

REALISING HUMAN RIGHTS IN TIMES OF RECESSION: WHAT COULD IRELAND HAVE DONE DIFFERENTLY?

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Šiame straipsnyje nagrinėjamas recesijos poveikis žmogaus teisėms Airijoje. Parodoma, kaip turi būti sustiprintas esamas ekonominių, socialinių ir kultūrinių teisių apsaugai skirtas teisinis reglamentavimas ir kad reikia atsižvelgti į biudžeto poveikio vertinimo sprendimus siekiant užtikrinti geresnę patirsiančiųjų recesijos poveikį teisių apsaugą.

This article addresses the impact of recession on human rights in Ireland. It illustrates how the current legal framework for the protection of economic, social and cultural rights needs to be strengthened and how a human rights impact assessment of budgetary decisions is necessary in order to ensure better protection of rights for those affected by recession in the future.

Introduction

Ireland was one of the countries which was worst affected by the recent global economic crisis. Ireland enjoyed an unprecedented phase of economic growth with the economy moving from being one of the poorest in Europe in the 1980s to one of the richest prior to the downturn¹ The financial success of the country resulted in Ireland being lauded as ‘the Celtic Tiger’. However, when the economic crisis gripped the country there was a sharp increase in unemployment² and an estimated 16% of Irish people living in poverty³. The Irish economy was devastated and indeed, a “downturn of this size is without precedent in Ireland’s recorded economic history and has few modern parallels at an international level”⁴. As a result of the economic crisis Ireland entered into an assistance programme, known as a ‘bailout’ deal, with the European Union, the European Central Bank and the International Monetary Fund (the ‘Troika’) which required the State to make a number of severe budgetary cuts in several key areas including a reduction in public spending. These have impacted significantly on numerous groups

¹ NÍ MHÁILLE BATTEL, R. Ireland’s ‘Celtic Tiger’ Economy, *Science Technology Human Values*. 2003, Vol. 28, p. 93–111, at 93.

² CENTRAL STATISTICS OFFICE, Seasonally Adjusted Standardised Unemployment Rates 2011 [interactive. Accessed on 22-11-2014]. Link: <<http://www.cso.ie/en/statistics/labourmarket/principalstatistics/seasonallyadjustedstandardisedunemploymentratesur/>>

³ See CENTRE FOR ECONOMIC AND SOCIAL RIGHTS, Ireland: Austerity Must Not Trump Human Rights In Constitutional Reforms, 2 February 2014 [interactive. Accessed on 22-11-2014]. Link: <<http://www.cesr.org/article.php?id=1299>>

⁴ Irish Government. National Recovery Plan (2011–2014), p. 14 [interactive. Accessed on 22-11-2014]. Link: <http://www.google.lt/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.budget.gov.ie%2FThe%2520National%2520Recovery%2520Plan%25202011-2014.pdf&ei=yMxxVOyqGaOlygOrtYLgBA&usg=AFQjCNHZDS7Fo2kQCqFMqyCz56zeTZaPoQ&sig2=y146_xL8WcdlJY7knJYTfw>

in Ireland, particularly vulnerable and disadvantaged groups, such as children, the elderly, disabled people etc⁵.

In Ireland, human rights are protected by the Constitution (*Bunreacht na hÉireann*) which was adopted in 1937, in addition to numerous pieces of legislation. Furthermore, Ireland's membership of regional bodies, such as the European Union and the Council of Europe, and of international organisations, such as the United Nations, has greatly influenced the development of the protection of human rights of Irish citizens. However, economic, social and cultural rights are sidelined in Ireland in favour of civil and political rights. Therefore, while the human rights environment in Ireland has been undermined significantly as a result of governmental cuts during the economic crisis, the fact that socio-economic rights are so poorly protected means that there are very few remedies available to citizens through the Courts.

This article analyses the impact of austerity measures on human rights in Ireland. In order to do this it sets out how human rights are protected in Ireland and locates the place of economic, social and cultural rights in the protective regime. It further summarises trends in the human rights regime in Ireland during the crisis. In addition, the article suggests how a human rights based approach to the budgetary cuts would ensure a higher level of protection of human rights during times of economic difficulty.

1. The Protection of Human Rights in Ireland

Civil and political rights are quite strongly protected in the Irish Constitution. Among the rights protected are the right to life, good name, property, liberty, expression, assembly, association, family, education, religion, and a fair trial. These rights have been “invoked with steadily increasing frequency”⁶ before Irish courts.

In addition to the explicit rights set out in the text of the Constitution, the Irish courts have also developed constitutional rights through an ‘unenumerated’ human rights doctrine. This doctrine arises from the wording of Article 40.3 of the Constitution which states that “[t]he 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”⁷ and “[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen”⁸. In the case of *Ryan v Attorney General*⁹ Kenny J stated “I think that the personal rights which may be involved to invalidate legislation are not confined to those specified in Article 40 but include all those rights which result from the Christian and democratic nature of the State”¹⁰. Thus, the Court decided that the wording of this provision allowed it to ‘discover’ new rights, not explicitly set out in the Constitution¹¹. The Courts have referred to a number of sources of these rights, including other provisions of the Constitution, rights protected under the common law and the concept of inherent

⁵ See HAMMARBERG, T. Human rights of vulnerable groups in times of austerity budgets. *Council of Europe's Commissioner for Human Rights Report 2011* [interactive. Accessed on 22-11-2014]. Link: <<https://wcd.coe.int/ViewDoc.jsp?id=1831077>>

⁶ HOGAN, G. W. and WHYTE G. F. J. M. Kelly: *The Irish Constitution*, 4th ed. Dublin: Tottel, 2003, p. 1245.

⁷ Article 40.3.1, Irish Constitution 1937 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/en/constitution/>>

⁸ Article 40.3.2, Irish Constitution 1937 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/en/constitution/>>.

⁹ *Ryan v Attorney General* [1965] IR 294.

¹⁰ *Ryan v Attorney General* [1965] IR 294, 312.

¹¹ See MULLALLY, S. Searching for Foundations in Irish Constitutional Law. *Irish Jurist*, 1998, Vol. 33, p. 333.

rights¹². Thus the courts¹³ have recognised that the Constitution protects, *inter alia*, the right to bodily integrity, to travel, to earn a livelihood, to legal aid, to individual privacy and marital privacy, to litigate and have access to the courts, to justice and fair procedures, to travel, to marry and procreate, to communicate and to freedom from torture and from inhuman or degrading treatment or punishment¹⁴.

1.1. Economic, Social and Cultural Rights protected by the Constitution

Given that the Irish Constitution was adopted in 1937, before the adoption of the Universal Declaration of Human Rights and the subsequent development and expansion of universal human rights thinking and instruments, it is unsurprising that the fundamental rights explicitly protected by the Constitution are, in the main, civil and political in nature. However, some rights pertain to economic, social and cultural issues.

First, the right to property straddles both civil and political rights and economic, social and cultural rights. This right finds protection in the Irish constitution in Article 40.3.2° and in Article 43. This right could be expanded via judicial interpretation to have an impact on economic, social and cultural rights. Second, Article 42 deals with education. It acknowledges the Family as the “primary and natural educator of the child” and “guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children”¹⁵. In addition, Article 42.4 provides that the State “shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation”. Furthermore, Article 42.5 deals with the rights of the child and states that in exceptional circumstances where parents fail in their duty towards their children that the State will step in in place of the parents. This has been interpreted to mean that the State will have an obligation to adequately provide for children in its care¹⁶. In addition, the right to form a union is provided for in Article 40.6.1°, although this does not necessarily guarantee a right to join a particular union.

In relation to cultural rights, the only provision that falls within this realm in the Irish constitution is Article 8 which categorises Irish as the first official language. The courts have interpreted this right to mean that there is a right to use one’s native language in the courts. This has subsequently been complemented by rights contained in the *Official Languages Act 2003*¹⁷.

The Irish Constitution also contains a provision entitled, “Directive Principles of Social Policy” in Article 45. This provision states that the State shall “strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity

¹² See CASEY, J. *Constitutional Law in Ireland*. Dublin: Round Hall Sweet & Maxwell, 2000, p. 395.

¹³ Only the High Court and Supreme Court may ‘discover’ unenumerated rights. See *I.O’T v B* [1998] 2 IR 321.

¹⁴ See DEWHURST, E.; HIGGINS, N. AND WATKINS, L. *Principles of Irish Human Rights Law*. Dublin: Clarus, 2012, p. 6.

¹⁵ Article 42.2 recognises the freedom of parents to provide this education in their homes or in State schools (Article 42.2). Article 42.3, while preventing the State from obliging parents to send their children to State schools or particular types of school designated by the State “in violation of their conscience and lawful preference”, nonetheless provides that the State, as guardian of the common good shall “require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social”.

¹⁶ See, for example, *G v An Bord Uchtála* [1980] IR 32; *FN v Minister for Education* [1995] 1 IR 409; *TD v Minister for Education* [2001] 4 IR 259. A proposed amendment to the Constitution was accepted in 2012 which expands the rights of the child. However, this amendment has yet to be incorporated as it is being challenged in the Irish courts – see case of *Jordan v Minister for Children and Youth Affairs* [2014] IEHC 327.

¹⁷ For a discussion of the caselaw regarding the Irish language, see the website of the Irish Language Commissioner, www.commissioner.ie.

shall inform all the institutions of the national life”. It also sets out ideals in relation to the social and economic situation in the State. Article 45(2)(i) states that the State shall direct its policy towards securing:

That the citizens (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.

In the same vein Article 45(4) states that the State pledges to “safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged”. In addition, it states that the State “shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength”.

Despite the impressive words contained in Article 45, they have had no real impact on the human rights situation of Irish people during the recession. This is because, according to its text, this provision was drafted for the general guidance of the Parliament. It states:

The application of those principles in the making of laws shall be in the care of the Oireachtas [Irish Parliament] exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.

Therefore the principles were inserted into the Constitution to give guidance to the Parliament when enacting laws and they are not cognisable which essentially means they are not justiciable. Indeed, the Courts have been incredibly cautious in their approach to Article 45.

1.2. Unenumerated Economic, Social and Cultural Rights

The Irish courts have not been very willing to recognise economic, social and cultural rights which are not explicitly set out in the constitution, despite the doctrine of unenumerated rights. However, they have recognised the right to work or earn a livelihood¹⁸. In *Murtagh Properties v Cleary*¹⁹ it was held that this right was one of the personal rights as set out in Article 40.3. In this case Kenny J referred to the Directive Principles of Social Policy in Article 45 which includes mention of the right to an adequate means of livelihood. However, this right was limited in subsequent cases²⁰. The Irish courts have also dealt with the right to strike to a certain extent, although this is not without controversy.

Under the unenumerated rights doctrine, the Courts have recognised a number of civil and political rights which have socio-economic elements²¹. In this context, the Irish courts have recognised a right to legal aid in both criminal²² and civil matters²³. They have also recognised the requirement that the State protect the health of persons being held in custody and the right of a prisoner not to have their health endangered²⁴ under the rubric of the right to bodily integrity.

¹⁸ *Tierney v Amalgamated Society of Woodworkers* [1959] IR 254.

¹⁹ *Murtagh Properties v Cleary* [1972] IR 330.

²⁰ See *Greally v Minister for Education (No 2)* [1999] 1 IR 1 and *Attorney-General v Paperlink* [1984] ILRM 373.

²¹ See FENNELLY, D., Economic, Social & Cultural Rights in Irish Constitutional Law. Submission in relation to the Constitutional Convention, 22nd February 2014, p. 6.

²² *The State (Healy) v Donoghue* [1976] IR 325.

²³ *O'Donoghue v Legal Aid Board* [2006] 4 IR 204.

²⁴ *The State (C) v Frawley* [1976] 365; *The State (Richardson) v The Governor of Mountjoy Prison* [1980] ILRM 82.

However, the reluctance of Irish courts to recognise socio-economic rights under the unenumerated rights doctrine is clear from a number of cases, including *O'Reilly v Limerick Corporation*²⁵. In this case, members of a national minority (the Travelling community) were living in caravans in situations of extreme poverty. They sought injunctions directing the local corporation to provide them with serviced caravan sites and claimed damages for past suffering for violation of their constitutional rights. They claimed they had an unenumerated right to be provided with a certain minimum standard of basic material conditions to foster or protect his dignity and freedom as a human person. However, this right was not recognised by the High Court with Costello J stating that the claimants should pursue their rights through Parliament rather than the courts.

In the case of *TD v Minister for Education*²⁶ the Chief Justice of the Supreme Court, in addition to other members of the Court, expressed “gravest doubts as to whether the courts at any stage should assume the function of declaring what are today described as ‘socio-economic rights’ to be unenumerated rights guaranteed by Article 40”²⁷. In a similar vein Henchy J stated that “the courts should not assume the policy making role in relation to the multitude of social and economic issues which form the staple of public debate”²⁸. He was of the opinion that this would be against the separation of powers doctrine.

It is clear, therefore, that Irish courts have tended to view the protection of economic, social and cultural rights as a responsibility of the Parliament²⁹. The Parliament has in fact adopted some legislation pertaining to economic, social and cultural rights, including, for example, the Child Care Acts 2001–2011, the Health Acts 1947–2007 and the Housing Acts 1966–2009, although their reference to the ‘Directive Principles of Social Policy’ in the Constitution in the drafting of these pieces of legislation has been minimal.

1.3. Incorporating Human Rights into the Irish Constitution?

The time is now ripe in Ireland to afford constitutional protection to economic, social and cultural rights. A Constitutional Convention, made up of 100 people, including politicians and randomly selected individuals and guided by an expert advisory group, was formed in the country in 2012 to discuss proposed amendments to the Constitution. It completed its work in March 2014. During this time it was tasked with considering a number of specific issues, including, same-sex marriage and blasphemy, and was also permitted to make recommendations on other issues. The Convention took this opportunity to make recommendations in relation to economic, social and cultural rights³⁰ and set out the case for incorporation of such rights in the constitution while also highlighting the challenges to this approach. The recommendation from the Convention was that the Constitution should be amended to better protect economic, social and cultural rights. Protecting such rights in the Constitution would be the strongest protective mechanism as it would ensure accountability for human rights violations and provide effective remedies for violations.

²⁵ *O'Reilly v Limerick Corporation* [1989] ILRM 181.

²⁶ *TD v Minister for Education* [2001] 4 IR 259.

²⁷ *TD v Minister for Education* [2001] 4 IR 259, at 282.

²⁸ *TD v Minister for Education* [2001] 4 IR 259, at 361.

²⁹ See, however, *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105.

³⁰ Eighth Report of the Convention on the Constitution Economic, Social and Cultural (ESC) Rights, March, 2014 [interactive. Accessed on 22-11-2014]. Link: <[https://www.google.lt/?gws_rd=cr,ssl&ei=T81xVKC_FdDlaluNgKAG#q=Eighth+Report+of+the+Convention+on+the+Constitution+Economic%2C+Social+and+Cultural+\(ESC\)+Rights](https://www.google.lt/?gws_rd=cr,ssl&ei=T81xVKC_FdDlaluNgKAG#q=Eighth+Report+of+the+Convention+on+the+Constitution+Economic%2C+Social+and+Cultural+(ESC)+Rights)>.

1.4. The impact of membership of the European Union (EU) on the protection of economic, social and cultural rights in Ireland

Membership of the European Union has the potential to reinforce the importance of economic, social and cultural rights in the Irish legal framework. According to Article 29.4 of the Constitution the treaties of the Union are part of Irish law, and indeed, in case of conflict, take precedence over Irish law, including conflicting provisions of the Irish Constitution or legislation. The Charter of Fundamental Rights of the European Union, which is of equal legal value to the treaties³¹, came into force on 1st December 2009. This instrument protects an incredibly broad range of human rights of European citizens and all persons resident in the EU. Rights, insofar as they mirror certain protections of the ECHR, are to be interpreted in line with the decisions the European Court of Human Rights. However, this does not prevent the Court of Justice of the European Union from ensuring more extensive protection³². The Charter places a great deal of importance on economic, social and cultural rights, which are, in the main, absent from the protective regime of the European Convention on Human Rights. The Charter includes the right to education³³, the freedom to choose an occupation and the right to engage in work³⁴, the right to fair and just working conditions³⁵ and the right to engage in collective bargaining and action, including strike action³⁶. It also includes an entitlement to social security and assistance³⁷ and to healthcare³⁸. One very important limitation of the Charter of Fundamental Rights lies in the fact that an individual can only claim that their rights have been violated in circumstances where this violation has been carried out by an EU institution or body or by the Member State in its implementation of EU instruments³⁹. Therefore, while the EU expands the scope of protection of economic, social and cultural rights which could potentially be applicable in Ireland, the exact extent of the influence of the EU in this regard has yet to be clarified.

1.5. The Impact of International Human Rights Treaties on the protection of economic, social and cultural rights in Ireland

Ireland is a dualist system⁴⁰ and in order for an international treaty to be justiciable in Ireland it must be ratified at an international level and directly incorporated into the domestic legal system, either as an amendment to the Constitution or by an Act of Parliament. Ireland became a member of the Council of Europe in 1949, with the government signing its seminal human rights instrument, the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1950 and ratifying it in 1953. This was incorporated into domestic law by means of the European Convention on Human Rights Act 2003. This act provides that the courts should interpret and apply laws⁴¹ and that organs of

³¹ See Article 6, *TEU (Treaty on European Union)* [interactive. Accessed on 22-11-2014]. Link: <http://europa.eu/eu-law/decision-making/treaties/index_en.htm>.

³² Article 52, *EU Charter of Fundamental Rights. European Union Official Journal C 364*, 18/12/2000, p. 1–22.

³³ Article 14, *EU Charter of Fundamental Rights*.

³⁴ Article 15, *EU Charter of Fundamental Rights*.

³⁵ Article 31, *EU Charter of Fundamental Rights*.

³⁶ Article 28, *EU Charter of Fundamental Rights*.

³⁷ Article 34, *EU Charter of Fundamental Rights*.

³⁸ Article 35, *EU Charter of Fundamental Rights*.

³⁹ Article 51, *EU Charter of Fundamental Rights*. See Also *Åklagaren v Hans Åkerberg Fransson, C/617/10*, where the Court of Justice of the European Union clarified that the Charter is applicable “in all situations governed by European Union law, but not outside such situations”, para. 19.

⁴⁰ Article 29.3.1, Irish Constitution.

⁴¹ Section 2, European Convention on Human Rights Act 2003 [interactive. Accessed 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2003/en/act/pub/0020/print.html>>.

state⁴² should perform their duties in a Convention-compatible manner⁴³. However, given the almost exclusive civil and political nature of the ECHR, and the fact that it has been incorporated into Irish law at a sub-constitutional level, its potential to ameliorate the socio-economic rights of people in Ireland is very limited.

The Council of Europe's Social Charter 1961, which was revised in 1996, guarantees protection of a number of economic and social rights within the Council of Europe region, including Ireland. Unfortunately, economic and cultural rights have not enjoyed the same level of protection as civil and political rights and the implementation system is seen to be quite weak. The European Committee of Social Rights monitors States' compliance with Charter provisions and can deal with complaints made against States but this mechanism has been very under-utilised and has had very limited influence over the development and protection of socio-economic rights in Ireland.

Ireland has ratified six international human rights treaties: International Covenant on Civil and Political Rights 1966; International Covenant on Economic, Social and Cultural Rights 1966; International Convention on the Elimination of All Forms of Racial Discrimination 1965; Convention on the Elimination of All Forms of Discrimination against Women 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; and Convention on the Rights of the Child 1989, and has directly incorporated the Torture Convention into domestic law. It is important to note that while Ireland has ratified the International Covenant on Economic, Social and Cultural Rights, it has not incorporated it into domestic law. Therefore, Irish citizens cannot rely on its provisions in the Irish Courts. Incorporation of this instrument, in addition to other treaties which protect human rights already ratified by Ireland, such as the International Convention on the Elimination of all Forms of Racial Discrimination, Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child, would add significantly to the protection paradigm of socio-economic rights and must be considered as an important option for the government and indeed, the government is under constant pressure from non-governmental organisations and human rights bodies to incorporate international human rights instruments into domestic law⁴⁴. However, even in the absence of incorporation, "given the character of international human rights obligations and the principles of good faith elaborated in the Vienna Convention on the Law of Treaties, it should comply with treaty obligations in all spheres of activity, at the national and international levels, whether or not the specific wording of the treaty has been incorporated in domestic laws"⁴⁵.

⁴² Section 3, European Convention on Human Rights Act 2003.

⁴³ There is also provision made for the courts to make a declaration that a statutory provision or common law rule is incompatible with the Convention. Such a declaration does not invalidate the law; rather the Irish prime minister is obliged to bring any such declaration to the attention of both houses of Parliament within 21 days. A litigant who has been granted a declaration of incompatibility may receive monetary compensation in accordance with the principles of just satisfaction under Article 41 ECHR, but the award of such compensation is entirely within the discretion of the government. Where the courts deny an applicant certain rights at a domestic level, the applicant may take a case to the European Court of Human Rights.

⁴⁴ See HOGAN, D. Human Rights and Austerity in Ireland: Response to CESR Paper. Seminar on Austerity and Human Rights in Europe, *The Impact of European austerity policies on the realisation of economic, social and cultural rights*, European Group of National Human Rights Institutions. Berlin / Brussels, 12–13 June 2013, footnote 16.

⁴⁵ Magdalena Sepúlveda Carmona, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty: On the Human Rights Based Approach to Recovery from the Global Economic and Financial Crises, with a Focus on those Living in Poverty, UN Doc. A/HRC/17/34, 17 March 2011, para 7.

2. The Impact of the Recession on Human Rights Law and Policies in Ireland⁴⁶

During the height of the boom times (2001–2007) the Irish government enacted numerous pieces of legislation and adopted human rights based policies in order to improve human rights protection in the State. At the forefront of this movement was the adoption of the *European Convention on Human Rights Act 2003*, whereby the European Convention on Human Rights was finally incorporated into domestic law⁴⁷. In addition, during this period, a raft of legislation was adopted in relation to other vulnerable groups and socio-economic rights. Human rights law has developed significantly in Ireland during the period 2001–2007, with the introduction of legislation relating to carer’s leave from employment⁴⁸, the care and protection of children⁴⁹, the care and protection of person’s suffering from mental illness⁵⁰, the protection of part-time workers⁵¹ and the care and protection of victims of domestic violence⁵². There was also a very strong recognition of the need to protect vulnerable groups and legislation relating to immigrants⁵³, employees⁵⁴, children⁵⁵, persons with special needs⁵⁶, disabled persons⁵⁷ and prisoners⁵⁸. This also tied in with the establishment of a

⁴⁶ This section is based on a working paper by DEWHURST, E. And HIGGINS, N., *Human Rights in Times of Economic Transition*, 2011, on file with author.

⁴⁷ See DE LONDRAS, F. and KELLY, C. *European Convention on Human Rights Act*. Dublin: Thomson Reuters, 2010, p. 6. See also O’ DONNELL, D., *A Comparison of Article 6 of the European Convention on Human Rights and the Due Process Requirements of the Constitution of Ireland*. *Judicial Studies Institute Journal*, Vol. 4, 2004, No. 2, p. 48. The incorporation of the ECHR happened for the purposes of ensuring equivalency of rights between Northern Ireland and Ireland which was required under the Good Friday Agreement 1998. Despite many recommendations from the Irish Human Rights Commission, the Irish government chose to incorporate the Convention at a sub-constitutional level which was met with the criticism of being a “minimalist” approach to human rights protection.

⁴⁸ Carer’s Leave Act 2001 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2001/en/act/pub/0019/>>

⁴⁹ Children’s Act 2001 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2001/en/act/pub/0024/>>.

⁵⁰ Mental Health Act 2001 [interactive. Accessed on 22-11-2014]. Link: <Mental Health Act 2001>

⁵¹ Protection of Employees (Part-time Workers) Act 2001 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2001/en/act/pub/0045/>>

⁵² Domestic Violence (Amendment) Act 2002 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2002/en/act/pub/0030/>>

⁵³ Immigration Act 2003 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2003/en/act/pub/0026/index.html>> and the Immigration Act 2004 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2004/en/act/pub/0001/>>

⁵⁴ Protection of Employees (Fixed Term Workers) Act 2003 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2003/en/act/pub/0029/index.html>>; Safety, Health and Welfare at Work Act 2005 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2005/en/act/pub/0010/>>; Adoptive Leave Act 2005 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2005/en/act/pub/0025/index.html>>; Employees (Provision of Information and Consultation) Act 2006 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2006/en/act/pub/0009/index.html>>; Parental Leave (Amendment) Act 2006 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2006/en/act/pub/0013/>>; Employment Permits Act 2006 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2006/en/act/pub/0016/>>; Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2007/en/act/pub/0027/>>

⁵⁵ Child Trafficking and Pornography (Amendment) Act 2004 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2004/en/act/pub/0017/print.html>>; Child Care (Amendment) Act 2007 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2013/en/act/pub/0005/index.html>>

⁵⁶ Education for Persons with Special Educational Needs Act 2004. [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2004/en/act/pub/0030/>>

⁵⁷ Disability Act 2005 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2005/en/act/pub/0014/>>

⁵⁸ Prisons Act 2007 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2007/en/act/pub/0010/>>

number of improved investigative, monitoring and complaint bodies⁵⁹, including the Family Support Agency⁶⁰ and an Ombudsman for Children⁶¹.

However, the onset of the economic crisis engendered a slowdown in the enactment of human rights legislation. During the period 2008–2011, there has been markedly less human rights legislation, although some legislation was adopted in relation to vulnerable individuals such as victims of human trafficking⁶², persons suffering from mental health issues⁶³, and children⁶⁴.

In addition to the downturn in the adoption of legislation, there was a marked change in governmental policies when the recession hit. *Towards 2016* was the National Social Partnership Agreement⁶⁵ agreed in 2006. It highlights numerous plans to ameliorate human rights laws and policies, including in the field of economic, social and cultural rights (e.g. education). The Partnership Agreement was complemented by two national plans, i.e. the National Development Plan 2007–2013 and the National Action Plan on Social Inclusion 2007–2016. The former Plan singles out a number of human rights areas and communities which it prioritises for attention, including children, older people, people with disabilities and immigrants⁶⁶. The latter plan focuses on similar vulnerable societal groups, including children, older people, people with disabilities and members of the Travelling community⁶⁷.

However, policies adopted once the recession began were not so inclusionary and budget cuts and rationalisation have been widespread. On the 16th July 2009, the Government issued the McCarthy Report⁶⁸, which highlighted the need to make expenditure savings. Disproportionate budgetary cuts were also made to the human rights and equality infrastructure with the Irish Human Rights Commission and the Equality Authority being merged. These cuts were criticised by the Council of Europe’s Human Rights Commissioner who emphasised that “human rights bodies must have an operational stability, including in particular a sufficient number of core staff as well as a predictable budget to be able to fulfil their functions”⁶⁹. He also suggested that the moratorium on staff recruitment should not apply to human rights institutions as they “provide for a balance by protecting the human

⁵⁹ Ombudsman (Defence Forces) Act 2004 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2004/en/act/pub/0036/>>; Commission to Inquire into Child Abuse (Amendment) Act 2005 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2005/en/act/pub/0017/>>; International Criminal Court Act 2006 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2006/en/act/pub/0030/>>

⁶⁰ Family Support Agency Act 2001 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2001/en/act/pub/0054/>>

⁶¹ Ombudsman for Children Act 2002 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2002/en/act/pub/0022/index.html>>.

⁶² Criminal Law (Human Trafficking) Act 2008 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2008/en/act/pub/0008/index.html>>

⁶³ Mental Health Act 2008 [interactive. Accessed on 22-11-2014]. Link: <https://www.google.lt/?gws_rd=cr,ssl&ei=cvNxVMHCGIaBsQTFuoD4DQ#q=Mental+Health+Act+2008>

⁶⁴ Child Care (Amendment) Act 2011 [interactive. Accessed on 22-11-2014]. Link: <<http://www.irishstatutebook.ie/2011/en/act/pub/0019/>>

⁶⁵ Government of Ireland. *Towards 2016, Ten-Year Framework Social Partnership Agreement 2006–2015* [interactive. Accessed on 22-11-2014]. Link: <http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2006/Towards_2016_Ten-Year_Framework_Social_Partnership_Agreement_2006-2015.html>

⁶⁶ Government of Ireland. *National Development Plan 2007–2013, 42–43 and Chapter 11* [interactive. Accessed on 22-11-2014]. Link: <<http://sustainabledevelopment.un.org/index.php?page=view&type=99&nr=98&menu=1449>>

⁶⁷ Government of Ireland. *National Action Plan on Social Inclusion 2007–2016* [interactive. Accessed on 22-11-2014]. Link: <<http://www.socialinclusion.ie/nationalactionplan2007.html>>

⁶⁸ Government of Ireland. *Report of the Special Group on Public Service Numbers and Expenditure Programmes 2009* [interactive. Accessed on 22-11-2014]. Link: <Government of Ireland. *Report of the Special Group on Public Service Numbers and Expenditure Programmes 2009*>

⁶⁹ HAMMARBERG, T. *Human rights of vulnerable groups in times of austerity budgets*, Council of Europe’s Commissioner for Human Rights Report 2011, p. 6 [interactive. Accessed on 22-11-2014]. Link: <<https://wcd.coe.int/ViewDoc.jsp?id=1831077>>.

rights of vulnerable groups and ensuring social cohesion within society”⁷⁰. Similar criticisms of the government’s budgetary cuts were made at Ireland’s universal periodic review before the UN Human Rights Council. The Netherlands asked “How does the Irish government ensure and assess that economic measures do not disproportionately impact on the most vulnerable and excluded in the Irish Society or have a general retrogressive effect?”⁷¹ Ireland’s report states that the government “is committed to protecting the vulnerable”⁷² and discussed the social welfare system in the state. It acknowledged that austerity measures have been implemented in all areas but stated that certain measures have been taken to protect older people, such as payment of the Old Age Pension. Chile also recommended to Ireland that the government maintain strategies of holistic health and provision of health care, with special emphasis on vulnerable groups, in spite of the budget cuts.

While Ireland accepted this and other suggestions, it has never taken a human rights impact analysis of its budgetary decisions and the austerity measures implemented by the Government have had a very negative impact on areas such as housing, social security, health and for disadvantaged groups such as disabled people and minorities, including Travellers, Roma and migrants⁷³.

Conclusions

The impact of the economic crisis has been severe, especially for the most vulnerable groups in Irish society. While the lack of protection of economic, social and cultural rights in the Irish Constitution and the non-incorporation of the International Covenant on Economic, Social and Cultural Rights into domestic law has meant that the Courts have not been in a position to find a series of violations of human rights, the human rights environment has nonetheless been seriously undermined, especially in the areas of housing, health and education. Other States have successfully incorporated economic, social and cultural rights into their constitutions, such as Hungary, Portugal and Latvia⁷⁴. This has allowed them to ensure that any austerity measures be restricted in line with the protection of these rights⁷⁵. The Irish government should therefore take on board the recommendations made by the Constitutional Convention in relation to the incorporation of socio-economic rights in the Constitution. In addition, Ireland should ratify the Optional Protocol to the Covenant on Economic, Social and Cultural Rights and incorporate its provisions, in addition to other human rights instruments containing socio-economic rights, in particular the International Covenant on Economic, Social and Cultural Rights, into domestic law. This would further strengthen the protection of socio-economic rights and ensure that there are remedies available for the violation of such rights.

⁷⁰ HAMMARBERG, T., Human rights <...>. The National Committee on Racism and Interculturalism (NCCRI), an expert advisory body established to advise the Government in relation to racism and integration, was also closed down and the Combat Poverty Agency, a statutory agency tasked with promoting social inclusion was subsumed into the Office of the Minister for Social Inclusion in 2008.

⁷¹ Advance Questions to Ireland on State Report under the United Nation’s Human Rights Council’s Universal Periodic Review Process, October 2011 [interactive. Accessed on 22-11-2014]. Link: <<http://www.upr.ie/>>.

⁷² National Report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1, July 2011. A/HRC/WG.6/12/IRL/1 [interactive. Accessed on 22-11-2014]. Link: <http://ap.ohchr.org/documents/alldocs.aspx?doc_id=19040>.

⁷³ FLAC Presentation, Fair Budget, Fair Society: Human Rights Analysis of Budget 2015 [interactive. Accessed on 22-11-2014]. Link: <www.flac.ie/.../pptx/human_rights_analysis_of_budget_2015_final.pptx>.

⁷⁴ See Amnesty International, *Bringing ESC Rights Home: Applying Ireland’s Economic, Social and Cultural Rights Obligations to Budgetary Policy (2014)*, Chapter 5 [interactive. Accessed on 22-11-2014]. Link: <Amnesty International, *Bringing ESC Rights Home: Applying Ireland’s Economic, Social and Cultural Rights Obligations to Budgetary Policy (2014)*>

⁷⁵ For models of including economic, social and cultural rights in domestic legal frameworks, see Eighth Report of the Convention on the Constitution Economic, Social and Cultural (ESC) Rights, March, 2014, para. 4.3.

In addition, human rights standards should be used as a reference point by the government when preparing budgets. It is essential that commitments are specifically made to ensure that the fundamental human rights of vulnerable groups are protected and that “before designing and implementing any policy measures aimed at the recovery, policy makers <...> assess the impact of the measures on the most vulnerable groups of society, assess the appropriateness of the measures, and examine alternative policy options that would protect vulnerable sectors of society as a matter of priority over those who are better off”⁷⁶. A human rights based approach to the budgetary process would ensure that “public policy decisions are non-discriminatory, are geared at the protection and advancement of human rights and the prioritisation of the most vulnerable”⁷⁷. However, the Irish government’s hands are tied, to a certain extent, as a result of the bailout deal made with the Troika. This deal, which, arguably, the government was forced to take, was not the subject of a human rights impact assessment. International bodies such as the Troika, should undertake such assessments when entering into deals with States, otherwise their legitimacy is left open to question. Indeed, as suggested by the Acting Chief Executive of the Irish Human Rights Commission, “if bodies such as the IMF are specialised bodies of the UN, are they not obliged to act in compliance with the Charter and indeed the ICESCR?”⁷⁸ The EU, for its part, has stated that its response to the economic crisis was rooted in the human rights based approach of the Decent Work Agenda⁷⁹. It places responsibility squarely on States to ensure that the human rights of their citizens are not diminished as a result of the crisis, but does not take into account the unequal bargaining power of States who enter into bailout deals with them. In addition, they do not require States involved to undertake a human rights impact assessment. However, in order to avoid the undermining and violating of human rights in times of economic crisis all actors must be cognisant of their role in promoting and protecting human rights and must place human rights at the fore of their decision making.

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⁷⁶ Magdalena Sepúlveda Carmona, Report of the Independent Expert <...>.

⁷⁷ FLAC Presentation, Fair Budget, Fair Society: Human Rights Analysis of Budget 2015 [interactive. Accessed on 22-11-2014]. Link: <www.flac.ie/.../pptx/human_rights_analysis_of_budget_2015_final.pptx>

⁷⁸ HOGAN, D. Human Rights and Austerity in Ireland <...>, p. 13.

⁷⁹ See European Union intervention at the Human Rights Council 13th session Panel discussion on the impact of the global economic and financial crises on the realisation of all human rights, Geneva, 1 March, 2010 [interactive. Accessed on 22-11-2014]. Link: <http://eu-un.europa.eu/articles/en/article_10315_en.htm>.