumerated right.<sup>240</sup> An argument that the right to work is one of the unenumerated rights in the Constitution was later accepted by Walsh J in the Supreme Court.<sup>241</sup>

The High Court has interpreted the right to earn a livelihood as mainly a negative right stating that there is no positive obligation on the State to provide a

livelihood.<sup>242</sup> The Court has also held that the right to earn a livelihood does not mean a right to receive employment from any particular employer.<sup>243</sup>

In *Cox v Ireland*,<sup>244</sup> the Supreme Court held that any statutory regulation of the right to earn a livelihood must not be disproportionate. In this case, the Supreme Court made clear that **the test for any restriction on the right to earn a livelihood is the objective test of proportionality**, as already referred to above under the right to private property.

- **Indirect protection of ESC rights through other rights in the Constitution**

This section briefly considers how the right to life has been interpreted elsewhere to include ESC rights aspects. A more detailed examination of indirect protection of ESC rights through other rights in the Irish Constitution is included in the IHRC Discussion Document on ESC rights.<sup>245</sup>

As already noted above, the courts in India, drawing on the indivisibility principle, have interpreted rights such as the rights to health (with particular reference to emergency medical treatment), to education, to earn a livelihood and to shelter as flowing from the right to life in the Indian Constitution.

In Ireland, there have not been any examples of an expansive interpretation of the right to life to include ESC rights.<sup>246</sup>

However, in *G v An Bord Uchtála*,<sup>247</sup> Walsh J in the High Court did state that the right to life “necessarily implies the right ... to maintain that life at a proper human standard in matters of food, clothing and habitation”.<sup>248</sup>

Such an interpretation of the right to life would resonate with the right to an adequate standard of living as protected in Article 11 of the ICESCR which includes “adequate food, clothing and housing, and the continuous improvement of living conditions”. However, Irish constitutional law experts have observed that “it is extremely unlikely that such an approach would be endorsed by the present Supreme Court”<sup>249</sup> having regard to its judgments in *Sinnott* and *TD* as discussed above under the right to education.

## CONCLUSION

Limited protection is given to ESC rights in the Irish Constitution. Where express protection is given to ESC rights such as the right to primary education, the *Sinnott* and *TD* cases are illustrative of the conservative position of both the Supreme Court and the Government on the separation of powers. The cases show the extreme reluctance of the Court to involve itself in issues impacting upon the allocation of resources by the State. It also demonstrates the belief within the Government that adjudication of ESC rights claims will lead to judgments requiring huge spending by the Government. While judgments on ESC rights may include government spending, as can also be the case with civil and political rights, it is important to remember that the ICESCR<sup>250</sup> and how it has been interpreted by the CESCR<sup>251</sup> have made provision for the fact that no State has infinite resources.

It is also important to note that the cases did help to bring about changes to government policy and service delivery when it comes to children with special needs.

**As noted by constitutional law experts, the education cases show that it is possible to interpret the Constitution in two ways. One is the approach adopted by Kelly J, the other the conservative approach adopted by the Supreme Court in *Sinnott* and *TD*.<sup>252</sup> The latter approach, it has been noted, is not necessarily based on the Constitution itself but rather on pre-existing, ingrained views of some members of the judiciary that the Constitution does not allow for judicial activism of this kind.<sup>253</sup>**

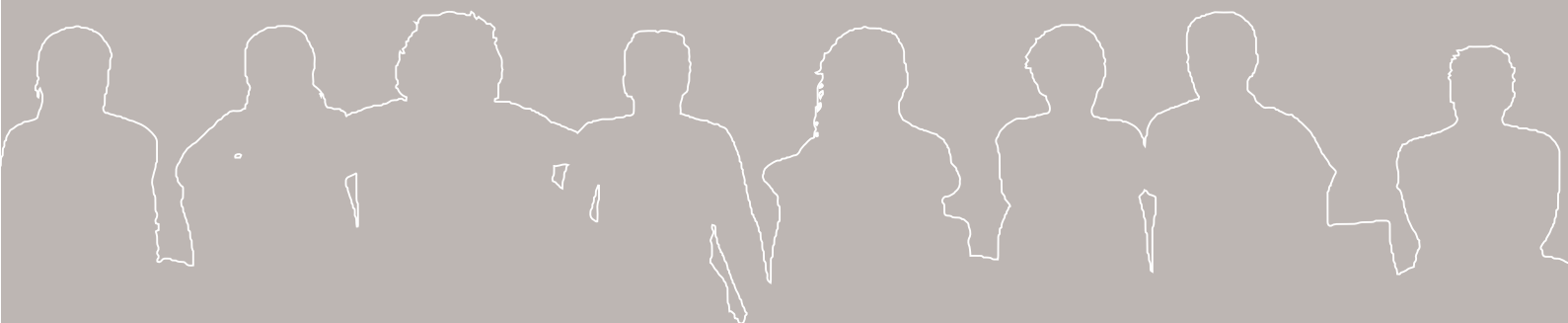
While the separation of powers between the different branches of government must be respected, mandatory orders may be warranted in certain circumstances, in order to protect the constitutional rights of a person or group of people. This is particularly evident in the cases that have arisen under Article 42.5.

As already discussed in Chapter 3, courts around the world have developed different approaches when adjudicating ESC rights claims, for example by considering procedural obligations, the reasonableness of government measures, or basing judgments on the protection of a minimum level of rights. In addition, some States which protect ESC rights in their constitutions have included specific clauses which lay out how courts are to deal with claims by the State that it does not have the resources to fulfil a particular right.<sup>254</sup>

The proportionality test as applied by the Irish courts in constitutional right to property cases is not unlike the reasonableness test used to adjudicate on ESC rights in other jurisdictions. A similar approach in cases involving ESC rights could prove to be of useful guidance to the courts in striking an appropriate balance, particularly since it also resembles the approach of the European Court of Human Rights.

ESC rights should be given explicit recognition within the Irish Constitution. In the interim, the Irish courts should adopt a more progressive and less cautious approach to adjudicating ESC rights related cases. This chapter shows that it is not outside the remit of the courts to do so even where there is no express provision for certain rights in the Constitution. The recognition of unenumerated rights by the Irish courts in the past is also indicative of this.

**Overall, however, the general reluctance of the courts when it comes to the recognition of unenumerated rights and to positively interpret ESC rights, is yet another argument in favour of strengthening the protection of ESC rights in the Constitution and providing legal clarity around these rights by making explicit provision for them.**



## **CHAPTER 5:**

# **LEGISLATION AND POLICY IN IRELAND RELATING TO CERTAIN ESC RIGHTS**

**This paper examines the legal protection given to ESC rights in Ireland and the extent to which these rights are enforceable. Few ESC rights are protected in Bunreacht na hÉireann, as outlined in this paper, and the CESCR and other human rights bodies have recommended that Ireland enshrine these rights in the Constitution. Amnesty International is also of the view that Ireland should take less than a minimalist approach and enshrine these rights in the Constitution to give them long-term protection. However, while preferable, there is no obligation as such under human rights law to give explicit constitutional protection to ESC rights. However, ESC rights do need to be given appropriate protection within the domestic legal order. There must be appropriate means of ensuring governmental accountability and for providing remedies and redress.<sup>255</sup> This may be done by enshrining these rights in legislation and reflecting them in policy. In the absence of a constitutional framework on ESC rights, it is important to examine whether Irish legislation and policy provide a framework that is sufficiently accountable and transparent to deliver on ESC rights.**

It must be noted that this chapter does not provide a comprehensive analysis of all relevant law and policy in Ireland, and there are extensive frameworks in place in Ireland regarding a number of ESC rights related areas, such as social security and work (employment) and extensive legal frameworks on equality, which are beyond the scope of this chapter to examine.

This chapter gives a broad overview of legislation and policy using health and housing as illustrative examples, two rights not explicitly protected by the Irish Constitution.<sup>256</sup> It outlines Ireland's main obligations; how legislation and policy address elements of and are helping to deliver on these rights; and the gaps and impacts on the enjoyment



of these rights in practice. In view of the purpose of this chapter, we look at the overarching framework in place and do not go into detail on individual legislation and policies. The existing frameworks around health and housing are examined in light of the core components of these rights as outlined in international human rights law. The

As outlined in Chapter 1, under human rights law, the State has an obligation to respect, protect and fulfil human rights.

In the context of the right to health:

The obligation to respect requires States to refrain from denying or limiting equal access for all persons (e.g. prisoners, asylum seekers) to health facilities.

The obligation to protect requires States to prevent third parties from jeopardising the health of others. Even if health facilities, goods and services are delivered by private actors the Government has an obligation to regulate these.

The obligation to fulfil requires States to adopt necessary measures, including legislative, administrative and budgetary measures, to ensure the full realisation of the right to health.

gaps that are evidenced around components such as availability and accessibility among numerous others, paired with the absence of a strong system of accountability, are illustrative of the fact that a comprehensive framework is not currently in place to give adequate protection to these rights.

## HEALTH

Under Article 12 of the ICESCR, Ireland has the obligation to deliver on the right to health for everybody in the country.<sup>257</sup> Importantly, the right to health does not mean the right to be healthy. Rather it “must be understood as the right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health”.<sup>258</sup>

There are also a number of underlying determinants of health to be respected and fulfilled.<sup>259</sup> However, this chapter will focus largely on healthcare in Ireland.

There are 4 main components to Ireland’s right to health obligations as they relate to healthcare provision:<sup>260</sup>

### Ireland’s right to health obligations

**Availability:** Health facilities, goods, services and programmes must be available in sufficient quantity within the State.

**Accessibility:** Health facilities, goods and services have to be accessible to all without discrimination. This includes physical, economic and information accessibility.

**Acceptability:** Health facilities, goods and services must be respectful of medical ethics, of culture, sensitive to life-style requirements, designed to respect confidentiality and to improve the health status of those concerned.

**Quality:** Health facilities, goods and services must be scientifically and medically appropriate and of good quality. This includes appropriately trained health professionals.

## LEGISLATION AND POLICY

A range of legislation and policy exists in Ireland on various aspects of health and healthcare, relating both to the health system and delivery of healthcare broadly and to specific groups or areas of healthcare, covering aspects of the right to health. However, neither law nor policy adopts a rights based approach.

While some administrative accountability mechanisms exist, as discussed further below and there is some scope for judicial review, these are largely limited to considering the manner rather than the substance of decisions of tribunals, administrative bodies or lower courts.<sup>261</sup> As commentators have noted, “challenges to broader questions of social policy and primary legislation, of direct concern in human rights adjudication, remain for the most part beyond the reach of ... the courts in their exercise of judicial review”.<sup>262</sup>

It has also been noted that the test of reasonableness which is applied in cases of judicial review is “regarded by courts and commentators alike to be a highly deferential standard, and provides for considerably less scrutiny than the South African concept of *Grootboom* reasonableness”,<sup>263</sup> as discussed in Chapter 3.

In terms of outcomes, a human rights based approach would promote greater accountability and transparency in the State’s delivery of the right to health, prioritising the most vulnerable and helping to achieve fairer outcomes for all. It would provide a remedy for people where their right is not being met. The right to a remedy is at the heart of human rights law.

A human rights based approach would also help to protect against any retrogression in the enjoyment of the right to health. Any retrogressive measures would have to be carefully scrutinised and fully justified by the Government.

Moreover it would provide a framework to guide law and policy makers in progressively realising the right to health. In the UK, the parliamentary Joint

Committee on Human Rights in its report on ESC rights, noted that enshrining ESC rights in law would broaden and strengthen a culture of respect for human rights “and make clear that human rights address essential human needs and help to ensure that provision is made for the most vulnerable people in our society”.<sup>264</sup>

## LEGISLATION

Considering the core elements of the right to health – availability, accessibility, acceptability and good quality – helps to identify the extent to which Irish legislation is addressing Ireland’s right to health obligations.

The **accessibility and availability** of health services is dealt with in the Health Act 1970 which provides the overarching architecture of the system. It is the primary piece of legislation on the provision of health services in Ireland and relevant to accessibility of health facilities, goods and services. Regarding economic accessibility, the Act stipulates that individuals are responsible for the cost of their own healthcare unless where it would cause them “undue hardship”. It makes provision for the medical card and GP visit cards schemes.<sup>265</sup>

Ancillary legislation which deals with the **availability** of services is the Health Act 2004. It establishes the Health Service Executive (HSE) which is required to manage and deliver, or arrange to be delivered on its behalf, health and personal social services. As part of its healthcare reform agenda, the current Government has published legislation to abolish the HSE.<sup>266</sup>

Other legislation includes the Health Act 2007 which gives the Health Information and Quality Authority (HIQA) its mandate.<sup>267</sup> HIQA’s mandate helps to ensure the **acceptability and quality** of health and social care services in Ireland. (An exception is mental health services: the Mental Health Commission sets the standards for the delivery of community-based and in-patient services mental health services, and in-patient services are monitored against those standards by the Inspectorate of Mental Health Services.) The function of HIQA is discussed further in the accountability section of this chapter.

Legislation has been enacted to deal with specific areas of healthcare. For example, the Mental Health Act 2001 relates to a number of the components of the right to health, including **availability, accessibility and quality** of care, in mandating the Mental Health Commission to set standards in mental health services.<sup>268</sup> Its particular focus is on procedures relating to involuntary admission and detention, and consent to mental health treatment.<sup>269</sup>

## POLICY

There are a number of overarching health strategies and frameworks in Ireland including *Healthy Ireland*,<sup>270</sup> the national framework for action on health and wellbeing, and *Future Health*<sup>271</sup> which sets out a framework for reform of the health service, and deals with the **availability** and **accessibility** of health services. They cite some principles relevant to the right to health. These include principles of equity, public participation, monitoring and accountability, taking account of the determinants of health and health inequalities, equal access to healthcare and affordability. However, these policies are not framed in human rights language. A new public health policy, *Your health is your wealth, 2012-2020*, is to set out the Government's long-term vision for health and wellbeing of the population focussing on the **determinants** of health. At the time of writing, this policy has not yet been published. The approach to primary healthcare is outlined in *Primary Care: A New Direction* which was published in 2001.<sup>272</sup>

The current Government has committed to developing a universal, single-tier health service, which guarantees **accessibility** of medical care based on need not income. The planned introduction of Universal Health Insurance guaranteeing equal access to care, and Universal Primary Care, if successful, could be important steps for the State in realising its right to health obligations.<sup>273</sup> A White Paper on Universal Health Insurance was published in April 2014 outlining the Government's proposals. It is to be noted that the first overarching principle to inform which services are available as part of the universal healthcare package is that "[t]he Irish Government recognised the right of the Irish people to the enjoyment of the highest attainable standard of physical and mental health."<sup>274</sup> This reflection of the language of Article 12 ICESCR is the first such language in Irish general healthcare policy. The White Paper is subject to consultation, and it is proposed that, if implemented, universal healthcare will be in place by 2019.

There have also been a number of policies dealing with specific areas of healthcare or particular groups.

For example, with regard to **availability, acceptability and quality** of mental healthcare, in 2006 the Government set out a comprehensive reform agenda in its mental health policy, *A Vision for Change*, proposing to radically transform the mental health service model in Ireland. However as previously noted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,<sup>275</sup> the Mental Health Commission<sup>276</sup> and other stakeholders,<sup>277</sup> progress in implementing reform has been slow and particular concern has been raised about cuts in resources which have almost halted the reform process in recent years. Issues around the delivery of services and compliance with human rights standards have also been raised by the Inspector of Mental Health Services.<sup>278</sup> The policy now requires updating.

Strategies on particular groups<sup>279</sup> have included the National Strategy on Traveller Health published in 2002. The strategy is now out of date and has not been updated.

An “All Ireland Traveller Health Study” was published in 2010 with a view to providing a framework for policy development and practice in the area of Traveller health. The study found that while **access** to healthcare services for Travellers was generally good, there were a number of issues of concern including around the **acceptability** of care, particularly communication and discrimination in the healthcare setting.<sup>280</sup> At the time of writing a policy has not yet been published.

Legislation is being brought forward to introduce free **access** to GP care for children under the age of six.<sup>281</sup> However, it is important that extending access to healthcare is not piecemeal but that such provision takes place as part of a wider programme of reform to ensure all individuals can access healthcare based on need not income.

## THE RIGHT TO HEALTHCARE IN PRACTICE

An examination of the Constitution, legislation and policy in any area demonstrates the way the State is seeking to address that area. The overview of health legislation and policy above gives an outline of some of the steps the State has taken which can help to deliver on the health obligations of the State. However, there are numerous gaps when it comes to the protection of the right to health. Some of the resulting impacts of this are illustrated by the various concerns raised about the delivery and enjoyment of health in Ireland both at a national and international level. An overview of some of these concerns is outlined here.



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In terms of **availability**, primary, secondary and tertiary healthcare is available throughout Ireland. In certain circumstances, arrangements can be made for the purchase of particular services in other EEA States, when such services are not available in Ireland or not available within the necessary timeframe.<sup>282</sup> Some concern has been expressed about the poor availability of primary services in certain rural and urban areas.<sup>283</sup> The impact of the economic crisis on health services has been highlighted in terms of availability but also accessibility and quality of care.<sup>284</sup> There are also ongoing concerns around the roll-out of the Primary healthcare Strategy.<sup>285</sup>

When it comes to **accessibility** of healthcare, under the Health Act 1970, non-medical-card- holders are responsible for meeting the cost of their care.<sup>286</sup> This has raised serious concerns around the economic accessibility of healthcare in Ireland.<sup>287</sup> The unique public/private two-tier system in Ireland means that private patients or those who can afford to pay for private healthcare receive treatment more quickly than public patients. The CESCR has raised its concerns around **equal access** to healthcare for all without discrimination in Ireland, noting in particular its regret that a human rights framework had not been adopted in health policy.<sup>288</sup>

In terms of **physical accessibility** of services, concern has also been raised about problems of accessibility of healthcare services, particularly in rural areas, affecting certain vulnerable groups, especially older persons.<sup>289</sup> It has also been documented that lack of **accessible information** can act as a barrier to accessing healthcare, particularly for certain groups such as Travellers.<sup>290</sup> Numerous concerns around accessibility of healthcare were also raised by other States during Ireland's examination under the UPR.<sup>291</sup>

On the **acceptability and quality** of health facilities, goods and services, concerns have been expressed at a national and international level by relevant stakeholders,<sup>292</sup> particularly when it comes to certain vulnerable groups in Ireland. These vulnerable groups include, but are not limited to, older persons, persons with disabilities, children, prisoners, Travellers and persons with mental health difficulties.

**The above shows some of the steps taken by the State in striving to deliver on the right to health. However, as highlighted, there are a number of areas of concern, when it comes to the enjoyment of the right to health in Ireland, some of which are outlined above.**

**While there are many factors which impact upon the delivery of health facilities, goods and services, the lack of protection of the right to health in law and the failure to consider and adequately reflect the right to health in policy, contribute to gaps and weakness within the health system.**

**This includes issues around equal access to healthcare for all; availability, quality**

**and acceptability of care, particularly for vulnerable groups such as Travellers; and in the area of mental health.**

## **ACCOUNTABILITY**

Accountability is a key feature of human rights law. It is **an inherent part of the justiciability of ESC rights and ensuring that remedies exist for people when States fail to deliver on their rights.**

Accountability can also contribute significantly to delivering better policy outcomes through effective monitoring, responding to complaints, and remedial action.

Accountability in terms of the right to health is outlined below, and accountability more broadly is dealt with further in Chapter 6. Accountability mechanisms can take different forms, including administrative, political, quasi-judicial or judicial. These may include, but are not limited to, human rights impact assessments, parliamentary committee reviews,<sup>293</sup> National Human Rights Institutions and judicial review. As highlighted by the CESCR and already noted in Chapter 1, all remedies should be accompanied by an ultimate right of judicial appeal.<sup>294</sup>

In Ireland, there is a piecemeal approach to accountability for the right to health.

While some health related monitoring and accountability mechanisms exist in Ireland, the right to health itself is not legally enforceable in Ireland and there are few individual remedies for people if their right to health is violated.

With regard to the Health Service Executive (HSE), which is responsible for implementing policy, administration and management of services, deficiencies in accountability have been previously highlighted by Amnesty International Ireland in “Healthcare Guaranteed? The Right to Health in Ireland”.<sup>295</sup> In its Programme for Government 2011-2016, the Government has indicated that the HSE will be abolished and its functions transferred elsewhere. Regardless of what arrangements are put in place, it is important that the Government exercises sufficient accountability over the delivery of healthcare and wider components of the right to health.<sup>296</sup>

The Government has established a number of mechanisms which can help to monitor and ensure accountability for the delivery of the right to health.

For example, as mentioned earlier, HIQA plays an important role in monitoring compliance with standards and ensuring accountability in health and social care services in Ireland.<sup>297</sup> Its mandate includes setting standards on safety and quality



for health and social care services provided by or on behalf of the HSE, as well as services provided by nursing homes;<sup>298</sup> and monitoring compliance with those standards. While HIQA does not have the legal power to investigate individual complaints, it may take action in relation to health and social care services where serious concerns about welfare of service users are raised. This may include an investigation.<sup>299</sup> HIQA also has the function of carrying out Health Technology Assessments across the health system. It evaluates and publishes information about the delivery and performance of health and social care services in Ireland.<sup>300</sup>

Further, a statutory complaints system for the HSE has been in operation since 2007.<sup>301</sup> Anyone receiving public health or personal social services in Ireland may make a complaint about the actions or failures of the HSE, their service providers or HSE contractors who provide services on behalf of the HSE.<sup>302</sup> There are certain limitations to this complaints mechanism as highlighted by the IHRC, such as that a complaint may “only relate to actions concerning fair and sound administration” and “cannot concern substantive health or healthcare issues and cannot result in a change in a service agreement or arrangement between the service provider and the HSE”.<sup>303</sup>

Some independent oversight exists under the HSE complaints system as appeals may be made to the Office of the Ombudsman and the Ombudsman for Children. Cases relating to health form a substantial body of the Ombudsman’s work. As is discussed further in Chapter 6, the Ombudsman is largely focused on procedural propriety rather than individual rights. It is also limited to making recommendations and is not an adjudicatory body.<sup>304</sup> As noted by the IHRC, “[a]lthough it would be surprising if their recommendations were not adhered to in the vast majority of cases, nonetheless it is questionable to what extent the complaints mechanism under Part 9 of the Health Act 2004, leads to real accountability on the part of service providers.”<sup>305</sup> It has recommended reviewing and strengthening the limited complaints mechanisms under Part 9 of the Health Act 2004.<sup>306</sup>

Issues regarding accountability have been raised by the Ombudsman in relation to the HSE.<sup>307</sup> This includes difficulties by the Ombudsman in accessing information from the HSE. The Ombudsman has also highlighted problems in the HSE complaints procedure, and the way complaints are handled, including delays. In this regard the then Ombudsman highlighted “the need for public bodies to have a complaints system in place which engages with, and is responsive to, complainants and which deals with complaints in a fair and timely manner”.<sup>308</sup> Moreover, the current Ombudsman has raised concern about the low levels of complaints to his office relating to the health services, citing the failure of health bodies to inform complainants of their rights, the difficulty in making an initial complaint and the “protracted process which often follows”.<sup>309</sup>

As outlined further in Chapter 6, the IHRC also has certain competence in the area of the right to health.



With regard to mental health, the Mental Health Act 2001 established the Inspectorate of Mental Health Services, a body which provides independent monitoring of in-patient services. However the Inspectorate is not mandated to deal with individual complaints, and the Act does not provide for a mental health specific complaints procedure so recourse is instead via the HSE and the Ombudsman systems outlined above.

**While some accountability mechanisms exist, there is a lack of a comprehensive system of accountability when it comes to the right to health. It is clear that there are a number of weaknesses and limitations within the mechanisms that do exist. This is compounded by the failure to give legal protection to the right to health. In practice it is therefore very difficult for people in Ireland to seek a remedy when their right to health is violated.<sup>310</sup>**

**Reforms in health should adopt a human rights based approach.**

**As noted above, a human rights based approach would help the State to deliver on its right to health obligations and provide a framework to guide law and policy makers in planning and delivering on health. It would assist in ensuring greater accountability and transparency in decision-making, including around the allocation of resources, and help to achieve fairer outcomes for all.**

**A human rights based approach would require the State to put in place strong monitoring and accountability mechanisms to track progress over time and to ensure that remedies are available where the rights of individuals are breached. Any administrative remedies should be accompanied by an ultimate right of judicial appeal as highlighted by the CESCR.**

**Any retrogressive measures which impact on the enjoyment of the right to health would have to be fully justified.**

“[T]he right to ... health, informed by health good practices can help to make a practical, constructive contribution to health system strengthening ....

Additionally, States have a legal duty to comply with their binding international ... human rights obligations. Identifying the features of a health system that arise from the right to the highest attainable standard of health can help States ensure that their policies and practices are in conformity with their legally binding human rights duties”.

Report of the UN Special Rapporteur on the right to the highest attainable standard of physical and mental health, UN Doc A/HRC/7/11, (2008), paras 32- 33.

# HOUSING

The right to adequate housing, as a component of the right to an adequate standard of living, is protected in a number of international instruments, most notably Article 25(1) of the Universal Declaration of Human Rights and Article 11(1) of the ICESCR. As Ireland has ratified the ICESCR it has the legal obligation to deliver on the right to housing for everybody.<sup>311</sup> As highlighted by the CESCR, “the right to adequate housing should not be interpreted in a narrow or restrictive sense”.<sup>312</sup> It does not merely mean the ‘shelter’ provided by having a roof over one’s head but “should be seen as the right to live somewhere in security, dignity and peace”.<sup>313</sup>

There are seven key components of the right to adequate housing which help to determine whether certain forms of shelter can be considered as adequate housing.

## Seven key components of the right to adequate housing

**Legal security of tenure:** Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced evictions, harassment and other threats.

**Availability of services, materials, facilities and infrastructure:** An adequate form of housing must contain certain facilities essential for health, security, comfort and nutrition. There should be sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

**Affordability:** Personal or household financial costs associated with housing should not threaten or compromise the attainment of other basic needs. States should ensure that the percentage of housing related costs is commensurate with income levels and should establish housing subsidies for those unable to

In the context of the right to adequate housing:

The obligation to respect means States must refrain from interfering directly or indirectly with the enjoyment of the right to adequate housing. For example, this includes but is not limited to carrying out forced evictions and demolitions of homes, denying security of tenure, imposing discriminatory practices in terms of access to and control and housing and land.

The obligation to protect requires States to prevent third parties from interfering with the right to adequate housing, such as landlords, landowners, property developers and corporations.

The obligation to fulfil requires State to take positive steps towards the full realisation of the right to housing. This includes adopting legislative, administrative, budgetary, judicial and other measures such as a national housing plan with a particular focus on marginalised and vulnerable groups.

obtain affordable housing. Tenants should be protected against unreasonable rent levels or rent increases.

**Habitability:** Housing must have adequate space and protection from the weather or other threats to health, structural hazards and disease vectors.

**Accessibility:** Adequate housing must be accessible for those entitled to it. Disadvantaged groups must be given full and sustainable access to adequate housing resources and should be given some degree of priority consideration in the housing sphere. Housing law and policy should take full account of the needs of these groups.

**Location:** Adequate housing must be in a location which allows access to employment options, healthcare services, schools, childcare centres and other social facilities. Housing should not be built on or near polluted areas or sources of pollution that threaten the right to health of inhabitants.

**Cultural adequacy:** The way housing is constructed, the materials used and the policies supporting these must enable the expression of cultural identity and diversity of housing. Activities to develop or modernise the housing sphere should ensure that cultural dimensions of housing are not lost.

## LEGISLATION AND POLICY

A range of law and policy exists in Ireland on housing. However as with **the right to health, the right to adequate housing itself is not incorporated into legislation or policy and there is no explicit reference to rights language.**

## LEGISLATION

Considering some of the core components of the right to adequate housing - namely legal security of tenure, availability, affordability, habitability, accessibility, location and cultural adequacy - helps to identify the extent to which Irish legislation is addressing Ireland's right to adequate housing obligations.

The Department of the Environment, Community and Local Government is the primary Department with the responsibility for the formulation and implementation of policy and for the preparation of legislation in relation to housing. The provision of



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housing services falls largely under the remit of local authorities. This is dealt with in a series of Housing Acts 1966-2013, dealing with various elements of the right to adequate housing such as **availability, habitability, affordability and security of tenure**.

The Housing (Miscellaneous Provisions) Act 2009<sup>314</sup> amended and extended the Housing Acts 1966-2004 to provide local authorities with a framework for a more strategic approach to the delivery and management of housing services. The framework covers the adoption of strategies and action plans on issues such as homelessness, housing services, anti-social behaviour, the management and control regime covering tenancies, rent, and more objective methods of assessing need and allocating housing. It also provides a more developed legislative basis for the provision of rented social housing and an expanded basis for enabling home-ownership by lower-income households.<sup>315</sup>

While the Act also includes an equity-based approach to the recovery of discounts granted by housing authorities to **affordable** housing purchasers, legislation as a whole is not framed in human rights based language.

The needs of Travellers and the obligations of housing authorities in that regard is dealt with in the Housing (Traveller Accommodation) Act 1998, which is relevant when it comes to the **cultural adequacy** and **accessibility** of housing for other groups.

There are also a number of Acts which deal with homelessness.<sup>316</sup> For example, the Housing Act 1988 lays out the obligations of local authorities when it comes to homelessness. It enables local authorities to provide voluntary bodies with funding for the provision for emergency accommodation and long term housing. It also obliges local authorities to carry out periodic assessments of the number of homeless people in their administrative area as part of their housing needs assessment.

The Act has been criticised due to the fact that it obliges local authorities to assess homelessness but does not place any legal obligation on them to directly house people assessed as homeless.<sup>317</sup> It has also been criticised by NGO homeless service providers for providing too narrow a definition of homelessness.<sup>318</sup> For example, the Act does not cover people threatened with or at risk of homelessness<sup>319</sup> or other groups such as prisoners and people in long stay mental healthcare who will likely be homeless upon release/discharge.

With regard to **security of tenure** in the private rented sector, the main piece of legislation is the Residential Tenancies Act 2004.<sup>320</sup> It governs tenant and landlord relations and established a statutory body, the Private Residential Tenancies Board (PRTB), whose function includes the resolution of disputes, the provision of a new system of tenancy registration, carrying out of research, and provision of information and policy advice regarding the private rented sector. The decisions of the PRTB may be appealed to a three-person Tribunal. Appeals from Tribunal decisions may be made to the High Court on a point of law. While the Residential Tenancies Act and the PRTB have received some criticism, particularly with regard to the complexity of the legislation<sup>321</sup> and delays in processing times within the PRTB, the Act and the establishment of the PRTB thereunder can be seen as a positive step in strengthening security of tenure in the private rented sector.

## POLICY

The Government's housing policy is outlined in the Housing Policy Statement launched in June 2011.<sup>322</sup> Regarding **habitability, accessibility and location**, the overall objective is "to enable all households access good quality housing appropriate to household circumstances and in their particular community of choice". The statement lists choice, fairness, equity across tenures, and delivery of quality outcomes for the resources invested as forming the basis of the vision for the future of the housing sector in Ireland.

While rights language does not feature in the policy statement, there are a number of aspects important in terms of human rights, particularly when it comes to meeting the needs of vulnerable groups. The statement includes a commitment to reform the

response to social housing needs and the delivery of social housing, maximising the delivery of social housing supports within the resources available, and the publication of a Housing Strategy for People with Disabilities (2011-2016).<sup>323</sup>

The Housing Strategy for People with Disabilities (2011-2016) makes specific reference to the UN Convention on the Rights of Persons with Disabilities and the delivery of housing supports for households with special needs, dealing with the **accessibility** and **adequacy** of housing for persons with disabilities.<sup>324</sup>

With regard to policy on Traveller accommodation, this is dealt with largely on a local authority level. The Housing (Traveller Accommodation) Act 1998 obliges local authorities to establish a Traveller Accommodation Programme on a five-yearly basis for implementation in their functional area.<sup>325</sup> Programmes deal with a number of components of the right to adequate housing such as **availability, accessibility** and **cultural adequacy**. The 1998 Act also establishes a National Traveller Accommodation Consultative Committee which advises the Minister on matters concerning accommodation for Travellers. This is mirrored at a local level with the establishment of Local Traveller Accommodation Consultative Committees which give advice on the preparation of the Traveller accommodation programmes. There have been some concerns raised around the lack of sanctions in legislation if the obligation to provide adequate accommodation is not met. Weaknesses in the mandate of the Consultative Committees have also been raised.<sup>326</sup>

Policy on homelessness in Ireland has moved from a model focussed on shelter and services to a 'housing led' approach with the objective of providing permanent, standard housing and therefore minimising the use of temporary accommodation.<sup>327</sup> A new National Strategy on Homelessness, *The Way Home*, was adopted in 2008. It laid out six aims of policy regarding homelessness.<sup>328</sup> These were reiterated in the Government's Homelessness Policy Statement launched in February 2013. While not drafted in rights language, the Policy Statement contains references to **availability, affordability, adequacy and access** to good quality housing. The commitment to end long-term homelessness<sup>329</sup> and the need to sleep rough were also outlined in the 2011 Programme for Government.

**In principle, a range of housing legislation and policy exists in Ireland that govern aspects of the core components of the right to adequate housing. Some legislation and policy also exists to deal with the housing needs of certain groups. Despite this, the existing framework fails to adequately address the core elements of the right to adequate housing as outlined above. There are numerous gaps including but not limited to availability, accessibility, affordability and habitability of adequate housing, discussed further below. Moreover, the right to adequate housing remains largely unenforceable – it is not incorporated into legislation or explicitly contained in policy, and there is no explicit reference to rights language in either.**

In its third periodic report to the UN Committee on Economic, Social and Cultural Rights, the State noted that “a legal right to housing has not been provided for in Ireland ... in line with the 1996 report of the Constitutional Review Group, which concluded that the Constitution should not confer personal rights to freedom from poverty or other economic or social entitlements”.<sup>330</sup> The State’s position on providing such as right is now clearly outdated and should be reviewed considering that in February 2014, the Constitutional Convention voted in favour of giving explicit protection to the right to housing in the Constitution, by an overwhelming majority of 84 per cent.

## THE RIGHT TO ADEQUATE HOUSING IN PRACTICE

The above overview of legislation and policy on housing gives an indication of how the State is striving to deliver on housing. An examination of the enjoyment of the right to adequate housing in practice, gives an indication of the extent to which the State is succeeding in its delivery and where there are gaps. This section provides an overview of some of the concerns raised in Ireland around the right to adequate housing, particularly with regard to certain vulnerable groups. This section is merely illustrative of some of the issues of concern in Ireland and does not deal comprehensively with all concerns. The joint submission made by various NGOs specifically on the rights to health and housing, as part of Ireland’s 2011 review under the UN Human Rights Council Universal Periodic Review, provides a good distillation of issues regarding the right to adequate housing and is referenced throughout this section.<sup>331</sup> That joint submission provides an overview of concerns in this area but organisations have separately also done much additional work on the right to adequate housing in Ireland.

With regard to **security of tenure**, concern was raised in the joint UPR submission at the failure of Section 62 of the Housing Act 1966 (as amended) to conform with human rights standards relating to security of tenure, as individuals may be evicted without burden of evidence and the only existing appeals process deals with procedure. The Irish Human Rights Commission has also repeatedly called for the repeal of Section 62 which allows local authorities to summarily evict a local authority tenant in the District Court. As already outlined in Chapter 1, both the High Court and the Supreme Court have found this Section to be incompatible with the States obligations under the European Convention on Human Rights, pursuant to section 5 of the European Convention on Human Rights Act 2003.<sup>332</sup> A welcome development in this regard is the publication of the Housing (Amendment) Bill 2013



which proposes to introduce a new procedure for the repossession of local authority dwellings to replace Section 62. It is expected to be published in the 2014 summer session of Dáil Éireann. Section 62 remains in effect until it is formally repealed.

Concerns have been expressed around the vulnerability of certain groups to forced evictions, particularly Travellers. The relevant Housing Acts give local authorities power to forcibly evict at short notice,<sup>333</sup> and the ‘trespass’ onto land “with an object” such as a caravan is criminalised.<sup>334</sup> Concern was raised, in the joint NGO UPR submission at the powers of discretion granted to Gardaí and the lack of a requirement for written notice required under this legislation. Evictions may also be carried out with little or no notice periods under a number of other pieces of legislation,<sup>335</sup> providing no right to a fair hearing or appeal.<sup>336</sup>

When it comes to **availability and accessibility**, there are numerous problems regarding the availability of local authority housing stock, the high levels of households in need of access to local authority housing and long waiting lists. The current situation has recently been outlined in a report by Social Justice Ireland.<sup>337</sup> In 2002, the CESCR also noted its concern over waiting periods for social housing in Ireland at that time.<sup>338</sup> Similar concerns have recently been highlighted by Social Justice Ireland. In the joint NGO UPR submission, increase in demand for social housing from young people leaving institutional care was also noted, along with the undersupply of easily adaptable social housing for persons with disabilities as a result of which they are living in accommodation which does not meet their needs.

With regard to homelessness, concern over the levels of homeless households and the difficulties many homeless people face in applying for social housing have also been raised.<sup>339</sup> Concerns have also been noted over shortages of access to refuge services for women and children in situations of domestic violence,<sup>340</sup> and shortages of housing and appropriate accommodation for this group.<sup>341</sup>

With regard to Traveller accommodation, the CESCR expressed its concern in 2002 about the lack of water and adequate sanitary facilities for Travellers living in roadside encampments,<sup>342</sup> and today the situation remains.

On **affordability**, housing prices rose drastically during Ireland’s boom years and then fell steeply, with serious impacts in terms of mortgage defaults and repossessions during the economic crisis.<sup>343</sup> There have also been calls for a stronger system and better supports for people who find themselves in mortgage arrears and personal debt. While some measures have been adopted in this area,<sup>344</sup> it has been noted that further reforms to the system are necessary in order to ensure transparency and fair treatment of housing borrowers in debt.<sup>345</sup>



The negative impacts that costs related to housing can have on older people, has been raised by organisations working on the rights of older persons such as Age Action. Particular concern has been raised about the threat to progress made on combating poverty among older persons due to the economic crisis. Concern has been expressed about the high cost of living, including carbon taxation and home heating relative to the income available to older persons and the resulting effects such as fuel poverty.<sup>346</sup> This also potentially impacts upon the **habitability** of housing for many older people.

When it comes to **habitability** and **location** of housing, serious concern has been expressed about the ‘direct provision’ system of accommodation for asylum seekers in Ireland by a number of organisations and statutory bodies.<sup>347</sup> Issues raised include the poor standard of accommodation in direct provision centres, often for long periods of time, Particular concern has been raised around the limited space and inadequate size of rooms, lack of privacy, overcrowding and the prohibition on storing or cooking own food. The often remote location of centres and the impact which this has on the enjoyment of other ESC rights such as the right to education has also been highlighted.<sup>348</sup>

Grave concern has been expressed about the impact that the direct provision system has on children, including lack of privacy, the rapid spread of illness in children due to confined spaces, inadequate heating and insulation resulting in health problems, mental health problems due to confined living spaces for long periods of time, malnutrition due to lack of nutritious food, little access to play areas or ability to invite friends from outside Direct Provision to play and difficulties in accessing schooling.<sup>349</sup>

The joint NGO UPR submission raised the issue of regeneration of social housing. It noted that most of the partnerships established over the last decade on social housing regeneration will not go ahead and scheduled regeneration has not occurred. Concern was expressed over the fact that many rent supplement properties in Ireland do not conform with minimum legal standards. Particular attention was drawn to the Dolphin House flat complex in Dublin, where flats are affected by damp, mould and sewage problems.<sup>350</sup>

With regard to **cultural adequacy** of housing, there has been strong criticism of the failure by local authorities to address Traveller accommodation needs and to fully deliver Traveller Accommodation Programmes.<sup>351</sup> Particular concern has been expressed around the cultural adequacy of housing provision for Travellers, including the need for serviced halting sites, culturally appropriate group housing schemes and transient sites.<sup>352</sup>

In conclusion, while current Government law and policy include some of the fundamental principles of the right to adequate housing, there are a number of significant gaps and weaknesses in the delivery of adequate housing in Ireland which impact upon the enjoyment of that right in practice, particularly amongst vulnerable groups. While some aspects of legislation and policy include principles relevant to the right to housing, there are no direct legal protections to ensure that these are delivered.

## ACCOUNTABILITY

All persons who suffer a violation of the right to adequate housing should have access to a remedy when their right is not met. More generally, accountability requires the State to explain what it is doing and why and how it is progressively realising the right to adequate housing.

The CESCR has stated that **“many components of the right to adequate housing are at least consistent with the provision of domestic legal remedies”**.<sup>353</sup>

This may include but is not limited to: legal appeals aimed at preventing planned evictions or demolitions through court-ordered injunctions; legal procedures seeking compensation for forced eviction; complaints against illegal actions carried out or supported by landlords; allegations of any form of discrimination in the allocation or availability of access to housing; and complaints against landlords concerning unhealthy or inadequate living conditions.<sup>354</sup>

Some accountability mechanisms do exist in Ireland which have addressed certain aspects of the right to housing.

For instance, in terms of judicial remedies, an important way in which aspects of the right to housing have been addressed by the courts in Ireland is through the European Convention on Human Rights Act 2003, as seen in the case of *Donegan* and *Gallagher* cases,<sup>355</sup> as already discussed in Chapter 1. Here the Supreme Court found that the abovementioned Section 62 of the Housing Act 1966 (which allows for the summary eviction of local authority tenants in the District Court), was incompatible with Article 8 of the ECHR (right to private and family life) and Article 6 (right to a fair hearing).

Other accountability mechanisms include the Office of the Ombudsman which can examine complaints relating to local authorities, for example on decisions regarding the allocation of social housing or grants and loans relating to housing.<sup>356</sup> The

Ombudsman plays a vital oversight role in terms of administrative practice. However, it must be noted that, as mentioned in the right to health section of this Chapter, it is not an adjudicatory body and it makes non-binding recommendations rather than enforcing remedial action.

As outlined further in Chapter 6, the Irish Human Rights Commission also has certain competence in the area of the right housing, in carrying out a number of its functions such as the handling of individual complaints or conducting enquiries. It has appeared as *amicus curiae* ('friend of the court') before the High Court and Supreme Court in a number of housing-related cases, outlining the implications of the European Convention on Human Rights Act 2003 in these cases.

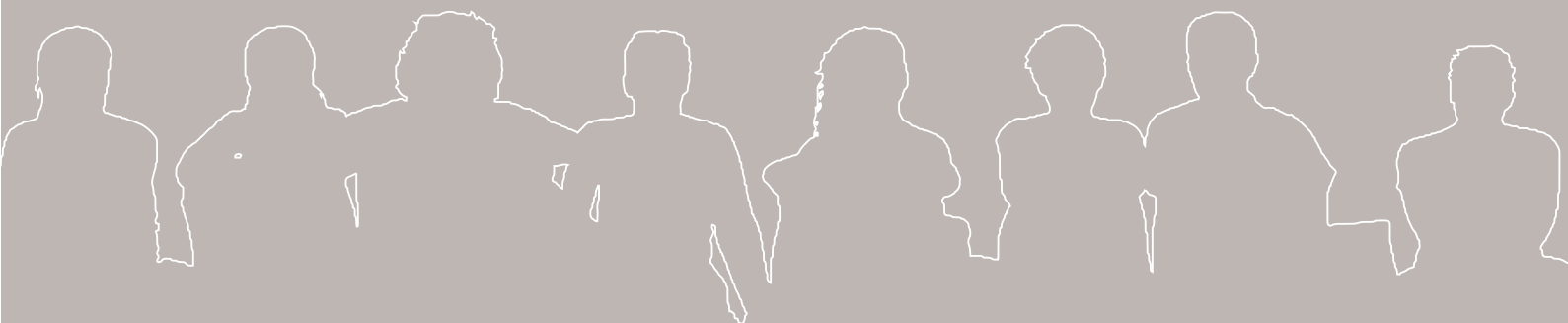
In relation to private housing, the PRTB handles dispute resolution and arbitration between landlords and tenants. There is a right of appeal to a Tribunal and finally the High Court. As noted above, there have been some concerns expressed about the slow turnaround times for dealing with disputes.<sup>357</sup>

**While there are certain limited ways in which complaints regarding aspects of the right to housing can be addressed, there is a lack of comprehensive mechanisms ensuring Government accountability. The Irish courts have adjudicated some cases relevant to certain aspects of the right to housing, through the interpretation of other rights protected in the ECHR Act and, to a very limited extent, the Constitution as outlined in Chapters 1 and 2. However as noted, relying on rights in the ECHR Act does not encompass all of the components of the right to adequate housing as protected in international human rights law. Moreover, in terms of constitutional case law relevant to housing, this has been largely conservative such as in *O'Reilly v Limerick Corporation*,<sup>358</sup> or mainly focussed on property rights such as *Blake v Attorney General*,<sup>359</sup> as seen in Chapter 2. The right to adequate housing therefore remains largely unenforceable, meaning that there is limited accountability when it is violated.**

Mechanisms such as the Ombudsman, play an important oversight role when it comes to administrative practice and procedural propriety. It is not however an adjudicatory body and its recommendations are non-binding. The Ombudsman and IHRC nevertheless form vital elements of the accountability infrastructure in the State. However, they do not replace the critical role of the courts.

Making the right to adequate housing legally enforceable in Ireland would strengthen government accountability and ensure that there are remedies available to individuals when their right to adequate housing is breached. It would mean that people have access to the courts as a last resort when other complaints mechanisms have failed, in order to vindicate their right to housing. Moreover, as already highlighted in the

context of the right to health, it would provide a framework to guide law and policy makers, particularly in protecting the most vulnerable, and would assist the State in meeting its legally binding obligations under the ICESCR to everyone in Ireland.



## **CHAPTER 6:**

# **EXISTING ACCOUNTABILITY MECHANISMS IN IRELAND ON ESC RIGHTS**

Accountability mechanisms must be impartial, independent, transparent, effective and accessible.

Participation is an essential element of human rights, including in accountability.

“Accountability established a dialogue between the government and rights-holders. It engages them in discussion. Hence, participation is present throughout the process of accountability. The methods of participation ... will vary in the context”.

Potts, H. Dr., *Accountability and the right to the highest attainable standard of health*, (Human Rights Centre, University of Essex, 2007), p 30.

**Human rights law places a duty on the State to ensure that remedies and appropriate redress are available to individuals or groups when their ESC rights are violated. The State has the obligation to put in place appropriate means of ensuring governmental accountability.<sup>360</sup>**

**Accountability mechanisms can take different forms, including but not limited to administrative, political, quasi-judicial and judicial. Non-judicial or quasi-judicial remedies do not eliminate the need for people to have recourse to the courts, as a last**

**resort. However they supplement the critical role of the courts and can help to reduce the need to access the court system.**

There are number of mechanisms and structures in place in Ireland which can play an important role in the promotion and protection of ESC rights and in ensuring government accountability. The most comprehensive of these is the Irish Human Rights Commission (IHRC), which is soon to be merged with the Equality Authority to form a new Irish Human Rights and Equality Commission (IHREC). Other structures, such as the Office of the Ombudsman and to some extent the Equality Tribunal, are also relevant.

However, while some accountability mechanisms exist, the extent to which they can address ESCR rights issues is limited in a number of ways, due to the mandate of these mechanisms and the nature of the findings and recommendations that they can make.

## IRISH HUMAN RIGHTS COMMISSION (IHRC)

The statutory powers of the IHRC include: promoting awareness about human rights; promoting and providing human rights education and training; making recommendations to the Government on how legislation, policy and practice should reflect human rights standards; promoting debate around human rights issues as part of the legislative process; appearing as amicus curiae in court proceedings; providing legal assistance for court proceedings; instituting legal proceedings seeking a declaration that a law or policy is unconstitutional or contrary to human rights law; carrying out enquiries into human rights concerns; and publishing and promoting research and reports on human rights.<sup>361</sup>

In a number of its enquiries, the IHRC has highlighted the State's obligations at both an international and regional level in relation to a range of ESC rights. These include the right to social security and the obligation of non-discrimination,<sup>362</sup> the rights to health and to education of persons with disabilities, and the core elements of some of those rights including accountability and access to remedies.<sup>363</sup> Upon the findings of an enquiry the IHRC may make recommendations to the State. However, these are not legally binding.

In its Annual Report 2012, the IHRC outlined a number of cases involving ESC rights where it had granted legal assistance to complainants.<sup>364</sup> In particular, cases related to housing issues including eviction of a person with an intellectual disability from local authority housing; eviction from local authority housing without an independent hearing; housing needs of a lone parent and her children who were members of the Traveller community; and living conditions of a lone parent and her children in local authority housing.<sup>365</sup>

Moreover, the IHRC has noted a sharp rise in communications received from individuals relating to ESC rights, with these being almost on par with civil and political rights communications.<sup>366</sup> Issues raised in communications have included access to healthcare, education, housing, social welfare and employment rights.<sup>367</sup>

The IHRC forms a key part in the framework for the protection and promotion of ESC rights in Ireland, and in ensuring accountability when it comes to delivery of these rights. It does so particularly in terms of its role as watchdog, and its ability to enquire into systematic failures by the State to protect ESC rights and to deal with individual cases which may concern ESC rights related issues. Furthermore, the IHRC can review draft legislation, publish policy statements on human rights issues in Ireland and make recommendations to the Government. The IHRC can contribute to governmental or parliamentary consultations through the provision of policy submissions on relevant human rights standards.<sup>368</sup>

While the IHRC plays a vital role, its role does not substitute the role of the courts in the protection of ESC rights. Rather, both should form individual components of the overall system of accountability existing in a state for the protection of ESC rights.

In 2011, the Government announced that the IHRC and the Equality Authority will be merged into a new body, the Irish Human Rights and Equality Commission (IHREC). The Bill to give statutory effect to this merger to mandate the IHREC was published on 21 March 2014. When publishing the Bill, the Minister for Justice and Equality commented that the merge is “designed to strengthen and enhance Ireland’s institutions for protection of equality and human rights”.<sup>369</sup>

A significant area of concern at the time of writing is that there are two definitions of “human rights” in the Bill with the narrower definition covering just those human rights “given the force of law in the State”, and what appears to be an overly broad application of the narrower definition to some of the new IHREC’s functions.<sup>370</sup> This potentially limits the mandate the IHREC might have with respect to ESC rights in a manner incompatible with the Paris Principles.<sup>371</sup>

## OFFICE OF THE OMBUDSMAN

The Ombudsman has the statutory power to investigate claims of maladministration in public bodies and make recommendations. Over 180 public bodies fall under the Ombudsman’s remit.<sup>372</sup> These include all Government Departments, local authorities and the HSE (including public hospitals and health agencies providing services on behalf of the HSE).

As noted in Chapter 5, the Ombudsman can examine complaints relating to local authorities, for example on decisions regarding the allocation of social housing or grants and loans relating to housing.<sup>373</sup> The Ombudsman may also investigate insurability and entitlement to benefit under the Social Welfare Acts.

While the recommendations made by the Ombudsman are not legally binding they are of highly persuasive value and have led to changes in Government policy including policies which deal with ESC rights related issues.<sup>374</sup>

However, as noted by the then Ombudsman, the Irish Ombudsman legislation seems to be “concerned with a narrower set of rules and focussed more on procedural propriety (the avoidance of maladministration) as opposed to the protection of basic human rights”.<sup>375</sup>

The then Ombudsman has highlighted the effective role that the office can play with





regard to human rights in its decision-making. However, as with the IHRC, the Ombudsman operates within certain restrictions. Its role does not negate the need for judicial remedies on ESC rights but should be seen as a complementary accountability mechanism rather than a substitution for judicial adjudication of ESC rights claims as a last resort.

## EQUALITY TRIBUNAL

The Equality Tribunal is a quasi-judicial body which investigates and mediates complaints of discrimination in relation to employment and to access to goods and services, disposal of property and some elements of education. The Equality Tribunal also has the remit to investigate complaints on the ground of gender under the Pensions Acts 1990-2009, where an employer does not comply with the principle of equal treatment regarding occupational benefit and pension schemes. The decisions of the Equality Tribunal are binding and it may award redress.

While the Tribunal's work is based on equality rather than broader human rights standards, its work nonetheless provides for accountability on issues relevant to ESC rights related areas such as non-discrimination with regard to the right to work including equal pay and working conditions covered by the Employment Equality Acts 1998-2011 and protected under Article 7 of the ICESCR.

The current Government has proposed to merge the employment rights and industrial relations bodies and to form a Workplace Relations Commission. It is proposed that the Equality Tribunal, the Labour Relations Commission, the National Employment Rights Authority, the Employment Appeal Tribunal and a number of the functions of the Labour Court will be taken over by the new Commission.<sup>381</sup>

As highlighted by the IHRC, domestic anti-discrimination law in Ireland has been less influenced by international human rights law than in other jurisdictions, such as Canada where “the interpretation and application of equality guarantees have been strongly influenced by the obligations of that state under international human rights treaties”.<sup>382</sup> The protection against discrimination in Irish equality legislation applies to nine specific grounds.<sup>383</sup> These grounds are gender, civil status, family status, age, race, religion, disability, sexual orientation and membership of the Traveller Community and are narrower than the non-discrimination provisions in Article 2(2) of the ICESCR which is a non-exhaustive list and includes “other status”. The need to widen the grounds upon which discrimination is prohibited in equality legislation, including the ground of socio-economic status in employment equality, has been highlighted by the Equality Authority.<sup>384</sup>

Article 14 of the European Convention on Human Rights (ECHR) prohibits discrimination in the enjoyment of the rights and freedoms in the ECHR.<sup>385</sup> In addition to this, Protocol 12 of the ECHR also obliges States to secure the enjoyment of any right set forth by law without discrimination, on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Ireland signed Protocol 12 in 2000 but has not yet ratified it.

## PARLIAMENTARY COMMITTEES

Parliamentary Committees can play an important oversight role when it comes to ESC rights. It has been noted that “they can also provide a forum for a form of participation by civil society”.<sup>386</sup>

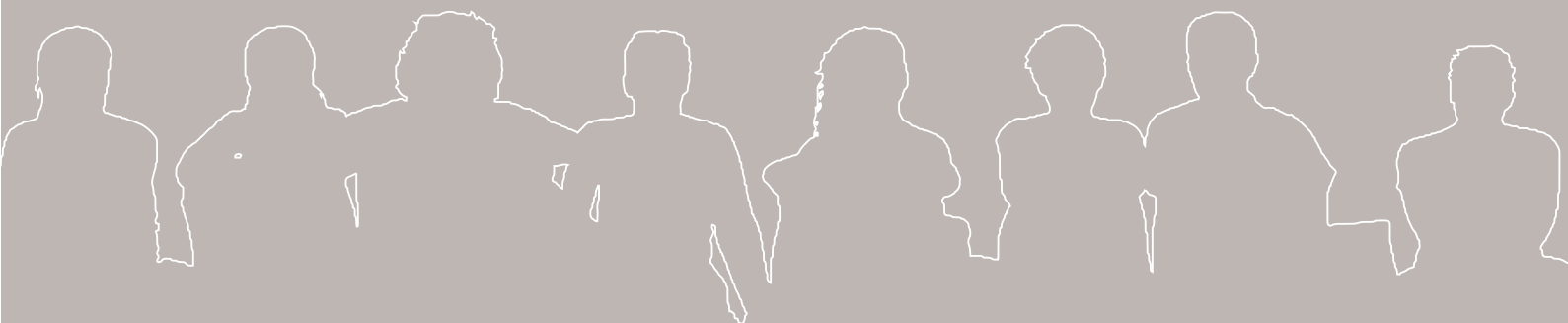
A number of Oireachtas committees exist in Ireland that are relevant in this regard, such as the Joint Committee on Health and Children, the Joint Committee on Education and Social Protection, the Joint Committee on Finance, Public Expenditure and Reform, the Joint Committee on Jobs, Enterprise and Innovation and the Joint Sub-Committee on the Ombudsman. The Joint Committee on Justice, Equality and Defence is also of key relevance, of course, in overarching human rights and equality matters.

However, despite some examples of reference to international human rights standards,<sup>387</sup> the committees generally do not incorporate human rights provisions on ESC rights into their work unless the issue is already expressly deemed a human rights one (for instance the 2012 Joint Committee on Justice, Equality and Defence review of proposed legislation founding the new IHREC). There is also no dedicated parliamentary committee on domestic human rights. The only committee which routinely deals with human rights matters is the Joint Committee on Foreign Affairs and Trade, but this does not have a domestic remit. For an example of the role that parliamentary committees have played in the protection of human rights in other jurisdictions, see Chapter 7’s discussion of Finland.

## OTHER MECHANISMS

A number of existing mechanisms and structures in Ireland relevant to specific ESC rights related areas such as health and housing are outlined further in Chapter 5. A number of other bodies and mechanisms exist, relate to areas such as work, social

security, cultural rights, the rights of persons with disabilities and the rights of the child. It is beyond the scope of this paper to elaborate upon these but they are further outlined in Ireland's updated 'common core document' submitted to the UN.<sup>388</sup> Many of the same limitations apply to these bodies as to those discussed above.



## **CHAPTER 7:**

# **LEGAL PROTECTION OF ESC RIGHTS IN OTHER EUROPEAN STATES**

As noted in Chapter 3, the level of protection granted to ESC rights and approach taken when adjudicating these rights can differ from State to State. Some States have given extensive protection to ESC rights in their constitutions while others have interpreted other constitutional rights to include ESC rights. This chapter considers how ESC rights have been protected and adjudicated in three European jurisdictions and the role played by the courts but also other branches of the government. It should be noted that this is a selective and non-exhaustive overview of those jurisdictions, designed to inform discussions in Ireland. They are selected to demonstrate how ESC rights are capable of protection and adjudication under different systems and the impact that such adjudication can have.

## GERMANY

The German Constitution (Basic Law) makes limited provision for ESC rights. Human dignity is protected in Article 1 of the Constitution and has been progressively interpreted in a number of landmark cases to offer some indirect protection of ESCR. The Constitution also makes certain provisions for education rights and the school system, occupational freedom, the inviolability of the home and property rights.<sup>389</sup> The Social State Principle is enshrined in Article 20(1). State (Länder) Constitutions and federal legislation contain some provisions on certain social rights but do not recognise these as individual entitlements.<sup>390</sup>

There have been a number of court cases relating to different ESC rights issues some of which are highlighted briefly below. However the most significant recent developments in the area of ESC rights are the *Hartz IV* and *Asylum Seekers Benefits* cases relating to social security, which will be the primary focus in this section and which are discussed further below. In these cases the German Constitutional Court interpreted Article 1(1) on human dignity and Article 20(1) on the Social State Principle in the German Constitution to include the right to a dignified minimum existence.

This recognition of the right to a dignified minimum existence arising from other articles of the Constitution contrasts with the position taken by the Irish courts which, although recognising a number of unenumerated rights in the Irish Constitution, have been reluctant to interpret these as including ESC rights aspects. This is discussed further in Chapter 3.

Prior to the *Hartz IV* and *Asylum Seekers Benefits* cases, early case law from the German Constitutional Court **established the duty on the State to provide for a subsistence minimum** but denied the existence of an individual constitutional right to a subsistence minimum.<sup>391</sup> The Court has also held that the State must provide social assistance to those who, as a result of a physical or mental disability are unable to take care of themselves, to enable such persons to live a dignified existence.<sup>392</sup> It has also found that in order to ensure the vital minimum to persons in need, the State must provide for access to social services and benefits and it must ensure that income needed to satisfy minimum conditions for a dignified existence is tax free.<sup>393</sup> The Court has held that it is not enough for the State to provide a certain level of security as a matter of fact but that this **had to be provided for in law giving a legal entitlement for such security**.<sup>394</sup> As noted by the Court, “[t]he State has to provide the minimum conditions for an existence in human dignity by defining a statutory claim to this minimum”.<sup>395</sup>

Further, regarding the right to education, the Court has interpreted the Social State Principle and the freedom to choose ones’ occupation in the German Constitution as placing an obligation on the State “to justify its inability to provide access to education that is relevant to one’s chosen profession” and any restrictions must be objectively justified.<sup>396</sup>

The most recent Constitutional Court cases, *Hartz IV* (2010)<sup>397</sup> and the *Asylum Seekers Benefits* (2011)<sup>398</sup> cases, are of particular significance. They have been described as a move “towards providing a progressive interpretation of the human right to social security”.<sup>399</sup> These cases are particularly significant because they firmly established a correlating right to the already established duty of the State to provide for a subsistence minimum. The Court also relied to a certain extent on international human rights standards in the judgments. As already described in Chapter 2, the German Constitutional Court relied on the procedural obligations of the State, when adjudicating these cases. It stated that procedures to determine benefits must be needs-oriented and realistic, transparent and based on reliable data. It held that the legislature must conduct a procedure to ascertain the benefits necessary for securing a subsistence minimum that is in line with human dignity, which is realistic and takes account of actual need. The results of such a procedure must be anchored in law as a claim to benefits.<sup>400</sup>

**The Court stated that it did not have the competence to determine the amount of benefits, and this was within the role of the legislature. The role of the Court was to stipulate and assess whether the State had met its procedural obligations.**

The first of these cases, the *Hartz IV* case, involved a question of the constitutionality of social security benefits under Hartz IV legislation (relating to unemployment benefits). The introduction of this legislation had led to certain groups being entitled only to reduced benefits compared to what they had previously received. The standard benefit level was challenged as being insufficient and therefore unconstitutional.

The Court considered whether:

- 1) The benefits were evidently insufficient; and
- 2) A transparent and comprehensive, needs-based and realistic process had been used to determine the level of benefits

On the first point the Court held that the Hartz IV benefits were not evidently insufficient.

On the second point, Court examined the calculation of the standard benefit. It found that the general model and approach taken to determine the benefits was justifiable and permissible but that there were certain inconsistencies and irregularities in the process. The Court held that the provisions in the legislation to determine the Hartz IV benefits were unconstitutional.<sup>401</sup>

The Constitutional Court relied on the right to a dignified minimum existence arising from Article 1(1) on human dignity of the Constitution in conjunction with Article 20(1) on the Social State principle. The Court held that it did not have the competence to determine a certain amount of benefits on the basis of its own assessments and evaluation and that this was within the role of the legislature. Instead the Court focussed on the process and method used by the legislature to determine the level of benefits. It held that the legislature must conduct a process to ascertain the benefits necessary for securing a subsistence minimum that is in line with human dignity, and which is realistic, based on reliable data, transparent and takes account of actual need. The results of such a procedure must be anchored in law as a claim to benefits.<sup>402</sup>

Following the *Hartz IV* case, the legislature enacted a new law for the estimation of benefits for the person concerned.<sup>403</sup>

In the *Asylum Seekers Benefits* case,<sup>404</sup> the German Constitutional Court took the same



approach as in its earlier *Hartz IV* decision and focussed on the procedural obligations of the State.

The case involved the constitutionality of the Asylum Seekers Benefits Act (1993) which had reduced the benefits payable to asylum seekers, and resulted in their special treatment as asylum seekers as the benefits were significantly lower than under other law governing social security benefits in general. The objective of the legislation was “to reduce the number of asylum seekers and to achieve savings in social benefits”.<sup>405</sup> The benefit rates had not been changed since the introduction of the Act in 1993, despite a significant rise in the cost of living in Germany.

As in the *Hartz IV* case, the German Constitutional Court interpreted Article 1(1) on human dignity together with Article 20(1) on the Social State Principle to include the right to a dignified minimum existence. In this case the Court also made clear that this right does not only apply to German citizens but to German and foreign residents.

The Court stated that “human dignity may not be relativized by migration-policy considerations”,<sup>406</sup> in other words that the objective of reducing the number of asylum seekers could not justify a decrease in benefits to the point below what is necessary to secure the physical and socio-cultural minimum required for human existence.

Again the Court considered whether:

- 1) The benefits were evidently insufficient; and
- 2) A transparent and comprehensive, needs-based and realised process had been used to determine the level of benefits

On the first point, the Court held that the level of benefits were evidently insufficient, particularly considering that the amount had not been changed since the introduction of the legislation in 1993, despite the rise in cost of living in Germany and the fact that the level of benefits payable to asylum seekers was approximately one-third less than to generally applicable welfare benefits.<sup>407</sup>

On the second point, the Court found that there were irregularities in the procedure to determine the benefits including a lack of reliable data and a failure to assess the needs of children; and held that future legislation must meet the requirements of the UN Convention on the Rights of the Child.

The Court held that the level of benefits paid to asylum seekers was unconstitutional. It ordered the State to enact new legislation guaranteeing the right to a dignified

minimum existence. It also devised a transitional agreement, impacting on the calculation of benefits for asylum seekers.<sup>408</sup>

In its judgment, the Court referred to Article 9 (social security) and Article 15(1)(a) (right to take part in cultural life) of the ICESCR along with provisions of the Convention on the Rights of the Child.

**The cases discussed above show the German Constitutional Court's acute awareness of the different roles of the branches of the Government. The Court identified the key elements of any procedures adopted by the State to determine entitlement to benefits. However, the Court did not determine the level of benefits that would meet the constitutional requirement, leaving it to the legislature to develop the appropriate procedure to determine the amount of the benefit entitlement.**

## PORTUGAL

### CONSTITUTIONAL OBLIGATION TO LEGISLATE

The Portuguese Constitution of 1976 enshrines a wide range of ESC rights<sup>409</sup> enforceable by the Portuguese Constitutional Court. The Constitution also makes provision for an Ombudsman who has the power to engage with the Constitutional Court.

However, ESC rights in the Constitution are not self-executing and require legislation in order to make them enforceable. An “unconstitutional omission” arises where the State fails to legislate for the rights within the Constitution, and the Constitutional Court has the power to rule that constitutional rights are not being protected due to lack of legislation.<sup>410</sup> An individual may seek damages where the Government continues to fail to legislate for constitutional rights in breach of the ruling of the Court.

Portuguese case law provides an example of how domestic courts have interpreted human rights concepts such as non-retrogression and minimum core. In particular, the Constitutional Court has dealt with the issue of non-retrogression of human rights and the obligation of the State to protect human rights in times of economic crisis.

#### **Non-retrogression**

As already noted in Chapter 1 of this paper, States should not take any retrogressive measures (steps backwards) in achieving the full realisation of ESC rights. Case law from the Portuguese Constitutional Court provides an example of how domestic courts have dealt with the prohibition of retrogression.



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For example, in the *NHS* case,<sup>411</sup> the Constitutional Court heard a constitutional challenge against a law revoking the statute which had established the National Health Service. The Court held that the constitutional right to health expressly imposed on the government a duty to establish a national health service and that revoking that law was unconstitutional. The NHS could be reformed but not abolished. It stated:

**“If the Constitution imposes upon the State a certain task – the creation of a certain institution, a certain modification of the legal order - then, when that task has already been complied with, its outcome becomes constitutionally protected. The State cannot move backwards – it cannot undo what it has already accomplished ....”<sup>412</sup>**

The Court pointed out that, where the State has a positive obligation under the Constitution to establish a certain institution such as the National Health Service, once this positive obligation has been fulfilled, the State then has a negative obligation not to threaten the existence of that institution.

In a later case, the Constitutional Court heard a challenge against a law which regulated a guaranteed minimum income benefit.<sup>413</sup> The new law changed the minimum age limit for those receiving benefits meaning that some who had previously been covered were now excluded. The Court stated that the law which had been in place, defined the minimum content of the right to social security. It held that the new legislation which narrowed the scope of beneficiaries, resulted in a deprivation of the right to social security for the category of persons excluded and that this was unconstitutional.<sup>414</sup>

**As has been noted, in these cases, the Portuguese Constitutional Court took the position that while a law may be amended, it must respect the minimum core of the constitutional right which was legislated for. Coverage cannot be so restricted that a majority are left outside the protection of the minimum core of that right.<sup>415</sup>**

### **Austerity**

The Portuguese Constitutional Court has ruled on a number of cases relating to austerity measures adopted by the State in response to the economic crisis and Portugal's bail-out programme.

In one case involving cuts to benefits of public sector workers and reduction in pensions, the Court, relying on the **principle of equality**, held that any measures which impact disproportionately on one group (public sector workers in this instance) must be fully justified and that any measures would only be **“justified as long as the situation remained exceptional, time-constrained and within certain limits”**.<sup>416</sup> The Court held that the measures were not justified because the cuts affected the total remuneration of workers up to a certain level and affected a three-year time span which the Court deemed too long to be considered acceptable.<sup>417</sup>

In later cases, the Court rejected a number of measures in the 2013 budget relating to cuts in state pensions and public sector pay as well as cuts in sickness and unemployment benefits, whilst upholding a tax surcharge and cut in overtime pay rates for public sector workers.<sup>418</sup> The Court has also struck down a number of articles of a Bill which would have made it easier to lay off civil servants, holding that it violated the principle of prohibiting dismissal ‘without just cause’,<sup>419</sup> the principle of proportionality in relation to the restriction of the right to employment security<sup>420</sup> and the principle of trust.<sup>421</sup> On the latter, cuts to civil service pensions provided for in the 2014 budget were also struck down on the same basis.<sup>422</sup>

Judgments of the Court have also had an impact on the private sector, including a decision on the Labour Code 2012, which introduced certain changes brought in as a result of the Memorandum of Understanding agreed with the Troika.<sup>423</sup> The Court upheld certain provisions of the Code but declared others to be unconstitutional.

**The Portuguese case law shows that it is possible for courts to adjudicate at a domestic level on the application of ESC rights obligations such as non-retrogression to respect the minimum core of a right which has been legislated for.**

**In recent years, constitutional ESC rights in Portugal have had a tangible impact in the sense of providing some form of a buffer against certain government measures in times of economic crisis.**

With regard to the case law on austerity measures and the economic crisis, it is

important to note that Portugal is used here as just one example of how courts have dealt with cases involving ESC rights and the economic crisis. A number of courts in other jurisdictions have also considered similar cases.<sup>424</sup> Further case law will be outlined and analysed in a separate Amnesty International Ireland paper to be published in coming months. This will consider in more detail the obligations of States when implementing ESC rights in practice, including human rights obligations in times of economic crisis.

## FINLAND

The new Constitution of Finland entered into force in 2000. Earlier reform of the fundamental rights provisions in the former Constitution Act took place in 1995 to extend the protection of rights to include guarantees of de facto equality and the enjoyment of ESC rights.<sup>425</sup>

The Constitution protects a number of ESC rights including: the right to education; language and cultural rights; the right to work; and the right to receive indispensable subsistence and care in the event of illness, and disability and during old age as well as at the birth of a child or the loss of a provider. Public authorities shall guarantee adequate social, health and medical services; support for the family; and the right to housing.<sup>426</sup> The right and corresponding duty to a healthy environment, the inviolability of human dignity, equality<sup>427</sup> and the protection of property are also enshrined in the Constitution. Section 22 of the Constitution places an obligation on all public authorities to guarantee the observance of constitutional rights and international human rights. This section has been described as giving “quasi-constitutional status to international human rights treaties, and hence to give them special status within the Finnish legal system”.<sup>428</sup>

**A distinctive feature of the Finnish legal system is the parliament’s Constitutional Law Committee which deals with constitutional, human rights and EU law matters. It is made up of Members of the parliament assisted by constitutional law experts. It also regularly hears academics and experts in international human rights law. Finland does not have a Constitutional Court and the Committee is the main monitoring body which scrutinises the constitutionality of government Bills before they are enacted, and of other matters, and their bearing on international human rights instruments to which Finland is a party.<sup>429</sup> All opinions of the Committee are generally understood to be binding.<sup>430</sup> This monitoring process has been described as a “democratic self-control of the Parliament”.<sup>431</sup>**

The Constitutional Law Committee can recommend amendment of acts before promulgation, and can also authoritatively interpret the terms of the Act in relation to

the Constitution before it is enacted. For example, in relation to a particular Social Assistance Bill the Committee stated that the clause relating to reasonableness must be interpreted in a manner positive towards basic rights.<sup>432</sup>

The Committee has also given further definition to a number of ESC rights in the Constitution. For example, with regard to Article 19.1 (the right to obtain subsistence and care if one does not have the means to live a dignified life), the Committee has stated that this right has an absolute core which cannot be limited by the legislature through enacting legislation. This core is made up of the fundamental aspects and preconditions necessary to live a dignified life.<sup>433</sup>

In other opinions, the Committee highlighted that client fees collected for social welfare and healthcare services provided for under the Constitution (Article 19.3) must not be so high that they makes the services inaccessible for those who need them.<sup>434</sup> In another opinion relating to restrictions on property rights, the Committee upheld restrictions imposed by a new government Bill on amendments to legislation in the field of publicly subsidised housing.<sup>435</sup> It stated that the restrictions placed on the property rights of owners served the continued use of State subsidised rental houses as rental dwellings allocated according to social criteria. This aim was connected to the duty of the public authorities to promote the right to housing (Section 19.4. Constitution). The restriction on the property rights of owners therefore served a legitimate aim and was proportionate. However, certain amendments and specifications had to be made in order to fully comply with the constitutional clause on property rights.

The Committee has also examined a number of ‘rescue packages’ such as the European Financial Stability Facility and the Treaty Establishing the European Stability Mechanism (ESM Treaty), and has emphasised that financial liabilities and commitments cannot, as a whole, jeopardise the State’s capacity to meet its financial obligations under the Constitution such as those relating to social and health services.<sup>436</sup>

**Along with the quasi-judicial and political mechanisms, the judiciary in Finland has played a role in ensuring government compliance with constitutional provisions on ESC rights. While there has not been a large volume of case law, it has been noted that the courts “have gained an important role in developing the understanding of the legal nature and contents of various economic, social and cultural rights.”<sup>437</sup>**

The oversight of the observance of human rights by Finnish public authorities lies first and foremost with the Parliamentary Ombudsman and the Chancellor of Justice of the Council of State.<sup>438</sup>



The Ombudsman investigates complaints, takes decision on them and conducts inspections. Any person may file a complaint with the Ombudsman.<sup>439</sup> The Ombudsman may issue a reprimand which may be directed to an authority or a person<sup>440</sup> or may simply make her/his findings known publicly.<sup>441</sup> In her/his annual report, the Parliamentary Ombudsman includes a section on monitoring constitutional and human rights. It highlights decisions of the Ombudsman. It has been observed that many findings are related to ESC rights, showing how the Ombudsman can draw attention to ESC rights.<sup>442</sup>

The majority of administrative decisions may be appealed to an administrative court, and this court has adjudicated on ESC rights. For example, the right to social security was invoked in a number of cases where municipalities had attempted to introduce internal guidelines to cut down the cost of social assistance.<sup>443</sup>

It has been noted that what emanates from these cases, “is a requirement that applications for social assistance must be assessed on the basis of a person’s individual needs and that a municipality may not exclude any category of persons from such individual assessment”.<sup>444</sup> The administrative courts have referred to the constitutional right to social assistance in order to secure a life of dignity and in some cases have referred directly to the ICESCR.<sup>445</sup>

ESC rights have also been invoked by the courts in other situations. This has included claims for civil damages through the ordinary courts. For example, the Supreme Court of Finland has awarded damages in the context of obligations of a municipality under the relevant employment Act thereby enforcing the right to work.<sup>446</sup> In another case the Supreme Court awarded damages to a family in a case involving delay in the provision of children’s day care, on the basis of the relevant Act on child day care and entitlement to adequate social welfare services as part of the right to social security in the Constitution.<sup>447</sup>

**The Finnish model presents an example of the roles that the different branches of the government and different mechanisms can play in the enforcement of ESC rights. The Constitutional Law Committee is a unique element of the Finnish model, giving a strong role to parliamentarians in the protection of rights, whilst a legitimate role for the courts is also reserved.**

**With regard to the Committee, it has been noted that “[w]hile such a procedure can never replace the need for judicial and non-judicial protection against individual violations of human rights, Finland represents an interesting example of ... a relatively well developed mechanism for quality-control of new legislation that is largely based on constitutional and human rights provisions, including those on [ESC] rights”.<sup>448</sup>**

## CONCLUSION

The jurisdictions discussed here are selected examples of how domestic legal systems in other countries have protected ESC rights, and the role of the courts and other bodies in that regard.

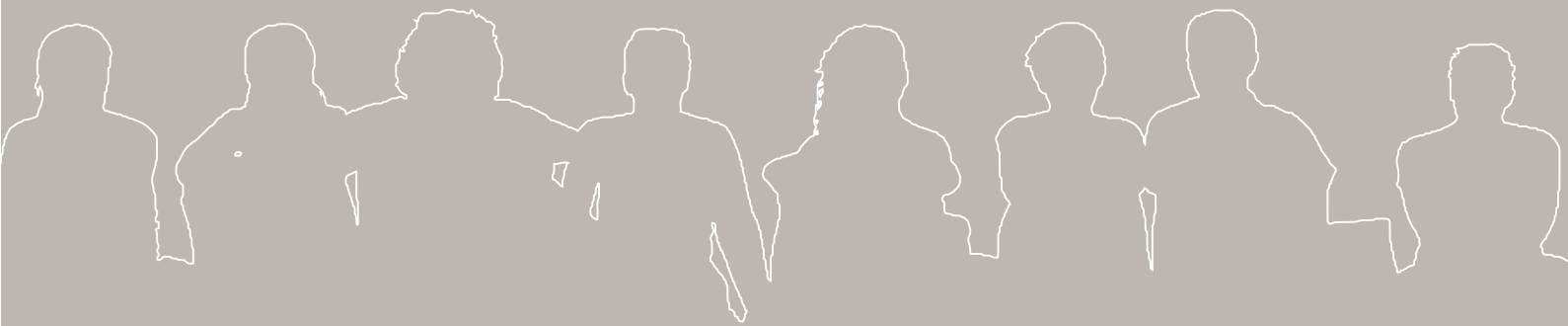
The German example demonstrates the willingness of the courts there to interpret other rights in the Constitution to include ESC rights elements, even though very little protection is explicitly afforded to these rights in the Constitution. The German Constitutional Court has achieved this whilst restricting itself to adjudicating on the procedural obligations of the State in ensuring ESC rights.

The Portuguese Constitution, on the other hand, gives very comprehensive protection to ESC rights and the case law of the courts there have given direction to the State regarding its obligations, particularly when it comes to non-retrogression of rights and more recently in the context of the economic crisis and austerity measures adopted by the State.

Lastly, the Finnish model provides an example of the role that political, quasi-judicial and judicial mechanisms can play in the protection of ESC rights, highlighting in particular the role of parliament via its Constitutional Law Committee.

However, what they all have in common is the ability to translate what might appear to be abstract ESC rights legal protection into positive and tangible change on the ground.





# CHAPTER 8:

## CONCLUSIONS AND RECOMMENDATIONS

## CONCLUSIONS

It has been almost 25 years since the Irish State ratified the International Covenant on Economic, Social and Cultural Rights, thereby agreeing to be bound by its provisions. Yet the ICESCR has never been given legal effect in Ireland. The State has also made many other commitments on ESC rights, including in the European Social Charter (Revised). At an international level Ireland has emphasised the equal importance of all human rights, civil and political as well as economic, social and cultural. It is time that this is reflected at a national level.

Prevailing myths and misconceptions around ESC rights combined with a lack of political will, have hindered their application in Ireland. The recommendation on ESC rights made by the Constitutional Convention in February 2014 reinforces the need for the Government to move beyond these myths and misconceptions and to give greater legal protection of ESC rights in Ireland.

Very limited provision is made for ESC rights in Bunreacht na hÉireann. Promises to achieve the enjoyment of ESC rights must go beyond the programmes of individual governments and they must be granted long-term legal protection in the Irish Constitution. Enshrining ESC rights in the Constitution would bring Bunreacht na hÉireann in line with the growing trend among many countries which have revised their constitutions and have included ESC rights. The growing jurisprudence from courts in other countries also shows that legally enforceable ESC rights are neither a radical nor revolutionary concept.

A first step should be for the Government to accept the recommendation of the Constitutional Convention to strengthen the protection of ESC rights in Bunreacht na hÉireann.

Constitutional provision should be made for ESC rights along with provision for these rights in relevant legislation and policy. In Ireland, some policies reflect certain aspects of ESC rights; however human rights standards are not routinely incorporated in policy, and legislation is not framed in rights language.

In line with Ireland's human rights obligations, robust ESC rights related monitoring and accountability mechanisms must be put in place. While some accountability mechanisms exist in Ireland, there is no adequate accountability system when it comes to these rights and people do not have recourse to the courts. In effect, often times people have nowhere to go if something goes wrong. Accountability mechanisms can and indeed should take many different forms, including administrative, political and quasi-judicial. However, these should not replace the right of people to be able to access judicial remedies, as a last resort.



- In its reports to the UN treaty bodies and other monitoring mechanisms, the State should provide information on the justiciability of ESC rights at a national level.

## OIREACHTAS

- Relevant Oireachtas Committees such as the Joint Committee on Health and Children, the Joint Committee on Education and Social Protection, the Joint Committee on Finance, Public Expenditure and Reform, the Joint Committee on Jobs, Enterprise and Innovation and the Joint Sub-Committee on the Ombudsman should take account of human rights standards and obligations in their work.
- The establishment of an Oireachtas Committee on Human Rights with the mandate to assess all Bills for human rights compliance should be considered.

## EXECUTIVE

- The Constitution should be updated to give greater protection to ESC rights. In that regard, the Government should make a commitment to holding a referendum on ESC rights in due course.
- The Government should accept the Constitutional Convention's recommendation on giving greater protection to ESC rights in the Constitution. It should engage robustly on the issue of constitutional ESC rights and should ensure full transparency and clear timelines in any measures adopted to take this matter forward.
- ESC rights related legislation should be framed in rights language, guided by the provisions of ICESCR, the General Comments of the ICESCR and the work of other relevant UN procedures.
- The requirement in the Irish Human Rights and Equality Commission Bill 2014 that public authorities "give consideration" to equality and human rights in relation to their policies, actions, strategic plans and reporting, should be clarified, and for this purpose "human rights" should be defined as including all international human rights standards not just those with domestic legal effect. In addition to the proposed IHREC's advisory function, a supervisory and monitoring mechanism should be put in place in order to ensure that public bodies take this duty seriously and comply with same.

A broad definition of human rights should be consistently applied in the legislation.

Optimally a mechanism of enforcement should be put in place, but such a mechanism should focus on incentivising compliance rather than on the imposition of sanctions. In the interim however, a supervisory and monitoring mechanism should be put in place in order to ensure that public bodies take this duty seriously and comply with same.

- Human rights standards should inform decisions by the Government around budgets and the allocation of resources. (The obligations arising in this regard will be elaborated further in a separate paper by Amnesty International Ireland).

## **GOVERNMENT DEPARTMENTS**

- All civil servants should engage in human rights training to ensure a full understanding of human rights and the State's obligations.
- There should be increased dialogue on human rights between Government Departments. This would help to ensure a full understanding of the nature of duties arising from human rights law. This in turn would assist the State in its reporting to UN treaty bodies and in considering ratification of treaties and Optional Protocols.
- ESC rights should be reflected in policy making on relevant areas and in the allocation and expenditure of resources.
- A central inter-departmental mechanism should be established to review and report on the implementation of international recommendations on human rights including ESC rights.

## **IN RELATION TO THE COURTS AND LEGAL PROFESSION**

- One of the functions of the Judicial Council once established on a statutory basis, will include the preparation and dissemination of information for use by judges.<sup>450</sup> This should include information on the nature of ESC rights and their interpretation to date. Another function of the Council will be to develop and manage schemes for the education and training of assistance to judges.<sup>451</sup> This should include training on human rights and in particular ESC rights, in order to encourage the judiciary to refer to and draw guidance from international human rights law more frequently.

- The executive should ensure the availability of information for judges and lawyers, on the nature of ESC rights and their interpretation to date in and outside Ireland.

## **IN RELATION TO STATE BODIES**

- In line with international human rights standards, the State must ensure that all accountability mechanisms are fully impartial, independent, transparent, accessible and effective.
- The IHREC must be given sufficient funding and an appropriate mandate to allow it to effectively promote and protect ESC rights.
- The IHREC Bill should be an opportunity to review how Ireland's nine prohibited grounds of discrimination in its domestic equality legislation might be expanded, and whether/how that equality legislation might be extended beyond the spheres of employment and goods/ services, and how positive action measures could be further provided for in law. It also provides an important opportunity for Ireland to consider ratifying Protocol 12 to the European Convention on Human Rights.
- Sufficient resources must be given to the Equality Tribunal in its new form when its functions are brought under the auspices of the Workplace Relations Commission.
- The Office of the Ombudsman should be given the mandate and resources to consider human rights elements in her/his recommendations.

## **POLITICAL PARTIES**

- Political Parties should include ESC rights in their manifestos and take them into account in the formulation of policy and responses to the Government.

## **OTHER RECOMMENDATIONS**

- Most of the time people will only be introduced to human rights in limited circumstances and many may not be aware of their rights or the State's obligations. Human rights education and training is therefore crucial and it should be promoted and adequately resourced within the State.<sup>452</sup>
- A National Action Plan on Human Rights should be developed.

## sCIVIL SOCIETY

- At both a national and international level, civil society should continue to call on the Government to strengthen the legal protection and enforceability of ESC rights in Ireland.



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- 1 Civil and political rights include but are not limited to the right to liberty and security of person; freedom from torture, cruel, inhuman or degrading treatment or punishment; equality before the law; the right to privacy; freedom of expression; freedom of opinion; freedom of thought, conscience and religion.
  - 2 Concluding Observations of the UN Committee on Economic, Social and Cultural Rights, Ireland, E/C.12/1/Add.77, (2002); Concluding Observations of the UN Committee on Economic, Social and Cultural Rights, Ireland, E/C.12/1/Add.35, (1999).
  - 3 Article 5 (e).
  - 4 Articles 10 -14.
  - 5 See in particular Articles 4 and Articles 24-32.
  - 6 See in particular Articles 23-30.
  - 7 See the website of the International Labour Organisation at: <[http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102901](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102901)> (date accessed: 9 April 2014).
  - 8 See the website of the International Labour Organisation at: <<http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO:::>> (date accessed: 9 April 2014).
  - 9 See the UNESCO website at: <[http://portal.unesco.org/en/ev.php-URL\\_ID=12025&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=471.html](http://portal.unesco.org/en/ev.php-URL_ID=12025&URL_DO=DO_TOPIC&URL_SECTION=471.html)> (date accessed: 9 April 2014). For a list of UNESCO Conventions ratified by Ireland see the UNESCO website at: <[http://www.unesco.org/eri/la/conventions\\_by\\_country.asp?contr=IE&language=E&typeconv=1](http://www.unesco.org/eri/la/conventions_by_country.asp?contr=IE&language=E&typeconv=1)> (date accessed: 9 April 2014).
  - 10 The European Committee of Social Rights adopts conclusions on particular articles of the European Social Charter (Revised). For the Committee's most recent conclusions on Ireland issued in 2013, see the Council of Europe website at: <[http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Ireland2013\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/Ireland2013_en.pdf)> (date accessed: 3 March 2013).
  - 11 *ERRC v Bulgaria*, Complaint No. 31/2005.
  - 12 *Ibid* at 34.
  - 13 For the full text of the European Social Charter (Revised) see the Council of Europe website at: <<http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>> (date accessed: 10 March 2014). For fact sheet on Ireland see the Council of Europe website at: <[http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/Ireland\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/Ireland_en.pdf)> (date accessed: 10 March 2014).
  - 14 *World Organisation against Torture v Ireland*, Complaint No.18/2003.
  - 15 *International Federation of Human Rights v Ireland*, Complaint No. 42/2007.
  - 16 It had been argued that the State had discriminated against persons in receipt of Irish Contributory Old Age Pension and who do not reside permanently in Ireland in that they were not granted access to a Free Travel Scheme, when they returned to Ireland to visit. The Committee also held that the benefit at issue was not covered by the social security rights of Article 12.
  - 17 *European Roma Rights Centre v Ireland*, Complaint No.100/2013.
  - 18 Ratified by Ireland in 1999.
  - 19 Prior to the Charter of Fundamental Rights of the EU, the Court of Justice of the EU had already recognised in the *Handelsgesellschaft* case that "respect for fundamental rights forms an integral part of the general principles of Community law", Case 11/70, [1970] ECR 1161.
  - 20 For all provisions see the Official Journal of the European Union at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF>> (date accessed: 7 January 2014).
  - 21 For list of EU legislation on communicable diseases see the European Commission website at: <[http://ec.europa.eu/health/communicable\\_diseases/early\\_warning/comm\\_legislation\\_en.htm](http://ec.europa.eu/health/communicable_diseases/early_warning/comm_legislation_en.htm)> (date accessed: 7 January 2014).
  - 22 Regulation (EC) No 883/2004 and 987/2009.
  - 23 For example, Protection of Employees (Temporary Agency Work) Act 2012 which transposes EU Directive on Temporary Agency Work 2008/104/EC into national law.
  - 24 See the European Commission website at: <[http://ec.europa.eu/justice/fundamentalrights charter/implementation/index\\_en.htm](http://ec.europa.eu/justice/fundamentalrights charter/implementation/index_en.htm)> (date accessed: 8 January 2014).
  - 25 Article 6 Treaty on European Union (TEU).
  - 26 For further detail see presentation by David Fennelly to the Constitutional Convention, 22 February 2014, pp 10-12 <<https://www.constitution.ie/AttachmentDownload.ashx?mid=40c56f1e-b39b-e311-a7ce-005056a32ee4>> (date accessed: 28 February 2014).
  - 27 See *J. McB v L.E.*, Case C-400/10/PPU, 5 October 2010 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0400:EN:PDF>> (date accessed: 8 January 2014).
  - 28 For further information and analysis see Hervey, TK., Kenner, J. (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A legal perspective*, Hart Publishing 2003. See also Douglas-Scott S., "The European Union and Human Rights after the Treaty of Lisbon", *Human Rights Law Review*, 11 (2011), 645-682. See also the European Commission website at: <<http://ec.europa.eu/justice/fundamental-rights charter/>> (date accessed: 8 January 2014).



- <sup>29</sup> *Digital Rights Ireland v The Minister for Communications, Marine and Natural Resources and Ors*, Case C-293/12. A decision on the case is awaited. For the list of questions referred by the High Court see the InfoCuria website at: <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=125859&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=167537>> (date accessed: 10 January 2014).
- <sup>30</sup> CJEU-C-175/11/Judgment-H.I.D., B.A. *Refugee Applications Commissioners, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland* <<https://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=666>> (date accessed: 10 January 2014). For summaries of case examples from Ireland and other jurisdictions see the website of the Irish Human Rights Commission at: <<http://www.ihrc.ie/enquiriesandlegal/courtjustice.html>> (date accessed: 10 January 2014).
- <sup>31</sup> Supra note 26 at 12.
- <sup>32</sup> See for example, *Valkov and Others v Bulgaria*, (App 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05, 2041/05), Judgment of 25 October 2011; *Stec and Others v United Kingdom*, (App 10094/82), 2005-X; 41 EHRR SE18; *Gaygusuz v Austria*, (App 17371/90), Judgment of 16 September 1996, (1997) 23 EHRR 364; *G v Austria*, (App 10094/82), Judgment of 14 May 1984, (1984) 38 DR 84; *Mueller v Austria*, (App. 5849/72), Judgment of 16 December 1974, (1975) 1 DR 46; *X v Netherlands*, (App 4130/69), Judgment of 20 July 1971, (1972) 38 CD 9; *X v United Kingdom*, (App 4288/69), Judgment of 17 March 1970, (1970) 13 Yearbook 892.
- <sup>33</sup> The rights to property and to education are included in Articles 1 and 2 of Protocol 1 to the European Convention on Human Rights, ratified by Ireland in 1953 and entered into force in 1954.
- <sup>34</sup> *Airey v Ireland*, (App 6289/73), Judgment of 9 October 1979, Series A No. 32; (1979-80) 2 EHRR 305, para 26.
- <sup>35</sup> *Moldovan and Others v Romania*, (App 41138/98 and 64320/01), Judgment of 12 July 2005. See also *Mentes and Others v Turkey*, (Article 60), (App 23186/94), Judgment of 24 July 1998.
- <sup>36</sup> *López Ostra v Spain*, (App 16798/90), Judgment of 9 December 1994, Series A No. 303-C; (1995) 20 EHRR 277.
- <sup>37</sup> Ibid at 51.
- <sup>38</sup> *Donegan v Dublin City Council&Ors*, [2008] IEHC 288.
- <sup>39</sup> See also *Dublin City Council v Gallagher*, [2008] IEHC 354 and *Foy v An t-Ard Clártheoir & Others*, (No.2) [2007] IEHC 470.
- <sup>40</sup> Amnesty International, *Human rights for human dignity: A primer on economic, social and cultural rights* (London: Amnesty International Publications, 2005), p 27.
- <sup>41</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 9: the domestic application of the Covenant, UN Doc. E/C.12/1998/24, (1998), para 5.
- <sup>42</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para. 1), UN Doc. E/1991/23, (1990), para 3.
- <sup>43</sup> Supra note 41 at 1.
- <sup>44</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN. Doc. E/C.12/2000/4, (2000), para 43.
- <sup>45</sup> For a more comprehensive explanation of the principle of non-discrimination in international human rights law see Amnesty International, *Dealing with Difference: A Framework to Combat Discrimination in Europe*, (London: Amnesty International Publications, 2009). See also, Weiwei, L., *Equality and Non-Discrimination Under International Human Rights Law* (Norwegian Centre for Human Rights, University of Oslo, 2004), <<http://www.corteidh.or.cr/tablas/R08121.pdf>> (date accessed: 3 December 2013).
- <sup>46</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights, (art 2, para 2), UN Doc E/C.12/GC/20, (1999).
- <sup>47</sup> For example, the CESCR has stated that “[e]conomic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination.” Ibid at 38.
- <sup>48</sup> Supra note 42 at 9.
- <sup>49</sup> Center for Economic and Social Rights, *Mauled by the Celtic Tiger: Human rights in Ireland's economic meltdown, Rights in Crisis Briefing Paper*, (Madrid: CESR, 2012), p 4.
- <sup>50</sup> OHCHR, *Economic, Social and Cultural Rights Handbook for National Human Rights Institutions* (UN New York and Geneva, 2005), p 28.
- <sup>51</sup> Supra note 49. See also report by Thomas Hammerberg, Commissioner for Human Rights of the Council of Europe, following his visit to Ireland from 1 to 2 June 2011, *Issue reviewed: Human rights of vulnerable groups in times of austerity budgets* (Strasbourg: 15 September 2011) <<https://wcd.coe.int/ViewDoc.jsp?id=1831077>> (date accessed: 6 February 2014).
- <sup>52</sup> Supra note 41.
- <sup>53</sup> Ibid at 2.
- <sup>54</sup> Ibid at 7.
- <sup>55</sup> Ibid.
- <sup>56</sup> Ibid at 8.

- 57 59 per cent voted in favour of this proposal. Regarding specific additional rights which should be enumerated in the Constitution 84 per cent voted in favour of the right to housing, 78 per cent right to social security, 87 per cent essential healthcare, 90 per cent rights of people with disabilities, 75 per cent linguistic and cultural rights.
- 58 Supra note 2 at 12.
- 59 In 2011, in its concluding observations on Ireland's third and fourth periodic reports under the **Convention on the Elimination of Racial Discrimination (CERD)** which protects a number of ESC rights, the CERD Committee reiterated its previous recommendation that Ireland should incorporate CERD into national law. Concluding Observations of the Committee on the Elimination of Racial Discrimination, Ireland, CERD/C/IRL/CO/2, (2005), para 9.  
In 2006 the Committee on the Rights of the Child recommended that Ireland incorporate the **Convention on the Rights of the Child (CRC)** into domestic law. The Convention protects both ESC rights and civil and political rights. Concluding Observations of the Committee on the Rights of the Child, Ireland, CRC/C/IRL/CO/2, (2006), paras 8-9.  
In 2005, in its examination of Ireland's combined fourth and fifth periodic reports under the **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** which covers a range of ESC rights, the CEDAW Committee recommended that Ireland "take all appropriate measures to incorporate all the relevant provisions of the Convention into domestic law and to ensure that effective remedies are available to women whose rights are violated". Concluding Observations of the Committee on the Elimination of Discrimination against Women, Ireland, CEDAW/C/IRL/4-5/CO, (2005), para 23.
- 60 Note that this mandate has evolved from Independent Expert to Special Rapporteur. At the time of her mission to Ireland Ms Sepúlveda's mandate was that of Independent Expert.
- 61 Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepúlveda Carmona, Mission to Ireland 10-15 January 2011, UN Doc. A/HRC/17/34/Add.2, (2011), para 7.
- 62 Report of the Working Group on the Universal Periodic Review, Ireland, UN Doc. A/HRC/19/9, (2011), para 106.18.
- 63 Ibid at 107.4.
- 64 Report of the Working Group of the Universal Periodic Review, Ireland, Addendum, UN Doc. A/HRC.19/9/Add.1, (2012):  
"6. The Government is embarking on a major reform programme for the health system, the aim of which is to deliver a single-tier health service that will ensure equal access to care based on need, not income. This will be achieved through the introduction of universal health insurance.  
7. Ireland will sign the Optional Protocol to the ICESCR shortly.  
8. The overarching aim of the Government's Housing Policy is to enable all households to access good quality housing appropriate to household circumstances and in their particular community of choice."  
<<http://www.ohchr.org/EN/HRBodies/UPR/Pages/IESession12.aspx>> (date accessed: 7 March 2014).
- 65 The terms 'economic, social and cultural rights' and 'socio-economic rights' are at times used inter-changeably.
- 66 Convention on the Elimination of all Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture. See also European Social Charter (Revised) and the EU Charter of Fundamental Rights.
- 67 Ireland has signed but not yet ratified the Optional Protocol to the ICESCR.
- 68 Supra note 41 at 3. The CESCR stated that questions relating to the domestic application of the ICESCR must be considered in light of the principle of international law "reflected in Article 8 of the Universal Declaration of Human Rights".
- 69 Ibid.
- 70 Porter, B., "The Domestic Implementation of the ICESCR: The Right to Effective Remedies, the Role of the Courts and the Place of the Claimants of ESC Rights" Remarks for the Workshop for Judges and Lawyers in North East Asia on the Justiciability of Economic, Social and Cultural Rights, Ulaan Baatar, Mongolia, January 26, 2004, p 13.
- 71 Common core document forming part of the reports of States parties: Ireland, UN Doc. HRI/CORE/IRL/2014 (2014).  
<[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolNo=HRI%2fCORE%2fIRL%2f2014&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=HRI%2fCORE%2fIRL%2f2014&Lang=en)> (date accessed: 11 April 2014).
- 72 Supra note 41 at 3.
- 73 See for example the Treatment Action Campaign (TAC) in South Africa. It has mobilised people to campaign on the right to health through a combination of litigation, human rights education, HIV treatment literacy and demonstrations. This has led to more accessible and affordable medicines, the prevention of hundreds of thousands HIV-related deaths and the provision of additional resources in the health system  
<<http://www.tac.org.za/>> (date accessed: 25 April 2014). For case law see *Minister for Health and Ors v Treatment Action Campaign and Others*, (1) 2002 (10) BCLR 1033 (CC). For a summary of the case see the ESCR-Net website at: <<http://www.escr-net.org/docs/i/403050>> (date accessed: 25 April 2014). See also the Right to Food Campaign in India in particular *PUCL v Union of India and others*, (Writ Petition [Civil] No. 196 of 2001) <<http://www.righttofoodcampaign.in/legal-action/supreme-court-orders>> (date accessed: 25 April 2014).
- 74 Draft paper by Whyte G., Law School, Trinity College Dublin, "Socio-Economic Rights in Ireland: Judicial and Non-Judicial Enforcement" presented at the IHRC Conference on Economic, Social and Cultural Rights, 9 December 2005.

- <sup>75</sup> Letter dated 13 April 2012 from the Permanent Representative of Ireland to the United Nations addressed to the President of the General Assembly, UN Doc. A/67/80, (2012) <<https://www.dfa.ie/media/dfa/alldfawebsitesmedia/ourrolesandpolicies/pledges-and-commitments-during-election-to-hrc.pdf>> (date accessed: 8 October 2013).
- <sup>76</sup> Ireland's address to the UN Human Rights Council, 29 February 2012 <<http://www.dfa.ie/home/index.aspx?id=87574>> (date accessed: 8 October 2013).
- <sup>77</sup> This was reaffirmed by the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5:  
 "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."
- <sup>78</sup> International NGO Coalition for OP-ICESCR, *A Toolkit for Action, Booklet 3: Why Should States Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?* (New York: 2011), p 5 <[http://www.escr-net.org/usr\\_doc/Booklet\\_3\\_Jan\\_2011\\_FINAL.pdf](http://www.escr-net.org/usr_doc/Booklet_3_Jan_2011_FINAL.pdf)> (date accessed: 17 October 2013).
- <sup>79</sup> *Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28, paras 160-161.
- <sup>80</sup> See for example *Mazibuko v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28, where the South African Constitutional Court stated that "ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right." The Court stated that, the positive obligations imposed upon government by the constitutional social and economic rights will be enforced by courts in at least the following ways: (a) where government takes no steps to realise the rights; (b) where the government's adopted measures are unreasonable; and (c) where the government fails to give effect to its duty under the obligation of progressive realization to continually review its policies to ensure that the achievement of the right is progressively realised. See also *Government of the Republic of South Africa and Others v Grootboom*, 2001 (1) SA 46 (CC).
- <sup>81</sup> Judicial review is the process by which the High Court can review public decisions made by administrative bodies and the lower courts. The Court normally focusses on the lawfulness and fairness of the decision-making process rather than the merits of the case.
- <sup>82</sup> Amnesty International, Submission for consideration by the Constitution Review Commission on the review of Economic, Social and Cultural Rights in the 2011 Interim Constitution of South Sudan, p.6. See in particular pages 8-17 Annex, for examples of constitutional provisions on enforceable ESC rights from all regions of the world <<https://www.amnesty.org/pt-br/library/asset/AFR54/009/2011/en/32089790-dc51-46be-bb29-a599d992299c/af540092011en.pdf>> (date accessed: 25 October 2013).
- <sup>83</sup> For example, Constitution of Spain, (apart from right to education) and Constitution of Malta include ESC rights only as guiding principles. The Irish Constitution which protects the right to free primary education (Article 42.4), offers some protection in relation to private property (Article 43.2.2) and includes Directive Principles of Social Policy (Article 45) which make provision for a right to a livelihood, protection of the vulnerable and an obligation of the State towards the health of people living in Ireland. However Article 45 is not enforceable by law.
- <sup>84</sup> For example, Constitution of Portugal has a very comprehensive list of ESC rights and obligations. Title III: Economic, social and cultural rights and duties, Chapter I economic rights and duties, Chapter II social rights and duties, Chapter III cultural rights and duties. Examples of Constitutions which include specific sections/chapters on ESC rights include the Constitutions of Croatia (Chapter 3); Czech Republic (Chapter 4); Poland Arts 64-75. A number of Constitutions also include various ESC rights in sections/chapters on fundamental rights, such as Bulgaria (Chapter 2 Fundamental Rights and Obligations of Citizens); Cyprus (Part2 Fundamental Rights and Liberties); Finland (Chapter 2 Basic Rights and Liberties); Greece (Part2 Individual and Social Rights); Latvia (Chapter VIII Fundamental Human Rights); Romania (Title II Fundamental Rights, Freedoms and Duties, Chapter II Fundamental Freedoms); Slovenia (II. Human Rights and Fundamental Freedoms). This is a non-exhaustive list and provides a number of examples only.
- <sup>85</sup> International NGO Coalition for OP-ICESCR, *A Toolkit for Action, Booklet 3: Why Should States Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?* (New York: 2011), p 5 <[http://www.escr-net.org/usr\\_doc/Booklet\\_3\\_Jan\\_2011\\_FINAL.pdf](http://www.escr-net.org/usr_doc/Booklet_3_Jan_2011_FINAL.pdf)> (date accessed: 17 October 2013).
- <sup>86</sup> For example, following the case of *O' Donoghue v Minister for Health* [1996] 2 IR 20, as discussed further in Chapter 4, the Department of Education introduced an "automatic response" to special educational needs and issued two circulars which set out eligibility criteria for additional teaching and special needs assistance supports. This led to a high number of applications for services and in turn the provision of extra posts in schools. The development also demonstrated the recognition by the Department of Education that care needs to exist within the school setting. These became crucial in terms of the development of education services for students with disabilities. However, the process was fraught by delays in the provision of supports for children in schools. See Centre for Early Childhood Development and Education, "Questions of Quality: Proceedings of a Conference on Defining, Assessing and Supporting Quality in Early Childhood Care and Education" (Dublin: 2005), p 140 <<http://www.cecde.ie/english/pdf/Questions%20of%20Quality/Questions%20of%20Quality.pdf>> (date accessed: 1 November 2013).  
*Sinnott v Minister for Education* [2001] 2 IR 545 and other similar cases demonstrated the need for a legislative framework to provide for the education of children with special educational needs. The Education for Persons with Special Education Needs Act 2004 provided such a framework. It makes provision for the assessment of educational needs and enforceable education plans for children with special educational needs.

However due to the economic crisis there has been a delay in the full commencement of the Act and the most important provisions of the Act are not in operation. The Act also only applies to children under the age of 18, following the decision in *Sinnott*. See O' Mahony, C., "National Mechanism's for Protecting the Right to Education" Irish Human Rights Commission/Law Society of Ireland Annual Human Rights Conference 2009 <[http://www.ihrc.ie/download/pdf/paper20091121\\_annconf\\_omahony.pdf](http://www.ihrc.ie/download/pdf/paper20091121_annconf_omahony.pdf)> (date accessed: 22 November 2013). See also Disability Act 2005.

- <sup>87</sup> Supra note 73.
- <sup>88</sup> For greater analysis see Liebenberg, S., "South Africa: Adjudicating Social Rights under a Transformative Constitution" in Langford, M., ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008), 75.
- <sup>89</sup> *Unnikrishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645. The case involved a challenge to the validity of provincial state laws which regulated the charging of fees for private educational institutions and prohibited the charges of capitation fees from students seeking admission. The Court held that a child has the fundamental right to free education up to the age of fourteen. The State later included a provision in the Constitution providing for the fundamental right to education between the ages of 6 and 14.
- <sup>90</sup> BVerfG, IBvL 1/09, 9.2. 2010, (Hartz IV).
- <sup>91</sup> For further analysis see Winkler, I., Mahler, C., "Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?" (2013) 13:2 *Human Rights Law Review*, 388.
- <sup>92</sup> For an in-depth analysis see Whelan, J. D., Donnelly, J., "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight" (2007) 29:4 *Human Rights Quarterly*, 908.
- <sup>93</sup> Bedggood, M., "Progress and Politics of Economic, Social and Cultural Rights", [2012] *Taiwan Human Rights Journal*, 37 at 40.
- <sup>94</sup> Statement of the UN Committee on Economic, Social and Cultural Rights at the Vienna World Conference on Human Rights, U.N. Doc. E/1992/22, Annex III, para 5.
- <sup>95</sup> Mac Cormaic, R., "Untangling the threads of the Supreme Court", *The Irish Times* (8 July 2013), 7. <<http://www.irishtimes.com/news/crime-and-law/untangling-the-threads-of-the-supreme-court-s-thinking-1.1456003>> (date accessed: 19 November 2013).
- <sup>96</sup> Including administrative tribunals, international judicial and quasi-judicial bodies.
- <sup>97</sup> Supra note 41 at 10.
- <sup>98</sup> Ibid.
- <sup>99</sup> Vienna Declaration and Programme for Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para 5 <<http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>> (date accessed: 5 December 2013).
- <sup>100</sup> Supra note 40 at 68.
- <sup>101</sup> Office of the UN High Commissioner for Human Rights, *Fact Sheet: Frequently Asked Questions on Economic, Social and Cultural Rights* (Geneva: 2008), p. 30.
- <sup>102</sup> Supra note 85 at 6. Examples of case law include *Soobramoney v Minister for Health KwaZulu Natal* (1998 (1) SA 765, CC) (on the right to health), *The Government of the Republic of South Africa and others v Irene Grootboom and others*, 2001(1) SA 46 (CC) October 4, 2000 (right to housing), Human Rights Committee decision in *F.H.Zwaan-de Vries v The Netherlands*, Communication No. 182/1984 (9 April 1987), UN Doc. Supp. No. 40 (A/42/40) at 160 (1987) (discrimination between married men and women in access to unemployment benefits).
- <sup>103</sup> Quinn, G., "Rethinking the Nature of Economic, Social and Cultural Rights" in Costello, C., ed., *Fundamental Social Rights: Current Legal Protection and the Challenge of the EU Charter of Fundamental Rights*, Irish Centre for European Law (Dublin: 2001), 41.
- <sup>104</sup> Ibid at 42.
- <sup>105</sup> See for example General Comment No. 14 (the right to health), General Comments No. 4 and No. 7 (the right to adequate housing/forced evictions), General Comment No. 12 (the right to adequate food), General Comment No.13 (the right to education), General Comment No. 15 (the right to water), General Comments No. 21 and No. 17 (cultural rights), General Comment No.18 (the right to work), General Comment No.19 (the right to social security)., This is a non-exhaustive list. For an exhaustive list of all General Comments by the UN Committee on Economic, Social and Cultural Rights see the OHCHR website at: <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11)> (date accessed: 9 January 2014).
- <sup>106</sup> These include General Comment No. 3 (The nature of States Parties obligations (Art 2, para 1)), General Comment No. 9 (The domestic application of the Covenant) and General Comment No. 20 (Non-discrimination in economic, social and cultural rights).
- <sup>107</sup> UN Committee on Economic, Social and Cultural Rights, *Guidelines on Treaty-Specific Documents to be Submitted by States Parties Under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights* UN Doc. E/C.12/2008/2, 24 March 2009. See the OHCHR website at: <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?key=92g0+9FnI5fX/ePqHxWObPpm//kusKEXT+B4cp/uCKqWAFsFrDexWgk2iQgS46+H&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?key=92g0+9FnI5fX/ePqHxWObPpm//kusKEXT+B4cp/uCKqWAFsFrDexWgk2iQgS46+H&Lang=en)> (date accessed: 9 January 2014).
- <sup>108</sup> For a full list of Special Rapporteurs and their reports see the ohchr website at: <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>> (date accessed: 28 April 2014).
- <sup>109</sup> Supra note 85 at 5.
- <sup>110</sup> Ibid.

- <sup>111</sup> Ibid.
- <sup>112</sup> The Limburg Principles were drawn up in 1986, by a group of distinguished international experts in international law. The principles set out obligations relating to ESC rights and views on the interpretation of key provisions of the ICESCR. They provide a framework for understanding the legal nature of the rights in the ICESCR. The Limburg Principles are available on the ESCR-Net website at: <<http://www.escr-net.org/docs/i/425445>> (date accessed: 30 April 2014). The Maastricht Guidelines supplement the Limburg Principles and were drawn up in 1997 by a meeting of international law experts. They deal with violations of ESC rights through acts of commission and omission, responsibly for violations and the entitlement to remedies. The Maastricht Guidelines are available on the University of Minnesota Human Rights Library website at: <[http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines\\_.html](http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines_.html)> (date accessed: 30 April 2014).
- <sup>113</sup> Irish Human Rights Commission, *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document*, (Dublin: 2005). See also work of the Scottish Human Rights Commission on health and human rights <<http://www.scottishhumanrights.com/ourwork/health>> (date accessed: 20 December 2013). See also ESC rights project of the Deutsche Institut fuer Menschenrechte <<http://www.institut-fuer-menschenrechte.de/en/publications/esc-rights.html>> (date accessed: 20 December 2013).
- <sup>114</sup> When a State signs a treaty it demonstrates its intention to take steps towards ratification of that treaty. According to Article 18 of the Vienna Convention on the Law of Treaties, signature creates the obligation to refrain in good faith from acts that would defeat the object and purpose of the treaty. When a State ratifies a treaty it agrees to be legally bound by its provisions.
- <sup>115</sup> Supra note 113 at 19.
- <sup>116</sup> Constitution Review Group, *Report of the Constitution Review Group* (Dublin: Stationary Office, 1996) p 235, para 1.
- <sup>117</sup> Ex Parte Chairperson of the Constitutional Assembly: *in re Certification of the Constitution of the Republic of South Africa 1996* (First Certification judgment) 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), para 77.
- <sup>118</sup> Hardiman, A. Justice, Judge of the Supreme Court, “The Role of the Supreme Court in our Democracy”, in Mullholland. J. ed., *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers*, MacGill Summer School, 2004, p 43. See also *Sinnott v Minister for Education*, [2001] 2 IR 545 at 711 (SC).
- <sup>119</sup> Ibid at 44.
- <sup>120</sup> Speech by Michael McDowell T.D., Minister for Justice, Equality and Law Reform, at the Annual Conference of the Irish Social Policy Association, 12 September 2002.
- <sup>121</sup> Eide, A., in Eide, A., Krause, C., Rosas A., eds., *Economic Social and Cultural Rights: A Textbook, Second Edition*, (Martinus Nijhoff Publishers, 2001), p 10.
- <sup>122</sup> *The State (Healy) v Donoghue*, [1976] IR 325.
- <sup>123</sup> Supra note 34.
- <sup>124</sup> *R v Askov*, [1990] 2 SCR 119.
- <sup>125</sup> *Eldridge v British Columbia* (Attorney General), [1997] 3 SCR 624.
- <sup>126</sup> Van Bueren, G., “Including the excluded: the case for an economic, social and cultural Human Rights Act” [2002] Public Law, 456.
- <sup>127</sup> This is outlined in detail in the UN Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work, 2005, UN Doc. E/C.12/GC/18 <[file:///C:/Documents%20and%20Settings/pjanning/My%20Documents/Downloads/G0640313%20\(2\).pdf](file:///C:/Documents%20and%20Settings/pjanning/My%20Documents/Downloads/G0640313%20(2).pdf) > (date accessed: 4 March 2013).
- <sup>128</sup> *O’Reilly v Limerick Corporation*, [1989] ILRM181.
- <sup>129</sup> Supra note 113 at 25.
- <sup>130</sup> Casey, J., *Constitutional Law in Ireland*, 3rd ed (Dublin: Roundhall Sweet & Maxwell, 2000), p 349.
- <sup>131</sup> Supra note 128 at 194.
- <sup>132</sup> Supra note 130.
- <sup>133</sup> Supra note 113 at 26.
- <sup>134</sup> *Blake v Attorney General*, [1982] IR 117.
- <sup>135</sup> Supra note 130 at 669.
- <sup>136</sup> In this context see also case law of the European Court of Human Rights. For example, *James v United Kingdom*, (App 8793/79), Judgment of 21 February 1986, 8 EHRR 123, which dealt with property rights as protected in Article 1 Protocol 1 ECHR. The Court noted that Article 1 Protocol 1 comprised three rules; 1) the general principles of the peaceful enjoyment of property, 2) the deprivation of possession subject to certain conditions, 3) the entitlement of the State to control the use of property in accordance with the general interest. The Court stated that the 2nd and 3rd principles must be read in light of the 1st principle. It also held that the State enjoyed a wide margin of appreciation in applying the concept of ‘general interest’. However according to the case law of the Court, any measure depriving a person of his property must pursue a legitimate aim and the means used must be proportionate to the aim sought to be realised..
- <sup>137</sup> Supra note 130 at 352.
- <sup>138</sup> Ibid at 671.
- <sup>139</sup> *Murphy v Attorney General*, [1982] IR 241.
- <sup>140</sup> Supra note 130 at 370.
- <sup>141</sup> *O’ Brien v Wicklow UDC*, (June 10, 1994, unreported), High Court.



- <sup>142</sup> Supra note 113 at 26.
- <sup>143</sup> For discussion of this and other similar cases see Whyte, G., *Social Inclusion and the Legal System: Public Interest Law in Ireland*, (Dublin: Institute of Public Administration, 2002), p 229.
- <sup>144</sup> Ibid.
- <sup>145</sup> *V v Resident Municipality X and Bern Canton Government Council (Constitutional Complaint)*, October 27, 1995 (translated version by ESCR-Net).
- <sup>146</sup> Ibid at 372.
- <sup>147</sup> Ibid at 371.
- <sup>148</sup> Ibid at 374.
- <sup>149</sup> Ibid at 373.
- <sup>150</sup> Connolly, J., “Caging the Tiger: Strengthening Socio-Economic rights”, (2000) 1 Ireland Now, 75. <<http://theirelandinstitute.com/republic/01/pdf/connolly001.pdf>> (date accessed: 22 January 2014).
- <sup>151</sup> Federal Supreme Court, RE 411518/SP (2004).
- <sup>152</sup> Resp 575280/SP (2004).
- <sup>153</sup> Argentine Supreme Court, *Reynoso, Nida Noemí c/INSSJP/amparo*, May 16, 2006.
- <sup>154</sup> For further discussion see International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series: No. 2, (Geneva: 2008), p 25.
- <sup>155</sup> Supra note 90.
- <sup>156</sup> For further analysis see Supra note 90. See also BVerfG, 1 BvL 10/10, 9.7.2012 (Asylum Seekers Benefits case), discussed in more detail in Chapter 7.
- <sup>157</sup> Case No. 2000-08-0109, Constitutional Court of Latvia, On Compliance of Item 1 of the Transitional Provisions of the Law on Social Insurance with Articles 1 and 109 of the Satversme (Constitution) of the Republic of Latvia and Articles 9 and 11 ICESCR.
- <sup>158</sup> Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000.
- <sup>159</sup> For summary of case see the ESCR-net website at: <<http://www.eschr-net.org/docs/i/401409>> (date accessed: 19 February 2014).
- <sup>160</sup> *Soobramoney v Minister for Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC), November 27, 1997.
- <sup>161</sup> The right of access to health is protected in Section 27. Mr. Soobramoney also relied on Section 27 (3) the right to emergency medical treatment, which the Court held only applied to “sudden catastrophes”. He also relied on the right to life section 11. The Court held that the right to medical treatment could not be inferred from the right to life where there was express protection of the right of access to healthcare services in the Constitution.
- <sup>162</sup> For further discussion Supra note 154.
- <sup>163</sup> Mc Dowell, M., “Legal activism no substitute for politics” *The Irish Times* (8 July 2009), 2. <<http://www.irishtimes.com/news/crime-and-law/legal-activism-no-substitute-for-politics-mcdowell-1.693681>> (date accessed: 18 October 2013).
- <sup>164</sup> O’Connell, D., “Balance of powers as important as their separation” *The Irish Times* (20 July 2009), 3. <<http://www.irishtimes.com/news/crime-and-law/balance-of-powers-as-important-as-their-separation-1.702976?page=3>> (date accessed: 18 October 2013).
- <sup>165</sup> Supra note 113 at 83-88. See also Potts, H. Dr., *Accountability and the right to the highest attainable standard of health*, (Human Rights Centre, University of Essex, 2007), pp 28-29.
- <sup>166</sup> Article 13 ICESCR. <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>> (date accessed: 28 April 2014).  
Article 28 Convention on the Rights of the Child <<http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>> (date accessed: 28 April 2014).
- <sup>167</sup> Article 42.1- 42.3.
- <sup>168</sup> *Crowley v Ireland*, [1980] IR 102
- <sup>169</sup> The wording of the 1922 Constitution had read “provide education” but this was changed in the 1937 Constitution to read “provide for education”.
- <sup>170</sup> Supra note 168 at 126. This is based primarily on historical arrangements for the provision of education in Ireland as noted in Supra note 130 at 655.
- <sup>171</sup> O’ Mahony, C., *Educational Rights in Irish Law* (Dublin: Thomson Round Hall, 2006), p. 148.
- <sup>172</sup> Supra note 86.
- <sup>173</sup> Ibid at 65. O’ Hanlon J. adopted the definition of education set out in the Supreme Court by O’ Dálaigh C.J. in *Ryan v Attorney General*, [1965] IR 294 at 350.
- <sup>174</sup> It argued that all that could be done for him was to make his life more tolerable by training him in the basics of bodily function and movement.
- <sup>175</sup> This was confirmed in *Comerford v Minister for Education*, [1997] 2 ILRM 134 at 143 by McGuinness J. She held that “the right to free primary education extends to every child, although the education provided must vary in accordance with the child’s abilities and needs.” Keane C.J. in the Supreme Court, also approved of this definition in *Sinnott v Minister for Education*, [2001] 2 IR 545 at 628.
- <sup>176</sup> Supra note 86 at 69. The Government subsequently fixed the pupil-teacher ratio for children with autism as six to one.

- <sup>177</sup> *Sinnott v Minister for Education*, [2001] 2 IR 545.
- <sup>178</sup> Evidence cited in the High Court included that in cases of autism, the termination of education results in regression of the person back to his/her condition prior to receiving education,. Ibid at 583-584.
- <sup>179</sup> Ibid at 592.
- <sup>180</sup> The High Court awarded damages to both Jamie and also to his mother, holding that the State had failed to honour its constitutional obligations constitutional obligations to both of them. On appeal, the Supreme Court held that Jamie's mother was not entitled to damages as a consequence of her being adversely affected as a result of a breach of Jamie's constitutional rights.
- <sup>181</sup> Oliver, E., "Anxious parents, State await Sinnott appeal outcome" *The Irish Times* (1 November 2000), 8. <<http://www.irishtimes.com/newspaper/archive/2000/1101/Pg006.html>> (date accessed: 4 November 2013). The Department of Education, upon legal advice, noted that the ruling could mean that anybody regardless of whether they had a disability or not and regardless of age, could see legal redress of inadequacies in their primary education.
- <sup>182</sup> Hennessy, M., "State will pay family £40,000 in spite of ruling" *The Irish Times* (13 July 2001), 6. <<http://www.irishtimes.com/newspaper/archive/2001/0713/Pg006.html#Ar00603>> (date accessed: 4 November 2013).
- <sup>183</sup> Oliver, E., "Anxious parents, State await Sinnott appeal outcome" *The Irish Times* (1 November 2000), 8. <<http://www.irishtimes.com/newspaper/archive/2000/1101/Pg006.html>> (date accessed: 4 November 2013).
- <sup>184</sup> The Irish Times, "State 'should drop Sinnott appeal'" (28 December 2000), 8. <<http://www.irishtimes.com/newspaper/archive/2000/1228/Pg008.html>> (date accessed: 4 November 2013).
- <sup>185</sup> Delivered at the Burren Law School and referenced in Ruane, M., "'Ireland' beats the Sinnotts'" *The Irish Times* (13 July 2001), 14. <<http://www.irishtimes.com/newspaper/archive/2001/0713/Pg014.html>> (date accessed: 4 November 2013).
- <sup>186</sup> For greater analysis see Hogan G. W., Whyte, G. F., *J M Kelly: The Irish Constitution*, 4th ed. (Dublin: Tottel Publishing, 2006), pp 1956-1960.
- <sup>187</sup> Supra note 177 at 710.
- <sup>188</sup> Carolan, M., "Judgment is reserved on Sinnott case appeal" *Irish Times*, (4 April 2001), 4. <<http://www.irishtimes.com/newspaper/archive/2001/0404/Pg004.html#Ar00403>> (date accessed: 4 November 2013).
- <sup>189</sup> Supra note 185.
- <sup>190</sup> *FN v Minister for Education and Ors*, [1995] 1 IR 409.
- <sup>191</sup> Ibid at 416.
- <sup>192</sup> *DB v Minister for Justice and Ors*, [1999] 1 ILRM 93.
- <sup>193</sup> Ibid at 104.
- <sup>194</sup> Ibid at 105.
- <sup>195</sup> *TD v Minister for Education*, [2000] 2 ILRM 321.
- <sup>196</sup> Ibid.
- <sup>197</sup> Fabre, C., *Social Rights under the Constitution: Government and the Decent Life* (OUP, 2000), p 178.
- <sup>198</sup> O' Mahony, C., "Education, Remedies and the Separation of Powers" (2002) 24 DULJ 57 (p 18 online version).
- <sup>199</sup> Supra note 195 at 337.
- <sup>200</sup> For a more detailed discussion see Nolan, A., "The Separation of Powers Doctrine vs. Socio-economic Rights?" in supra note 88 at 295.
- <sup>201</sup> Supra note 113 at 103.
- <sup>202</sup> All-Party Oireachtas Committee on the Constitution, Ninth Progress Report, Private Property, (Dublin: Stationary Office, 2004), see submissions in Annex pp 252-284.
- <sup>203</sup> The European Court of Human Rights has also restricted individual property rights in the broader public interest on housing which is similar to the social justice provision in the Constitution. For example *James v United Kingdom*, (App 8793/79), Judgment of 21 February 1986, 8 EHRR 123.
- <sup>204</sup> *Dreher v Irish Land Commission*, [1984] ILRM 94.
- <sup>205</sup> *Fisher v Irish Land Commission*, [1948] IR 3.
- <sup>206</sup> Supra note 186 at 1970.
- <sup>207</sup> *Buckely and Ors (Sinn Féin) v Attorney General*, [1950] IR 67.
- <sup>208</sup> First applied in the context of private property in *Iarnród Eireann v Ireland*, [1996] 3 IR 321. See also *Daly v Revenue Commissioners*, [1995] 3 IR 1 where the High Court adopted the proportionality test as formulated by the Canadian Supreme Court  
 "The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:  
 a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;  
 b) impair the right as little as possible, and  
 c) be such that their effects on rights are proportional to the objective".
- <sup>209</sup> Ibid.
- <sup>210</sup> Supra note 186 at 1999.

- 211 Supra note 208. The proportionality test was applied by the Supreme Court in *Article 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321.
- 212 Supra note 136.
- 213 Supra note 113 at 104.
- 214 Directive or Fundamental Principles of State Policy are found in a number of constitutions such as India, Bangladesh, Nepal, Pakistan, Sri Lanka, having been increasingly invoked to give meaning to constitutional rights such as the right to life. See Byrne, I., Hossain S., “Economic and Social Rights Case Law of Bangladesh, Nepal, Pakistan and Sri Lanka” in supra note 88 at 125. A number of African States also include Directive Principles such as Nigeria, Lesotho, Sierra, Ethiopia, Ghana and Uganda, the latter three containing both justiciable and non-justiciable formulations of ESC rights.
- 215 Supra note 186 at 2079. See for example, *Buckley v Attorney General*, [1950] IR 67; *Byrne v Ireland*, [1972] IR 241; *O’ Brien v Manufacturing Engineering Co Ltd*, [1973] IR 334.
- 216 *Buckley v Attorney General*, [1950] IR 67, p. 83.
- 217 *Murtagh Properties v Cleary*, [1972] IR 330.
- 218 *Rogers v ITGWU*, [1978] ILRM 51.
- 219 Ibid at 62.
- 220 For further discussion of how the courts have relied on Article 45 see supra note 186 at 2079-2089.
- 221 Ibid at 2083.
- 222 Supra note 113.
- 223 For greater analysis see Muralidhar, S., “The Expectations and Challenges of Judicial Enforcement of Social Rights” in supra note 88 at 102.
- 224 *Paschim Banga Khet Majoor Samity and others v State of West Bengal and another*, (1996) 4 SCC 37, AIR 1996 Supreme Court 2426, June 5, 1996.
- 225 For summary of case see the ESCR-Net website at: <<http://www.escr-net.org/docs/i/401236>> (date accessed: 13 February 2014).
- 226 Supra note 126.
- 227 40.3.1, “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”
- 228 *Ryan v Attorney General*, [1965] IR 24.
- 229 Ibid at 348.
- 230 *State (C) v Frawley*, [1976] IR 365.
- 231 The applicant was a prisoner who required highly specialised and expensive psychiatric treatment not available in Ireland. The Court held that the State did not have the duty to build and equip a specialised unit to treat the applicant and a small number of other people. It held however that the Executive had a duty to not expose the health of a person to risk, without justification.
- 232 *Heeney v Dublin Corporation*, [1998] IESC 26.
- 233 Supra note 200 at 304.
- 234 In re Article 26 and the Health (Amendment) (No.2) Bill 2004, [2005] IESC 7.
- 235 Ibid at 34.
- 236 Ibid at 3.
- 237 Supra note 44 at 12 (b).
- 238 *Murtagh Properties v Cleary*, [1972] IR 330. For greater analysis see supra note 130 at 404.
- 239 “The State shall, in particular, direct its policy towards securing;-  
i) That the citizen (all of whom, men and women equally have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.”
- 240 *Landers v Attorney General*, (1973) 109 ILTR 1.
- 241 *Murphy v Stewart*, [1973] IR 97. O Dálaigh CJ and Budd J agreed with Walsh J. This was obiter as the point was not the main issue in the case.
- 242 *Shanley v Galway Corporation*, [1995] I IR 1.
- 243 *Greally v Minister for Education*, (No. 2) [1999] IR 1.
- 244 *Cox v Ireland*, [1992] 2 IR 503.
- 245 Supra note 113.
- 246 Ibid at 107.
- 247 *G v An Bord Uchtála*, [1980] IR 32.
- 248 Ibid at 69.
- 249 Supra note 186 at 1402.
- 250 For example, States’ obligation under Article 2 (1) of the ICESCR, to “achieve progressively” the rights in the ICESCR “to the maximum of its available resources”.
- 251 Supra note 43 where the CESCR deals with the impact of financial and economic crises on ESC rights.
- 252 Supra note 198 p at 17.



- <sup>253</sup> Whyte, G., "Discerning the Philosophical Premises of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights" in *Contemporary Issues in Irish Law and Politics* (No. 2) (Dublin: Round Hall, Sweet & Maxwell, 1998), 216 at 226.
- <sup>254</sup> For example, Article 20 (5) of the Kenyan Constitution, on the application of the Bill of Rights, reads:  
 "(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles--  
 (a) it is the responsibility of the State to show that the resources are not available;  
 (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and  
 (c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion."
- <sup>255</sup> See Chapter 1 and supra note 41.
- <sup>256</sup> It should be noted that in February 2014 the Constitutional Convention recommended that essential healthcare and housing should be given explicit protection in the Irish Constitution.
- <sup>257</sup> As Ireland is a State Party to the ICESCR it has the obligation to progressively realise the right over time, as outlined further in Chapter 1. Ireland also has a number of immediate obligations in relation to the right to health, including the guarantee that the right to health will be exercised without discrimination of any kind (Article 2.2 ICESCR) and the obligation to take steps towards the full realisation of the right to health (Article 2.1 ICESCR). Under the ICESCR, all States Parties have a core obligation to ensure the satisfaction of, at the very least the minimum essential levels of each of the rights in the ICESCR. In the context of the right to health This includes but is not limited to, the obligation to ensure at the very least minimum essential levels of primary healthcare; to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups; to ensure equitable distribution of all health facilities, goods and services; to adopt and implement a national public health strategy and plan of action. The State also has a number of other obligations of comparable priority. A State Party should also not take any retrogressive measures or steps back in achieving the full realisation of the right to health, for example by massively investment in health services. If retrogressive measures are taken the State must show these have been given the most careful consideration, are fully justified with reference to the totality of the rights protected in the ICESCR and that the maximum available resources have been used.  
 Moreover, the right to health is an inclusive right that encompasses more than timely and appropriate healthcare. As noted by the ICESCR, the right to health also includes, "the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, health occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health". Another important component of the right to health is the participation of the population in all health-related decision-making at all levels, community, national and international (UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), UN. Doc. E/C.12/2000/4, (2000), para 11).
- <sup>258</sup> Supra note 44 at 9.
- <sup>259</sup> Underlying determinants of the right to health include food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions and a healthy environment.
- <sup>260</sup> Supra note 44 at 9.
- <sup>261</sup> Judicial review is largely limited to looking at the lawfulness of the decision- making process and does not look at the merits of a decision. In the *Gallagher* and *Donegan* housing cases, discussed in Chapter 1, judicial review was held to be an inadequate remedy as the facts which were disputed could not be considered by the court.
- <sup>262</sup> King, A. J., "Asserting Social Rights in a Multi-layered System" in supra note 88 at 284.
- <sup>263</sup> Ibid.
- <sup>264</sup> House of Lords, House of Commons, *Joint Committee on Human Rights Twenty First Report* (2004), para 73. <<http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/18302.htm>> (date accessed: 28 April 2014).
- <sup>265</sup> Those entitled to medical cards (full eligibility) or GP visit cards (limited eligibility) are entitled to varying degrees of access to free primary and acute healthcare services and other benefits .The Act also covers a number of schemes such as the Long-Term Illness Scheme for people with certain medical conditions. They can access a range of facilities, goods and services free of charge < <http://www.hse.ie/eng/services/list/1/schemes/mc/>> (date accessed: 5 March 2014).
- <sup>266</sup> Health Service Executive (Government) Bill 2012.
- <sup>267</sup> The Health Information and Quality Authority derives its mandate from, and undertakes its functions pursuant to, the Health Act 2007 and other relevant legislation (the Child Care Act, 1991 and the Children Act, 2001).
- <sup>268</sup> The Act sets out the circumstances in which a person may be admitted to, and involuntarily detained in an approved centre. The Act introduces mental health tribunals to review involuntary admissions and the Mental Health Commission.
- <sup>269</sup> Amnesty International considers that Act's provisions in this regard to lack compliance with international human rights standards. See for instance, Amnesty International submission to the Universal Periodic Review 12th session of th UPR Working Group, Ireland, October 2011, p 3 <<http://www.amnesty.ie/sites/default/files/HRII/UPR12,%20Amnesty%20International%20submission%20for%20the%20UPR%20of%20Ireland,%20March%202011.pdf>> (date accessed: 9 May 2014).  
 For example, contrary to the right to consent to or refuse treatment, it provides that electro-convulsive therapy or the continuation of medicine after three months may be administered where a patient is "unwilling" to consent to

the treatment if both the treating consultant psychiatrist and a second consultant psychiatrist approve. The Government has conducted an interim review of the Mental Health Act finding certain areas in need of amendment, and established an expert group to further that review, including against human rights standards. Any amending legislation following this review will be an important step in helping to ensure the **acceptability and quality** of mental healthcare in Ireland.

- <sup>270</sup> Department of Health, *Healthy Ireland: A Framework for Improved Health and Wellbeing, 2013-2025* <<http://www.dohc.ie/publications/pdf/HealthyIrelandBrochureWA2.pdf?direct=1>> (date accessed: 5 March 2014).
- <sup>271</sup> Department of Health, *Future Health: A Strategic Framework for reform of the Health Service, 2012-2015* <[http://www.dohc.ie/publications/Future\\_Health.html?lang=en](http://www.dohc.ie/publications/Future_Health.html?lang=en)> (date accessed: 5 March 2014).
- <sup>272</sup> Department of Health and Children, *Primary Care: A New Direction, Quality and Fairness- A Health System for You, Health Strategy* (Dublin: 2001) <<http://www.dohc.ie/publications/pdf/primcare.pdf?direct=1>> (date accessed: 5 March 2014).
- <sup>273</sup> In Budget 2014, the Government announced that it will be introducing free GP care for children aged 5 and under. While this is an important step in the progressive realisation of the right to health, the Government must ensure that everyone in Ireland has access to healthcare without discrimination, including on the basis of cost. As noted in Government policy, universal healthcare insurance will be based on need. Particular attention must be given to the most vulnerable and marginalised individuals and groups in society.
- <sup>274</sup> Department of Health, *The Path to Universal Healthcare: White Paper on Universal Health Insurance* (Dublin: 2014) <<http://health.gov.ie/wp-content/uploads/2014/04/White-Paper-Final-version-1-April-2014.pdf>> (date accessed: 4 April 2014).
- <sup>275</sup> Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 25 January to 5 February 2010, CPT/Inf/(2011) 3, para 114.
- <sup>276</sup> Chairman's Foreword, *Mental Health Commission Annual Report 2012 including the Report of the Inspector of Mental Health Services* (Dublin: 2013) <<http://www.mhcirl.ie/File/MHC-2012-Annual-Report.pdf>> (date accessed: 8 May 2014).
- <sup>277</sup> Age Action Ireland, Disability Federation Ireland, Make Room Campaign Alliance, Mental Health Reform Women's Human Rights Alliance, Submission to the OHCHR, on the Occasion of Ireland's examination under the 12th session of the UPR: Report on the right to health and housing, p 2 <<http://lib.ohchr.org/HRBodies/UPR/Documents/session12/IE/JS3-JointSubmission3-eng.pdf>> (date accessed: 5 March 2014).
- <sup>278</sup> Supra note 276 at 51-59.
- <sup>279</sup> During Ireland's examination under the UPR, the State was criticised for its failure to implement a women's health strategy. Supra note 277 at 2.1.
- <sup>280</sup> *All Ireland Traveller Health Study : Our Geels, Summary of Findings*, (Department of Health and Children, 2010). <[http://www.dohc.ie/publications/aiths2010/ExecutiveSummary/AITHS2010\\_SUMMARY\\_LR\\_All.pdf?direct=1](http://www.dohc.ie/publications/aiths2010/ExecutiveSummary/AITHS2010_SUMMARY_LR_All.pdf?direct=1)> (date accessed: 18 February 2014).
- <sup>281</sup> See the Oireachtas website: <<http://www.oireachtas.ie/documents/bills28/bills/2014/3414/b3414d.pdf>> (date accessed: 28 April 2014).
- <sup>282</sup> For example the Treatment Abroad Scheme. See the HSE website: <<http://www.hse.ie/eng/services/list/1/schemes/treatmentabroad/>> (date accessed: 19 February 2014).
- <sup>283</sup> Central Statistics Office, *Survey on Income and Living Conditions: Housing Module 2007* (Dublin: 2009), p 16 <<http://www.cso.ie/en/media/csoie/releasespublications/documents/silc/2007/silchousing2007.pdf>> (date accessed: 19 February 2014).
- <sup>284</sup> "Pillinger J. Dr., *The future of healthcare in Ireland: Position paper on the health crisis and the government's plans for healthcare*" prepared for IMPACT (2012) <<http://www.impact.ie/files/healthpdf/reform/FutureofHealthcare.pdf>> (21 February 2014).
- <sup>285</sup> For example, with regard to mental health see *Mental Health Reform, Mental Health in Primary Care in Ireland: A briefing paper* (Dublin: 2013) <<http://www.mentalhealthreform.ie/wp-content/uploads/2013/07/Mental-Health-in-Primary-Care-in-Ireland1.pdf>> (date accessed: 21 February 2014).
- <sup>286</sup> They must pay for primary care at the point of use and are liable for statutory in-patient and outpatient charge for public care in public hospitals.
- <sup>287</sup> See Amnesty International Ireland, *Healthcare Guarantee? The Right to Health in Ireland* (2011).
- <sup>288</sup> Supra note 2 at 22.  
While human rights law does not require a particular healthcare system, access to healthcare must be timely and equal for all without discrimination. In effect, the two-tier system means that those who can afford it are fast-tracked through the system. Public and private patients are often treated in the same public hospitals. Private patients or those who can afford to pay for private care, including for example diagnostic tests, can skip the queue, leaving public patients waiting longer to access healthcare services. While the implementation of a number of strategies to combat these problems, such as the National Treatment Purchas Fund in 2002 has been successful in reducing waiting lists for certain procedures, overall impact has been limited. See the NTPF website at: <<http://www.ntpf.ie/home/PDF/Hospital%20Trend%20Analysis%20of%20Waiting%20Times.pdf>> (date accessed: 24 February 2014). The Special Delivery Unit (SDU) was established in 2011 tasked with implementing performance improvement in Irish hospitals involving emergency departments, in-patient and day case waiting lists and out-patient waiting lists. The full impact of the SDU remains to be seen. See the HSE

- website at:  
<http://www.hse.ie/eng/services/news/newsarchive/2013archive/jun13/IanCarter.html> (date accessed: 24 February 2014).
- <sup>289</sup> Supra note 277 at 2.3.
- <sup>290</sup> Supra note 280 at 76.
- <sup>291</sup> Supra note 62.
- <sup>292</sup> See for example Age Action, *Struggling To Make Ends Meet-The Cumulative Effect of Austerity On Older People, Pre-Budget Submission 2014* (May 2014), p 14  
[http://www.ageaction.ie/sites/default/files/pdf/Prebudget%20submission%202014\\_Final.pdf](http://www.ageaction.ie/sites/default/files/pdf/Prebudget%20submission%202014_Final.pdf) (date accessed: 14 March 2014) See also the Children's Rights Alliance, *Report Card 2014: Is Government keeping its promises to children?* (2014)  
[http://www.childrensrightrights.ie/sites/default/files/submissions\\_reports/files/REPORTCARD2014\\_0.pdf](http://www.childrensrightrights.ie/sites/default/files/submissions_reports/files/REPORTCARD2014_0.pdf) (date accessed: 14 March 2014).  
 See also Concluding observations of the Committee on Economic, Social and Cultural Rights: Ireland, 2002, UN Doc. E/C.12/1/Add.77 which raised concern and made recommendations to Ireland around the provision of facilities, goods and services for certain groups. These observations date to 2002, but remain on the record until Ireland's 3rd periodic report is examined by the Committee in 2015.
- <sup>293</sup> The Joint Committee on Health and Children in the context of the right to health.
- <sup>294</sup> Supra note 41 at 3.
- <sup>295</sup> The HSE is accountable to the Minister for Health. However, as previously highlighted by Amnesty International, there is a gap in accountability as the level of detail in performance reports is not sufficient to ensure accountability for outcomes. Supra note 287 at 10.
- <sup>296</sup> Supra note 287.
- <sup>297</sup> The Health Act 2007 provides for the establishment of the Health Information and Quality Authority (HIQA) and for the registration and inspection of all nursing homes by the Chief Inspector of Social Services, as part of HIQA  
[http://www.dohc.ie/issues/nursing\\_home\\_inspection/](http://www.dohc.ie/issues/nursing_home_inspection/) (date accessed: 6 March 2014).
- <sup>298</sup> This includes but is not limited to acute hospitals, community hospitals, nursing homes/hospitals, district hospitals, health centres, dental clinics, childcare residential services, primary care services, home care.
- <sup>299</sup> See the HIQA website at: <http://www.hiqa.ie/contact-us/make-complaint> (date accessed: 7 March 2014).
- <sup>300</sup> For further information see the HIQA website at: <http://www.hiqa.ie/about-us/what-we-do-and-why> (date accessed: 7 March 2014).
- <sup>301</sup> As set out in Part 9 Health Act 2004.
- <sup>302</sup> *Your Service your Say* provides a complaints service for issues concerning care, treatment and practice  
[http://www.hse.ie/eng/services/Publications/Your\\_Service,\\_Your\\_Say\\_Consumer\\_Affairs/Policies/FeedbackPolicy.pdf](http://www.hse.ie/eng/services/Publications/Your_Service,_Your_Say_Consumer_Affairs/Policies/FeedbackPolicy.pdf) (date accessed: 7 March 2014). The HSE also has an appeals service to provide an "independent review of decisions taken by personnel of the HSE relating to applications by members of the public for specified services and entitlements, where applicants are dissatisfied with the outcome of their application". This appeals process includes decisions on the eligibility for Medical Cards and GP visit cards  
[http://www.hse.ie/eng/services/yourhealthservice/Appeals/Appeals\\_Process/](http://www.hse.ie/eng/services/yourhealthservice/Appeals/Appeals_Process/) (date accessed: 7 March 2014).
- <sup>303</sup> Irish Human Rights Commission, *Enquiry Report on the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for Persons with a Sever to Profound Intellectual Disability* (2010), p. 349 .
- <sup>304</sup> Supra note 287 at 21.
- <sup>305</sup> Supra note 303.
- <sup>306</sup> Ibid at 384.
- <sup>307</sup> See for example Office of the Ombudsman, *Annual Report 2012*  
[https://www.ombudsman.gov.ie/en/Publications/Annual-Reports/2012-Annual-Report/AnnualReport2012/media/ombudsman\\_annual\\_report\\_2012.pdf](https://www.ombudsman.gov.ie/en/Publications/Annual-Reports/2012-Annual-Report/AnnualReport2012/media/ombudsman_annual_report_2012.pdf) (date accessed: 7 April 2014).
- <sup>308</sup> Ibid at 46.
- <sup>309</sup> Tyndall, P., "low level of health service complaints to Ombudsman a matter of concern", *The Irish Times* (8 April 2014) <http://www.irishtimes.com/life-and-style/health-family/low-volume-of-health-service-complaints-to-ombudsman-a-matter-of-concern-1.1753065?page=1> (date accessed: 8 April 2014).
- <sup>310</sup> Judicial review is largely limited to looking at the lawfulness of the decision-making process and does not look at the merits of a decision. In the *Gallagher* and *Donegan* housing cases, discussed in Chapter 1, judicial review was held to be an inadequate remedy as the facts which were disputed could not be considered by the court.
- <sup>311</sup> Ireland has the obligation to progressively realise this right over time, as outlined further in Chapter 1. Ireland also has the obligation to take certain steps immediately, regardless of their state of development. These immediate obligations include, ensuring that the right to adequate housing is exercised on the basis of non-discrimination; giving due priority to those social groups living in unfavourable conditions by giving them particular consideration; adopting a national housing strategy; ensuring effective monitoring of the situation with respect to housing; ensure co-ordination between ministries and regional and local authorities in order to reconcile related policies (economics, environment, energy etc), with the obligations under Article 11; refraining from forced evictions and ensuring that the law is enforced against its agents or third parties who carry out forced evictions. The State should also guarantee at least the minimum essential levels of the right to adequate housing. For example, it should ensure that a significant amount of people are not deprived of basic shelter and housing. As with the right to health, the State should not take any retrogressive measures in the progressive realisation of the right to adequate. UN Committee on Economic, Social and Cultural Rights, General Comment No 4: the right

- to adequate housing (Art. 11 (1)), 13/12/1991, Sixth session, (1991), paras 10-13 and UN Committee on Economic, Social and Cultural Rights, General Comment No. 7: the right to adequate housing (Art. 11(1)): forced evictions, 20/05/1997, Sixteenth session, (1997), para 8.
- 312 UN Committee on Economic, Social and Cultural Rights, General Comment No. 4: the right to adequate housing (Art. 11 (1)), 13/12/1991, Sixth session, (1991), para 7.
- 313 Ibid.
- 314 The Housing (Amendment) Act 2013 amended section 31 of The Housing (Miscellaneous Provisions) Act 2009.
- 315 See Department of the Environment, Community and Local Government website at: <<http://www.environ.ie/en/Legislation/DevelopmentandHousing/Housing/FileDownload,21569,en.pdf> > (date accessed: 14 March 2014).
- 316 The main legislation dealing with homelessness in Ireland are the Health Act 1953, the Housing Act 1988 and the Child Care Act 1991.
- 317 Focus Ireland, *Information Leaflet: What is Irish Housing Policy and Homeless Law* (2005) <<https://www.focusireland.ie/files/publications/Info%20leaflet%20-%20What%20is%20Irish%20Housing%20Policy%20and%20Homeless%20Law.pdf>> (date accessed: 14 March 2014).
- 318 Focus Ireland, SVP, Threshold, Simon, *Preventing Homelessness- the need for legislative Change*, Joint submission, (2012) < <http://www.svp.ie/CMSPages/GetFile.aspx?guid=f5bfa984-311a-4017-801a-a39b2fd5a10c> > (date accessed: 14 March 2014).
- 319 Supra note 317.
- 320 As amended by the Housing (Miscellaneous Provisions) Act 2009.
- 321 *Canty v PRTB*, [2007] IEHC 243.
- 322 See the Department of the Environment, Community and Local Government, Housing Policy Statement (2011).
- 323 See the Department of the Environment, Community and Local Government, National Housing Strategy for People with a Disability 2011-2016 (2011).
- 324 Ibid.
- 325 The Programme must include a Statement of Policy in relation to meeting the accommodation needs identified in the Programme and the goals and timeframes within which these needs are to be met. It must also specify a strategy on how the programme will be met.
- 326 Pavee Point Traveller's Centre, Irish Travellers and Roma, Shadow Report, A response to Ireland's Third and Fourth Report on the International Convention on the Elimination of All Forms of Racial Discrimination, p 30 <[http://www2.ohchr.org/english/bodies/cerd/docs/ngos/PPTC\\_Ireland78.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/PPTC_Ireland78.pdf) > (date accessed: 13 March 2014).
- 327 Homelessness Oversight Group, First Report, (2013), p 8 <<http://www.environ.ie/en/Publications/DevelopmentandHousing/Housing/FileDownload,34865,en.pdf> > (date accessed: 13 March).
- 328 Prevent homelessness; eliminate the need to sleep rough; eliminate long term homelessness; meet long term housing needs; ensure effective services for homeless people; better co-ordinate funding arrangements.
- 329 For a copy of the Programme for Government 2011-2016 see the Department of the Taoiseach website at: <[http://www.taoiseach.gov.ie/eng/Work\\_Of\\_The\\_Department/Programme\\_for\\_Government/](http://www.taoiseach.gov.ie/eng/Work_Of_The_Department/Programme_for_Government/) > (date accessed: 13 March). For reference to the Government's commitment to end long-term homelessness see p 45 of the Programme for Government.
- 330 Ireland's Third periodic report to the UN Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/IRL/3, 2013, para 483. The Constitutional Review Group regarded these as being essentially political matters which should be the responsibility of the elected members to address and determine in a democracy. See Chapter 2 on myth and misconceptions for a further discussion of this.
- 331 Supra note 277.
- 332 *Donegan v Dublin City Council & anor; Dublin City Council v Gallagher*, [2012] IESC 18.
- 333 Section 10 Housing (Miscellaneous Provisions) Act 1992.
- 334 Section 24 of the Housing (Miscellaneous Provisions) Act 2002.
- 335 Section 69 Roads Act 1992; section 30 Local Government (Sanitary Services) Act 1948.
- 336 Supra note 277.
- 337 Social Justice Ireland, Socio Economic Review 2014, *Steps Towards a Fairer Future: Securing Economic Development, Social Equity and Sustainability* (2014), pp 288- 290 <<http://www.socialjustice.ie/sites/default/files/file/SER/2014-04-22%20-%20Socio%20Economic%20Review%202014%20-%20Full%20text%20and%20cover%20-%20FINAL.pdf>> (date accessed: 30 April 2014). Some of these issues were also raised in the joint NGO report during Ireland's UPR examination.
- 338 Supra note 2 at 32.
- 339 Dublin Simon Community Pre-Budget Submission 2014, (September 2014) <<http://www.oireachtas.ie/parliament/media/committees/finance/607.-Simon-Communities-in-Ireland---Pre-Budget-Submission-2014---Sept-2013.pdf> > (date accessed: 3 March 2014). See also supra note 277 at 3.1.
- 340 O'Connor, M., Pillinger, J., Mc Govern, P. ed., *A safe space – Dún Laoghaire Rathdown refuge – A feasibility study* (2011), para 9, <<http://www.southsidepartnership.ie/reports/A-Safe-Space%20REPORT.pdf>> (date accessed: 4 March 2014).

- <sup>341</sup> Sonas, Annual Report 2012, p 5 <<http://www.sonashousing.ie/wp-content/uploads/Sonas-Annual-Report-2012.pdf>> (date accessed: 4 March 2014)
- <sup>342</sup> Supra note 2 at 20.
- <sup>343</sup> Supra note 277 at 3.9.
- <sup>344</sup> Code of Conduct on Mortgage Arrears (CCMA) (2013), Personal Insolvency Act (2012).
- <sup>345</sup> FLAC, *Moving out of Mortgage Arrears and Personal Debt Part 1: A guide to the Code of Conduct on Mortgage Arrears* (2013), p 23.
- <sup>346</sup> Age Action Ireland, Submission to the Seanad Public Consultation Committee 2012, *Rights of Older People* (2012), p 2. <<http://lunchwithanoldbag.ie/wp-content/themes/Forsy/pdf/Campaigning%20&%20Policy/SubmissiontotheSeanadonthediscussionoftheRightsofOlderPeople2012.pdf>>, (date accessed: 7 March 2014). See also supra note 288 at 3.7.
- <sup>347</sup> The IHRC in its *Submission to the UN Human Rights Committee on Ireland's Fourth Periodic Report under the ICCPR – List of Issues Stage*, August 2013, said it "has repeatedly expressed its concerns about the length of time people remain in Direct Provision, and the impact on the physical and mental health of people in the system". In an article on the issue in (Summer 2013), 102: 406 *Studies Irish Review*, the then Ombudsman said of the direct provision system: "The system as it currently operates has a negative impact on mental health and the ability to lead a "normal" life. It is an unfair system which does not adequately address the needs of the vulnerable group of people for whom it is meant to provide. The "provision" is superficial and meets only the very basic requirements of a person ...." <<http://www.studiesirishreview.ie/lead-articles/67-asylum-seekers-in-our-republic-why-have-we-gone-wrong> > (date accessed: 13 May 2014). The Ombudsman for Children has also been critical of direct provision's impact on children.
- <sup>348</sup> Doras Luimini, Irish Refugee Council and NASC submission on Ireland's examination under the UPR, (March 2011), p 8 <<http://www.irishrefugeecouncil.ie/wp-content/uploads/2013/08/Irish-Refugee-Council-Pre-budget-submission-2013.pdf> > (date accessed: 7 March 2014).
- <sup>349</sup> Irish Refugee Council, *State Sanctioned Child Poverty and Exclusion – The case of children in state accommodation for asylum seekers* (2012) <<http://www.irishrefugeecouncil.ie/wp-content/uploads/2012/09/State-sanctioned-child-poverty-and-exclusion.pdf> > (date accessed: 11 March 2014).
- <sup>350</sup> Supra note 277 at 3.8.
- <sup>351</sup> Holland, K., "Traveller protest at 'total failure' of accommodation strategy" *Irish Times* (26 November 2013) <<http://www.irishtimes.com/news/social-affairs/traveller-protest-at-total-failure-of-accommodation-strategy-1.1607131>> (date accessed: 9 May 2014).
- <sup>352</sup> Supra note 277.
- <sup>353</sup> Supra note 312 at 17.
- <sup>354</sup> Ibid at 17.
- <sup>355</sup> Supra note 332.
- <sup>356</sup> For example the Housing Adaptation Grant for People with Disabilities, Housing Aid for Older People and Mobility Aid Grants.
- <sup>357</sup> See for example SIRR, L. Dr, lecturer in housing, School of Surveying and Construction Economics, Dublin Institute of Technology, "Opinion: Private rented sector in urgent need of attention" *Irish Times* (23 January, 2014) <<http://www.irishtimes.com/life-and-style/homes-and-property/opinion-private-rented-sector-in-urgent-need-of-attention-1.1664242> > (date accessed: 4 February 2014)
- <sup>358</sup> Supra note 128.
- <sup>359</sup> Supra note 134.
- <sup>360</sup> Supra note 41 at 2.
- <sup>361</sup> The functions of the new Irish Human Rights and Equality Commission are laid out in the Irish Human Rights and Equality Commission Bill 2014 <<http://www.oireachtas.ie/documents/bills28/bills/2014/2014/b2014d.pdf> > (date accessed: 30 April 2014).
- <sup>362</sup> Irish Human Rights Commission, Enquiry 2005-2007, *The Self-Employed And the Old Age Contributory Pension: Report of an Enquiry into the Impact of Certain Provisions of Social Welfare Legislation on the Self-Employed* (Dublin: 2007) <<http://www.ihrc.ie/download/pdf/pensionenquiry.pdf>> (date accessed: 30 April 2014).
- <sup>363</sup> Irish Human Rights Commission, *Enquiry 2008-2010, Enquiry Report on the Human Rights Issues Arising from the Operation of a Residential and Day Care Centre for Persons with a Severe to Profound Intellectual Disability* <<http://www.ihrc.ie/download/pdf/reporte3.pdf>> (date accessed: 30 April 2014).
- <sup>364</sup> Irish Human Rights Commission, Annual Report 2012, (Dublin: 2013),
- <sup>365</sup> Ibid at 33-35 and 39.
- <sup>366</sup> According to its Annual report, in 2012 the IHRC received 212 communications relating to civil and political rights and 203 relating to ESC rights.
- <sup>367</sup> Supra note 364 at 32.
- <sup>368</sup> For further information see the IHRC website at: <<http://www.ihrc.ie/legislationandpolicy/> > (date accessed: 30 April 2014).



- <sup>369</sup> Department of Justice and Equality, "Press Release: Shatter publishes the Irish Human Rights and Equality Commission Bill 2014", (21 March 2014) <<http://www.justice.ie/en/JELR/Pages/PR14000083>> (date accessed: 21 March 2014).
- <sup>370</sup> In its observations on the 2014 Bill, the IHREC (designate) points out that entitling Part 3 of the Bill "enforcement" may be a generally appropriate description of the sections, but it does not necessarily apply to certain functions conferred in this Part; and therefore limiting the definition of human rights to which all Part 3 functions apply, on the basis of their being "enforcement" functions, is potentially a limitation on the IHRC's current functions. The IHREC (designate) recommends that sections 30 (Provision of information to public, review of operation of certain enactments, etc.) and 42 (Public bodies' duties) be moved out of Part 3 into Part 2, since they carry no enforcement function and should have the wider definition apply. However, the IHREC (designate) recommends that the preferred solution would be to have one unified comprehensive definition of human rights applying to all sections in the Bill except section 41 (akin to section 11 of the Irish Human Rights Commission Act 2000, regarding the IHRC's litigation functions) and sections 36 to 39 (compliance notices). All has urged that this recommendation be adopted.
- <sup>371</sup> The Paris Principles were adopted by the General Assembly resolution 48/134 of 20 December 1993. They are the set of principles relating to National Human Rights Institutions, including: competence and responsibilities; composition and guarantees of independence and pluralism; and methods of operation <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>> (date accessed: 12 May 2014).
- <sup>372</sup> Ombudsman (Amendment) Act 2012.
- <sup>373</sup> For example, the Housing Adaptation Grant for People with Disabilities, Housing Aid for Older People and Mobility Aid Grants.
- <sup>374</sup> Change to policy regarding awarding of long-term illness cards, to ensure that this does not discriminate on the basis of where the applicant lives. See Office of the Ombudsman "HSE changes policy following Ombudsman Investigation" <<https://www.ombudsman.gov.ie/en/News/Media-Releases/2014-Media-Releases/HSE-changes-policy-following-Ombudsman-investigation.html>> (date published: 9 May 2014).  
In a further recent example, (unpublished non-investigation case) the complainant, who is a medical card holder, having had elective surgery in Merlin Park University Hospital, Galway was forced to obtain convalescent care in a private Nursing Home at her own expense because the policy of the West/North West Hospital group was that only patients who had been admitted through the A&E Department were entitled to have convalescence care provided. In examining the complaint the Office of the Ombudsman sought to establish whether there was a national policy in relation to the provision of convalescent care and whether elective patients could be excluded in this manner. The HSE confirmed that all medical card patients who have a need for convalescent care will have it provided. It said it would issue policy instructions to ensure consistency. (this investigation was not yet published at the time of writing this report. The relevant information was provided by the Office of the Ombudsman).  
For other examples of changes to policy and law in certain instances, which have resulted from investigations by the Ombudsman, see Office of the Ombudsman Annual Reports 2010 (change in policy regarding waste waiver scheme), 2008 (change in policy regarding recycling), 2003 (regarding the Disabled Persons' Grant Scheme and a change in the law in the Finance Act 2002 relating to tax clearance certificates for the carrying out of building works)
- <sup>375</sup> Address by Ms Emily O'Reilly, (Ombudsman and Information Commissioner) at the Biennial Conference of the British and Irish Ombudsman Association, Scarman House, University of Warwick, England, *Human Rights and the Ombudsman* (27 April 2007) <<http://www.ombudsmanassociation.org/docs/HumanRightsOmbudsmanEmilyOReilly.pdf>> (date accessed: 21 March 2014).
- <sup>376</sup> Address by Ms Emily O'Reilly (Ombudsman and Information Commissioner) at Comhairle National Conference, *The Challenges - who is excluded* <<http://archive.ombudsman.gov.ie/en/SpeechesArticlesandPresentations/Ombudsmansspeeches/Name,2168,en.htm>> (date accessed: 21 March 2014).
- <sup>377</sup> Ibid.
- <sup>378</sup> Supra note 375.
- <sup>379</sup> Ibid.
- <sup>380</sup> Supra note 376.  
However, weaknesses of this Ombudsman model in Ireland have also been highlighted such as the fact that the Houses of the Oireachtas are the final arbiter where a public body rejects an Ombudsman recommendation". However, concern has also been expressed about relevant Committees making decisions on special reports of the Ombudsman, based not on rational and objective engagement on the particular case but on the party whip system and that in effect "the Government is allowed to be the judge in its own case".
- <sup>381</sup> For further information see the work place relations website at: <[http://www.workplacelrelations.ie/en/About\\_the\\_Reform\\_Programme/Reform\\_of\\_the\\_State\\_s\\_Workplace\\_Relations\\_Structures/](http://www.workplacelrelations.ie/en/About_the_Reform_Programme/Reform_of_the_State_s_Workplace_Relations_Structures/)> (date accessed: 24 March 2014).
- <sup>382</sup> Irish Human Rights Commission, *Extending the Scope of Employment Equality Legislation* (Dublin: 2005), p 2 <<http://www.ihr.c.ie/publications/list/submission-on-extending-the-scope-of-employment-eq/>> (date accessed: 24 March 2014).  
See also Law Department, University College Cork, *Extending the Scope of the Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination: Report commissioned by the Department of Justice, Equality and Law Reform* (2004) <<http://www.justice.ie/en/JELR/Discrimination.pdf/Files/Discrimination.pdf>> (date accessed: 24 March 2014).

- <sup>383</sup> Employment Equality Acts 1998-2011, outlaw discrimination at work including recruitment and promotion; equal pay; working conditions; training or experience; dismissal and harassment including sexual harassment. Equal Status Acts 2000-2011, outlaw discrimination outside the workplace, in particular in the provision of goods and services, selling renting or leasing property and certain aspects of education.
- <sup>384</sup> Equality Authority, *Review of Discriminatory Grounds covered by the Employment Equality Act 1998*, (2001).
- <sup>385</sup> On any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- <sup>386</sup> Supra note 165 at 21.
- <sup>387</sup> Such as the Joint Committee on Education and Social Protection, Report on the Draft General Scheme of an Education (Admission to Schools) Bill 2013, March 2014, which reflects submissions made by civil society and the Ombudsman for Children referring to international human rights obligations of the State <<http://www.oireachtas.ie/parliament/media/Report-on-Schools-Admissions-Bill.pdf>> (date accessed: 23 April 2014).
- <sup>388</sup> Supra note 71.
- <sup>389</sup> See Articles 1, 7, 12, 13 and 14.
- <sup>390</sup> Trilsch, M. A., "The Justiciability of Economic, Social and Cultural Rights in Domestic Law" *Beitraege zum auslaendischen oeffentlichen Recht und Voelkerrecht*, Band 234, 2012, 506, Max Planck-Gesellschaft zur Foerderung der Wissenschaften e.V. <<http://www.mpil.de/files/pdf1/beitr234.pdf>> (date accessed: 7 April 2014).
- <sup>391</sup> The first decision was in 1951, BVerfG 1, 97 (104), 1 BvR 220/51 of 19 Dec. 1951 (Ger.) and was followed by a number of other cases an outline of which is provided in, Bittner, C., "Casenote- Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010" *German Law Journal* (2011) Vol 12 No. 11, 1941.
- <sup>392</sup> BVerfG 1, 97 (105). For discussion see supra note 155 at 24.
- <sup>393</sup> BVerfG 82, 60 (85), BVerfG 99, 246 (259).
- <sup>394</sup> BVerfG 14, 99, 2 BvR 840/06 of 24 July 2008 (Ger).
- <sup>395</sup> Bittner, C., "Casenote- Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010" *German Law Journal* (2011) Vol 12 No. 11, 1941 at 1943.
- <sup>396</sup> Numerus Clausus I Case, Federal Constitutional Court of Germany, (1972), 33 BVerfG 303. See Texier, J. P., Reidel, E., "France, Germany and Hungary: National Experiences" in COHRE, *"Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies"* (Geneva, 2003), p 126 <<http://globalinitiative-escr.org/wp-content/uploads/2012/06/Litigating-ESCR-Report.pdf>> (date accessed: 7 March 2014).
- <sup>397</sup> Supra note 90.
- <sup>398</sup> Supra note 156.
- <sup>399</sup> Supra note 91 at 389.
- <sup>400</sup> For further analysis of the German Constitutional Court's approach see *ibid*. See also BVerfG, 1 BvL 10/10, 9.7.2012 (Asylum Seekers Benefits case), discussed in more detail in Chapter 7.
- <sup>401</sup> Supra note 90 at 210 and 216. The Court examined the calculation of the standard benefit in four steps:
- 1) Whether the legislature has considered and described the objective of ensuring an existence in human dignity doing justice to Art 1(1) in conjunction with Art 20(1);
  - 2) Whether it has, within the boundaries of its latitude, chosen a fundamentally suitable method of calculation for assessing the subsistence minimum;
  - 3) Whether in essence, it has completely and correctly ascertained the necessary facts; and
  - 4) Whether it has kept within the boundaries of what is justifiable within the chosen method and its structural principles in all stages of calculation with plausible figures (consistency requirement).
- <sup>402</sup> For further analysis see supra note 91.
- <sup>403</sup> The Regelbedarfs-Ermittlungsgesetz, 24 March 2011 (BGBl. I S. 453). For greater analysis see supra note 91 at 391.
- <sup>404</sup> BVerfG, 1. BvL 10/10, Judgment of 18 July 2012.
- <sup>405</sup> Supra note 91 at 391.
- <sup>406</sup> Supra note 156 at 112.
- <sup>407</sup> These benefits had been redefined following the *Hartz IV* decision in order to ensure the necessary amount needed for a dignified minimum existence.
- <sup>408</sup> The Court did not set a deadline for the enactment of new legislative provisions, but stated that this should be done "immediately". Basic benefits under the Asylum Seekers Benefits Act must be calculated based on the general provisions which are applicable to all persons who receive social benefits. The transitional agreement was held to apply retroactively from 1 January 2011 onwards, until the legislature had complied with its obligations. See the ESCR-Net website at: <<http://www.escr-net.org/node/364979>> (date accessed: 8 May 2014). See also supra note 91 at 391.
- <sup>409</sup> ESC rights are enshrined in Articles 58 – 79.
- <sup>410</sup> Presentation by Moreira, V., *Experience of ESC rights from another European country*, at Seminar co-hosted by Amnesty International Ireland the Irish Human Rights Commission in advance of the Constitutional Convention examination of economic, social and cultural rights, (Dublin: 19 February 2014).

- 411 Constitutional Court of Portugal (*Tribunal Constitucional Portugal*), Decision (*Acórdão*) No. 39/84, 11 April 1984.
- 412 Ibid.
- 413 Constitutional Court of Portugal (*Tribunal Constitucional*), Decision (*Acórdão*) No. 509/2002, 19 December 2002.
- 414 For a discussion of the above and other cases see Courtis, C., "Standards to Make ESC Rights Justiciable: A Summary Exploration" (2009) 02: 04 *Erasmus Law Review*, 379 <[http://www.erasmuslawreview.nl/files/ELR\\_2009-4\\_02\\_Courtis.pdf](http://www.erasmuslawreview.nl/files/ELR_2009-4_02_Courtis.pdf) (date accessed: 12 May 2014). Courts in other jurisdictions have also made rulings on retrogressive measures adopted by the State in the context of ESC rights. For example, the **Belgian Court of Arbitration** has held that Article 23 of the Belgian Constitution enshrining ESC rights, forbids a significant retrogression in the protection given to ESC rights by legislation, at the moment the Constitution is adopted. (Belgian Court of Arbitration (Cour d'Arbitrage), Case No. 5/2004, 14 January 2004. The **Colombian Constitutional Court** provides an example of cases where retrogressive measures have been justified to the satisfaction of the courts. The Colombian Constitutional Court has held that retrogressive measures when it comes to ESC rights are presumed to be a breach of State duty and are therefore subjected to greater constitutional scrutiny. However in some case the Court held that the justification for retrogressive legislation, was sufficient to overcome the presumption of unconstitutionality. It held that the measures had been given careful consideration, the alternatives have been considered and the measures were proportionate with regard to the intended goal of reducing unemployment) Colombian Constitution Court, Decision C-038/2004, 27 January 2004).
- 415 *Supra* note 410.
- 416 Constitutional Court of Portugal (*Tribunal Constitucional Portugal*), Decision (*Acórdão*) No. 353, 2012. The case related to the suspension of certain subsidies for public sector workers and pensions which led to a substantial reduction in the value of pension s. Such reductions did not extend to private sector workers. The Government stated that the public sectors due to the benefits received and the stability of their employment were in a better position than private sector workers. The Court did not accept this position. It held that when citizens make important decisions, relying on the durability of acts adopted by the legislative and executive branches of government, this creates legitimate and justified expectations. The petitioners had relied on the principle of trust arguing that the budget affected "legitimate expectations" of public workers and pensioners that are protected by the principle of trust. They also argued that the measures failed the necessity test in the assessment of proportionality arguing that the same result could have been achieved through other means. Thirdly the relied on the principle of equality arguing that the measures created unjustified discrimination between public and private sector workers and pensioners. Lastly, they argued that the measures violated the principle of social security protected in Article 63 of the Constitution.
- 417 For further analysis of this case see Lucas Pires, M., "Private versus Public or State Versus Europe? A Portuguese Constitutional Tale" Mich. J. Int'l L. Emerging Scholarship Project (2013) <<http://www.mjilonline.org/wordpress/wp-content/uploads/2013/07/Pires.pdf> > (date accessed: 30 April 2014) See also BBC website at: <<http://www.bbc.com/news/world-europe-18732184> > (date accessed: 30 April 2014).
- 418 Constitutional Court of Portugal (*Tribunal Constitucional Portugal*), Decision (*Acórdão*) No. 187/2013. See the Financial Times website at: <<http://www.ft.com/cms/s/0/3a4aaed2-9e36-11e2-9ccc-00144feabdc0.html#ixzz2uRNQAoZd>> (date accessed: 30 April 2014).
- 419 It stated that there was insufficient detail about the legal criteria that would be used to make decisions on redundancies which could lead unjustified and potentially arbitrary redundancies, which violated the constitutional principle forbidding dismissals without just cause.
- 420 The court noted that in the private sector, employees could not be selected for redundancy on the basis that their dismissal would save more money. Instead employers had to demonstrate 'the occurrence of market, structural or technological reasons' for a dismissal.
- 421 Constitutional Court of Portugal (*Tribunal Constitucional Portugal*), Decision (*Acórdão*) No. 474/2013.
- 422 The principle of trust concerns the expectations created by a recurrent action of public powers in the life of citizens  
Novais, J.R., *Os Principios Constitucionais Estruturantes Da Republica Portuguesa* (2006), pp 261-265 .
- 423 Constitutional Court of Portugal (*Tribunal Constitucional Portugal*), Decision (*Acórdão*) No. 602/2013. See eurofond website at: <<http://www.eurofound.europa.eu/eiro/2013/10/articles/pt1310019i.htm> > (date accessed: 30 April 2014).
- 424 See for example Case No. 2009-43-01, judgment of the Constitutional Court of the Republic of Latvia which has ruled on the constitutionality of a law temporarily restricting payments of pension funds in an attempt to reduce the budget deficit <<http://www.escri-net.org/docs/i/1285934>> (date accessed: 28 April 2014).
- 425 Implementation of the International Covenant on Economic, Social and Cultural Rights, Fifth periodic report of Finland, UN. Doc. E/C.12/FIN/5, (2006), para 2.
- 426 See sections 1, 6 and 15-20.
- 427 The Equality provision in Section 6 states that no one shall, without an acceptable reasons, be treated differently from other persons on the grounds of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. It also includes guarantees of equality for children and equality between the sexes in relation to pay and terms of employment.
- 428 Scheinin, M., "Protection of the right to housing in Finland" in Leckie, S., *National perspectives on Housing Rights*, (Martinus Nijhoff Publishers, 2003), p 243.
- 429 See the Parliament of Finland website at: <<http://web.eduskunta.fi/Resource.phx/parliament/committees/constitutional.htm>> (date accessed 9 May 2014).



- <sup>430</sup> Robbers, G., *Encyclopaedia of World Constitutions* (Infobase Publishing, 2006), p 310.
- <sup>431</sup> Touri, K., "Rights, Democracy and Local Self-Governance: Social Rights in the Constitution of Finland," *Juridica International* XIII/2007, pp 70 at 72.
- <sup>432</sup> PeVL 31/1997.
- <sup>433</sup> Lind, A "The Right to Health from a Constitutional Perspective: The Example of Nordic Countries" in Rynning, E., Hartlev, M., *Nordic Health Law in a European Context: Welfare State Perspectives on Patients' Rights and Biomedicine* (Martinus Nijhoff Publishers, 2011), p 67 at 75. See also the statement of the parliamentary committee noting that the right to basic subsistence guaranteed in the Finnish Constitution (Art 19.1) is not lost even if an individual no longer falls under the reception system of asylum seekers <[http://www.eduskunta.fi/faktatmp/utatmp/akxtmp/pevl\\_26\\_2010\\_p.shtml](http://www.eduskunta.fi/faktatmp/utatmp/akxtmp/pevl_26_2010_p.shtml)> (date accessed: 14 May 2014).
- <sup>434</sup> PeVL 8/1999 vp and PeVL 39/1996 vp.
- <sup>435</sup> Opinion No. 17 of 1997.
- <sup>436</sup> Ojanen, T., "EU at the Finnish Constitutional Arena" *Bij De Buren, TvCR*, (July 2013), 242 at 247.
- <sup>437</sup> *Supra* note 428 at 245.
- <sup>438</sup> Common core document forming part of the reports of States parties: Finland, UN Doc, HRI/CORE/1/Add.59/Rev.2, (1998) para 32. For further information on the Chancellor of Justice see <<http://www.oikeuskansleri.fi/en/chancellor/chancellor-justice/>> (date accessed: 25 April 2014).
- <sup>439</sup> The same applies to the Chancellor of Justice.
- <sup>440</sup> See Annual Report of the Parliamentary Ombudsman of Finland (1996), pp 154-155. This outlines a decision by the Ombudsman taken in 1996 where the Ombudsman issued a reprimand against a director of a municipality which had refused municipal housing to a Roma family who had wanted to move due to security risks. Further examples are provided in the Annual Report of the Parliamentary Ombudsman 1998 pp. 54 and 93 such a decision by the Ombudsman to issue a reprimand to a judge who had made an eviction order as an injunction when the case was still pending an no full examination had taken place to establish whether the legal preconditions for an injunction existed.
- <sup>441</sup> Key findings have addressed issues such as the right of undocumented migrant children to basic education and international protection of unaccompanied minors. Press release from the Office of the Ombudsman regarding the right of undocumented migrant children to basic education <<http://www.oikeusasiatiedotus.fi/Resource.php/pubman/templates/2.htx?id=1022>> (date accessed: 14 May 2014). Decision of the Ombudsman on unaccompanied minors seeking international protection <[http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?\\${APPL}=ereopaa&\\${BASE}=ereopaa&\\${THWIDS}=0.54/1400056554\\_118101&\\${TRIPPIFE}=PDF.pdf](http://www.eduskunta.fi/triphome/bin/thw.cgi/trip/?${APPL}=ereopaa&${BASE}=ereopaa&${THWIDS}=0.54/1400056554_118101&${TRIPPIFE}=PDF.pdf)> (date accessed: 14 May 2014).
- <sup>442</sup> *Supra* note 428 at 250.
- <sup>443</sup> Keynote Address, Prof. Martin Scheinin, "*Economic, Social and Cultural Rights: Models of Enforcement*" IHRC conference, Dublin, 9-10 December 2005, p 5.
- <sup>444</sup> *Ibid.*
- <sup>445</sup> Cases in which the administrative and other courts have referred explicitly to the ICESCR include: the Supreme Court KKO:1998: 79 of 25 June 1998; the Supreme Administrative Court KHO:2003:58 of 5 September 2003; the County Administrative Court of Central Finland No 227 of 26 March 1997; the Labour Court TT:1995-43 of 3 July 1995.
- <sup>446</sup> KKO 1997:141 Yearbook of the Supreme Court.
- <sup>447</sup> Case S 98/225, Judgment of the Supreme Court of Finland, KKO 2001 (2001) No 93 Yearbook of the Supreme Court <<http://www.nordichumanrights.net/tema/tema3/caselaw> > (date accessed: 22 April 2014). See also Medical Aids case, Case 3118, judgment of the Supreme Administrative Court, 27 November 2000.
- <sup>448</sup> *Supra* note 428 at 249.
- <sup>449</sup> Both the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities protect a range of ESC rights.
- <sup>450</sup> General Scheme of the Judicial Council Bill 2010, Head 5: Functions of Judicial Council, 2 (1) (e) <<http://www.inis.gov.ie/en/JELR/General%20Scheme%20Judicial%20Bill.pdf/Files/General%20Scheme%20Judicial%20Bill.pdf> > (date accessed 8 May 2014).
- <sup>451</sup> General Scheme of the Judicial Council Bill, Head 5: Functions of Judicial Council, 2 (1) (d).
- <sup>452</sup> See for example the mandate of the Irish Human Rights Commission, including human rights education and training as discussed further in chapter 6. This also forms part of the mandate of the new Irish Human Rights and Equality Commission under the Irish Human Rights and Equality Commission Bill 2014. See s

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Amnesty International is a worldwide movement of people that campaign for the protection of the fundamental human rights guaranteed to each one of us in by the Universal Declaration of Human Rights. In Ireland, Amnesty International campaigns to strengthen the legal protection of economic, social and cultural rights.

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