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The Irish Community Development Law is an online journal, published twice a year by the Northside Community Law & Mediation Centre, in Coolock, Dublin. The journal seeks to offer a platform for interaction that encourages greater scholarly and academic collaboration in the areas of social policy, law and community development, promoting the practice of Community Economic Development (CED) law and policy in Ireland and learn about these initiatives in other countries.

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Submission Guidelines
Welcome to Volume 3, Issue 1 of the Irish Community Development Law Journal. The suggested theme of this issue is “Economic, Social and Cultural Rights in Practice.” In practice, economic, social and cultural rights are often used as tools for change to improve the lives of the marginalised and disadvantaged. The articles in this issue document how this occurs as well as discussing limitations as well as possible improvements in a number of contexts.

The issue opens with Katie Boyle’s article which ties in neatly with the theme of the issue. The article explores potential options open to Ireland for the constitutionalisation of economic, social and cultural rights, whilst considering the practical implications of so doing. The complex nature of economic, social and cultural rights in practice is acknowledged by the author, who alludes to the question of whether a legal mandate exists to constitutionalise these rights and the traditional deference on the part of the Courts to give these rights a Constitutional footing. The article discusses the possible change in approach to economic, social and cultural rights, a change which has been reflected by recent comments of a Supreme Court Judge.¹

Claire-Michelle Smyth’s article documents the growth and emergence of social and economic rights from the European Court of Human Rights’ jurisprudence. The article examines the jurisprudence of Article 2, 3 and 8 of the ECHR with a view to demonstrating the emerging trend of the Court adjudicating upon these rights. The Convention is seen as a benchmark for human rights, “a floor, but not a ceiling,” which suggests this emerging trend of justiciability could be applicable to domestic standards of rights protections, the article clearly sets out the basis on which any further strides would be made.

The next article focuses on the specific right of education, in the context of children with disabilities. Mona Niemeyer examines the right which has been much litigated in the Irish Courts.² The author begins by examining the social theory relating to special needs education. The author then moves on to use Article 24 of the UN Convention on the Rights of Persons with Disabilities as a framework for arguing for an inclusive, rights based approach to education for children with special needs. The author uses the empirical example of Germany to explore the inclusivity of children with disabilities in that jurisdiction. Mona’s article fits in neatly with the practical aspect of this issue’s theme.

The fourth article written by Ashling Ryan-Mangan also looks at children as a marginalised group. The author explores the direct and indirect effects that parental incarceration can so often have on children. Policy, practice and legislation from other jurisdictions are discussed and used to demonstrate how policy should be formulated

¹ In a recent address to Griffith College Dublin, Justice Frank Clarke touched upon the possible incorporation of socio-economic rights into the Irish Constitution.

² TD v the Minister for Education [2001] 4 IR 259; Sinnott v Minister for Education [2001] 2 IR 545.
in order to vindicate the rights of this marginalised group. The author concludes by arguing the need for domestic reform. This article goes to the heart of the *Irish Community Development Journal*’s mission, namely to address and tackle issues relating to social inclusion.

Chelsea Marshall, Kate Ward and Nicola Browne are the authors of the next article in this issue. The practical approach of the article sits comfortably with the overarching theme of this issue. The article explores the PPR’s human rights approach to tackling social marginalisation through employing international human rights standards and principles. The authors explore the ways in which marginalised groups in Northern Ireland have employed these human rights standards in their local communities in order to campaign on a number of issues such as mental health, housing, work and children’s play. This is done by way of an examination of four case studies which emerged from various campaigns inspired by the communities. The authors also discuss some of the limitations that emerge in relation to the realisation of social and economic rights in practice.

In the penultimate article, Oisin Bourke discusses the proposed constitutional protection of Economic, Social and Cultural Rights as well as examining the possible practical implications of so doing. In particular, the right to dignity is explored by way of arguing for a potential alternative practical realisation of Social, Cultural and Economic Rights.

The next article in this volume takes the form of a case study. Fred Rooney discusses the City University of New York’s Community Legal Resource Network as a case study addressing the issue of access to justice. The author, by way of interview, documents the evolution and growth of legal incubators or community law centres and his experience in establishing and launching a law centre. The article is apt for closing the issue as it well demonstrates economic, social and cultural rights in practice through the legal incubator concept.

Finally we have a case study on a Social Welfare case taken by Northside Community Law and Mediation Centre. The NCLMC represented an Appellant, a non-EU national, before the Social Welfare Appeals Office in respect of an application she made for Child Benefit in June 2011 which was disallowed. The application was refused on the grounds that the Appellant was not lawfully resident in the State and therefore could not satisfy the Habitual Residence Condition. This decision was appealed on the grounds that the Appellant derived a right of residence from her son, an Irish and EU citizen, under Articles 20 and 21 TFEU as per the decision of the European Court of Justice in *Ruiz Zambrano v Office national de l’emploi*.

The appeal was partially allowed and the Appellant was deemed entitled to Child Benefit from the 1st of December 2006. The Appellant was subsequently successful in her applications for Rent Supplement and One Parent Family Payment and was awarded arrears of payments dating back to 2006 which amounted to approximately €16,000.
Articles:

Economic, Social and Cultural Rights in Practice
An Accident of Birth

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Abstract:

Children of incarcerated parents have, repeatedly, been identified by international research as a group, within society, that is severely at risk. Yet no specific legislative mechanisms exist in Ireland by which to protect, support or, even, identify these children. Parental incarceration can have direct and indirect effects on children’s lives in any number of areas. This article explores some of these effects and other issues which arise in relation to parental incarceration in the context of children’s rights in order to stimulate reflection and debate in relation to how Ireland, as a nation, is respecting, protecting and fulfilling the rights of these at-risk children. Policy, practice and legislation in other countries that can be deemed samples of best practice are discussed and highlight the fact that reform needs to happen in the Irish case if we are to ameliorate current circumstances and future prospects for this vulnerable group.

Keywords:

Children, rights, incarcerated parents, prison, child well-being.
Introduction

This article refers to a group in Irish society whose rights have, to date, been largely ignored by legislation and policy. Their unique situation renders them an obvious choice for further attention when it comes to the practical implementation of existing (and, perhaps, new) legislation.

Those in this marginalised group have, in the past, been referred to as the ‘orphans of justice’ (Shaw 1992b, p.41), or the ‘invisible’ (Marshall 2008, p.4), even ‘forgotten victims’ of crime (Matthews 1983). An accident of birth has meant that their rights are not respected to the same extent as others of the same age. Unintentionally or not, society ignores or neglects them. Who are they? They are the children of incarcerated parents.

However, although researchers have often described these children as victims of crime, the following definition from Article 1 of the EU Framework Decision on the Standing of Victims in Criminal Proceedings (2001) draws that comparison into question. A ‘victim’ means ‘a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State’. This definition implies that children of incarcerated parents are not ‘victims’, by virtue of the fact that the emotional suffering or economic loss they experience is not caused directly by acts or omissions in violation of criminal law, but rather by acts or omissions concurrent with criminal law. This leads to the question: if children of incarcerated parents are not viewed by law as victims, how are they viewed or, indeed, are they seen at all? It is not acceptable that these children experience any form of suffering or loss, and even worse that must do so without the assistance of any specific constitutional protection or support. Further, the frighteningly common idea that their parents ‘should have thought of that before committing the crime’ does nothing but create an environment of acceptance of these children’s suffering.

Nonetheless, despite these issues of popular perception and technical language, children affected by the imprisonment of their parents make up a small but distinctive portion of society. But it can be difficult even to know their numbers. Despite the lack of official procedure for recording the existence (or identity) of these children in Ireland, Children of Prisoners Europe or CoPE (formerly known as the European Network for Children of Imprisoned Parents) estimates the number of children separated from incarcerated parents in the state to be approximately 4, 442 (cited in Martyn 2012, p.9).

In the course of this piece I shall, firstly, view the issue of children’s rights from an Irish perspective, exploring the level of provision in existence specifically for children. I shall then examine policy/legislation in place to protect three specific children’s rights, namely the right to protection and care in the interests of children’s well-being, the right to protection against discrimination and the right to maintain regular contact and personal relations with both parents. For each of these three rights, I shall, in turn, investigate one or more issues that arise when considering the right with regard to children of incarcerated parents, exploring, for each issue, a sample of international best practice.

Children’s rights in Ireland

Bunreacht na hÉireann/Constitution of Ireland, enacted in 1937, is the fundamental law of Ireland. Given the increased emphasis afforded, if belatedly and perhaps sometimes more in name than in fact, to children’s rights in Ireland in the late twentieth and early twenty-first century (e.g. establishment of the Children’s Rights Alliance in 1995 and the Ombudsman for Children Office in 2004), the lack of references to child-specific rights in the Constitution is striking and serves as a reminder of how much has changed in Irish culture since 1937. Children’s
rights exist for the purpose of increasing the protection of those who are most vulnerable in our society by virtue of their age and their correspondingly reduced ability to protect themselves (or their rights). In the Constitution children are afforded many of the same rights as adults in Ireland, by virtue of their being ‘citizens’ but child-specific rights are limited to Article 42.4, the right to ‘free primary education’, and Article 42.5, the right of the State to ‘supply the place of the parents’ when ‘parents for physical or moral reasons fail in their duty to their children’ (Bunreacht na hÉireann 1937).

Legislation such as the Child Care Act, 1991 and the Children Act, 2001 provide a more in-depth legal framework for the care and protection of children. However, while numerous references are made in these documents to children’s welfare, wishes, needs and best interests, there is almost a failure even to mention children’s rights. Following the passing of the Ombudsman for Children Act, 2002, the Ombudsman for Children Office [hereafter OCO] was established in 2004, with Emily Logan appointed Ireland’s first Ombudsman for Children. According to Chapters 3 and 4 of the Ombudsman for Children Act, 2002, the OCO is responsible for promoting children’s rights, dealing with complaints regarding children’s rights and liaising with the Irish government regarding issues related to children’s rights. In 2007 (the year in which the Child Care (Amendment) Act 2007 was enacted), the OCO commissioned a report to explore Obstacles to the Realisation of Children’s Rights in Ireland in which Kilkelly found that ‘despite many positive initiatives, Ireland lack[ed]… the children’s rights infrastructure necessary to underpin effective protection of children’s rights for this and future generations’ (2007, p.3).

The Department of Children and Youth Affairs was established in 2011 and Frances Fitzgerald was appointed the first Minister for Children and Youth Affairs (succeeded in May 2014 by Charlie Flanagan). When Frances Fitzgerald resolved to hold a Children’s Referendum with the intention of amending the Constitution with regard to children’s rights, it was generally seen, especially by children’s rights activists, as a step in the right direction. The referendum was voted upon and accepted by the Irish public on November 10th 2012. However, a challenge, and a subsequent appeal for its dismissal, resulted in the stalling of an amendment to the Irish Constitution which could serve to strengthen children’s rights in Ireland (Department of Children and Youth Affairs 2013). The main implications of the proposed amendment are that the ‘best interests of the child shall be the paramount consideration’ and the views of the child ‘shall be ascertained and given due weight having regard to the age and maturity of the child’ in all proceedings relating to the child (Department of Children and Youth Affairs 2013). For as long as the amendment remains unenacted and in the absence of any other secure constitutional provisions for the protection of children’s rights, the United Nations Convention on the Rights of the Child [hereafter UNCRC], ratified by Ireland in 1992, has provided a much-needed framework for the development of policy, laws and services. Special attention is paid in the UNCRC to children who are, for some reason, viewed as being even more vulnerable than others, for example, children with a disability or children from different cultural groups to the norm in a particular society. However, children of incarcerated parents are not specifically mentioned. Nonetheless, in considering the situation of such children, there are some articles that are particularly noteworthy, a number of which shall be discussed in this article.

**THE RIGHT: Protection and care for children’s well-being / welfare**

The aspiration that a child should be afforded ‘such protection and care as is necessary for his or her wellbeing’ is stated in Article 3 (2) of the UNCRC, as well as Article 24, paragraph 1 of the European Charter of Fundamental Rights. Indeed, Section 24 of the Child Care Act, 1991 makes provisions for children during court proceedings in relation to their care and protection. It requires that the court shall ‘regard the welfare of the child as the first and paramount consideration’.
In 2011, the Department of Children and Youth Affairs produced *Children First: National Guidance for the Protection and Welfare of Children* with the intention of promoting child protection and reducing instances of child abuse and neglect. The document is aimed at organisations working with children as well as members of the public and serves to clarify a number of essential expectations relating to child safety and procedures to be followed in cases of suspected child abuse or neglect. It draws particular attention to ‘especially vulnerable children’ including those who have disabilities, are homeless or are in the care of the State. Children of incarcerated parents are not listed in this category and yet research suggests that they may be more likely than their counterparts to experience abuse in the home (See Phillips et al. 2006, p.694). Foster and Hagan explain the increased likelihood of this by setting out a scenario involving daughters of imprisoned father, as follows:

> An indirect effect on daughters of [a] biological father’s incarceration is to leave these daughters unprotected and at heightened risk of physical and sexual abuse and neglect, possibly by adult males who become part of the family following the biological father’s departure for prison (2007, p.418).

Although elements of the *Children First: National Guidance for the Protection and Welfare of Children* are to be put on a statutory footing (The Children First Bill, 2014 was published in April 2014, with the legislation due to operate alongside the original guidelines), children of incarcerated parents have not yet been afforded any specific recognition or additional protection, as researchers continue to point out the deficiencies in the law regarding this minority group. Despite policy developers on the international stage emphasising the importance of support for these children, we, in Ireland, have continued to ignore their very existence, not to mention their needs. Let us now look at some of those needs and relevant samples of best practice.

**ISSUE: Arrest procedure**

Research has indicated that children who experience a parent’s arrest are more likely to display emotional difficulties, leading to ‘maladjustment in their emotional regulation skills’ (Dallaire & Wilson 2010, p.413). In 2014 Roberts et al. published results of their study on the associations between children who had experienced the arrest of a family member and mental health problems. They found that:

> Children exposed to arrest of a parent or other family member exhibit higher levels of mental health difficulties compared to peers not exposed and that these difficulties persist even when taking into account other trauma exposure(s) and individual and family risk factors’ (p.222).

Although there appeared to be some variation in the manner in which effects manifested themselves depending on the age and stage of development of the child (Roberts et al. 2014, p.220), these findings confirmed those of Phillips and Zhao, who found that witnessing the arrest of a household member predicts, to a significant degree, the development of symptoms of posttraumatic stress (2010).

**SAMPLE OF BEST PRACTICE: United States of America**

All of the American studies mentioned above agree that experiencing arrest of a family member is detrimental to a child’s mental health and development. But what are authorities in the United States of America doing to ameliorate the situation?
According to the Children of Incarcerated Parents [hereafter CoIP] initiative’s interagency working group report in 2013, the International Association of Chiefs of Police, along with a large number of organisations, ranging from the Federal Bureau of Investigation to the Administration for Children and Families, was to establish a ‘model arrest protocol’ and develop appropriate training for police officers to ensure that children are adequately protected, both physically and emotionally, during the process of an arrest. Although, in March 2014 (at the time of writing), the formation of the model policy was still ongoing and the training development had not yet begun (Rhodes, S. 2014, pers. comm., 28 March), the merits of the initiatives can be appreciated as, through their implementation, police officers will be encouraged to become more child-aware and are, thus, assisted in fulfilling their dual role as law enforcers and advocates of child protection (CoIP 2013).

The U.S. state of New Mexico might be considered particularly advanced when it comes to taking account of children of incarcerated parents. Section 31-1-8 of the 2013 New Mexico Statutes Annotated (NMSA 1978) states that police officers are required to make efforts to ensure the safety of any children ‘who may be at risk as a result of the arrest’. Aside from providing initial and annual in-service training in this, the Department of Public Safety is required to provide education on ‘how the effects of witnessing a violent crime or other event causes emotional harm to children and how law enforcement can assist in mitigating the long-term effects of the trauma’ (Section 31-1-8 of the New Mexico Statutes 2013). Other American bodies that have already adopted such policies and procedures include the San Francisco Police Department and the Child Development Community Policing Program in New Haven (Dallaire & Wilson 2010, p.415). Comparable programmes run in California, Connecticut and Arkansas (Roberts et al. 2014, p.221).

In 2012, Martyn’s report on the rights and needs of children and families affected by imprisonment in Ireland made recommendations with regard to arrest procedures (p.25) but this remains something that has received little or no attention, either in legislation terms or in Garda policy or practice.

**ISSUE: Records/Identification of children with parents in prison**

At the beginning of this article I stated that there was no official procedure for recording the numbers of children who experience parental incarceration in Ireland. Children of Prisoners Europe has provided an estimate of the number of children affected, yet who is to say that this is in any way accurate? How are we, as a country, to offer assistance to these children if we do not know how many there are or who they are? Some simple procedural changes could easily serve to identify these children and thus provide them with information regarding relevant support agencies.

**SAMPLE OF BEST PRACTICE: United States of America**

In the United States the Bureau of Justice Statistics Survey of Prison Inmates (SPI) periodically collects data on the number of incarcerated parents and their children (Bureau of Justice Statistics 2004). In June 2013, the SPI committed to collecting additional data, for example, parental involvement with their children prior to incarceration and level of contact maintained after incarceration (CoIP 2013). As already noted, Section 31-1-8 of the New Mexico Statutes (2013) states that police officers shall be trained in procedures which include inquiring if the individual being arrested has ‘minor or dependent children who may be present or at another location at the time of the arrest’ and the ‘proper arrangement of temporary care for children [if required] to ensure their safety and well-being’. Further, the US Federal Interagency Working Group for Children of Incarcerated Parents has published an online ‘toolkit’ of resources for child welfare and Federal corrections staff to increase inter-agency collaboration,
particularly in the case of children who are in foster care while their parents are in prison (CoIP 2013).

Ireland could also benefit from collaboration between bodies such as the Department of Justice and Equality and those for Children and Youth Affairs, Education and Skills and Social Protection in an attempt to identify and, thus, provide support for children affected by incarceration.

**ISSUE:** Supports for children during the term of incarceration

One simple means by which we can promote the well-being of children of incarcerated parents might be to make information readily available to families affected by incarceration regarding the services and supports available to them. There are a number of charitable and voluntary organisations in operation in Ireland (e.g. St. Nicholas Trust, Cork) which provide invaluable support to families, as well as a number of government agencies that are in a position to offer assistance. It is essential that families affected by imprisonment know about these services and supports. In fact, providing information about such services is a part of recommendation 6-v of the Council of Europe’s Recommendation 1340 on the Social and Family Effects of Detention.

**SAMPLE OF BEST PRACTICE:** United States of America

From 2012 to 2013 an interagency group in the United States of America consisting of the Departments of Justice, Health and Human Services, Housing and Urban Development, Education and Agriculture and the Social Security Administration, as well as a number of other government and non-government stakeholders, documented their efforts to achieve improved outcomes for children of incarcerated parents (CoIP 2013). Some of the more noteworthy initiatives, which might suggest the steps that remain to be taken in the Irish case, are set out below:

- A website for children of incarcerated parents which, although in its infancy, contains information in relation to Federal resources, grant opportunities and government initiatives to support these children and their carers.
- A Bureau of Prisons-based booklet for children entitled ‘Mommies and Daddies in Prison’ (based on the book ‘Mommies and Daddies in Jail’) which was produced with the intention of providing information for children regarding their parents’ daily lives and thus reducing children’s fears of the unknown.
- Support for existing mentoring programmes from the Office of Juvenile Justice and Delinquency Prevention.
- Expenditure of $7 million to strengthen family relationships through education and visitation programmes both for the sake of prisoners’ children and as a means to reduce recidivism (CoIP 2013).

**ISSUE:** Educational effects of parental incarceration

Much research has indicated that children with incarcerated parents are at increased risk of academic failure or a general decline in their educational performance (see, for example, Dallaire, Ciccone & Wilson 2010; Shaw 1987, p.41). Foster and Hagan claim that a father’s absence through incarceration ‘exerts a direct effect on his child’s ultimate educational detainment’ (2007, p.421) through the loss of educational opportunities (p.402). Presumably, the level of parental involvement prior to incarceration would determine the extent of this effect. However, even in cases of minimal prior parental involvement where the effect may be less, there are other consequences of parental incarceration that can render the attainment of academic success on the part of children with imprisoned parents unlikely, and perhaps all but impossible. For example, disruption caused by changes in caregiving
and living arrangements, friendships and schooling may combine with the financial strain, stigma and anxiety, conditions that can be shared by every member of a family, adult and child alike, to create concentration problems for children, thus impacting on academic performance (issues discussed variously by Phillips, Erkanli, Keeler, Costello & Angold 2006, p.688; Geller, Garfinkel, Cooper & Mincy 2009, p.1196; Cunningham 2001, p.36; Trice & Brewster 2004, p.27; Miller 2006, p.474; Boswell & Wedge 2002, p.11; Snyder, Carlo & Coats Mullins 2002, p.33; Gabel & Johnston 1995, p.76). While there is, admittedly, only so much that can be done within the school setting to reduce the effects of parental incarceration, the provision of information and guidance for teachers and principals can, potentially, go a long way towards fulfilling this objective.

SAMPLE OF BEST PRACTICE: United Kingdom (Gloucestershire County)

In 2002, as part of the Gloucestershire County Council Children and Young People’s Policy for the Education of Children with a Parent in Prison, guidelines were provided to schools and other relevant organisations with a number of aims in mind, among them: raising awareness of the needs of children with incarcerated parents, promoting social inclusion and equal opportunities, securing the educational achievement and attendance of these children and ensuring positive outcomes for these children ‘through effective multi-agency working’ (Gloucestershire County Council 2010a). Within the guidelines, specific risks facing children with parents in prison were identified, procedures for disclosures were suggested and guidance for teachers was offered. Essential to such initiatives is the need to consistently review and update such documents, as was done in 2010. In the review, statutory and voluntary agencies that had, since 2002, committed to supporting the policy were listed and guidelines for good practice were given (Gloucestershire County Council 2010b). The commitment of Gloucestershire’s local authority is evident, as is its devotion to the care and protection of children with incarcerated parents.

THE RIGHT: Protection against discrimination

While it might be tempting to place the emphasis on systemic failings, it should never be forgotten that the (mal) treatment of prisoners’ families is at least as much a social or cultural issue as anything else. In other words, the state and state agencies may only be able to do so much to mitigate children’s loss or suffering in such cases. Thus, although Article 2 (2) of the UNCRC asserts that:

*States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members, ‘all appropriate measures’ could never entirely eliminate the fact that children of incarcerated parents are often socially stigmatised by virtue of being related to offenders, something Condry refers to as ‘kin contamination’ (2007, p.141).*

ISSUE: Stigmatisation

Some research has indicated that these children can experience forms of discrimination, such as social isolation, as a direct cause of their parents’ incarceration (Bocknek, Sanderson & Britner 2009, p.328). Older children, those who are aware of the negative connotations of having a parent in prison, may decide not to continue a friendship with the children of incarcerated parents. Alternatively, parents of younger children have been known to ‘pull their children away from children of inmates, with little or no explanation’ (Breen 1995, p.98). If this happens to a child of an imprisoned parent once, the fear of it happening again may result in withdrawal from peer relationships (Miller 2006, p.477). This can have ‘lasting harmful consequences’ (Foster & Hagan 2007, p.403). Research in
America by Dallaire, Ciccone and Wilson has suggested that children may even be treated differently in schools, with teachers ‘expecting less from children of incarcerated parents’ (2010, p.284). Though far harder to deal with in any official or legislative way, the effects of such commonplace beliefs as ‘the apple never falls far from the tree’ or ‘it [criminality] runs in the family’ may be deep and long-lasting.

SAMPLE OF BEST PRACTICE: United States of America

On June 12th 2013, a ‘Champions of Change’ event was held at the White House in Washington D.C. to honour twelve people who had worked tirelessly to support children of incarcerated parents and their caregivers (Muñoz 2013). The event also served to raise public awareness of this marginalised group, as well as to inform the public of measures in place to support them. A number of new initiatives were introduced on the day, such as the Sesame Street television programme’s Little Children, Big Challenges: Incarceration initiative which includes online bilingual resources for children, parents and carers (Muñoz 2013). Events like this may be the most effective means by which to create awareness of, and concern for, children affected by parental incarceration, thereby reducing the level of stigma they experience at the hands of the public. The Sesame Street initiative, which introduced a new character named Alex whose father is in prison, is one that may increase the sensitivity of adults and children alike to the effects that their comments and attitudes can have on children in such circumstances. Incorporating characters like Alex into children’s programmes may help children to become more considerate of those with a parent in prison, a trait which, ideally, can last into adulthood and result in increased tolerance among the adults of the future.

THE RIGHT: Maintaining personal relations and regular contact

Article 9 (3) of the UNCRC states that:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.

This is in agreement with article 3 of the European Charter of Fundamental Rights, which makes the provision that ‘every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests’.

ISSUE: Regular contact

While the term ‘regular basis’ is, admittedly, vague, it may be argued that a thirty minute visit each week (Department of Justice, Equality and Law Reform 2007, p.30) is not a sufficient length of time to allow a parent and child to maintain ‘personal relations’, though it may be supplemented by letters and, typically, one telephone call per week (Department of Justice, Equality and Law Reform 2007, p.36 & 39). Of course, it is essential, in all matters concerning children, that the child’s best interests be a ‘primary consideration’ (as stated in Article 3 of the UNCRC) or, in the words of the proposed thirty-first amendment to the Constitution, the ‘paramount consideration’ (Department of Children and Youth Affairs 2013). Some might say that regular contact with a prisoner, whose morality might be viewed as questionable, is not advisable and, certainly there are cases in which the imprisonment of a parent might result in a negative influence being removed from the family home thereby benefitting the child (see, for example, Shaw 1992b, p.47). Yet there seems to be a much larger body of literature
suggesting that incarceration can impact negatively on a child’s life (see, for example, Sack 1977, p.170; Murray & Farrington 2005; Purvis 2013, p.9). Indeed Boswell and Wedge’s review of Lloyd’s 1995 report led them to conclude that nothing suggested ‘there was any good reason to equate offending behaviour with bad parenting’ (2002, p.63).

In relation to visits, according to the Prison Rules 2007, the principal document governing the conditions and conduct of prisoners in Irish prisons in 2014, ‘a prisoner shall not be required [emphasis added] to meet with a person who attends at the prison for the purpose of visiting the prisoner’ (Department of Justice, Equality and Law Reform 2007). This is in keeping with Shaw’s idea that visits tend to be seen as ‘the right (or privilege) of the inmate; never as the right of the child to maintain a relationship with its [sic] father or mother’ (1992c, p.196). Indeed, parents are often reluctant, or even refuse, to have their children visit them in prison for fear that the children would be adversely affected by the experience (e.g. Nesmith & Ruhland 2008, p.1121). Even prisoners who do receive family visits might feel uncomfortable about doing so. As one ex-prisoner put it, ‘the worst thing about prison? …the four kids coming to see their father behind bars’ (quoted in Drinkwater 2014). The result of this is that children’s rights are subordinated to parents’ fears, unfounded or not. Many children are not even informed of the whereabouts of their parent when they are in prison. In King’s study, just over 61% of parents in Irish prisons stated their children were unaware of the imprisonment (2002, p.30), while in Shaw’s study in England and Wales, a third of the children in the sample were told lies to explain the absence and a further third were told nothing at all (1992b, p.46). Reasons for keeping children in the dark include the belief that they are too young to understand (Bakker et al. 1978, p. 147), the view that they are ‘incapable of comprehending the concept of incarceration’ (Miller 2006, p.476) or the hope that keeping the knowledge from them will protect their emotional or psychological well-being (Miller 2006, p.476). Regardless of the reason for restricting or preventing regular contact between a child and a parent in prison, it seems reasonable to suggest that there may often be negative effects/consequences of doing so. Nesmith and Ruhland assert that this lack of contact may result in the child facing ‘a rupture in the child-parent bond [and] enduring traumatic stress…which can, in turn, adversely disrupt child development’ (2008, p.1120). Incidentally, the Council of Europe’s Recommendation 1340 on the Social and Family Effects of Detention makes a number of points in relation to ‘preventing the breakdown of family relations’, namely, reducing qualifying periods for prison leave (6-i), greater use of non-custodial sentences (6-ii) and improving visiting conditions (6-vi).

And we must not forget that there is reason to believe that maintaining a high degree of child-parent contact where at all possible without threat/harm to the child also has implications for the common good, with researchers suggesting that it has a positive impact on the rates of recidivism among offenders (as cited in Department for Children, Schools and Families and Ministry of Justice 2009, p.21). Indeed, the United Nations Standard Minimum Rules for the Treatment of Prisoners (1955) and the European Prison Rules 2006 have both made reference to the importance of allowing a prisoner to maintain family relations while incarcerated. Thus, society may have a lot to gain if parent-child relations are maintained.

SAMPLE OF BEST PRACTICE: Sweden

Sweden’s prisons made headlines in late 2013 when Nils Oberg, the head of its prison and probation service, announced that four prisons were to be closed due to a decline in prisoner numbers (Orange 2013). Yet, there was no significant drop in the crime rate recorded (James 2013). The apparent contradiction may be due to the wide variety of sanctions imposed by the Swedish Prison and Probation Service as alternatives to imprisonment.
Alternative sanctions include fines, as well as:

- **intensive supervision** – essentially electronic ‘tagging’ which allows the Probation Service to ensure that a person follows an established timetable or routine.
- **conditional release with community service** – the convicted person carries out unpaid work for a time period decided by the court (40-240 hours).
- **probation** – a non-custodial sentence with supervision during the first year.
- **probation with community service** – as with ‘conditional release with community service’ except with the added conditions of ‘probation’.
- **probation with contract treatment** – usually for ‘long-term substance abusers where there is a link between the abuse and the crime’, the convicted person attends a clinic or is treated at home (Kriminalvården 2014a).

Aside from imprisonment, all of these sanctions provide children of convicted persons with the opportunity to live with (or visit) their parents in a natural home environment, thereby respecting, protecting and fulfilling the right of children to maintain personal relations and direct contact with their parents.

Even in the case of imprisonment, conditions for children of incarcerated parents in Sweden are more favourable in Ireland for a number of reasons. Firstly, Swedish law dictates that prisoners may receive as many visits as is possible to arrange, so there is no official limit on the number of visits (Kriminalvården 2014b). Secondly, visits may last for ‘an hour or a couple of hours’, with visitors who have travelled long distances permitted to visit for up to a whole day (Kriminalvården 2014b). Thirdly, visits in closed institutions take place in ‘child-friendly visiting rooms’, while in open institutions they may take place in a prisoner’s cell and, in many larger institutions, there are special visiting apartments (Kriminalvården 2014b).

There also exist, under the Prison Treatment Act (SFS 2007:109), additional possibilities for gradual release which may prove instrumental in the fulfilment of the rights of the child. For example, under Section 54, ‘in order to reduce the risk of a prisoner relapsing into crime and in general to facilitate a prisoner’s adjustment in the community’, prisoners approaching the end of their sentences may be granted one of a number of ‘sojourns’ which might involve leaving the prison regularly to complete a training course or obtain treatment in a halfway house or simply to serve the remainder of the prison sentence ‘under supervision in his or her home’ (Kriminalvården SFS 2007:109). In addition, in the Act specifically but perhaps also in Swedish penal culture more generally, there is a noticeable focus on ‘treatment’ rather than punishment. Crucial to this is the fact of the prisoner’s treatment being planned ‘in consultation with the prisoner’ (Section 5 Kriminalvården SFS 2007:109).

To put the matter in statistical context, Ireland’s population is roughly half that of Sweden’s (Nations Online 2014) and, on May 8th 2014, the Irish prison population was 4,055 (Irish Prison Service 2014), while Sweden’s prison population on March 1st 2014 (the last date for which figures were available) was 3,925 (Kriminalvården 2014c).

While Swedish prisons are closing, Irish prisons (as of May 8th 2014) are operating at 97% capacity (Irish Prison Service 2014). In 1996, the average daily number of prisoners in custody in Ireland was 2,191 (Central Statistics Office 2002). The number has almost doubled, which means we may assume the number of children who are separated from their parents through incarceration has risen correspondingly. Bearing this in mind, perhaps it is time that Ireland had a closer look at the Swedish Prison Treatment Act.
Conclusion

Considering only the rights discussed above, it is evident that there are many respects in which children of incarcerated parents are in need of particular assistance, protection, care and support. To provide effectively the necessary protection and care for a child’s wellbeing, support must be made available to children at all stages of the parents’ criminal proceedings, i.e. during the arrest procedure, throughout the term of imprisonment and on a parent’s release from prison, and should take many forms (e.g. physical, emotional, educational, and social support).

This article has not examined the right of the child to express their views in matters that concern them (Article 12 of the United Nations Convention on the Rights of the Child). It was felt that, given the inherent conflict of interests between the justice system and the issue of children’s rights in this case, the area would be deserving of a more exhaustive, multidisciplinary examination in order to ascertain the appropriate weight that should be afforded to the views of children of parents on trial for a crime, while also safeguarding the public interest. With regard to a sample of best practice, however, future researchers might look to Norway, whose parliament has been commended for the many advances made in implementing children’s rights into legislation, particularly the right of children to express their views on matters that concern them (Lundy et al. 2012, pp.57-63).

Of the three main children’s rights discussed in this article, that of protection against discrimination is, probably, the most difficult to implement as its fulfilment is more dependent on the outlook of those in the child’s immediate environment and less on legislation or procedure that can simply (or not so simply) be introduced and made obligatory. Nevertheless, if Ireland is to meet the commitment to ‘take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the… activities… of the child’s parents...’ (UNCRC Article 2 (2)), then it must start developing and implementing policy, legislation and practice to support this commitment. In commencing this process, it might be of benefit to refer to the San Francisco Children of Incarcerated Parents Partnership’s Bill of Rights (2005) for children of incarcerated parents which says, in the voice of just such a child:

1. I have the right to be kept safe and informed at the time of my parent’s arrest.
2. I have the right to be heard when decisions are made about me
3. I have the right to be considered when decisions are made about my parent.
4. I have the right to be well cared for in my parent’s absence.
5. I have the right to speak with, see and touch my parent.
6. I have the right to support as I struggle with my parent’s incarceration.
7. I have the right not to be judged, blamed or labeled because of my parent’s incarceration.
8. I have the right to a lifelong relationship with my parent.

The Council of Europe’s Recommendation 1340 on the Social and Family Effects of Detention acknowledges that ‘the effects of custodial sentences are not entirely in keeping with the principle that the punishment should apply to the offender only: in practice, prisoners’ families also suffer indirect effects’ as ‘imprisonment poses a whole range of social problems, …especially with regard to children’. As we continue loudly to promote, and tirelessly try to protect, children’s rights, let us not forget that all children are equally deserving of our protection. Ireland must cease to overlook the most vulnerable, including children of incarcerated parents who are ‘not seen, not heard [and] not guilty’ (Marshall 2008).
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A Substantive Right to Human Dignity: An Irish Design to Constitutionalising Economic, Social and Cultural Rights (ESCR)?

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Abstract:
The paper discusses the Convention on the Constitution’s recommendation to government regarding constitutionalising ESCR, highlighting the problems of the proposition that the ‘state shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts’. In particular the paper has regard to four key considerations in choosing an appropriate model of ESCR: Will it serve its intended purpose? Will it be manageable for the courts? Will it be manageable for government? Will it be tangible for the people? Based on these considerations, the paper sketches out a potential alternative to a progressive realisation principle of ESCR – constitutionalising a strong substantive ‘right to human dignity’.

Keywords:
The Convention on the Constitution’s Proposition on ESCR

On the 23rd of February, the Constitutional Convention voted strongly in favour of the principle of affording greater constitutional protection to ESCR, recommendations have been laid before the House of the Oireachtas, and the Government will consider whether to hold a referendum on the issue. As the Irish Constitution already explicitly includes non-justiciable ESCR under the Directive Principles of Social Policy (Article 45), which apparently already informs and provides a framework for government decision-making regarding social policy, there is no merit to proposing anything other than revising the Constitution to include some manner of justiciable ESCR – rights that can be vindicated through the courts. While 85% of delegates to the Convention voted in favour of the principle of strengthening ESCR, only 59% of those in favour had a preference for strong justiciable ESCR, in that: ‘the state shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts’ (emphasis added). Further, some 43% of the delegates in favour of the principle of greater constitutional protection of ESCR thought it best to defer making recommendations to Government pending further consideration. Certainly, no clear consensus emerged from the Convention process that strongly justiciable ESCR were the way forward to equip Ireland’s constitution for the 21st Century. On that basis, it is extremely difficult to see how the Government might go about digesting the outcome of the Convention, let alone proposing constitutional reform on the issue to the people. Maybe, as Michael McDowell argued, the proposition before the Convention was ‘too vague’?

This brief article seeks to draw attention to the rather illusive nature of the Convention’s proposition regarding ESCR constitutional reform and to propose a more tangible alternative. The question as to the viability and preferability of justiciable ESCR is highly complex; therefore this examination will stay largely within the parameters of the Convention debate. While not proposing an actual textual amendment, this paper will advance a model of ESCR based on a substantive right to human dignity, as a more feasible and indigenous design to constitutionalising ESCR.

The Problem with Justiciable ESCR

Michaeal McDowell, while arguing against affording greater constitutional protection to ESCR, proposed that justiciable ESCR would diminish the power of the people, transferring ‘huge areas of public policy’ to be determined by ‘what judge says the Constitution says in those areas’, and serve to devalue politics, ‘however imperfect it has been’. McDowell, also prompted the delegates to give strong consideration to ‘the intended advantages and what are the unintended disadvantages?’ – that is the medium and long-term implications of such constitutional reform. Naturally, McDowell’s concerns are grounded in well-founded legal principles about the role of human rights and the courts in a constitutional democracy. Indeed, the very purpose of human rights law, or a bill of rights, .

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2 Joan Burton, Minister for Social Protection ‘Opening Remarks’ (PILA Conference, 28th Mar 2014). Ms Burton stated that Article 45 had been used as framework for guiding government decision-making in context of curtailing cutbacks to social security during the recession.
is to ‘withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities’, so that they ‘may not be submitted to vote’, so that ‘they depend on the outcome of no elections’.5 So while constitutionalising justiciable ESCR might have the immediate advantage of providing a ‘framework’ for Government with which to manage resource limitations and to protect the most vulnerable, as asserted by Dr Mary Murphy before the Convention,6 it may also have the unintended disadvantage of significantly curtailing the will of the people, and their elected representatives, pursuing particular policy agendas – empowering unelected judges to have the final say – devaluing the political process along the way. While democratically determined strong justiciable ESCR could not be described as a (further) loss of sovereignty per se, particularly where there is a strong public consensus on the issue, the unintended long-term implications of turning social policy-making into a type of law should not be understated.

Notwithstanding, the even thornier questions concerning whether the courts actually have the institutional competency to deal with such ‘distributive justice’ type matters. Do judges have the requisite skills to decide whether resources have been allocated correctly? Are courtrooms an appropriate forum to make those kinds of determinations? How can a judge provide, or oversee, an effective remedy to what will often be a structural social policy problem without a readily available immediate solution? Certainly, the debate about the relative merits of constitutionalising justiciable ESCR is an extremely complex issue, even to those who have given great consideration to the issue, garnering much academic debate.7 While an in depth discussion of the various issues regarding court, or judge-led, involvement with ESCR is beyond the scope of this brief article, in highlighting the problems with the Convention proposition, and proposing a more viable alternative, the crux of the fundamental concerns will be addressed.

Considerations in Designing an Irish Model of ESCR

Staying within the confines of the Convention debate, Professor Aoife Nolan, advanced three key questions to be considered in designing an appropriate Irish model of ESCR, noting that each nation’s constitution will invariably be ‘affected by the particular historical, political and legal context of the country in question’.8 First, will it meet the concerns that have led to the actual desire of constitutionalising ESCR in the first place – in terms of being an effective tool for those whose ESCR are not being given effect to? Second, will it be manageable for the Government – in terms of an appropriate framework for Government action that imposes realistic, achievable and tangible obligations? Third, will it be manageable for the courts – in terms of allowing for effective judicial enforcement and a model that does not overburden the courts? I would like to add a fourth vital consideration.

5 Justice Jackson of the US Supreme Court, in the case of West Virginia State Board of Education v Barnette, 319 U.S. 624, 638 (1943). The context was the overturning of a public school regulation making it mandatory to salute the flag and imposing penalties of expulsion and prosecution upon students who failed to comply.

6 (n 4) Dr Mary Murphy, chair of Irish Human Rights and Equality Commission. I say ‘framework’, as justiciable ESCR do far more than providing some kind of a system for reasoned decision-making in social policy, but rather, effectively turns social policy decision-making into a type of legal process.


Will the people comprehend it (including our elected representatives, civil servants and judges!)? Given the oft abstract and illusive nature of human rights, is our proposed model of ESCR framed in a tangible and ‘human’ way so that people might understand, acknowledge, and potentially use it? Surely, this is greatest consideration, given the fact that it is only by way of a referendum that such constitutional reform may take place, the actual legitimacy of such reform derives directly from the people, and ESCR are fundamentally about enabling and empowering the people to have their rights vindicated.

In view of these four key considerations, I would like to make some very brief comments about the preferred justiciable model of ESCR that the Constitutional Convention has recommended to government:9 ‘the state shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts’.

**The Problem with the Proposition**

The principle and language of ‘progressive realisation’ is derived directly from international human rights law,10 and is essentially an obligation on the state to take appropriate legislative steps to realise ESCR for everyone, while recognising that the ability of the state to do so may be hampered by resource constraints.11 The principle and language has been adopted in other national constitutions, such as that of the South Africa Constitution, where the ESCR under Sections 26 and 27 (the right to access adequate housing, health care services, food and water, and social security) are qualified by: ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’ (my emphasis). Thus, in the South African context, the courts will only intervene where a particular Government social policy is found to be unreasonable, allowing a rather wide margin of deference to the Government in such matters – in practice, this means the courts do not have the power to determine the actual scope or substantive content of ESCR12. Preeminent scholars on South African ESCR adjudication, have found that the ‘sheer vagueness of reasonableness’ has resulted in the process of judicial decision-making being unclear and apparently subjective,13 and further, in terms of ‘providing relief for those in desperate need and living in intolerable conditions is vague

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9 Eight Report of the Convention on the Constitution ‘Economic, Social and Cultural (ESC) Rights’ (March 2014) actually recommends that: ‘the State would progressively realise ESC rights, subject to maximum available resources, and that this duty would be cognisable by the courts’ (emphasis added). Presumably, this is to include both ‘shall progressively realise’ (59% of those in favour) and ‘shall endeavour to progressively realise’ (16% of those favour). It might be noted that those in favour of the strong justiciable option (shall progressively realise) represents only 50% of the delegates vote.

10 In particular, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR): ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.


12 The seminal case on this matter being Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC), where the Constitutional Court found, on a ‘reasonableness analysis’, that while the applicant’s ‘right to access adequate housing’ had been infringed, the Constitution ‘expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately’. Thus the Court issued a ‘declaratory order’ only, requiring the state authorities ‘to devise, fund, implement and supervise measures to provide relief to those in desperate need’.

and leaves many questions unanswered'.

As noted by Sandra Liebenberg, a leading advocate of social right in S.A., there has been a judicial trend toward the watering down of reasonableness review standard, and further, the downside of reasonableness is that one cannot get immediate relief, that it allows for excessive deference to government, and provides very weak guidance to the State. Effectively, a rather illusive principle of ‘progressive realisation’ is tied to a rather vague ‘reasonableness test’.

That said, as Nolan proposed to the Constitutional Convention, one may adopt a model of justiciable ESCR to be progressively realized, but then hook on ‘specific obligations that must be realised immediately’ (e.g. a right to basic education) or one where ‘particular groups are identified whose ESCR should be realised immediately’ (e.g. people with disabilities). That is, anchor a measure of immediacy onto the process orientated principle of progressive realisation – certain minimum core obligations. Although, maybe this language is too abstract, given that any such constitutional amendment requires a referendum?

In returning to our four key considerations in designing an Irish model of ESCR. The eminent Justice Sachs recently noted the problem of the abstract nature of human rights questions, but rather, when a social issue is framed in a ‘human way’ people can readily identify with it. Indeed, the disconnect between the language of human rights law and those individuals and groups whose rights are not being vindicated is one of the main obstacles to using the law to challenge injustices. Can we really expect the people to connect with, and engage with, a ‘progressive realisation principle’ of ESCR plucked from the tenets of international human rights law? May a ‘right to reasonable social policy decision-making’ garner any true gravitas rather than a right to something of substance, in this case subsistence?

As I have mentioned, even judges in the South African context have struggled with the concept of what might be ‘reasonable progressive realisation’ – manifesting itself in unclear, apparently subjective, and rather weak judgments. Further, a progressive realisation principle of ESCR effectively means that all social policy may be

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15 Sandra Liebenberg ‘The South African Experience’ (Conference on the Enforcement of Economic, Social and Cultural Rights, Trinity College Dublin, 9 May 2014): highlighting the case City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd and Another (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011), where the Constitutional Court noted that ‘The concepts of rationality and reasonableness are thus central’ (para 87). Rationality review is very weak standard of review.


18 UN Committee on Economic, Social and Cultural Rights ‘General Comment 3’ (1990) Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev.6: ‘On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned’ (para 10).

subject to protracted judicial review in the courts to test its ‘reasonableness’; even if the court finds the legislation or measures unreasonable, effective judicial vindication of the individual’s ESCR may be not so forthcoming. 20 Naturally, civil servants and public representatives will also struggle with a framework that imposes such abstract and far-reaching obligations upon them. While it is certainly preferable that government decision-making is evidence based, and might have due regard to the implications of social policy on the well-being of the most vulnerable sections of society, such an all-encompassing progressive realisation model of justiciable ESCR effectively turns social policy decision-making into a type of abstract legal process. Indeed, the level of deference afforded to Government by way of a progressive realisation principle may not provide any real structure, or ‘check’, on social policy decision-making.

Indeed, strengthening evidence based government decision-making, the ‘reasonableness’ of social policies vis-à-vis ESCR standards, and civil servants and public representatives engagement with ESCR, surely may be far better achieved by imbedding systems of preview in the legislative process, rather than court-based after-the-fact determinations.

As highlighted by Dr Liam Thornton before the Convention, such bodies as the UN Committee on Economic, Social and Cultural Rights and the European Committee on Social Rights endeavour to embed ESCR considerations into the structures of domestic policy-making, issuing non-binding recommendations. 21 Recently, methods have also been developed to applying ESCR based approaches to budgetary allocations 22 – a form of human rights proofing. Further, parliamentary committees and/or National Human Rights Institutions may have a formalised role in applying specialised and sophisticated ESCR analysis of budgets, law, and policy in the making – institutionalising a human rights framework into the legislative process. 23 The latter of these models seems like the most intuitive, practical and potentially effective option – the Irish Human Rights and Equality Commission could have a statutory role in ensuring that ESCR are given due consideration in the legislative and budgetary processes. Of course, a healthy and inclusive legislative process where legislation is properly debated and considered might be another way of ensuring that decision-making is at least well reasoned. While such ESCR type embedding does not strengthen the ability of an individual to have their rights vindicated in a court, it may guarantee a greater level of reasonableness vis-à-vis ESCR standards in social policy, and thus preclude judge involvement to quite exceptional and unforeseen contexts.

The final consideration, will the model of justiciable ESCR be an effective tool for those whose ESCR are not

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20 Without making a mandatory order, as to the actual scope or content of the particular right in question, state authorities or the Government may neglect to make the necessary policy or practice reforms. Unfortunately, declaratory type orders in ESCR matters have found to be quite futile. Probably best exemplified in the Irish context by the states failure to vindicate the rights of troubled youths over a period of seven years, which compelled Justice Kelly to make injunctions ordering the state to build the appropriate facilities within a specified timeframe (D.B. v Minister of Justice [1999] 1 LR 29; [1999] 93; T.D. v Minister of Education [2000] 3 IR 62; [2000] 2 ILRM 321), having exhausted the declaratory approach. Even in Brown v Board of Education 347 U.S. 483 (1954), it took a further ten years after the Supreme Court ruling before actual desegregation occurred, when Congress and the Executive became more actively involved with its implementation (see Cass R. Sunstein ‘Three Civil Rights Fallacies’ (1991) 79 California Law Review 3, 751).


being given effect to? While the so-called ‘Great Recession’ has hit Ireland harder than most in terms of declining household income, unemployment rates and mass emigration, it has been reported that ‘relative poverty’ has not increased primarily due to a ‘functioning and adequately resourced social protection system’, where ‘much of this spending was targeted to the poor’ – in fact public social spending as a percentage of GDP has increased during the crisis.\(^{24}\) Maybe, as our Minister for Social protection recently stated, our non-justiciable constitutional ESCR have in fact provided a framework for Government decision-making regarding public social spending? The relative increase in social spending is more likely a direct result of public pressure, political party commitments, and elected representatives desire to remain in office, in short, purely political considerations – rather than any kind of ESCR rationalisation.

Therefore, we could say that the Government has at least reasonably endeavoured to provide an adequate safety net to maintain essential living standards for the majority of people, having regard to the severe resource limitations placed on the state. I stress the majority, as Government will invariably attempt to please the ‘larger part’ of the electorate, often at the expense of ‘the few’. For example, the Traveller community, who effectively have no direct political representation as a minority group, has experienced disproportionate levels of cuts in social spending in relation to accommodation, education and community based initiatives – ‘compounded by the failure of the state to spend even the limited resources that it has made available’\(^{25}\) – since the start of the austerity programme. While there has not been any other focussed research on the impact of the recession on particularly marginalised groups (to my knowledge), overall there has been a reduction in funding for the voluntary and community organisations in the order of 35%, compared to a 7.1% reduction in overall spending,\(^{26}\) draining the state’s social policy infrastructure, and invariably disproportionately impacting the most vulnerable sections of society.

Therefore, there are certain ‘discrete’\(^ {27}\) sections of society that are often neglected by the ‘ordinary political process’,\(^ {28}\) which may require politically independent courts to provide a greater deal of ESCR protection – particularly in recessionary times. Indeed, human rights issues often only concern the well being of a relatively few citizens, or indeed noncitizens, those low profile issues that political representatives have relatively little interest in. Accordingly, for an Irish model of justiciable ESCR to be an effective tool for those whose rights are not being given effect to, it must empower the courts to robustly intervene in the face of government neglect, particular where the individual or group is not well represented by the political process. Anything other than robust judge-led intervention, where there will invariably be negligible government will and even opposition to resolving the issue, is unlikely to result in an individual’s rights being vindicated. In fact, the greatest failings of the Irish courts engagement with ESC type rights, or so-called ‘distributive justice’, has exclusively concerned such particularly


26 Brian Harvey ‘Review of grant making by the St Stephen’s Green Trust’ (Mar 2014) Table 5.1: ‘Change in funding for voluntary and community organizations, 2008-2014 under principal funding lines for the sector’ (forthcoming).

27 The term ‘discrete’ is borrowed from US ‘suspect classification’ model of judicial review, where in the Carolene Products case Justice Stone found that: ‘prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry’ (United States v. Carolene Products Co 304 US 144, 151 n4 (1938)).

marginalised groups: the Traveller community, troubled juveniles in state care and prisoners.

In light of these considerations, it begs the question as to what kind of a model of constitutional ESCR might be best to equip Ireland’s constitution for the 21st Century? An Irish design to constitutionalising ESCR that can find wide public support – one that everyone can connect with and that all branches of government can live with? A ‘shared commitment’ as to what must be done for everyone in society – irrespective of prevailing political and economic priorities? A kind of ‘normative plain’ that we, as a community, decide: beyond this point we do not go!

A Tentative Alternative?

It may come as a surprise to most, that there is no ‘right to human dignity’ in the Irish Constitution. Rather, the preamble, which encapsulates the spirit of the document, and has no true legal effect, states that: ‘seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured’. Clearly, the framers of the Constitution valued the principle of human dignity as something that must be guaranteed, and something more than assuring that certain fundamental freedoms were respected. That is, the spirit of the Constitution is concerned with not only with what the state should not do, but also with what the state ought to do. In fact, the Irish Constitution of 1937 was the very first constitution (at least that is still in existence) to enshrine the principle of human dignity. Since then, most constitutions have included at least the principle of human dignity in some form, with a strong trend of including human dignity as a type of fundamental right in most modern constitutions – 72% of Council of Europe member states constitution’s actually provide for an expressly guaranteed ‘right to dignity’ in some form. What more, as there is no provision for a right to dignity in the European Convention on Human Rights in any form, which has sub-constitutional status in Irish law, it seems that Ireland has gone from a pioneer of the principle of human dignity to being significantly behind the curve in terms of giving human dignity a manner of constitutional authority.

There are various ways of providing for a constitutional right to dignity. For example, in the German Constitution under ‘Basic Rights’, a standalone provision states that: ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority’. In Finland, a right to dignity is hooked onto a mini-bill of fundamental ESCR under the Constitution, and provides that: ‘Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care’. The Finnish design emphasises the relation between a life of dignity and certain minimum core levels of ESCR. Similarly, the Serbian Constitution ties the principle of human dignity directly to ESCR, in that: ‘Citizens and families that require welfare for the purpose of overcoming social and existential difficulties and creating conditions to provide subsistence, shall have the right to social protection the provision of which is based on social justice, humanity and respect of human dignity’, while also emphasising the minority rights dynamic: ‘inalienable human and minority rights in the Constitution have the purpose of preserving human dignity and exercising full freedom and equality of each individual’.

30 Ibid. Now 75% of constitutions mention human dignity.
31 Analysis of all 47 Council of Europe member states constitutions. Most of those state constitutions that include a right to dignity in some form also include an ESCR bill of rights, with the notable exceptions of Germany and Switzerland.
32 German Constitution 1949 section 1 article 1.
33 Finnish Constitution 1999 section 19.
34 Serbian Constitution 2006 part 2 section 2 article 69.
35 Ibid part 2 section 1 article 19.
The Irish Community Development Law Journal Vol.3 (1) [2014]

Oisín Bourke - A Substantive Right to Human Dignity: An Irish Design to Constitutionalising Economic, Social and Cultural Rights (ESCR)?

The Georgian Constitution takes a different approach. Under the Georgian Constitution’s ‘Basic Rights and Freedoms of Individuals,’ Article 17(1) provides a standalone right to dignity: ‘Honour and dignity of an individual is inviolable’, and Article 17(2) further positions the principle of dignity within the prohibition of inhuman and degrading treatment: ‘Torture, inhuman, cruel treatment and punishment or treatment and punishment infringing upon honour and dignity shall be impermissible’. The Georgian design seems to offer the potential that the inherent positive obligations connected to the prohibition inhuman and degrading treatment might be expanded and strengthened to the level of human dignity, conceptually bridging the gap between the prohibition of inhuman or degrading treatment and the right to privacy and family life. Certainly, all of the above constitutional models of a right to dignity give greater legal authority to the principle than exist in the Irish constitution, and uniformly appear to establish a commitment that human dignity is an inviolable concept, one that cannot be limited, or even temporally suspended (a non-derogable right) – a certain normative plain. It might be noted, that even in the German context, where there is no fundamental ESCR bill of rights, the Constitutional Court has interpreted the Basic Law to mean that there is a positive obligation on the state to provide social security support to people at levels consistent with their human dignity – a ‘dignified minimum existence’.

Arguably, the greatest drive for constitutionalising (more) justiciable ESCR has actually come from the inability, or unwillingness, of the courts to resolve the wholly unacceptable living conditions of particularly marginal and vulnerable sections of Irish society. In O’Reilly v Limerick Corporation, the High Court refused to relieve the deplorable living conditions of members of the Traveller community, as such ESCR claims were rightly ‘to be advanced in Leinster House rather than in the Four Courts’. Later, in TD v Minister for Education, the Supreme Court refused to vindicate the rights of particularly disadvantaged children under the care of the state who required specialised units, as to do would involve the courts social and economic public policy making – that which ‘form the staple of public debate’. Indeed, we continue to export such troubled juveniles due to the inadequate provision of appropriate facilities. More recently, in the case of Mulligan v Governor of Portlaoise, while the High Court found that there was evidence that the prison facilities fell significantly below acceptable standards with regards to ventilation, hygiene and the practice of slopping-out itself, and were clearly demeaning, the conditions were not such as to endanger the applicant’s life – therefore there had been no human rights violation.

This year, the system of direct provision for asylum seekers will be challenged in the High Court, by an African family of six who have lived in direct provision centres for five years, on weekly allowance of €19.10 per week per adult and €9.60 per week per child. While Justice Mac Eochaidh described the ‘urgency’ of the situation and consented to the accommodation of the applicant and children, the High Court refused to order their release on the ground of ‘a warrant to operate outside the relevant Convention Treaty regime’. However, the Supreme Court found that the High Court’s refusal in Mulligan to order the release of the applicant and children ‘had been ill-considered’.

36 Georgian Constitution 1995 chapter 2 article 17.
42 Mulligan v Governor of Portlaoise [2010] IEHC 269.
the ‘unacceptable circumstances’ of the direct provision system, it remains to be seen (although extremely unlikely) whether the Irish legal framework can provide a solution to what is clearly and intuitively a violation of the applicant’s human dignity. Of course, these cases only illustrate a tiny part of the bigger picture.

Nonetheless, these cases illustrate a rather dark depiction of Irish society and a desperately impoverished vision of human rights, where the political process has neglected particularly vulnerable sections of society, with real and tangible consequences for those concerned. By constitutionalising a strong substantive right to human dignity we might commit ourselves to a better society – most importantly guarantee it so.

As already noted, the current Government decision-making ‘framework’ has actually managed to maintain an adequately resourced social protection system for most of the population given the dramatic scale of the financial crisis. However, certain marginal groups, such as the Traveller community, who have little or no political representation, have experienced disproportionate levels of cuts to social spending. Indeed, irrespective of current financial constraints, it will invariably be the marginal few or the minority who will most likely be neglected by the ordinary political process, who may not have their human dignity respected (as illustrated by the Irish case law examples). In fact, marginalised group’s weak status in the political realm should actually alleviate judicial concern about the (democratic) legitimacy of intervening in such distributive type justice matters. To strengthen, or even ensure, government decision-making is at least reasonable vis-à-vis ESCR standards, it seems most prudent to institutionalise an ESCR proofing structure into the legislative and budgetary process, for example, giving the Irish Human Rights and Equality Commission a statutory role in this regard. This would ensure that the impact of social policy and law making on certain marginal groups would at least be given greater consideration by the Government.

However, there will of course be unforeseen individual circumstances, sections of society that have suffered from customary neglect, social rights issues that the Government of the day has no will or interest in resolving, investment in ESCR programs that may unpopular and negatively impact a Ministers incumbency – this is why the courts must maintain a minimum normative plain for everyone. A robustly framed substantive right to human dignity, would compel the courts to actually determine the scope of the right in question, to establish the parameters of our normative plain – beyond this point we cannot go.

It is not for the courts and judges to involve themselves with what might be preferable or even optimum levels of social entitlements, but rather to establish a minimum threshold that government cannot fall below – what we are concerned with is minimum levels of social security, shelter and housing, health care, and education. Indeed, the Irish courts have already engaged in a type of ESCR minimum core analysis, when determining the State had failed in its constitutional requirements to provide for a severely handicapped child’s primary education under Article 42.

Adjudication on ESCR matters, or distributive justice type issues, particularly where structural reform is required, has clearly demonstrated that the only way a court can effectively vindicate such human rights when faced with government disinterest or neglect is through robust intervention. While judges must of course adopt a common sense approach to the type of intervention needed, the court must have the power to make specific

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45 O’Donoghue v Minister for Health [1996] 2 IR 20: while the judgement did not exactly stipulate the details of steps that would be necessary, it was clear, based on the expert testimony and evidence, that children with severe or profound mental handicap should have the benefit of a pupil-teacher ratio of 6:1 and also two child care assistants per class.
orders requiring government to take a certain course of action within specific time frames – this may require the appointment of a ‘compliance coordinator’ or ‘special master’ to oversee remedial efforts.⁴⁶

While I have not proposed an actual text, a strongly framed substantive right to human dignity may the best way forward, given our particular historical affiliation to the principle, our economic-social and political realities, and our relatively unusual legal vacuum when it comes to enabling the courts to at least maintain certain minimum living conditions in particularly unacceptable contexts. Such a justiciable model of ESCR would meet the concerns that have actually led to the desire of strengthening their constitutional status, providing a legal basis for judicial intervention into the type of aforementioned circumstances that the Irish courts have previously failed to deal with. While not providing a framework for Government per se, rather such a model would establish an ultimate and final check on social policy and budgetary allocation – institutionalising ESCR considerations into the legislative and budgetary processes is the best if way of making government more responsive to ESCR standards. A substantive right to human dignity might allow courts to establish the actual parameters of acceptable living conditions, so that robust orders can be made to effectively resolve the issue – with appropriate embedding of ESCR standards into the legislative process the courts should not be overburdened. Further, judicial intervention will be limited to maintaining absolute minimum standards compatible with a dignified existence. Finally, the concept of legal right to human dignity intuitively has more gravitas than an abstract right to reasonable social policy measures – people also have a rather intuitive relationship to the concept.

In the US, a ‘compliance coordinator’ or ‘special master’ may be appointed by a court to oversee or manage effective implementation of a complex judgment, particularly where the judgment requires structural reform. Often such complex judgments are entered into through a ‘consent degree’, a type of legally binding agreed settlement, where a particular course of action is committed to.
Concluding Thoughts

I was impressed by many aspects of Justice Sachs keynote speech at the recent PILA conference, not least his contagious enthusiasm and charisma for human rights and social justice, but one comment really encourages me to write this paper: ‘judges know what human dignity is!’47 What more, I think that people know what human dignity is, and people intuitively know when an individual’s human dignity is not being respected. Human dignity has both an inherent, in terms of subsistence social security, and a relative quality, social security that allows one to function in society. Therefore, rather than a model of justiciable ESCR that imposes on Government to take reasonable steps to progressively realise ESCR, opening all social policy decision-making to court-based reasonableness review, perhaps we might be best to limit judicial oversight to maintaining a certain minimum normative plain that is consistent with human dignity – one that is very realistic, achievable and tangible.

What I am proposing is a restricted, but direct and robust judicial role, in maintaining certain basic living standards that are compatible with human dignity; coupled with embedding ESCR analysis and input into the legislative and budgetary decision-making processes. This would not significantly devalue politics, by transferring power over public policy to the hands of unelected judges, but merely guarantee that a life consistent with human dignity is not dependent on the outcome of elections. We undoubtedly have the financial resources to make it so. Surely, this is something that we can all commit to.
Economic, Social and Cultural Rights in Ireland: Models of Constitutionalisation

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Abstract:
The recommendation of the Constitutional Convention in Ireland to strengthen the protection of economic, social and cultural (ESC) rights in the Irish Constitution marks a historic moment in the trajectory of human rights protection in Ireland. This article explores potential options open to Ireland for ESC constitutionalisation. This examination is predicated with some of the legal considerations around the potential constitutionalisation of ESC rights including: an explanation of what is meant by ESC rights; whether ESC rights are already protected in Ireland; whether the Constitution is an appropriately place for their protection; and whether a legal mandate exists to constitutionalise these rights. The constitutional models are then examined in terms of their legitimacy and viability according to the particular circumstances of Ireland and the appropriate separation of powers between executive, legislative and judicial branches of the State is considered. The article concludes with a template for ESC constitutionalisation taking into consideration the allocation of limited financial resources available to the State and the possibility of conflicting constitutional rights.

Keywords:
Economic, Social and Cultural Rights; Ireland; Constitutional Models.
Introduction

On 23 February 2014 the Constitutional Convention in Ireland voted in favour of strengthening the protection of economic social and cultural (ESC) rights in the Irish Constitution. As part of this recommendation there was strong support for the better protection of rights relating to housing (84% in favour); social security (78%); essential health care (87%); rights of people with disabilities (90%); linguistic and cultural rights (75%); and rights covered in the International Covenant on Economic, Social and Cultural Rights (80%). In addition, only 24% of voters preferred an update of the socio-economic issues contained in Article 45 of the Convention (which deals with non-justiciable social principles) and instead the majority of the Constitutional Convention (59%) voted in favour of inserting a provision ‘that the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts.’ This vote marks a potential paradigmatic shift in the potential framework of the Irish Constitution and marks the beginning of a critical discussion on how human rights ought to be protected within the jurisdiction of Ireland in a democratically and constitutionally legitimate way.

This article will explore some of the key legal issues relating to the inclusion of economic, social and cultural rights in the Irish Constitution and will propose constitutional models for consideration. First the article begins by outlining what is meant by ESC rights and asks whether human rights in general are already adequately protected in Ireland. The article addresses whether ESC rights should be included in the Constitution or whether the directive principles of social policy are sufficient in relation to ESC protection in terms of constitutional recognition.

The article then considers whether there is a legal mandate for the inclusion of ESC rights in the Constitution and, finally, proposes forms of constitutionalisation and an example template of a potential constitutional provision for ESC rights for the particular circumstances of Ireland.

1. What are economic, social and cultural rights?

Mary Robinson, President of Ireland from 1990 to 1997 and former United Nations High Commissioner for Human Rights, described the protection of human rights in the following terms:

Simply stated, universality of human rights means that human rights must be the same everywhere and for everyone... Human rights are indivisible. This means that civil and political rights, on the one hand, and economic, social and cultural rights, on the other, must be treated equally... We must not be selective, for these rights are interrelated and interdependent... Universality is, in fact, the essence of human rights: all people are bound to observe them, all State and civil actors should defend them. The goal is nothing less than all human rights for all.1

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1 Constitutional Convention press release, 85% of voters voted in favour of strengthening the protection of economic, social and cultural rights, 23 February 2014, 1 http://www.constitution.ie/AttachmentDownload.ashx?mid=adc4c56a-a09c-e311-a7ce-005056a32ee4 accessed 10 March 2014


ESC, together with civil and political (CP) rights form the human rights framework established in the International Bill of Rights. As part of the Universal Declaration of Human Rights (UDHR) in 1948 nations throughout the world came together to support the protection and fulfilment of civil, political, economic, social and cultural rights. There was a commitment to ensure equal access to each of these rights (Article 7 UDHR). The UDHR was a declaratory instrument and was followed by two international treaties that were to give substance and confer obligations upon States to ensure the implementation of international human rights at the domestic level: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Together the UDHR, the ICCPR and ICESCR form the International Bill of Rights. It was intended that the covenants should be implemented concurrently and according to the principle of indivisibility. Subsequent international treaties have confirmed the legally binding status of these rights and their indivisible nature.

At a macro level, examples of civil and political rights include the right to a fair trial, the right to privacy, the right to vote, the right to freedom of conscience and so on. At the micro level, these rights form an important part of the rights currently protected under the Irish Constitution. Examples of economic, social and cultural rights include the right to education, the right to adequate housing, the right to a fair remuneration for work, the right to health, and the right to freedom from destitution. They also more broadly protect vulnerable groups such as those with disabilities, children, the elderly, minority communities or those who are unemployed.

It was accepted at an international level that these rights – civil, political, economic, social and cultural rights were ‘indivisible’ in nature. This means that fulfilment and enjoyment of one right is dependent on fulfilment and full protection of the other. For example – the right to vote cannot be fully enjoyed unless a person is also able to enjoy the right to education, the right to protest and the right to freedom of conscience and freedom of religion or belief. The right to life for example, cannot be fully enjoyed, unless there is also adequate protection of the right to health, which is equally dependent on the right to adequate and safe housing and the right to freedom from destitution (or the right to a minimum level of social security). The principle of indivisibility is a helpful way of viewing the human rights framework in a more holistic manner. It is therefore easier to understand why the inclusion of ESC rights in the Constitution is important as their exclusion may undermine the existing rights protected in the Constitution. On this basis, the CP rights currently protected cannot fully be enjoyed without adequate protection.
and acknowledgment of the universality, or indivisibility of all human rights, including ESC rights. Often, ESC rights have been incorrectly assigned to a lesser legal status than their CP counterparts based on confusion surrounding the method through which ESC rights ought to be implemented. This related to whether or not a duty existed to facilitate judicial remedies if a violation of an ESC right occurred. The International Covenant on Economic, Social and Cultural Rights did not explicitly stipulate for judicial remedies in the provision dealing with ESC implementation (Article 2(1) ICESCR stipulates for the progressive realisation of ESC rights through legislative or administrative mechanisms) and during the drafting process some States rejected the justiciable nature of ESC rights. However, the Committee on Economic, Social and Cultural Rights (the body responsible for overseeing implementation of the Covenant) has now called for justiciable remedies for violations of ESC rights to be made available. The Committee also indicates that a blanket refusal to recognise the justiciable nature of ESC rights is considered arbitrary and that, ideally, ESC rights should be protected in the same way as CP rights within the domestic legal order.

Despite difficult beginnings, it is now more commonly accepted in the literature and in practice that ESC rights can be judicially enforceable, or, that they ought to be - whereby effective remedies should be available for violations of ESC rights in the same way they are available for CP rights. The question now relates as to how best to deliver justiciable remedies, or, through what mechanisms might ESC rights be best protected within a particular constitutional framework. That is the question now facing Ireland – through what particular constitutional model could economic, social and cultural rights be protected in a way that is cognisable by the court and that is legitimate and viable with regard to the particular constitutional framework of Ireland? The Constitutional Convention has provided a forum offering a critical opportunity to deliberate on these issues and it is crucial citizen engagement is ensured. The Constitution, after all, belongs to the People and so any change to the constitutional framework should happen on a deliberative and informed basis. Critically, this requires an exploration of the viable options open for consideration in order to ensure a robust system coupled with safeguards for the particular circumstances of Ireland. A legitimate and viable constitutionalisation requires that drafters should consider the concerns of those opposed to the constitutionalisation of ESC rights, or to

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11 For example, during the drafting of ICESCR, the Indian representative stated that ‘economic, social and cultural rights, though equally fundamental and therefore important, formed a separate category of rights from that of civil and political rights, in that they were not justiciable rights, and that the method of their implementation was, therefore different.’ UN DOCE/1992 (1951) Commission on Human Rights, Report of the Seventh Session, 13 UN ESCOR, Supplement 9 at 15, para.67.

12 A ‘justiciable remedy’ is a remedy granted by a court. For the purposes of this article ‘justiciability’ refers to the adjudication of a right by a court.


14 General Comment No. 9 ibid.

15 See Tinta supra n 9, see also General Comment No 9 supra n 13, see also Anashri Pillay, ‘Economic and Social Rights Adjudication: developing principles of judicial restraint in South Africa and the United Kingdom’ (2013) Public Law 599. Pillay contends that ‘the weight of academic, judicial and political opinion has moved away from justiciability to a consideration of the most effective judicial approaches to [ESC] rights’ p.599.
granting judicial remedies for violations of ESC rights. Issues relating to democratic legitimacy; polycentricity; expertise; and budgetary allocation require to be addressed. They do not, however, exclude the viability of ESC constitutionalisation and ESC adjudication in practice and nor should they be wielded as reasons for an outright rejection of the legitimacy of ESC constitutionalisation. To do so, would be operating under a false dichotomy of rights along the positive v negative alignment. It would be an arbitrary position to take and is no longer tenable in international law.

2. Are human rights not already adequately protected in Ireland?

Many human rights are already protected in Ireland through a variety of mechanisms – legislative; administrative and judicial. Some human rights are currently protected in the Constitution; however, the Constitution protects rights that fall predominantly within the civil and political category such as the right to life, the right to freedom of expression and the right to privacy. The right to education and the right to property are examples of the ESC rights protected in the Constitution. Under Article 45 of the Constitution the directive principles of social policy, although referring to socio-economic duties, are not enforceable in court. Some of the rights protected in the Constitution are explicitly mentioned and others are implicit, or derived from other rights. Through the jurisprudence of the Supreme Court it has become clear that the court responsible for interpreting and guarding the Constitution does not consider that ESC rights ought to be recognised as implicit within the explicit enumerated rights of the Irish Constitution.

The reluctance to extend protection to ESC rights rests on the premise first articulated by Costello J in O’Reilly that the separation of powers precludes the Irish Courts from intervening to enforce claims based on distributive justice (the sole responsibility of the legislature and executive), as opposed to commutative justice (which falls within the realm of the court’s competence). This reluctance was later reinforced in the decisions of TD v Minister for Education and Sinnott v Minister of Education.

Whether or not ESC rights ought to be implicitly recognised in the Irish Constitution in its current form is contestable, however, it is not within the scope of this article to revisit these debates here. The recommendation made by the Constitutional Convention allows for a renewed discussion on the constitutional protection of ESC rights through explicit recognition, as opposed to implicit interpretation. The playing field has therefore completely changed. In its current format, the constitutional framework does not extend protection to the full framework of human rights


A blanket refusal to acknowledge the justiciable nature of ESC rights is considered arbitrary by the Committee on Economic, Social and Cultural Rights, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para.10.

The judiciary in Ireland have developed a number of unenumerated rights in the Irish Constitution. For a discussion on these rights see Elaine Dewhurst et al, Principles of Irish Human Rights Law (Clarus Press, 2013).


[2001] 2 IR 545.
Moving beyond the Constitution, the State has also legislated to protect human rights through the enactment of the European Convention of Human Rights Act 2003 (‘the 2003 Act’). The European Convention of Human Rights 1950 (‘ECHR’) mostly protects civil and political rights. In some cases, the jurisprudence of the European Court of Human Rights (‘ECtHR’) has followed what can be described as an ‘evolutive’ or ‘dynamic’ approach to interpretation and this has resulted in an interpretation of CP rights that implicitly recognises ESC rights through the underlying indivisible nature of the human rights framework.\(^{23}\)

Under the 2003 Act, if the domestic court finds a violation of a Convention right through the act or omission of a public body (organ of the State) it can declare that the public body acted unlawfully and provide a remedy to the citizen (section 3 of the 2003 Act). Also, if a piece of legislation is open to interpretation then the courts must interpret it in a way which ensures compliance with Convention rights (section 2 of the 2003 Act). These mechanisms further extend the protection of human rights in Ireland within a ‘rights-affirmative’ interpretative framework.\(^{24}\)

However, if the public body is acting in accordance with an obligation conferred on them by domestic legislation that is impossible to interpret in a way that is compatible with human rights, the court can only declare that the legislation is incompatible – meaning no direct remedy for the citizen (section 5 of the 2003 Act). The Government may consider paying compensation on a discretionary basis and there is no requirement to change the law. The only effective remedy then available to the individual is to seek recourse in Strasbourg. This demonstrates that even where international treaties are incorporated into domestic law through legislation, the court is limited in providing a remedy.

Fundamental rights have formed part of the EU legal order from as early as 1969.\(^{25}\) As the jurisprudence of the then European Court of Justice (now the Court of Justice of the European Union ‘CJEU’) developed, so too did the recognition of human rights as ‘general principles’ of EU law.\(^{26}\) International human rights treaties were to serve as a source for these general principles as was the national constitutional traditions of member States.\(^{27}\) This body of jurisprudence was by no means restricted to the binary application of rights entrenched in the Council of Europe system and some ESC rights form part of the ‘general principles’ of EU law.\(^{28}\)

23 Compare for example the cases of Chapman v UK (2001) 33 E.H.R.R. 18 ECtHR and Airey v. Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305. In the latter the ECtHR recognised that there is no water-tight division separating CP rights from the sphere of ESC rights and the interpretation of CP may lead to the protection of ESC rights. On the other hand, in the former case the ECtHR refused to extend the right to housing to the realm of the court preferring instead to leave this to the political sphere. For a discussion on ECHR protection of CP and ESC rights see Liam Thornton, ‘Seasca Bliain Faoi Bhláth: Socio-economic rights and the European Convention on Human Rights’, Draft Paper, UCD School of Law & UCD Human Rights Network.

24 Meaning there is a presumption in favour of interpreting provisions in such a way as to ensure compliance in so far as it is possible to do so.


28 As Williams asserts, ‘The development of social policy internally and identification of economic and social rights for promotion externally point to an institutional appreciation of indivisibility within the EU that simply transcends the limitations of the Convention. The CJEU’s jurisprudence also indicates a willingness to see matters of equality and solidarity as human rights matters worthy of protection as well as being justiciable. It is plausible to suggest therefore that indivisibility is a working normative principle applicable in the EU context, one which is not shared by the ECHR in its constitution.’ Andrew Williams, ‘The European Convention on Human Rights, the EU and the UK: confronting a heresy’ (2013) 24 European Journal of International Law 1157, at 1172.
Following entry into force of the Lisbon Treaty in 2009, the indivisibility approach is now explicitly evident in the EU legal order with the introduction of an EU constitution under the Treaty of the European Union (TEU)\textsuperscript{29}, the Treaty on the Functioning of the European Union (TFEU)\textsuperscript{30} and the European Charter of Fundamental Rights (the EU Charter).\textsuperscript{31} Article 6(3) TEU confirms the continuing relevance of fundamental rights as general principles of Union law and Article 6(1) of the TEU incorporates the EU Charter into the EU legal order as a matter of primary law holding the same status as the TEU and the TFEU. The EU Charter provides for civil, political, economic, social and cultural rights. In Ireland, as in other Member States of the European Union, the application of EU law has direct effect in the domestic legal order and supersedes national law that is incompatible.\textsuperscript{32}

Rights protected under the EU Charter are therefore subject to stronger protection mechanisms than are available under the ECHR structure. However, application of the EU Charter is limited in three respects. First, in relation to the general application of the Charter, Article 6(1) of the TEU and Article 51(2) of the Charter clarify that there is no extension of EU competency under the provisions of the Charter (meaning the Charter does not proclaim any new rights – only reiterates what rights currently exist under EU law). Second, the Charter only applies at a domestic level when member States are applying Union law (Article 51(1)) meaning that the Charter provisions will only be engaged if connected to a matter of EU law. Allan Rosas, President of the Chamber of the CJEU, addressed concerns raised in the literature and in practice of the practicability of these limitations by reiterating what he describes as an already existing Union norm.\textsuperscript{33} Article 6(1) TEU together with Article 51(1) EU Charter merely enumerate the principles of EU law already established in jurisprudence of the CJEU prior to the enactment of the Charter in so far as EU fundamental rights should be protected when ‘implementing’ EU law at both the EU and national level.\textsuperscript{34} Implementation, he argues, relates to applicability, so when a Union norm is sufficiently relevant to the outcome of a case (\textit{in concreto} as opposed to \textit{in abstracto}), this opens the door for an application of the Charter provisions as well.\textsuperscript{35} The meaning of implementation was clarified in the case of \textit{Akerberg Fransson}\textsuperscript{36} when the CJEU extended the meaning of Article 51(1) to engagement when an issue falls within the ‘scope of EU law’ (far reaching application) rather than a more limited operation engaged when a State merely ‘implements’ EU law (narrow application).\textsuperscript{37}

Third, the EU Charter makes a distinction between rights v principles. There is no definition of the rights v principles distinction in the text of the Charter other than to clarify that rights are justiciable, and principles are the

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  \item \textsuperscript{29} European Union, \textit{Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.}
  \item \textsuperscript{30} European Union, \textit{Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, 2012/C 326/47.}
  \item \textsuperscript{31} European Union: Council of the European Union, \textit{Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1.}
  \item \textsuperscript{32} Costa v Enel [1964] ECR 585 (6/64) whereby the Court of Justice held that EU law supersedes national law and Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62 where the court held that EU law operates with direct effect in national courts of Member States.
  \item \textsuperscript{33} Allan Rosas, ‘When is the EU Charter Applicable at National Level?’ (2012) 19 JURISPRIDENCE 1269.
  \item \textsuperscript{34} In the case of \textit{Wachauf} the court confirmed that Union fundamental rights are also binding on the Member States when they implement Community rules’ Case 5/88 \textit{Wachauf} [1989] ECR 2607, para.19. See also for example: Case C-60/00 \textit{Carpenter} [2002] ECR I-6279, para.37–40; Case C-117/01 KB [2004] ECR I-541, paras 30–34. Rosas contrasts the approaches taken in these cases with that of Kremzov, where the court held that the situation did not ‘establish a sufficient connection with Community law to justify the application of Community provisions’, Case C-299/95 \textit{Kremzov} [1997] ECR I-2405, para.16.
  \item \textsuperscript{35} Rosas, ibid, 1278.
  \item \textsuperscript{36} \textit{Akerberg Fransson} C-617/10 26 February 2013.
  \item \textsuperscript{37} ibid para.19.
\end{itemize}
responsibility of the legislature and executive with limited justiciability.38 As to what constitutes rights or principles, there is no clear definition on content either. The explanatory notes merely state that some articles are principles and that other provisions are illustrative of articles that contain rights and principles. Without further clarification on this, Lenaerts concludes that interpretation will fall to the CJEU when a challenge to rights v principles arises.39 There is a danger that the rights v principles definition will distinguish a justiciable difference between CP v ESC rights in the future.40 This is particularly problematic in relation to the ‘opt out’ to the EU Charter sought by Poland and the UK through the operation of Protocol 30.41 The UK and Poland sought to diminish the applicability of the Charter by rendering the Charter rights contained in Title IV (Solidarity) as non-justiciable.42 The rights contained in Title IV of the Charter relate to ESC rights such as labour rights43, the right to social security44 and the right to adequate health care.45 This distinction mirrors the positive v negative dichotomy that undermines the principle of indivisibility. Jurisprudence of the CJEU has already clarified that the Protocol does not relieve the UK (or Poland) of obligations in relation to the application of the Charter at the national level when considering an aspect of EU law.46 In other words, the ‘opt out’ does not apply to existing rights when a case falls within the scope of EU law. This would indicate that the justiciable nature of existing ESC rights will most certainly not be diminished, and, as jurisprudence of the CJEU demonstrates, there is the potential for a teleological development towards further ESC protection as evidenced by recent case law in Ireland.47 On the other hand, it is important to recognise that a rights v principles distinction may be determined in the future as a result of the distinction in Protocol 30 in order to reflect a universal approach to human rights across the EU legal order.48

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38 Article 52(2) provides ‘The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.’


41 Protocol (No 30) on the Application of the Charter of the Fundamental Rights of the European Union to Poland and to the United Kingdom annexed to the TEU and the TFEU.

42 Article 1(2) Protocol 30 to Charter of Fundamental Rights and Freedoms.

43 Articles 27-32.

44 Article 34.

45 Article 35.

46 Joined Cases C-411/10 and C-493/10 N.S. and M.E., judgment of 21 December 2011, ‘Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions’ at para.120. This case dealt with a CP right (Art 3 ECHR and Art 4 EU Charter) as opposed to an ESC right (under Title IV) meaning that the rights v principles distinction did not require determination in this case leaving it open to challenge in the future.

47 For example the following cases extended ESC protection in Ireland: J. Mc. B. v L. E., Case C-400/10 5 October 2010 (father’s rights of custody relating to family rights [Art 7] and the best interests of the child [Art 24.2]); M. M. v Minister for Justice, Equality and Law Reform, C-277/11, 22 November 2012 (greater procedural protection for those seeking asylum [Art 41 Right to good administration]); Joined Cases C-411/10 and C-493/10 N.S. and M.E. ibid (held: Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 falls within the scope of EU law and indivisible approach to those seeking asylum in EU, removal to another member state and the right to freedom from inhuman and degrading treatment [Art 3 ECHR and Art 4 EU Charter]). ‘Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.’ At para.106.

48 Barnard supra n 40. See also the Melloni case in which the CJEU limited the application of more stringent fair trial safeguards at the national level in order to reflect a universal approach in the operation of the European Arrest Warrant as an area fully regulated by EU law, Melloni C399/11 26 February 2013.
The EU Charter provides a new mechanism through which ESC rights can be more robustly protected in Ireland.\footnote{49}{For a discussion on this see Michael Farrell, ‘Protecting Human Rights Another Way – Using the EU Charter of Fundamental Rights’, PILA Bulletin, 23 April 2014, available at http://www.pila.ie/bulletin/april-2014/23-april/guest-article-by-flac-s-michael-farrell-protecting-human-rights-another-way-using-the-eu-charter-of-fundamental-rights/ accessed 24 April 2014.} This is a positive development. However, it is not fully inclusive of all human rights and although the Charter goes further than the ECHR framework, it is not without its limitations.

This demonstrates that, even where international treaties are incorporated into domestic law through legislation or through the EU legal order, the court is limited in providing a domestic remedy and there are potential gaps in accountability. In this sense, non-justiciable constitutional mechanisms (such as the directive principles), legislation (whether specifically providing for ESC rights or incorporating an international treaty that protects rights) and the EU Charter of Fundamental Rights do not go far enough to ensure the substantive legal protection of all human rights in Ireland.

The court can only intervene and declare legislation unlawful if it is unconstitutional. It is for this reason that fundamental rights, including ESC rights, would arguably be better protected through explicit enumeration in the Constitution so as to provide an appropriate accountability mechanism in the exercise of power by the State. This would also mean that human rights are ‘home grown’ rather than relying on the decisions of international courts to rectify a human right breach.

### 3. Why should ESC rights be included in the Constitution?

There are a number of ways through which ESC rights might arguably be protected. This may be achieved, for example, through legislation or administrative policies without the need for explicit recognition in the Constitution. However, relying on this alone would mean that the citizen depends on the relevant public authority or current political leadership to ensure protection and fulfilment of ESC rights without any mechanism for accountability if they fail to act in compliance with human rights. This can often leave those who are more vulnerable and marginalised in society in a weaker position. This is particularly true of a democracy that accommodates a strong lobby system. There is an inherent danger that such a system will result in majoritarian politics without any safeguards in place to ensure the rights of minority groups are protected.\footnote{50}{See King supra n 15.} King notes that this is particularly problematic within the context of social rights as a strong welfare State employing safety mechanisms for those who are vulnerable or marginalised ‘is diametrically opposed, to the interests of the wealthy and is therefore precisely the target of the well-resourced lobbying interests.’\footnote{51}{ibid King 157 (emphasis added).} By affording constitutional status to ESC rights there would be a stronger mechanism in place to protect those who do not currently have a strong voice in the political system. It would also ensure that citizens are able to access an effective remedy by holding public authorities and the Government to account for an alleged violation by going to court. This by no means necessarily facilitates a compensation culture or the redistribution of wealth by the judiciary contrary to the intentions of the
It would merely afford the individual and the court the authority to examine the exercise of power by the State to ensure that there has been no violation of a right unless the State is in a position to justify interference (in the same way that CP rights are already constitutionally protected).

4. What is the legal mandate for inclusion?

There is a legal mandate to ensure the substantive protection of ESC rights based on a number of international legal obligations. Ireland has ratified the International Covenant on Economic, Social and Cultural Rights 1966, the European Social Charter (Revised) 1996, the Convention on the Rights of the Child 1989, the Convention on the Elimination of Discrimination Against Women 1979 and the Convention on the Elimination of Racial Discrimination 1965, each of which contain legally binding obligations to protect civil, political, economic, social and cultural rights in Ireland. There has also been a commitment to protect all human rights through other internationally legally binding obligations as a result of the peace process in Northern Ireland. These obligations are contained in the 1998 peace agreement and the international binding treaty between the British and Irish governments, which together stipulate for the protection of human rights, including ESC rights, to be extended across the island of Ireland. The UN Committee on Economic, Social and Cultural Rights has also recommended that Ireland incorporate ESC rights into the Constitution.

5. How can ESC rights be included in the Constitution?

There are a variety of ways to include ESC rights in a Constitution and other countries have applied different kinds of constitutional mechanisms in order to achieve this. It is important to examine mechanisms that would suit the particular circumstances of Ireland. This can be done by also taking into consideration the balancing of rights and the limited resources of a State. Any reluctance of the judiciary to adjudicate on these rights can also be dealt with through the use of appropriate safeguards to ensure the balance of power between the State and the courts is not upset. A carefully crafted constitutional model can overcome barriers associated with political juridification. That is to say, it is a legitimate concern that judicial supremacy could usurp the role of the

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52 There can be many different forms of review by the judiciary of the actions of the executive or legislature. There can also be many different forms of remedy available for a violation. A declaratory order for example would defer the matter back to the legislature or executive to decide following a breach of an ESC constitutional right. A structural interdict could see the judiciary adopt a more involved role in supervising compliance with an order. For a discussion on remedies in the South African context see Christopher Mbazira, ‘From Ambivalence to Certainty; Norms and Principles For the Structural Interdict in Socio-Economic Rights Litigation in South Africa’ (2008) 24 South African Journal of Human Rights 1.


legislature in determining matters relating to the allocation of limited resources across different socio-economic areas. And so, unelected judges should not have a monopoly on decisions regarding polycentric issues with far reaching budgetary implications. However, the question before the people of Ireland is whether the court can act as an important accountability mechanism when the executive or legislature fail to comply with basic human rights when implementing polycentric issues with wide reaching budgetary implications. If so, then the degree of protection of basic human rights can also be set out in the Constitution. The following questions will help assist in determining the extent to which ESC rights should be protected:

**Should there be immediately enforceable duties in relation to the mainstreaming of those aspects of ESC rights that do not require an allocation of State resources?**

The Constitution could immediately protect ‘negative’ ESC rights such as the right not to be evicted or procedural rights with positive aspects such as duties to take into consideration the adverse impact of budgetary decisions on vulnerable or marginalised groups before reallocating funds.

**Should there be a minimal level of subsistence below which no person should fall?**

If so, the Constitution can provide that the legislature and executive are required to take this into consideration when exercising power on behalf of the State through the enactment of legislation or through administrative policies. This could in itself require the State to set out what the minimal level of subsistence is taking into consideration the minimum core obligations of international law as a starting point.

**Should the executive and the legislature be required to progressively and substantively achieve the fulfilment of ESC rights?**

If so, then the Constitution can impose such a duty on the State to progressively achieve these rights. This duty could be qualified as to the availability of resources and the balancing of priorities. There are different theories of adjudication that will minimise the impact of judicial interference unless the State fails to justify why a right is not being complied with in which case the judiciary can intervene to require the State to remedy the matter.

Constitutional texts have taken on a number of different approaches to deal with some of the issues raised above. The Constitution of Argentina for example directly implements ICESCR in addition to other constitutional rights, which, can be denounced by the executive if two thirds of each chamber of the parliament approve (creating

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57 See for example the judicial recognition of an immediately enforceable right to highest attainable health in Brazil that resulted in more inequity in health provision, favouring the wealthy and further marginalising the poor, Octavio Luiz Motto Ferraz, ‘The Right to Health in the Courts of Brazil: Worsening Health Inequities?’ (2009) 11 Health and Human Rights: an International Journal 33.

58 The latter is similar to the protection afforded to vulnerable and marginalised groups in the UK under the Equality Act 2010 that imposes a far reaching duty to have due regard to promoting equality of opportunity between different groups when allocating resources (s149 Equality Act 2010). This is a procedural duty to have ‘due regard’ to positive outcomes. If public bodies do not comply the judiciary can quash the decision. See for example Harjula v London Borough Council supra Harjula v London Borough Council [2011] EWHC 151 (QB); on the Application of W,M,G & H v Birmingham City Council, [2011] EWHC 1147 Admin.

59 This would essentially establish a minimum core of human rights in line with the General Comments of CESCR and the Human Rights Council.

a rights-affirmative framework with the option for parliamentary derogation). The Constitution of Angola requires the government and the legislature to create the necessary conditions to effectively implement ESC rights including through legislative and other appropriate measures in accordance with available resources.

In the Czech Republic, the Constitution consists of a Charter of Fundamental Freedoms with extensive prescription of ESC related rights, however, these rights can only be judicially claimed within the confines of the implementation mechanisms (so according to their legislative status). The South African model also adopts a mixture of substantive rights recognition, together with safeguards and limitation clauses contained in the Constitution. Rights are also afforded protection to different degrees along the respect, protect, promote, fulfil axis. Some ‘negative’ rights enjoy immediate protection such as the right not to be evicted without fair procedure. Some rights are afforded non-derogable status, such as rights relating to children. Other rights are considered to be subject to progressive realisation such as the right to access adequate housing and the right to access health care, food, water and social security. There is a general limitation clause under section 36 whereby rights may be limited if reasonable and justifiable in an open and democratic society.

There are also institutional safeguards in place within different constitutional models that would be open to Ireland for consideration. For example, the Constitution of Argentina permits the executive to derogate from fundamental rights if there is a two thirds majority in both houses of parliament. In Canada the primacy of the Constitution is guaranteed in section 52 of the Constitution Act 1982 granting the courts the power to strike down incompatible legislation. However, parliament has the power to override compliance with the Charter of Fundamental Rights and Freedoms under section 33 of the Act (the ‘notwithstanding’ clause). This effectively places the final pronouncement on human rights compliance back in the hands of the legislature; at the same time, the use of the clause may risk strong political opposition. At the very least, it places compliance as the default position and derogation from rights as a secondary position that can only occur in a transparent and explicit declaration.

In Finland, there is a hybrid constitutional model in place with safeguards ensured through ex ante parliamentary

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63 Article 41 places the limit on claiming rights contained in Articles 26, 27(4), 28-31, 32(1) & (3), 33, 35.
64 Section 7 of the Constitution.
65 See for example Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others CCT 24/07 Medium Neutral Citation [2008] ZACC 1 – meaningful engagement and participation is required by the constitution before an eviction order can be served (no forced eviction without notice).
66 Such as the right to be protected from maltreatment, neglect, abuse or degradation; and the right to be protected from exploitative labour practices (section 28(1)(d) and (e)). See section 37(5)(c) for a table listing non-derogable rights in the South African Constitution. For a discussion on the rights of the child (particularly girls’ ESC rights) in the South African Constitution see Ann Skelton, ‘Girls’ Socio-Economic Rights in South Africa’ (2010) 26 South African Journal of Human Rights 141.
67 For example, section 26 of the South African Constitution provides for the right to have access to health care, food, water and social security. The constitution further provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights (Sections 26(2) and 27(2) respectively).
68 The South African judiciary review compliance with the progressive realisation of sections 26 and 27 based on a reasonableness test as developed in Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) and Minister of Health v. Treatment Action Campaign (no 2) (TAC), 2002 (5) SA 721 (CC).
69 The Charter of Fundamental Rights and Freedoms forms part of the Constitution Act 1982 granting the Charter constitutional status and part of the primacy of constitutional law. ESC rights have been recognised under the rubric of equality under the Charter – see Eldridge v British Colombia (Attorney General) [1997] 2 SCR 624.
The Constitutional Law Committee of Parliament in Finland conducts a thorough review of legislation prior to enactment. The Committee consists of Members of Parliament; however, its decisions are largely based on the deliberations of constitutional experts from whom the committee seeks evidence. What is more, the reports of the Committee tend to be legally, rather than politically, focussed. The decision of the Committee on the compatibility of legislation with constitutional rights, including ESC rights, is binding on Parliament. The ex ante review of a bill secures a strong degree of constitutional compatibility in abstracto following which, the court is authorised to remedy any conflict with the Constitution on a case by case basis if a contradiction arises.

Furthermore, the constitutional provisions dealing with ESC rights in the Finnish model are directed at the legislature: the right to citizenship (Article 5); the right to equality before the law (Article 6); educational rights (Article 16); the right to language and culture (Article 17); the right to work (Article 18); and the right to social security (Article 19) are all required to be given effect to through subsequent legislation. The constitutional mandate to fulfil the ESC obligations is therefore directly addressed to the legislature. In this sense, the constitution imposes a mandatory obligation on the legislature to legislate for the protection and fulfilment of ESC rights. This model is therefore consonant with the doctrine of parliamentary supremacy but with the caveat that if the legislature fails to meet its constitutional obligations the court can intervene. In Sweden a similar pre-enactment preview process is in place. Thomas Bull has argued that this type of ex ante review of legislation through the Parliamentary system makes it difficult (although not impossible) to legislate in a way that infringes fundamental rights. The court, however, is required as a means of last resort to ensure executive and legislative compliance.

This approach is not so far removed from the role played by the Joint Committee on Human Rights (JCHR) in the Westminster Parliament. However, ESC rights are not granted constitutional status in the uncodified UK Constitution. The recommendations of the JCHR are not binding on the UK Parliament. The legitimacy of the Finnish model is reinforced by the constitutional recognition of human rights, including ESC rights, from the outset,
consequently to ignore the committee’s recommendations would be to risk acting \textit{ultra vires}\textsuperscript{80} the constitution. The work of the JCHR on the other hand, can be more easily dismissed in the UK Parliamentary system where parliamentary supremacy prevails. In this sense it is viewed more as a ‘thorn in the side’ of the legislature\textsuperscript{81}, rather than a form of \textit{ex ante} constitutional deliberation engendering legitimacy in the legislative process.

There is currently no mechanism for \textit{ex ante} or \textit{ex post} review of ESC rights compatibility in Ireland. Constitutional recognition, together with mechanisms for parliamentary scrutiny of legislation and judicial review of legislative and administrative action would surely provide a more robust system of compliance with fundamental human rights than is currently available. This is of particular importance with regards to those who are not represented in a majoritarian representative system such as the most vulnerable and marginalised groups.

The options for constitutionalisation are numerous and there will require to be a comprehensive investigation into the model most appropriate for the circumstances of Ireland. Some of the options available include the following:

- there could be a general provision that the Oireachtas must enact legislation in order to comply with the State’s international human rights obligations/ or specifically enumerated ESC rights and provision made to ensure that the State performs this duty in a reasonable manner.
- an amendment to Article 29 of the constitution could incorporate ICESCR into domestic law.
- there could be a requirement on the State to meet a minimum standard across particular socio-economic areas with a duty to ensure in a reasonable manner that policies are in place to continue to enhance the lives of all citizens in accordance with the resources available to the State.
- the Constitution could provide that the State enacts a Charter of Fundamental Freedoms which holds constitutional status and the Charter could outline the constitutional rights to be protected, the most appropriate procedure for judicial review, and the remedies available.
- there could be a requirement to implement mechanisms for \textit{ex ante} parliamentary scrutiny and \textit{ex post} judicial review for ESC rights compliance. This could see the formation of a Human Rights Committee in the Oireachtas.
- there could be a number of safeguards introduced to administer the separation of powers through a ‘notwithstanding’ type clause or through development of remedies that defer the matter back to parliament for consideration with a supervisory role for the courts for compliance .
- there could be constitutional provisions that directly impose a duty on the legislature to legislate for the protection of ESC rights with a requirement that the legislature take into consideration what remedies ought to be available within the confines of the implementing legislation.

\textsuperscript{80} Beyond the competence of the constitution.

As a starting point the following is a suggested template for ESC constitutionalisation. The provisions take into account the limited financial resources available to the State and the possibility of conflicting constitutional rights:

‘The State recognises the indivisibility of civil, political, economic, social and cultural rights protected in the Constitution (a list of the rights for inclusion should be considered and could be written out in full or reference made to their status in international law).

1. The State must, to the maximum of its available resources, ensure the protection and enforcement of each of these rights.
2. The citizen will have access to an effective judicial remedy if the State fails to comply with the duty under paragraph (1).
3. The State must ensure to take all reasonable steps to ensure the full and substantive enjoyment of economic, social and cultural rights as well as civil and political rights.
4. The State must demonstrate what reasonable steps are being taken to comply with a right if a violation of a right occurs.
5. Each individual will have equal access to the enjoyment of all human rights free from discrimination on grounds of race, minority status (ethnic or otherwise), age, gender, disability, religion or belief, marital status, sexual orientation, gender reassignment or disadvantaged socio-economic status.
6. Each of the rights set out in the Constitution are subject only to reasonable and proportionate limits prescribed by law as can be justified in a free and democratic society for the common good or public order.
7. A proportionate limit can include the balancing of a competing constitutional right where there is a conflict between more than one right protected in the Constitution.
7. An effective remedy does not entitle an individual to compensation if the State can justify interference under paragraph (6) or demonstrate reasonable steps to comply with the right and remedy the applicant’s circumstances under paragraph (4) within a reasonable time frame.’
Conclusion

This article has considered the legal position in relation to the potential constitutionalisation of ESC rights in Ireland. The arbitrary blanket refusal to acknowledge the justiciable nature of ESC rights is no longer a tenable position in international human rights law. The proposal of the Constitutional Convention to recommend the better protection of ESC rights in the Constitution provides a welcome opportunity to revisit the Constitution with a renewed understanding of the nature of ESC rights and their foundational and normative value in a modern, liberal and democratic society. This article seeks to inform the debate on what forms of constitutionalisation are open for deliberation and to engage the wider community in the debate surrounding the legal status of ESC rights. Essentially, the question on whether to constitutionalise ESC rights will rest with the people of Ireland by way of referendum if the government acts upon the recommendation of the Convention. It is critical that the choice before the people is based on an informed and substantive debate as to the potential form and content of a constitutional model crafted for the particular circumstances of Ireland.
The Right to Inclusive Education in Germany

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Abstract:

The UN Convention on the Rights of Persons with Disabilities in article 24 seeks to combat discrimination of children with disabilities in the field of education by prescribing a model of social inclusion. This paper will critically examine the sociological concept of inclusion, the German experience in implementing article 24 and the limitations of article 24 vis à vis the Right to Education in the International Covenant on Economic, Social and Cultural Rights. Before turning to the situation in Germany it is beneficial to discuss underlying concepts relating to special need education in order to clarify the notion of inclusion. In doing so, contested medical concepts, the perception of education as end rather than means and the voicelessness of the child, all lead to the conclusion that a rights-based approach is advantageous in acquiring social justice. Moreover, looking at the case of Germany and a school system with an exclusion rate of 82% the delay in the public discourse about inclusion is particularly striking. Hence, section 3 will look at empirical data, the UN definition of education and elaborate on the German confusion of inclusion and integration by making reference to domestic law and an exemplary case along with relating the Monitoring Body’s guidelines of availability, accessibility, acceptability and adaptability to the action plan of North Rhine-Westphalia. Finally, the application of social inclusion maxims to anti-discrimination law demands significant, positive adjustments but is also restricted by its focus on absolute disadvantage. The convention is arguably limited because of its narrow outlook owed to its civil and political nature and inclusive reform might bring broader equality when applied to the a priori Right to Education from the International Covenant on Economic, Social and Cultural Rights.

Keywords:

Right to education, economic, social and cultural rights, UNCRPD, inclusion, Germany, disability.


Introduction

The UN Convention on the Rights of Persons with Disabilities in article 24 seeks to combat discrimination of children with disabilities in the field of education by prescribing a model of social inclusion. This paper will firstly elaborate on the thus far predominant conception of special needs and education in general to show where and how social inclusion can bring considerable improvements. In doing so, contested medical concepts, the perception of education as end rather than means and the voicelessness of the child, all lead to the conclusion that a rights-based approach is advantageous in acquiring social justice. Further, the German experience in implementing article 24 will be discussed with the example of the Verwaltungsgerichthof Hessen (Administrative Court) and the North-Rhine Westphalian action plan. Looking at the case of Germany and a school system with an exclusion rate of 82% the delay in the public discourse about inclusion is particularly striking. Hence, section 3 will look at empirical data from Germany, the relevant UN documents on education and elaborate on an exemplary case along with relating the Monitoring Body’s guidelines of availability, accessibility, acceptability and adaptability to the action plan of North Rhine-Westphalia. Finally, it will be interesting to critically examine the sociological concept of inclusion and the limitations of article 24 vis à vis the Right to Education in the International Covenant on Economic, Social and Cultural Rights. The application of social inclusion maxims to anti-discrimination law demands significant, positive adjustments but is also restricted by its focus on absolute disadvantage. The convention is arguably limited because of its narrow outlook owed to its civil and political nature and inclusive reform might bring broader equality when applied to the a priori Right to Education from the ICESCR.

Special needs, Rights and Social Inclusion

In the educational context the debate often finds itself around the idea of intelligence which is not perceived as problematic in itself.1 There are disagreements about its measurement where IQ figures for example support the idea that children with disabilities do not sufficiently benefit from education,2 but very little has been said about its existence per se.3 In eugenic thought for instant, intelligence is not something a person creates or develops it is an innate phenomenon and playing by the rules of genetics, the most effective way to a more intelligent society is to separate the ‘stupid’ from the ‘smart’.4 Further, this separation process in the field of education then is managed and legitimized by labeling children as, for example, having emotional and behavioural difficulties (EBD).5 In this context, EBD is a good example for showing how apparent scientific truths lead to labels which in turn lead to the identification of certain needs children with disabilities supposedly have. The concept of Cartesian dualism defining the interrelatedness of body and mind is the underlying supposition for holding psychological processes accountable for behaviour. So that, the problem is to explain behaviour by ability which in a different context than education would not be seen as appropriate. For example, to drive a car a person needs to move their arms and yet no arm movement course is set out to be the solution to improve driving skills. The assumption

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3 Thomas and Loxley (n 1) 45.
4 Ibid (n 1) 23-32.
5 Ibid (n 1) 70; For further reading on the creation and effects of labels, compare Thomas and Loxley (n 1) 44; Rioux and Pinto (n 2) 637; Iris Marion Young, Together in Difference: Transforming the Logic of Group Political Difference in Principled Positions: Postmodernism and the Rediscovery of Value (Laurence & Wishart, London 1997).
that children who behave differently, for example learn slower, have special needs is simply not a scientific fact and is open to debate.\(^6\) Importantly, presenting these concepts and ideologies as scientific facts supports the necessity for social exclusion. Further, EBD effectively allocates the problem within the child as opposed to admitting institutional difficulties and evokes the here contested suggestion of specific needs that have to be met. The argument runs that disabled children need to find stability, nurture and security in education and that even more so than other children. But whose need is met when the child’s behaviour is primarily unwelcomed by the institution? It is arguably the school which benefits the most from excluding disturbances and not the children themselves.\(^7\) As an explanation for this, Bourdieu argues that doxa, the things taken for granted and remaining unquestioned because of their apparent self-evidence, supports this need-allocation to individuals because of managerial aspects. Thus, it is much more difficult to accept institutional flaws than individual ones because it is a lot more problematic to find appropriate remedies.\(^8\) Furthermore, in practice schools are unable to cope with children that do not react to subtle forms of punishment which is why Foucault speaks of a shift from punishment to judgment that has taken place in order to solve this dilemma, from ‘naughty-therefore-impose-sanction’ to ‘disturbed-therefore-meet-needs’.\(^9\) This brings the opportunity of converting the teacher’s role from labeling into helper at the same time as reformulating institutional demands into children’s needs with the ultimate result that a child’s action is accounted for by defining his/her personality.\(^10\) Additionally, labels effect the labeled in so far as individuals internalize the status imposed upon them and by acting accordingly they reinforce their exclusion.\(^11\) Similarly, Foucault stresses the importance of power in these situations and finds that the label of deviance is not ultimately an individual’s characteristic but rather defines the relationship between two individuals as it is the comparative element between children that leads to concepts like slow learners.\(^12\) Questioning these concepts of intelligence, EBD, deviance and special needs is crucial in order to understand the status quo and facilitate the change towards social inclusion.

Furthermore, what the concept of inclusion entails cannot be understood without examining fundamental questions about the nature of education and its purpose within society. Hence, John Dewey illustrates that the school is a social institution, a community in which the social individual through the use of language can take part in shaping society.\(^13\) On that account he states that ‘What the best and wisest parent wants for his own child that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy’.\(^14\) In this quote the indication of democracy should be highlighted as it demands for a participatory and inclusive approach to education in order to support the entire community. Dewey further discusses the idea of diversity in a pluralistic society and finds that the oppression of various interests in order to promote the agenda of the powerful will produce a vulnerable society unable to cope with change.\(^15\)

\(^6\) Thomas and Loxley (n 1) 70.
\(^7\) Ibid (n 1) 52.
\(^8\) Ibid (n 1) 54; Compare generally Michael Grenfell and David James, Bourdieu and Education (Falmer Press, London 1998).
\(^9\) Ibid (n 1) 50; Compare generally Michel Foucault, Discipline and Punish (Penguin, Harmondsworth 1977).
\(^10\) Ibid (n 1) 53.
\(^11\) Ibid (n 1) 52-54 and 85; Rioux and Pinto (n 2) 630.
\(^12\) Thomas and Loxley (n 1) 78 and 84-85.
\(^15\) Blake and others (n 13) 27-28.
It is in this light that the pragmatic approach characterizes education as growth and therefore, allocates the ability to support growth as the primary tool to assess schools.\textsuperscript{16} Likewise, Adorno’s concept of *Halb-Bildung* establishes the argument that *Bildung* (education) in its normative function supplied students with the capacity to question and change social order whereas now its focus is reduced to the ability to live in the existing system and thus, became *Halb-Bildung*.\textsuperscript{17} Correspondingly, other theorists like Giroux, Freire and Bourdieu argue that schools represent and reinforce systems of oppression but essentially have the potential in a democratic manner to advocate critical thinking\textsuperscript{18} and in the Deweyan sense, to support the expression of a given society’s aims and definitions by the community itself.\textsuperscript{19} This potential can only be unleashed when the educational system is inclusive.

Following from this, participation and empowerment are crucial when understanding education as the heart of democracy by bringing about social progress and reform, advocating for growth and limiting the reproduction of the system. In this regard, individuals have to recognize the equality of the other so that each, governed by justice, can take part in shaping the social structure.\textsuperscript{20} Thus, an essential requirement for any individual to participate in society is to have a voice. Children are perceived as incapable, irrational and vulnerable which accommodates a paternalistic notion of protection. The issue is that this leads to a fundamentally weak voice of the child, even more so when the child is labeled with a learning disability. Effectively, the safeguarding of children results in their exclusion from any real engagement with their society\textsuperscript{21} based on the allegation of a deficiency in moral capacity.\textsuperscript{22} In this respect, Dewey has long argued that all interests should be taken into account and that non-recognition will leave the individual feeling powerless and alienated.\textsuperscript{23} Consequently, social justice demands for the voice of the child to be acknowledged and the education system is the means to show children how to acquire the capacity to participate.\textsuperscript{24} What’s more, exclusion and disempowerment must not take place within the system itself.\textsuperscript{25} In this matter, the policy implications and the philosophy of the New Right approach\textsuperscript{26} situated in an era of Neoliberalism are substantial in order to understand that there has been a major shift in the understanding of the purpose of education. This also helps to explain the focus on exclusion rather than inclusion in education. Hayek completely opposes the concept of social justice and establishes the idea of a natural social order in which inequalities are inevitable and provide stability for society. It is the notion of a spontaneous order that cannot be positively influenced by interference.\textsuperscript{27} Therefore, any effort towards inclusion in the education

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\item \textsuperscript{16} Ibid (n 13) 28.
\item \textsuperscript{17} Ibid (n 13) 40.
\item \textsuperscript{18} Thomas and Loxley (n 1)28-50.
\item \textsuperscript{19} McDermott (n 14)453.
\item \textsuperscript{20} Blake and others (n 13) 83.
\item \textsuperscript{21} Thomas and Loxley (n 1) 57-61.
\item \textsuperscript{22} Rioux and Pinto (n 2) 626.
\item \textsuperscript{24} Rioux and Pinto(n 2) 632; Compare also Neville Harris, ‘Empowerment and State Education: Rights of Choice and Participation’ (2005) 68(6) Modern Law Review 925-957, 938; J. Nixon and others, ‘Confronting Failure: Towards a Pedagogy of Recognition’ (1997) 1 International Journal of Inclusive Education 121-142.
\item \textsuperscript{25} Blake and others (n 13) 90; Rioux and Pinto (n 2) 630.
\item \textsuperscript{26} It should be noted that there are different viewpoints and conceptions within the group of the New Right but this abstract focuses mainly on Hayek’s philosophy of a spontaneous order.
\item \textsuperscript{27} Norman Barry, *The Tradition of Spontaneous Order; A Selected Essay Reprint* (Literature of Liberty, Arlington 1982) B76.
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system will endanger that order. Further, New Right policies in the field of education were designed to advance the economy by tying schools closer to employment and businesses, increase the state’s control over the curriculum and emphasize community involvement as to support more community input and simultaneously less government expenditure. Ultimately, education has been transformed into a quasi-market whereby students are made customers and the basic criterion for evaluation is productivity. Thus, describing exactly what Adorno referred to as *Halb-Bildung*. This marketization lead to division rather than diversity in the field of education and can be partly explained by the phenomenon of cost externalization, meaning that the schools which refuse to include certain children do not have to pay or account for the consequences of social exclusion.

Moreover, article 24 of the UN CRPD emphasizes the shift from a needs-based approach towards a rights-based approach in education. For the actual realization of inclusive education a rights-based approach will be an effective instrument. A needs-based approach perpetuates the failure to recognise the right of the child. This seen in combination with the lack of student’s voices forms the grounds on which power relations are played out and prevent active participation. In this light, a rights-based approach is of benefit because agency is perceived to have objective interests in planning and choosing their goals in life so that the possibility of meaningful contribution by students will limit segregation and ultimately provide for their autonomy. The individual Right to Education for children with disabilities has the capacity to realize a child-centered approach to the matter which will enable an occupation primarily with the child’s interest. Additionally, the concept of rights brings the notion of duty which changes the perspective of the disempowered as being the outcome of unfortunate circumstances to being the subject of injustice. Injustice then invokes the idea of remedies that have to be provided by the duty-carrier whereby rights lead to more accountability of schools and governments. In this light a legal framework corrects who has the decision-making power. Moreover, in special needs education a human rights-based approach will set out a more comprehensive approach as it delivers entitlements of access as well as quality so that it steps beyond the mere equality of opportunity proposal in favour of including a definition of conditions within the education system. Further, the holistic angle of the legal conception manifests itself in not limiting inclusion to merely affect economic results but also comprehending social and environmental consequences. There is a danger though to undermine the substantiality of the right to inclusive education and transforming it into a procedural right when allocating decision-making power to individual institutions. Supporting a basic Right to Education deduced from general principles that can deliver equality for all is advantageous because it is not as vulnerable to narrow interpretation and does not limit the focus on disability.

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28 Ibid; Blake and others (n 13) 126.
30 Thomas and Loxley (n 1) 114; Harris (n 24) 933.
32 Rioux and Pinto (n 2) 630.
33 Yamin (n 31) 5, 6-8 and 16.
34 Rioux and Pinto (n 2) 622, 626-627.
35 Ibid (n 2) 636.
36 Ibid (n 2) 635.
37 Ibid (n 2) 637.
The German Example

Having examined the conceptual background of an inclusive education system and understanding its importance for the whole entity of society this paper will now turn to the specific situation in Germany looking at significant statistics, presenting the relevant United Nation’s conventions, analysing some aspects of domestic law with help of the important judgment of the Verwaltungsgerichtshof Hessen (VGH – Administrative Court of the State of Hesse) and the example of North Rhine-Westphalia (NRW) considering an independent expert’s report and the general guidelines for the realization of article 24 from the Monitoring Body of the German Institute for Human Rights.

Exclusion in Numbers

The statistical data from 2010 for the situation in Germany underlines the lack of an inclusive educational model. Looking at day care facilities the national average of the inclusion proportion is relatively high with 61.5% even though there are significant variations in the different Bundesländer (counties). Children with special educative needs form 6% of all children within the age group subject to fulltime compulsory education. Since 4.6% of these 6% constitute the so-called exclusion rate. 82% of the children with special needs are facilitated in special institutions, namely the Sonderschule (special needs school). Additionally, the children who are in general schools, around 18% of all children with special needs, although under the same roof as ordinary children, are being taught in separate classes. Thus, describing the idea of integration rather than inclusion, an important differentiation. The federal average exclusion rate lies by 4.9%. Moreover, looking at the specific enhancement focuses or focuses of advancement efforts it is noticeable that 43.7% are children with learning disabilities who form along with the 11.5% children with behavioural and emotional difficulties (BED) more than half of the group of children with special needs. Another important and striking group within this are the children with the enhancement focus language constituting 10.6% of all children with special needs along with the enhancement focus of mental development (16%). In summary, the four enhancements focuses in learning disabilities, BED, mental development and language embody 81.8% of all children with special needs. Having already discussed the controversy around the concept of BED above, it would be interesting to know how many children of those with an enhancement focus in language are not native German speakers and or come from a migration background. Also, there is no data available to determine generally how many children with special needs have a migration background.

In general, the federal inclusion proportion for primary schools reaches an average of 33.6% while secondary schools only manage to include 14.9% of all children with special needs. Further, this signifies that children who have been inclusively educated in day care and or primary school have to overcome a big barrier in order to get accepted to mainstream secondary schools. In addition, 45.3% of the 14.9% who are visiting ordinary secondary schools are found in the Hauptschule, the lowest in the three-tier-system hierarchy and with the necessity for the Abitur (normally received at the Gymnasium) in order to apply for programmes at university there is very little evidence for social inclusion in this model. In summary, the empirical data points out that the inclusion proportion in the sphere of day care facilities is significantly greater than in the area of schooling. Furthermore, 6% of the children in the age of fulltime compulsory schooling have special needs and primary

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38 The inclusion proportion represents the fraction of students with special needs present in inclusive systems from all the students with special needs.
39 The exclusion rate is the fraction of students with special needs in separate institutions from all students.
42 Klemm (n 40) 15-21.
schools have an inclusion proportion of 33.6% contrary to only 14.9% in secondary schools. The problem of equality expresses itself most obviously considering that 76.3% of all children with special needs do not manage to achieve the leaving certificate from the *Hauptschule*, the lowest in the secondary school hierarchy which leaves no real job opportunities.\(^{43}\) Generally, the focus in empirical research will have to be on providing more holistic data in order to illuminate the real issues underlying exclusion policies.\(^{44}\)

**Inclusion in International Provisions**

As seen above the concept of inclusion is far from being realized in Germany despite the ratification of the relevant international documents, the CRPD and the ICESCR. It is surprising that the controversy around inclusion did not achieve any public attention before the CRPD as article 13 of the ICESCR introduced the Right to Education as early as 1976 and should have been read in conjunction with a non-discrimination clause and is justiciable.

Article 13 of the International Covenant on Economic, Social and Cultural Rights talks about the ‘right of everyone to education’ in order to facilitate meaningful participation of individuals within their society. The document specifies that primary, secondary and higher education should be free of charge and ‘accessible for all’ along with the right of the parents or legal guardians to select an institution for their child.\(^{45}\) This read along with article 2, paragraph 2 in the same Covenant which provides a non-exhaustive list of criteria upon which rights should not be discriminated on leads to the question as to why children with disabilities are excluded from mainstream schooling. While it is true that *Sonderschulen* (special education schools) are free of charge and compulsory these institutions have deprived children of access to secondary schools and universities as well as of vocational opportunities as indicated by the figures above. Moreover, possible explanations for the failure of the state and civil society to notice this human rights violation earlier are rooted in the impression that education has little to offer to persons with disabilities.\(^{46}\) And as mentioned above, the growing influences of New Right policies and the ideology of Neoliberalism colonized the domain of education nurturing competition and exclusion.\(^{47}\)

Additionally, the need of politicians to provide visible solutions for their constituency should not be dismissed. The establishment of special institutions is therefore more effective in letting politicians appear to actively solve the problem.\(^{48}\) It follows that inclusion is an issue intrinsically concerning politics.\(^{49}\) In this light, art. 24 of the CRPD can be seen as an extension of the Right to Education in the ICESCR in that the document specifically relates the Right to Education to persons with disabilities and seeks to avoid discrimination against this group. Further, inclusion means no exclusion of any child from the general school system which then more than clearly condemns the *Sonderschule* as illegal under international law. It is crucial to stress the danger of using the terms of inclusion and integration interchangeably because the need to understand what inclusion means is especially important in the German context where case law and other documents display major misinterpretations.

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43 Ibid (n 40) 21-23.
44 Rioux and Pinto (n 2) 621-642, 639.
46 Rioux and Pinto (n 2) 622, Basser (n 2) 540 and 545.
48 Thomas and Loxley (n 1) 43.
49 Rioux and Pinto (n 2)638.
Hence, Integration is a concept that aims at incorporating excluded children into the existing system and is therefore distinct from the idea of inclusion in that the latter claims to support diversity.\(^5^0\) It follows that, integrative measures still allow for children to be separated when being taught on the basis of the child being the inherent problem.\(^5^1\) The UNESCO in 2006 therefore observes: ‘Looking at education through an inclusive lens implies a shift from seeing the child as the problem to seeing the education system as a problem.’\(^5^2\) This confirms and reinforces the already mentioned critique of a needs-based approach to special education. Already in 1994 in the Declaration of Salamanca did the UNESCO expressly abolish the idea of integration to promote inclusion.\(^5^4\) In general, the concept of education as understood by the United Nations is not informed by Neoliberalism’s and New Right’s economic worries. It rather reinforces Dewey’s notion of its importance for a democratic society and tries to bring out its potential to promote communicative action\(^5^5\) and critical thinking based on Human Rights norms.\(^5^6\) Thus, the ICESCR qualifies the overarching aim of education as to ‘be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.’\(^5^7\) Moreover, the idea of inclusion in a UN context is not new as the absence of former debate might suggest. The Convention of the Child in 1989, for example, defines the Right to Education and in article 23 refers precisely to active and meaningful participation and in 2007 General Comment No 9 of the UN Committee on the Rights of the Child identifies inclusion as a key element to educate children with disabilities.\(^5^8\) Furthermore, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) established in 1993 emphasize the integrity of education provided for disabled children in the general system and clearly articulate the preference of inclusion into mainstream education over special support measures.\(^5^9\) Followed by the UNESCO Declaration of Salamanca 1994, previously pointed out, these documents form a substantive basis for an inclusive approach to education. Additionally, they define the way in which the broader principle of equality illustrated in the Universal Declaration on Human Rights (1948) and the ICESCR (1966) can be accomplished\(^6^0\) by specifying the meaning of the right to education.\(^6^1\) The added value the CRPD brought to the debate is the legal dimension.
The Case of the VGH Hessen

One of the main court cases concerning the right to inclusive education is the judgement of the Hessischer Verwaltungsgerichtshof (VGH Hessen) from the 12 November 2009. It has to be noted that Germany is a monist system of law meaning that there is no need to specifically translate international into domestic legislation and sufficiently defined normative aspects require no further legal implementation on the national level. The significance of the legislation domestically then depends on whether the legislator acknowledged it and gave an order to apply law (Rechtsanwendungsbefehl). In the context of CRPD Germany ratified, therefore acknowledged the law and further, included it in the Bundesgesetzblatt (federal Gazette). Consequently, it is now considered equal in status with ordinary federal law. Furthermore, international law is to be understood as a guideline for the constitution and hence, national law is to be interpreted in accordance with the convention.

It is important to read the convention as part of the wider Human Rights context and it should be acknowledged that article 24 of the CRPD contains several responsibilities which are distinct in their understanding and degree of legal bindingness. As such there are supportive responsibilities along with duties to respect, protect and ensure rights as well as the obligation to progressively realize some rights while others are immediately justiciable. Overall, Germany signed the convention on 30.3.2007, requiring the state to abstain from any act contrary to the treaty and with ratification on 24.2.2009 committed to progressive implementation and compliance with already sufficiently defined norms. Further, the CRPD excludes certain rights from the principle of progressivity and clearly stresses their immediate justiciability in article 4 paragraph 2 saying that states have to take measures ‘(…) without prejudice to those obligations contained in the present Convention that are immediately applicable (…)’. Looking at the court case this notion will be important along with the assurance of the provision of reasonable accommodation made in article 24, paragraph 2c. It defines the responsibility of the relevant institutions to make amendments in order to facilitate mainstream schooling in individual cases implying effects on authoritative procedures concerning diagnostics and reasons for decisions. The judgment of the VGH Hessen from 12.11.2009 provides an example on how litigation plays an essential role in the implementation process.

In the case the applicant was assigned to go to a special school (Schule für praktisch Bildbare) against her will and she appealed to the court invoking the CRPD. The VGH Hessen dismissed the application mainly on three grounds: the CRPD not being part of domestic law, that there has been no agreement from the Land Hessen to the convention and that article 24 does not fulfil the requirements for immediate justiciability based on sufficiently defined norms. The argument accusing the convention of not being domestically justiciable

62 Ibid (n 2) 538.
64 ‘Stellungnahme zur Rechtsordnung und behoerdlie Verfahren’ (n 63) 8.
66 Ibid.
68 ‘Stellungnahme zur Rechtsordnung und behoerdlie Verfahren’ (n 63) 3-9.
69 Hessischer Verwaltungsgerichtshof (VGH Hessen) 7 B 2763/09 of 12 November 2009.
is based on the Grundgesetz (GG) as the court finds that the confederation has no legislative competence along with insufficient legislative jurisdiction under chapter VII of the GG.\(^70\) Here, the German constitutional law specifies that the legislative competence lies with the Länder unless it is assigned to the confederation by the GG and article 73, in particular, lists the areas in which the confederation enjoys exclusive legislation. The school system is not included in the list neither is it mentioned in article 74 which defines the domains of competing or rivalry legislation.\(^71\) In paragraph 6 of the judgment, the court proceeds to claim that international treaty law is only subject to domestic law as far as the confederation has the legal competence over resource matters. But this perception is not acceptable when it comes to international human rights treaties as it would mean that international law has to be transformed into domestic law on county level. One could then raise the question as to why no county has implemented the ICESCR, for example. Eventually, German case law and practice shows an acceptance that the Länder, even when exclusively legally competent in the matter, have to follow the guidelines of international law.\(^72\) Additionally, there is no case that ever denied authority of international law on the basis of the GG and the therein principle of legal competence. Moreover, the court completely misinterprets the link between the GG and the convention when ignoring that article 3, paragraph 3 (second sentence)\(^73\) now has to be analysed in the light of an inclusive society. The second main reason appealed on by the VGH Hessen concerning the consent of the Land Hessen to the convention is founded on article 32, paragraph 1 and article 59, paragraph 1 of the GG.\(^74\) But the argument is weak because the Bundesrat expressed its consent on the matter on 19 December 2008 and consequently, the indicated requirements are met. Finally, the third point of critique from the court is the observation that immediate justiciability could not be provided because the convention did not include sufficiently defined norms. Generally, this view can be opposed by the fact that the CRPD clearly excludes some rights from progressive realization and it remains questionable if the court fulfilled its duty to at least not act contrary to the convention even if not yet transformed on a local level. Since the convention is obviously justiciable and applicable to domestic law of the counties the findings of the VGH Hessen are deeply flawed. Moreover, this case is crucial to the situation in Germany because of its precedent effect as it was cited for example by the Niedersächsisches Oberverwaltungsgericht in 2010.\(^75\) This evolution consequently shows the importance of the courts to interpret and enforce the convention conformable to human rights principles.\(^76\)

**Realization of Article 24 in North Rhine-Westphalia**

Besides the court’s role concerning implementation there has been an argument that the federal system allocating substantial authority over education within the Länder ultimately constraints the realization of article 24 of the convention. As seen above, the empirical evidence indeed suggests quite elementary disparities in the level of inclusion found in the various Länder. While the convention does not give detailed guidelines concerning practicalities of its implementation it is not acceptable that the Länder who have always been pushing for autonomy now use this as an excuse for not achieving the goals of article 24 and there is no manifestation that any county’s

\(^{70}\) Hessischer Verwaltungsgerichtshof (VGH Hessen) (n 69) para. 5 and 7.

\(^{71}\) Grundgesetz (GG) der Bundesrepublik Deutschland (Bundestag, 1948) [http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/gg_07.html] accessed 2 December 2011.

\(^{72}\) For example, on police law: SächsVerfGH, Vf. 44-II-94 of 14 May 1996 para. 162.

\(^{73}\) GG (n71): Art. 3, para.3, sentence 2 states that no one shall be disadvantaged because of their disability.

\(^{74}\) These articles declare that although the confederation is responsible for signing international treaties the Länder have to be informed and consent to it.

\(^{75}\) Niedersächsisches Oberverwaltungsgericht 2 ME 278/10 on 16 September 2010.

\(^{76}\) ‘Stellungnahme zur Rechtsordnung und behördliche Verfahren’ (n 63) 10-11.
legal system is not appropriate for this purpose. Generally, an international treaty cannot provide such specific information as to accurately relate to a range of states and human rights conventions have to be interpreted in a differentiated manner and are not merely programmatic.\(^7\) It follows that implementing the UN norms of article 24 foremost depends on political action recognizing the inherent rights in order to make the small but necessary changes in the legislation to reach a setting in which individuals have internalized these rights. Therefore, this paper will now turn its attention to the position of the Ländere making particular reference to the example of North Rhine-Westphalia combined with the guidelines for the realization of article 24 published by the Monitoring Body of the German Institute for Human Rights, the national human rights institution.

In order to inspect the situation in the Ländere it will be useful to take a closer look at the example of North Rhine-Westphalia (NRW) to discuss possible measures for progressive realization which can mostly be assigned to other counties as well. Further, in conjunction with the example, the position and suggestions of the Monitoring Body of the German Institute for Human Rights will be introduced. The empirical data describing the situation in NRW for the term 2009/2010 is in many respects similar to the national average which was evaluated earlier. In this regard, the special needs rate (all children that are diagnosed to have special needs) with 6.3% and the exclusion rate with 5.3% lie slightly above national average (6% and 4.6%).\(^2\) Remarkable is that despite the increase in the inclusion proportion the general special needs rate and the exclusion rate continued to grow\(^2\) which can be explained by the connection of resource allocation and special needs diagnosis applying to mainstream schools. Moreover, the phenomenon of a biographic disruption with reference to the changeover from primary school to secondary school can also be observed in NRW\(^8\) along with gender imbalances as just 34.8% of all children diagnosed with special needs are girls and additionally, only 12.3% of the group with special focus on emotional and behavioural difficulties are female. Further, the analysis of the county shows substantial regional discrepancies which points out the need to pay particular attention to those areas characterized by greater shortcomings. Consequently, the approach to the realization of article 24 has to be specific to regional contexts.\(^8\) The suggestions then to develop an inclusive education system in NRW are largely based on the guidelines for the realization of article 24 of the convention set out by the Monitoring Body concentrating on the four main aspects of availability, accessibility, acceptability and adaptability. First, availability as defined in General Comment 13 No. 6 by the UN Committee on ESCR\(^8\) covers primarily, the implication that national law accommodates for the possibility to flexibly regulate resources in mainstream schools. Also, provisions should be made in order to guarantee continuous resources for the future. Moreover, in the domain of constructions barrier-free buildings have to be further developed and no new special needs institutions should be established. Finally, the Monitoring Body acknowledges the

\(^{7}\) ibid (n 63) 6.

\(^{78}\) In this respect, the special needs rate (all children that are diagnosed to have special needs) with 6.3% and the exclusion rate with 5.3% lie slightly above national average (6.0% and 4.6%). Compare Klemm (n 40) 15.


\(^{80}\) The inclusion proportion in primary schools amounts to 29.1% compared to 12.3% in secondary schools. Compare Klemm and Preuss-Lausitz (n 79) 60.

\(^{81}\) Klemm and Preuss-Lausitz (n 79) 58-67.

\(^{82}\) The General Comment links availability with quality (‘functioning’) and quantity (adequate amount) of institutions.
importance of the impact the convention has to have on the technical didactics. In this regard, the experts advise North Rhine-Westphalia to first and foremost formulate an action plan in order to achieve the goal of an inclusion proportion of 85% by 2020. With respect to availability the county has to ensure the preservation of resources related to special needs education for the future despite the fact of a general decrease in student admissions. Therefore, paragraph 2 of the education act has to be amended as to include the individual right of the convention along with the elimination of the reservations of school supervisory boards in paragraphs 19 and 20. Furthermore, children enjoying inclusive primary school education shall be instantly entitled to continue their secondary education within an inclusive system. In practice the claim to the right to inclusive education will be progressively realized starting with transferring classes 1 and 5 into the mainstream system in 2012/2013 and then gradually moving upwards. Further, the area of technical didactics will be improved through measures of vocational training on inclusion and the introduction of a new subject of study, for example. At the same time NRW has to adequately adjust the building regulations for schools. The second important aspect expressed by the Monitoring Body is accessibility and deals with the abolition of the interrelationship between resource allocation and diagnostics and emphasises the concept of a child centred approach meaning that the parent’s right of choice only prevails when in accordance with the inclusion principle. Moreover, the parents have to be informed and educated about their role to safeguard the child’s best interest. In addition, a legal definition of the principle of reasonable accommodation will serve to avoid confusion. Consequently, the regions and cities within NRW have to create Ombuds centres to inform and include parents in the transformation process along with the establishment of a working group in order to coordinate the developments on the different levels of engagement (Regional Authorities, Cities Council, County Association, Association of Towns and Municipalities and Project Team Inclusion). Thirdly, acceptability is a fundamentally crucial element of article 24 of the CRPD. In order to generate a functioning system of inclusive education in Germany all of society has to understand and support its basic components and the core educative goals of the convention have to be mirrored in the legal system. It follows a demand for the participation of the child as well as a legal entitlement to consultations for parents and pupils. Moreover, under this point the Monitoring Body takes the opportunity to point out that the practice of diagnostics, too, has to be directed towards inclusion. In the concrete case of NRW a feedback group should be developed in addition to the Project Team Inclusion as to insure the cooperation and presence of civil society in the process. Moreover, the countywide progress towards inclusion will be documented for periodic publication (every 2 years) and shall be publicly discussed. Also, in respect to diagnostics the exercise of a declarative diagnosis will be avoided so as to give way to a school internal process of diagnostic. Furthermore, the enhancement focuses in learning difficulties, EBD and language problems will be grouped together as LES. Finally, the fourth feature of adaptability encompasses amongst other notions the priority of academic and

84 Klemm and Preuss-Lausitz (n 79) 5.
85 This paragraph defines the educational mandate and purpose of the school.
86 Klemm and Preuss-Lausitz (n 79) 75
87 This subject will be titled LES referring to the special needs areas of learning, EBD and language.
88 Klemm and Preuss-Lausitz (n 79) 124-128 and 130.
89 ‘Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems’ (n 83) 13-14.
90 Klemm and Preuss-Lausitz (n 79) 127-129.
91 ‘Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems’ (n 83) 15.
92 Klemm and Preuss-Lausitz (n 79) 125 and 127 and 130.
scientific support. Here, the communication of relevant, successful examples from the praxis should be given preference. Further, the education of teachers should reflect the positive results from empirical findings along with the use of uniform human rights based indicators as to facilitate meaningful comparisons of empirical data. This finds practical implications in the form of a process-oriented approach to academic and scientific data that will evaluate and report experiences of the feedback group and the Project Team Inclusion for the purpose of acquiring quick and effective solutions. In conclusion the expert’s report on North Rhine-Westphalia deals with all the relevant aspects of the guidelines put forward by the Monitoring Body and succeeds in revealing a detailed, comprehensive document relating to the realization, progressive and immediate, of article 24 of the CRPD. The Land North Rhine-Westphalia has to adopt these suggestions as quick as possible and transform them into an action plan for the county as the National Action Plan cannot accomplish the task to provide uniform guidelines for the considerably autonomous Länder and their diverse positions.

Limitations of a Civil and Political Right to Education

Having seen the German efforts to implement article 24 of the CRPD and understanding the value added it will be interesting to provide an outlook on some underlying restrictions of article 24 based on its civil and political nature.

Generally, when talking of anti-discrimination laws the notion of equality instantly springs to mind. The problem is an inherent tension between equality of opportunity, a procedural issue and equality of outcome, a more substantial perception. In European litigation the principle of proportionality has been largely applied to decide whether or not it is possible to deviate from the doctrine of equal treatment depending on the outcome. But despite its usefulness as a legal instrument it still means that courts have to judge over the persisting tension. The principle of equal treatment must be acknowledged as a crucial element, the substantive aspect of equality must feature within the law, the idea of equal worth or respect should be attached but the tension can never be completely suspended. Social inclusion sets out a particular framework addressing the themes of relevant social problems, appropriate prioritization of the standard of equal treatment and the procedure of proving illegal discrimination. Hence, as to the social problem intended to be dealt with by anti-discrimination law social inclusion focuses on structural disadvantage. The concept of structural disadvantage is built on the presupposition that there are certain groups that are systematically worse off than others and that these conditions are generated by institutions. It follows that in order to account for the cause of structural disadvantage the theory has to further investigate the constitution of the group, the characteristics of the disadvantages and the features of the institutions constructing the disadvantages. Considering the aspects that constitute a socially excluded group the concept’s definition is inherently linked to a de facto asymmetric discrimination of a group compared to the rest of the community. Therefore, the nature of the classifying components, whether genetic or social for example, is irrelevant in determining discrimination. Furthermore, the account gives a more holistic perspective on the

93 ‘Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems’ (n 83) 16.
94 Klemm and Preuss-Lausitz (n 79) 130.
95 Collins (n 23) 17.
96 Ibid (n 23) 18.
97 Ibid (n 23) 20.
98 Ibid (n 23) 26.
99 Ibid (n 23) 27.
disadvantages that should be addressed by anti-discrimination law because of its focus on the well-being of the individual which is not merely subject to economic circumstances. Hence, the concept perceives employment for example as the most efficient reassurance of social inclusion and therefore, attaches great importance to education as the precondition to get a job. Notice here that education and employment are not defined as means to enhance one’s economic position but are ends in themselves. The third important aspect of the idea of structural disadvantage is the centrality of institutions in producing inequality and therefore, their character has to be examined. So far, individuals that are subject to indirect discrimination have to resort to stereotypes and classifications which they might object to. Thus, a woman for instance has to live up to formal requirements of the job (working hours) and informal social norms (mother caring for her children). The legislation scrutinizes the effect of institutions but not of social norms. This is where social inclusion does not accept individual autonomy if the outcome leads to exclusion and thereby manages to account for problematic social conventions at the same time as negative impacts of institutions. Moreover, social inclusion gives guidelines as to when the principle of equal treatment can be abolished by not relying on a comparative element of proof. In practice anti-discrimination laws often make use of comparisons in order to determine whether or not an individual has been discriminated against. The problem with this reasoning is that it prompts the individual from a disadvantaged group to look for someone who is better off and similar to them in order to confirm discrimination. Effectively, this is hard to achieve since the worse-off by the mere nature of their category are usually very different from the privileged. In this respect, social inclusion limits the requirements to the exhibition of the excluding aspect of a rule and the presentation of the de facto impact on the individual. Additionally, contrary to mainstream anti-discrimination law the concept takes into account that exclusion most of the times results from the combination of several factors which cannot be separated. Another main issue is the stand social inclusion takes towards the method of a justification defence of discrimination. Therefore, under the CRPD parents do not have to show the integrative capacity of their child anymore but the burden of proof shifted towards the schools that have to provide for reasonable accommodations. Consequently, the issue at stake is not the equality of treatment but the substantive legitimization of the practice and therefore, social inclusion in a Rawlsian sense acknowledges deviation from equality of treatment if benefiting the least well-off. Remember though that the least well-off are not defined only in economic terms and remedies have to be understood in non-material as well as material terms.

Moreover, the social inclusion perspective constitutes a political justification of the legislation for the Third Way because of its ability to find a compromise between egalitarian welfarism and neoliberal individualism. In this sense, the theory is essentially concerned with justice but not with egalitarian distribution as it focuses on the absolutely disadvantaged and does not seek to reach general equality but rather looks towards realizing a minimal cut-off point. The argument here is fundamentally dependent on the lack of a refusal of the status quo as social inclusion gives a broad margin of appreciation to governments in the matter of resource allocation. It acknowledges that resources can never be completely fairly distributed and this leads to the ultimate difficulty

100 Ibid (n 23) 29-30.
101 Ibid (n 23) 30; Compare also N. Lacey, Unspeakable Subjects: Feminist Essays in Legal and Social Theory (Hart, Oxford 1998) 22.
102 Collins (n 23) 31.
103 Ibid (n 23) 32.
104 Collins (n 23) 35; Rioux and Pinto (n 2) 629.
105 Collins (n 23) 40 & 23.
106 Collins (n 23) 22-23.
the approach encounters namely the question whether or not inclusive education can reach beyond the category of disability.\textsuperscript{107} While article 24 of the CRPD formulates rights for children with disabilities it is limited in its approach because of its inability to address wider inequalities. Although, as empirical research shows, the Sonderschule is a school of the poor there are other relatively disadvantaged groups that are excluded from inclusion.\textsuperscript{108} This has been very clearly argued by social inclusion proponents in the German context as they specifically state not to confuse the abolition of special education schools with the fundamental debate around the restructuring of the three-tier system of secondary schools.\textsuperscript{109} Although the argument is maybe considered more realistic there is no substantial reason against the practicality of a broader approach to social inclusion.\textsuperscript{110} This point however does partly not arise because of the consideration of the matter under the umbrella of civil and political rights rather than under the Right to Education in article 13 of the ICESCR. This fall back on a civil and political right to implement an inclusive education system despite the danger of benefiting exclusively one group shows the apparently still predominant perception of the injusticiability of economic, social and cultural rights.

\textsuperscript{107} Collins (n 23) 23.

\textsuperscript{108} Klemm and Preuss-Lausitz (n 79) 125.

\textsuperscript{109} Compare for example, ‘Eckpunkte zur Verwirklichung eines Inklusiven Bildungssystems’ (n 83) 6.

\textsuperscript{110} Klemm, for example, points to the inconsistency of the German school structure with the inclusion model. Compare: Klemm (n 40) 12.
Conclusion

Social theory helps to explain problematic concepts of special needs education such as presenting some differences as scientifically proved medical concepts, labelling children with disability which leads to the internalisation of the labels and the voicelessness of the child. Moreover, it is important to stress the potential education has to strengthen democracy through empowerment. In this regard, a rights-based approach further strengthens the voice of the child. Ultimately, the German experience shows that the exclusion rate of 85% has to be addressed by litigation of the relevant UN documents. Further, the experience demonstrates the central role the monitoring body of the German Institute for Human Rights plays in clarifying and advising on human rights obligations so as to avoiding misunderstandings. Further, it is important to distinguish between integration and inclusion as only the latter will accommodate diversity instead of difference. However, the question arises as to why the debate and measures taken to realize an inclusive education system only happen in relation to the CRPD while other earlier UN documents have been ignored in this context. This is partly because of the legally binding character of article 24 and on the other hand, because of the vague definition of the Right to Education in the ICESCR leading to segregating policies in a country with a fundamentally hierarchical education system. The problem is that while social inclusion suggests legitimate changes of anti-discrimination law it does not inevitably provide a comprehensive approach to universal equality because of its focus on absolute disadvantage. There is a danger of applying the right to social inclusion exclusively to persons with disabilities. This narrowness partly stems from the connection of social inclusion with a civil and political right rather than with the a priori Right to Education in article 13 of the ICESCR. The disregard of an interrelationship between the notion of inclusion and article 13 seems to suggest the prevailing idea of the injusticiability and inferior value of economic, social and cultural rights.
Reimagining rights-based accountability: community use of economic and social rights

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Abstract:
This article explores the ways in which marginalised groups in Northern Ireland have employed and translated for practical use human rights standards, principles and mechanisms to campaign for the implementation of economic and social rights obligations. With the support of Participation and Practice of Rights, a regional non-governmental organisation, marginalised groups have drawn upon human rights in their local context to campaign on issues related to mental health, housing, work and play. Based on case studies from four such campaigns, this article reviews the practical steps groups took to engage directly or indirectly with economic and social rights tools and mechanisms. The article reflects on the usefulness of these frameworks and mechanisms for achieving change in the case studies discussed, as well as the value of a human rights framework for empowering marginalised communities to make rights-based demands for change. It is argued that although the realisation of economic and social rights is limited in part by the lack of traditional enforcement mechanisms, community-driven campaigns offer an opportunity for reimagining mechanisms for rights-based accountability.

Keywords:
Human rights-based approach, community participation, economic and social rights, human rights indicators, progressive realisation
Introduction

The United Kingdom ratified the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in 1976, yet it remains difficult for communities to engage economic and social rights arguments, tools and mechanisms in campaigns for local change. Despite arguments affirming the justiciability of economic and social rights (Nolan et al., 2007), traditional legal methods to challenge such rights violations are rare. States are obligated to give *effect* to economic and social rights (CESCR, 1998, para 1), yet these rights often rely on non-legal measures of implementation. Unlike their civil and political counterparts, long-considered by the courts, economic and social rights often fall within the remit of political decision-making. Communities seeking to hold governments to account for the implementation of economic and social rights are left, therefore, to engage in State-led public decision-making processes. Communities are invited to participate in government decision-making regularly in the Northern Ireland, but these invitations occur when policy-makers have agreed many substantive issues, at later stages in the process. Moreover, when vulnerable and marginalised groups are asked to participate through consultation or consultative bodies, they must “enter the terrain of others and learn to play by their rules” (Eversole, 2012, p.38). Over-reliance on State-led opportunities for participation raises questions about the extent to which the experience and expertise of communities affected by public policies has meaningful influence. In practice, therefore, community access to meaningful levers for progressing economic and social rights has been limited.

The human rights-based approach developed by Participation and Practice of Rights (PPR) and its groups identifies those responsible for fulfilling rights commitments and seeks to hold those in power (duty-bearers) to account through community-led monitoring processes. This approach, which has at its core a partnership approach between policy and development functions, builds the capacity of marginalised individuals and communities to name the issues of relevance to their lives while ensuring the agenda for change begins with their experiences. Community groups employing this approach have secured identifiable change at both policy and grassroots level, through, for example, the implementation of a new appointment card system for mental health patients leaving hospital and greater employment equality in public procurement processes. These successes demonstrate the strength of developing alternative accountability mechanisms for social and economic rights implementation (e.g. Diamond, 2012). Based on fundamental human rights principles, including progressive realisation, accountability, transparency of decision-making and participation, PPR’s approach supports affected communities to identify issues they would like to see change on, develop these into human rights indicators and benchmarks, which are monitored to hold government to account for its rights obligations. Through a series of examples from the work of groups PPR has supported, this article explores the ways in which communities in Northern Ireland have employed economic and social rights standards, principles and mechanisms in their ongoing campaigns for change in the areas of housing, health, play and work.

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1. The Committee on Economic, Social and Cultural Rights (CESCR) states that the “central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein”. The Vienna Declaration and Programme of Action (1993, sec 1, para 27) affirms that “every State should provide an effective framework of remedies to redress human rights grievances or violations”.


3. The approach developed and used by PPR is referenced briefly by Shiel (2013, p.26) in this journal.

4. Campaign successes include: a £900,000 investment by the local housing authority into a local high rise flats (Seven Towers, North Belfast) to install a new sewage system; a new appointment card system, the ‘Card Before You Leave’, for people at risk of suicide who present at Accident and Emergency Departments; the insertion of equality clauses into £42 million of government procurement contracts to provide real jobs and apprenticeships for the long term unemployed; and the re-housing of 60 families from unsuitable high rise flats into more appropriate social homes.
Direct use of human rights standards and provisions

States are obligated to raise awareness among rights-holders about human rights standards and provisions, yet PPR’s experience working with socio-economically marginalised communities in Northern Ireland demonstrates that the direct use of rights standards rarely begins with rights as the starting point. Instead, communities engage with rights on the basis of their situation and lived experience, and with support, translate rights for use in their campaigns. Although the aim of the approach is not the development of specialist policy skills by communities, this approach brings the direct use of human rights standards and provisions into community-led campaigning through their work with PPR. This indirect use of human rights standards is the point of departure for many groups, facilitating vulnerable and marginalised communities to move from aligning issues of concern with human rights provisions to viewing themselves as rights-holders.

PPR’s approach begins with a development programme for affected communities, which includes a series of modules on: confidence building; international human rights standards; identification of issues; action research; setting benchmarks and indicators; developing tactics and strategies; understanding power; and preparing for engagement with government. The programme’s focus on identifying human rights concerns facilitates a paradigm shift for participant groups to recognise their identified issues within the human rights framework. For example, children, young people and adults in the Lower Shankill community in Belfast, an area marked by high levels of deprivation across multiple indices, worked with PPR in 2009 to identify issues of significant concern on which they would establish their campaign. Both adults and children determined that the most immediate need was to address barriers to the enjoyment of the children’s right to play in their community (UNCRC, art 31).\(^5\) The group’s expression of issues included: broken glass and poor lighting in play areas; speed of traffic in the adjoining roads; provision of age- and ability-appropriate facilities; and structural concerns regarding the participation of both children and parents in government decisions related to play. In the group’s words, these were not only “the issues parents and children chose in our survey” but also “issues government is already supposed to fix” as “all of the issues we have chosen are supported by the international human rights standards” (When Kids Decide, 2009). Exploring provisions in a range of human rights treaties to which the UK is a signatory, PPR staff identified rights obligations in the UN Convention on the Rights of the Child (UNCRC) that would support the group’s concerns. Article 31 of the UNCRC recognises “the right of the child to rest and leisure, to engage in play and recreational activities”, and the group drew upon this provision to campaign as rights-holders demanding change, rather than individuals asking for improvements (e.g. Donnelly, 2013).

PPR’s approach in fomenting rights ownership by participant groups requires dedicated policy support to rights-holders so that they can navigate and extrapolate relevant rights provisions, providing an indirect link between rights-holders and the direct use of rights standards. This type of support involves the use of skills that have been viewed traditionally as specialist in nature, owing to the emphasis on understanding and interpreting human rights standards within the context of the wider international public law normative framework. Marginalised communities’ access to these skills may be inhibited by barriers such as knowledge, awareness, literacy issues and complexity of the information, especially in communities affected by inequalities in education provision and attainment. Access to these skills, and the process of rights ownership, can be inhibited also by the traditional role of non-governmental organisations (NGOs) and community development organisations structured in such a way that “very little decision making authority is vested in communities or clients, with actual project objectives being determined by NGOs and funders long before any ‘participation’ occurs” (Ebrahim, 2003, p.818).

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5 This campaign included a group of adults and a group of children from the area, who worked separately and together towards the realisation of shared campaign goals.
It is significant therefore that PPR’s approach places development and policy skills at the service of communities to support the identification of rights concerns by communities themselves.

In practice, providing development and policy support to communities to articulate rights from their own experiences, rather than being led by specialist knowledge of human rights standards creates opportunities for more nuanced understandings of rights implementation. The Committee on the Rights of the Child produced General Comment No 17 due to its concern regarding “the poor recognition given by States to the rights contained in Article 31” (CRC, 2013, para 2). Until 2013, when the Committee published this elaboration of the meaning and extent of Article 31, the community members’ articulation of the detailed aspects of the enjoyment of the right to play in the Lower Shankill was more developed than international documents. By starting with the issues most relevant to their community, group members in the Lower Shankill articulated necessary and practical components for the realisation of these rights. In this way the direct use of rights standards and provisions by communities goes further than a process of alignment of community-identified issues with rights standards. This example demonstrated how communities’ articulation of what full enjoyment of their rights would mean in reality can be more developed, nuanced and useful to defining change than the text of international human rights documents.

Experience in the application of this approach has highlighted the potential for use of these tools to be universalised, while at the same time underlining the essential nature of structured support to rights-holders. By engaging rights-holders in the alignment of issues with rights standards, groups develop familiarity with rights provisions and build confidence to employ these tools in their work. PPR’s experience in developing and applying this approach highlights tentative examples of the support given to groups to conduct elements of this work directly. In one example, women living in social housing in high-rise flats in north Belfast, known as the Seven Towers, sought rights provisions to support their campaign to improve housing conditions. The Seven Towers Residents Group had identified multiple housing and health complaints, chief among them were inefficient and costly heating provision, the prevalence of damp and mould and the presence of pigeon excrement on communal landings and drying areas. Residents analysed Article 11(1) of ICESCR through an examination of the Committee on Economic, Social and Cultural Rights’ (CESCR, 1991) General Comment No. 4 on the right to adequate housing. The direct identification of their complaints as rights issues relevant to habitability (ibid, para 8(d)) enhanced the process of ownership of rights and was a key element in developing the rights-based context for indicator development.

Crucially, in order to frame issues as human rights indicators, the identification of ‘rights’ issues need also be viewed within the broader paradox of socio-economic provisions. These broader provisions contextualise rights enjoyment within the obligations of the State and include affording due priority to vulnerable groups; fulfilling and protecting rights in a manner which is non-discriminatory and crucially, ensuring the progressive realisation of rights.

Progressive Realisation

Progressive realisation is a principle of economic and social rights that creates critical opportunities for marginalised communities to hold governments to account for their obligations. A signatory State to ICESCR is obligated to take steps to the “maximum extent of its available resources with a view to achieving progressively the full realization” of economic, social and cultural rights (art 2(1)). Within the global framework of rights protections, this principle acknowledges that States Parties will have various systems in place and resources to meet their obligations under the Covenant. Still, there is an expectation of continuous improvement. Notwithstanding resource barriers,
CESCR recommends that States should take steps toward the realisation of economic and social rights and that “Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant” (CESCR, 1990, paras 1-2).

Progressive realisation is monitored through various mechanisms at both international and domestic levels. States Parties are required to submit periodic reports to CESCR, and following an examination of the State’s progress, the Committee produces Concluding Observations, assessing the extent to which rights are being realised and making recommendations for further action. This process occurs generally every five years and provides a limited opportunity for communities to raise concerns at an international level through NGO alternative reporting. At a domestic level, States’ progressive realisation of their obligations can be assessed through human rights indicators and benchmarks. By monitoring progress on particular areas, States can determine appropriate resource allocation and future policy-making. However, despite the emphasis in international human rights law on the participation of affected groups and individuals in public decision-making, the process of identifying and monitoring indicators remains distant from the traditional mechanisms for public involvement through consultation processes.

Thus, although opportunities exist in both international and domestic mechanisms for affected communities to use the principle of progressive realisation to hold governments to account, meaningful engagement with these mechanisms is constrained by: knowledge and awareness of existing processes; capacity to engage with technical procedures; relying on government to “invite” (Eversole, 2012) communities into domestic monitoring processes. The rights-based approach developed by PPR disrupts traditional power relationships by centralising the meaningful and timely involvement of affected communities in the identification of indicators and benchmarks, monitoring of progress and reporting on the realization of their rights. A key element of PPR’s approach is to support affected communities to establish their own indicators, benchmarks and timelines for change. As much as possible, community members lead the monitoring of progress on the issues they identified by gathering evidence from the experience of local communities. Participation at this level (re)establishes rights-holders at the centre of service design and delivery. In this way, communities drive the agenda for change at a pace demonstrated by targeted, community-identified need. The indicator methodology developed by PPR and groups was named by the UN Office of the High Commissioner on Human Rights as a “best practice example of how communities can claim their rights” (OHCHR, 2012). This section reviews how communities in Northern Ireland, with the support of PPR, have translated the principle of progressive realisation into their campaigns for change.

**Identifying indicators**

Following a development programme led by PPR, the first step in creating indicators is facilitating the group’s identification of the key issues for remedy in their community. In addition to development workers, who build the capacities of groups to campaign for change in their communities, PPR’s staff team includes policy workers, skilled with awareness and understanding of international and domestic legal and policy frameworks. Policy workers build capacity, knowledge and understanding of human rights within the groups when possible, although more often development workers achieve this process with support from the policy team. Led by the groups’ priorities, PPR staff members align community-identified issues with rights-based commitments.

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6 PPR’s engagement with periodic reporting will be discussed below.

7 When possible, this process includes working with the group to identify these areas of alignment, and in one instance described below, group members have made tentative steps towards taking this step on themselves.
Following this, groups establish indicators and benchmarks to monitor change made during their campaigns for action with support. Together, two parts of the organisation create a critical bridge for community groups to use international legal frameworks, addressing in part the gap discussed above in communities’ ability to hold the State to account through traditional means.

After multiple experiences supporting communities through this progress, PPR has learned that the following criteria help groups to establish indicators that strengthen their overall campaigns for the progressive realisation of rights:

Indicators should be *measurable* through means accessible to the group. In practice, this means there should be a small number of indicators that are specific and clear enough for community groups to research and monitor them through accessible methods, such as door-to-door surveys. Since indicators are developed to reflect the particular issues identified by the group, it is unlikely that there will be existing data to use as a baseline or collected on the specific area of their focus. Even if data exist, for example through an annual report produced by a governmental department, the group may require information more regularly (e.g. six to twelve month intervals) to support their on-going campaign work. As such, indicators should be chosen with a view to facilitating the group’s establishment of a baseline through the wider community’s experience and capacity to conduct subsequent monitoring. The Lower Shankill’s campaign on the right to play, for example, involved both children and adults in monitoring specific issues that the group had identified as barriers to the fulfilment of the right to play. The presence of broken glass was identified in 25 sites across the community, which children had identified as locations where they played. Monthly monitoring conducted by adults and children established visually and recorded if each site contained broken glass. Monitoring results were often supplemented with photographic evidence (Lower Shankill Residents’ Voice, 2009). Critically, since the community had identified that the presence of any broken glass was experienced as a barrier to the right to play, it was not necessary to quantify the amount of glass in each site. Simple, visual and photographic monitoring methods could be used for this indicator and had the added benefit of allowing younger community members to participate in the monitoring process.

Indicators should be *true to the issue* the group has identified. When aligning human rights standards to issues raised and identified by communities affected directly, it can be tempting to look towards UN Committees’ interpretation of States’ obligations in a particular area. However, the fundamental aim of the human rights-based approach is to locate marginalised communities’ articulation of their own needs and demands at the centre of each group’s campaign. For example, PPR’s early work with residents living in the Seven Towers high rise flats in north Belfast led to the immediate identification by the group of the issue of pigeon waste accumulating in the landing and drying areas of the flats. The group was concerned that this posed a health risk to residents and prevented the enjoyment of the space, especially by children. PPR’s experience pointed towards the structural root of the many concerns highlighted by the residents in the persistent religious inequality faced by the Catholic community who lived there and who were over represented on the social housing waiting list. This inequality manifested itself in excessive waiting times to be rehoused in suitable homes with improved conditions (e.g. PPR, 2013). By developing the indicator from the lived experiences of the marginalised group, however, their priority of removing pigeon waste was central to the campaign, rather than the likely focus on inequality that a strictly legal approach would have taken. As the campaign developed in later years, residents themselves began to articulate religious inequality as a priority for government in order for progress on substantive rights relating to habitability to be realised (PPR, 2014).

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8 Due to the specific nature of the group’s concerns in the Mental Health Rights Group’s campaign to improve mental health services, surveys were conducted through supporting community and voluntary organisations and often by a PPR worker or volunteer.
Indicators should be **strategically aligned** to the group’s primary goal of holding government to account for its human rights obligations. This may mean the group **names an issue** by creating an indicator to measure, even if they acknowledge that there may be little or no change in the issue during their campaign. For example, all PPR groups monitor the extent to which affected groups feel they are involved in State decision-making about the issue. In this way, each campaign acknowledges that rights violations persist in decision-making processes that do not include rights-holders or prioritise their concerns. Monitoring this issue is not associated with an expectation for significant change but rather a determination to ‘name’ the violation. The group may also choose **not to name an issue** because of strategic campaign considerations that doing so would create challenges for the broader campaign or because the group determined that it would not focus on that area at a particular time. Mental health service users and carers in the Belfast Mental Health Rights Group, for example, identified a concern with appropriate service provision through General Practitioners (GPs) for those in mental health distress during their initial discussions. However, the group opted not to include the concern as a human rights indicator since the structure of GP contracts blurred lines of accountability with government duty-bearers.9

Indicators should measure both **outcome** and **process**. PPR groups have chosen outcome indicators in many instances, such as the presence of pigeon waste in flat landings and drying areas (right to housing) or broken glass in public areas (right to play). In order to measure communities’ full enjoyment of their rights, however, groups have included process indicators. These indicators have monitored participation, such as the percentage of residents who feel involved in decisions made by government about social housing (right to housing), and the suitability of existing remedies to rights violations, such as the percentage of respondents who were satisfied with information about complaints procedures in hospital (right to health). Although structural indicators may reveal significant barriers or opportunities for further implementation, this approach has focused on process and outcome indicators (see Corkery, Way and Otero, 2012) that can be measured through rights-holders’ stated enjoyment of their rights.

There may also be strategic reasons for selecting indicators or benchmarks that are **achievable**. When developing their campaigns, groups have included indicators that seem achievable because they: relate to clear existing guidance or policy that government bodies have already brought into force; are resource neutral or low-cost; articulate a clear priority of the community that with practical attention could result in considerable improvement in the fulfilment of governmental obligations. For example, one group campaigned for the use of an appointment card to be given to patients leaving accident and emergency services after presenting for acute mental health needs. This card describes clearly the details of the person’s next appointment, and the Belfast Mental Health Rights Group believed this was a reasonable change health trusts could make that would improve significantly patients’ and carers’ experience waiting for follow-up appointments during critical times. PPR’s experience demonstrates that when at least one indicator is ‘achievable’ in a short timeframe, this sustains community engagement and builds confidence of communities to continue pursuing longer term issues. Further, including achievable demands provides a clear message to decision-makers that communities are campaigning for serious improvements, and media are better able to understand and engage with the campaign demands.

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9 As the work of this group has developed and expanded geographically across Northern Ireland, concerns at GPs have re-emerged as a priority issue. The most recent indicators set by the group, now aligned in a broader Mental Health Rights Campaign, monitor concerns with GPs.
Establishing benchmarks – timetable for change

With indicators identified, PPR supported groups to establish benchmarks on which they would campaign for improvement in service delivery. This is a critical step in that it prescribes power to communities to identify the speed of meaningful change. As PPR founder, Inez McCormack (2008, p.136), notes, government processes for implementing change are slow, and “the timetable for implementation remains at the discretion of those who are required to change, not according to the right of those who need the change”. With support from policy and development staff at PPR, groups discussed how to set benchmarks in relation to: the strength of the rights argument underpinning the issue; whether government had already brought the international standard into local legislative or policy commitments; the severity of the violation and time sensitivity for change.

The following table describes one indicator and benchmark used in the campaign of a group of unemployed people in Belfast who launched the ‘Right to Work, Right to Welfare’ campaign in March 2013. This campaign called for the progressive realisation of both the right to work (ICESCR, art 6) and the right to social security (ICESCR, art 9). As the table shows below, baseline results demonstrated that 72% of people surveyed who were able to work had not had a job for more than a year (classified by government as ‘long term unemployed’). By assessing the strength of the rights argument, the policy commitment of government to tackle long term unemployment and the devastating impact on the affected group, the campaign set a benchmark for change that required a significant reduction and would see the problem halving to 36% in one year.

<table>
<thead>
<tr>
<th>Indicator: % of people who told us that they were able to work but hadn’t had a job in over one year</th>
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<tr>
<td><strong>International Human Rights Context:</strong> “The principal obligation of States parties is to ensure the progressive realization of the exercise of the right to work. States parties must therefore adopt, as quickly as possible, measures aiming at achieving full employment” (CESCR, 2006, para 19).</td>
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<tr>
<td><strong>Government policy:</strong> “The primary objective of these efforts remains the effective targeting of resources towards those in greatest objective need” (OFMDFM, 2012, p.24).</td>
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<td>Baseline (March 2013): 72%</td>
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Once groups identified a manageable number of indicators and established benchmarks for improvement, they began research in the community. In order to provide evidence for progress made against the groups’ specific concerns, it was necessary to establish a baseline of information. Groups used survey-based research methods to establish a baseline and conducted follow-up research to monitor progress. With support from PPR staff, groups developed questionnaires, conducted research in their communities and, in some instances, worked through relevant community and voluntary organisations to access further research participants. Groups were well positioned in most cases to identify research participants in their communities when the campaigns related to community experiences. The following table is an example of how survey-based results were monitored against benchmarks depicted above:

<table>
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<tr>
<th>Indicator: % of people who told us that they were able to work but hadn’t had a job in over one year</th>
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<td>Baseline (March 2013): 72%</td>
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Although government departments, agencies and other research bodies collect data across many aspects of people’s lives, it is unlikely that data will exist in relation to the particular indicators groups develop. It may be possible to draw on existing data to supplement the campaign, but research conducted directly with affected groups supports on-going campaigns in at least the following ways: raises awareness about the campaign issues with the wider community and develops a constituency of support; measures the specific issues of interest to the group; is independent of government oversight and can therefore be a useful tool for holding duty-bearers to account; acts as an organising tool by encouraging active participation of rights-holders. Perhaps most importantly, research conducted directly with affected communities confirms and legitimises through community experience the issues identified by group members, off-setting potential criticism that individuals involved are unrepresentative.

Accountability for progressing economic and social rights

A key component in community-monitoring of economic and social rights progression is the participation of rights-holders in identifying duty-bearers and structuring accountability on the basis of their rights. We suggest the use of community-generated indicators and benchmarks contributes to accountability through structuring this relationship between duty-bearers and rights-holders.\(^\text{10}\)

Structured engagement

The use of indicators and benchmarks was significant to PPR groups’ campaigns for accountability because this placed a timetable on engagement with duty-bearers. Early campaigns used formal public launches to declare the intention of the group to monitor State progress in relation to specific indicators. International experts in the areas of health and housing were invited to affirm the groups’ identification of particular issues as rights-based and to demonstrate to duty-bearers that the group would be highlighting progress, or lack thereof, of action at identified intervals (e.g. six or twelve months) (e.g. PPR, 2007). Later campaigns used benchmarks as reporting timelines with duty-bearers through structured engagement sessions. For example, residents of the Seven Towers flats in Belfast worked with PPR to establish the Seven Towers Monitoring Group (STMG), through which residents communicated directly with the government department with responsibility for housing (Department for Social Development (DSD)) and the local housing authority (Northern Ireland Housing Executive (NIHE)) about progress in relation to their key issues of concern. In contrast with participative models of the State “inviting communities into decision making” (Eversole, 2012, p.38), Seven Towers residents instigated the engagement on their own terms.

There has been notable success in ensuring accountability for rights progression from the STMG, principally in terms of indicator progression on issues relating to sewerage and pigeon waste. The NIHE has referenced the STMG engagement structure as having the effect of “focusing” or “targeting of resources” of the Housing Executive management and staff towards the delivery of improvements especially in terms of financial options (PPR, 2010).\(^\text{11}\) At the same time, engagement with duty-bearers through the STMG structure has been one punctuated by dissatisfaction with and criticism of the indicator/benchmark process. As De Vos et al. (2009, p.27) note, there is likely to be resistance from the State when communities “set their own priorities, make their own

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\(^{10}\) Lines of accountability for rights obligations can be blurred by increasing privatisation of economic and social rights provision, such as the rights to health and housing. Though beyond the scope of the current study, we argue that although structured accountability becomes more complex in such cases, it is not impossible.

\(^{11}\) Comments made by Northern Ireland Housing Executive area manager at the 2nd Housing Hearing, 23 January 2009.
decisions, and take a lead role in implementing these priorities and decisions”. The Housing Executive has been resistant to external monitoring and critical of the role of the affected community in articulating their demands as human rights indicators. During this time, therefore, the group has used other campaigning tools to apply pressure on the duty-bearer to progress rights. In the face of such resistance, it has been of significant value to the group that their campaign was grounded in international human rights standards and provisions that experts in the field have commended the approach.\textsuperscript{12}

Despite the normative framework identifying the obligations on the State for rights progression, often the process of seeking accountability at local levels is curtailed by political reluctance to realise these responsibilities at government levels. The STMG was developed initially in 2007, following campaign pressure resulting in the Minister for Social Development’s decision to “work with” the residents (McEntee, 2007). A change in minister, however, has meant that formal departmental engagement in the structure has become more limited. The experience of engagement through the STMG demonstrates a successful model of rights-based accountability, as well as the persistent challenges communities face when seeking meaningful engagement with the State for the realisation of rights.

**Transparency and Information**

Accountability for rights progression relies on the practical application of other inter-related rights principles, such as transparency in decision-making and the right to information. CESCR has emphasised repeatedly the interdependence of these rights with more familiar social and economic rights. In its *General Comment No. 4*, the Committee specifies that with immediate effect States should collect “detailed information” about the enjoyment of rights by different groups. Further, the Committee underscores the need for health decisions to be made “with the participation of the population” (CESCR, 2000, para 11) and “on the basis of a participatory and transparent process” (ibid, para 43(f)). This is a call that is repeated in relation to other rights, such as the right to work (CESCR, 2006, para 31(c)) and the right to social security (CESCR, 2008, para 26). Significantly, the Committee recalls these rights in all instances as core obligations, and thus they are said to have immediate effect. This is crucial for groups who require change, and their practical application is discussed in the next section.

In PPR’s experience, government decision-making processes typically do not involve vulnerable groups in a meaningful way when priorities related to service design; provision and resource allocation are set. Therefore, especially for those groups from marginalised communities where enjoyment of these rights has been limited, the ability to establish whether a group’s concerns are prioritised requires government transparency.

One group that worked with PPR to locate their concerns about the campaigns in the language and practice of accountability was S.T.E.P.S., a mental health group based in rural County Derry. S.T.E.P.S. used the *Freedom of Information Act 2000* (FOIA) to access information related to the local health authority’s assessment of the differing needs of rural and urban communities in the design and delivery of media campaigns providing advice to those in mental health distress. In February 2013, S.T.E.P.S. submitted a FOIA request to the Public Health Agency (PHA) to access the formal evaluation of its ‘Under the Surface’ media campaign. Information secured through this process revealed that the PHA media campaigns were of limited impact to those in rural communities owing

\textsuperscript{12} E.g. The UN Special Rapporteur on extreme poverty and human rights sent a message of support to the group stating, “The important work being done by the Right to Work: Right to Welfare Group in Belfast, Northern Ireland to hold the government accountable... is crucial and should be praised as a promising practice to be followed” (Sepúlveda, 2013).
to the type of provision that was being advertised and the methods for making this information available. Initially, the aim of the PHA had been to advise those in need of mental health care to seek both help from their local GP and advice from an online resource. The PHA recognised barriers to accessing sufficient support from GPs, and the campaign changed latterly to one with the sole aim of highlighting the existence of an online resource. To S.T.E.P.S., a rural group whose access to mental health services was generally limited to GP services and for whom internet access is unreliable, it was clear that the experiences of rural communities were not reflected in this decision. The FOIA request documented further that the campaign advertisements were delivered through radio and print press outlets, and the group’s analysis identified that none of the media platforms used were local, rural-based media. The PHA’s evaluation of the success of the campaign had relied on a survey of the local population to assess their recall of the campaign, its key messages and any resulting information. Across all of these indices, communities living in rural areas had poorer recall of the campaign. The information obtained by the S.T.E.P.S. group identified that despite a total cost for the “Under the Surface” campaign reaching more than £450,000, the specific needs of rural communities had not been identified or targeted. S.T.E.P.S.’ use of the Freedom of Information Act evidenced the potential for inadequate service design and delivery when government decisions do not take into consideration the experiences of vulnerable. With this evidence, the S.T.E.P.S. group was able to use local media, lobby local political representatives and demonstrate successfully to duty-bearers the ineffectiveness of public health campaigns that do not account for the needs of marginalised groups. Employing tools to promote the provision of information and transparency in decision-making therefore has allowed S.T.E.P.S to call for accountability for rights progression.

With support from PPR, the Seven Towers Residents Group also engaged Freedom of Information requests as a mechanism of accountability. Residents submitted a request regarding the local housing authority’s proposals for a multi-million pound renovation to the tower blocks in which they lived. The group aimed to assess the impact of this investment against the issues of concern they were monitoring as human rights indicators. The Housing Executive proposed the installation of PVC cladding for the buildings, and, despite repeated requests from residents, had failed to evidence how this would tackle the poor heating and chronic dampness experienced by residents. The response to the FOIA request revealed that specialist consultants had advised the Housing Executive five months previously of their “serious concern over the condition of the metal surrounds to the balcony glazing units” and had recommended that residents be advised not to use the balconies. Despite this, residents had not been informed of the potential danger of the balconies. Seven Towers residents engaged effectively with local politicians and the media in light of this information, which resulted in an apology from the Housing Executive to residents (‘NIHE says sorry for not highlighting balcony risk’, 2011). This work secured a programme of balcony repair work as well, which was completed in late 2013.

Practically, accessing information often involves sustained support from those who are familiar with processes such as Freedom of Information Act requests and the extent to which State decision-making should be transparent. Support is necessary also in the analysis of information yielded through such exercises, as well as the use of information in relation to the rights-based priorities identified by the group. Often, in spite of domestic legislation and international obligations to ensure decision-making is transparent and information is accessible, rights-holders remain subject to duty-bearers’ compliance with these provisions.

Recall of campaign press advertisements among those living in the Belfast Health and Social Care Trust area (urban) was reported at 48%, compared with 24% recall for those in the Northern Trust area (includes mostly rural areas). Awareness of the campaign radio advertisement was also considerably higher in the Belfast Trust (46%) than the Northern Trust (36%) (Social Market Research, 2012).
Engaging with international human rights mechanisms

In addition to the use of human rights standards at a national level, PPR and its participant groups engage more traditional international human rights mechanisms to enhance local accountability. NGOs may participate in periodic examinations by treaty monitoring bodies by submitting alternative reports for the Committee’s consideration, campaigning around the examination process and seeking an audience with Committee members or Rapporteurs. In the last examination of the UK by the Committee on Economic, Social and Cultural Rights, PPR (2009) submitted a report documenting key rights failings as evidenced by the groups indicator monitoring. The action research phase of all PPR’s participant groups’ work ensures confirmation of the resonance of the group’s priorities in the wider community of those affected by the same issues and thus deepens the mandate to report to the Committee. Priority issues identified by groups and reaffirmed by the wider affected group were presented as key human rights concerns of international relevance.

PPR submitted evidence from groups’ campaigns and sought to influence Committee questioning during the State examination. A representative from each of the groups campaigning on rights related to mental health, housing, the right to play and urban regeneration at that time were supported by PPR to attend the examination. Further participation of affected groups was facilitated by the production of short daily videos and blog diary entries from attendees (e.g. Atkinson, 2009; McCartan, 2009; McManus, 2009; Valente, 2009), which were sent back to Northern Ireland as both a campaigning tool to raise the profile of the issues being highlighted by groups attending and also as a mechanism for raising awareness among local communities about the process. The significance of group members’ involvement in the process was captured by one participant, a member of the Seven Towers Residents Group, who stated that it was “important” for her to see a member of the Committee a question proposed by her group on the concerns relevant to them (McManus, 2009).

The Committee’s (CESCR, 2009) Concluding Observations contain three specific concerns relevant to the groups’ concerns on mental health, housing and urban regeneration, as well as recommendations for specific State action. One such recommendation refers to the existence of religious inequality in the provision of social housing in north Belfast, which impacted the Catholic community and manifested in lengthy time spent on the waiting list in unsuitable housing – key concerns for the Seven Towers group. The Committee (ibid., para 29) expressed its concern with “the chronic shortage” of housing in north Belfast, noted that the existence of this shortage was “in spite of financial measures taken by the State Party in this regard” and called on the State to “intensify its efforts”. The Seven Towers Residents Group raised this issue again with the UN Special Rapporteur on the Right to Adequate Housing, Raquel Rolnik, during her official visit to the UK in 2013. In her final report, Rolnik (2013, para 73) observed that “long standing issues related to inequality continue to require concerted efforts” and highlighted that “concerns about differences in the way information is collected, disaggregated and presented have been raised”. Specifically, of the Special Rapporteur’s ten key recommendations to the UK government, the requirement that “additional efforts to address challenges to overcome persistent inequalities in housing in North Belfast” (ibid., para 80) is notable. It is significant also that the Special Rapporteur recommended that for this purpose the “active, free and meaningful participation of all in decisions made about housing should be promoted” in that the demand for participation in devising a remedy was core to the campaign for change articulated by north Belfast residents (PPR, 2014).

Notwithstanding the increased and internationalised profile of community demands for change through these mechanisms, however, clear limitations in affecting change and in securing progression of economic and social rights should be noted. Whilst the UK government retains overall responsibility for obligations under international human rights treaties, socio-economic decisions such as those relating to housing are made by the devolved
administration in Northern Ireland. Despite the obligation on the Northern Ireland government to ‘give effect’
to economic and social rights contained within the Covenant, however, there has been limited participation in
human rights processes by the government. For example, the Northern Ireland Office did not attend the CESCR
examination in Geneva in 2009, frustrating the Committee’s opportunities for direct questioning. Attempts to
measure the influence of the Committee’s recommendations, through submission of written requests for
information on the State’s progress since 2009, have been constrained by a lack of information produced by the
department responsible for human rights in Northern Ireland.¹⁴

Devolved arrangements in the UK create complexities the ability to exercise levers of State accountability. This was
evident in the UK government’s recent response to the Special Rapporteur on Adequate Housing’s report, which
did not deal with the specific references to housing rights issues in Northern Ireland. Instead, the response cited
housing as “a matter for the devolved administrations” and concluded that it would therefore be “inappropriate
for the UK government to respond” (Human Rights Council, 2014, para 80). At the same time, Northern Ireland’s
Minister for Social Development responded to the visit of and report by the Special Rapporteur by questioning
her credibility and the independence of her visit (Northern Ireland Assembly, 2013), as well as and disputing the
existence of the central problem highlighted (Northern Ireland Assembly, 2014). Unfortunately, these responses
from the Northern Ireland and UK governments to the CESCR examination and the report of the Official Mission
by the Special Rapporteur have impeded potential for international mechanisms of accountability.

Critically, however, the use of traditional human rights mechanisms focuses international attention on local issues,
which has been of significant value to PPR groups. Community groups have been able to apply pressure on
duty-bearers in Northern Ireland not only to progress economic and social rights but to discuss group-identified
priorities as internationally significant issues. The use of local media and other campaign tools in achieving this
has been essential in validating groups’ concerns. Moreover, international reinforcement of PPR groups’ use
of rights standards and principles further re-energises and adds validation to the campaigns for economic and
social rights pursued by vulnerable groups.

¹⁴ The Office of the First and Deputy First Minister has not responded to letters from PPR requesting information dated January 2012 and
February 2014.
Conclusion

This article has reviewed PPR’s human rights-based approach to explore how vulnerable and marginalised communities have employed international human rights standards and principles in their campaigns for change. Despite limitations to traditional domestic and international mechanisms for State accountability for human rights obligations, the experiences of the groups described here offer useful examples for communities in Ireland and elsewhere to employ in their own campaigns. By working outside formal legal and political structures, PPR’s groups have demonstrated the potential use and usefulness of international human rights frameworks for contributing to community-led change on the ground.

We suggest this model of working relies on at least three factors: the meaningful participation of communities affected by the issues; sustained support from individuals or NGOs who are familiar with human rights law, tools and mechanisms and are committed to working with affected communities to support their campaigns; and flexibility on the part of all involved to apply these tools or develop new approaches when and where appropriate. McMillan et al. (2009, p.69) argue that “Without addressing patterns of nonparticipation and the lopsided power relationships between rights-holders and governments, many of the underlying causes of problems in service delivery will remain unresolved”. PPR’s approach relies fundamentally on supporting the participation of marginalised groups and communities to claim their rights, rather than waiting to be invited into State-led processes for change. Through development and policy support, organisation works to build confidence in marginalised community groups to use human rights tools in their campaign work. As McCormack (Cizmar et al., 2008) states, “To enable the powerless, the invisible, to be part of making change. That changes how they see themselves... and that changes everything”. The articulation of the groups’ issues as human rights demands has demonstrated change in individuals’ perceptions of themselves as rights-holders and claimants, as well as direct improvements to implementation of rights on the ground and the shape of government decision-making.

Critically, the approach discussed has developed and adapted in relation to various groups’ priorities, challenges faced in holding particular State bodies to account, and in response to the added skills, interests and creative contributions of individuals involved in each campaign. Although the groups working with PPR have engaged in many central elements of this human rights-based approach, the reality of working with marginalised communities to improve the realisation of rights requires flexibility in the face of challenges and opportunities. Although human rights standards and provisions may support a community’s campaign, it is important that a rigid reading and understanding of these documents does not constrain a group’s development and articulation of their rights from their own positioning. Examples from a range of the groups demonstrated the use and usefulness of some tools human rights can add to traditional community empowerment frameworks, but these campaigns have also drawn on other models, such as trade union organising, use of the media and lobbying politicians. A central component of PPR’s approach, however, is the articulation of issues as human rights indicators with benchmarks for improvement, on which a considerable portion of this article has been focused. As former Special Rapporteur on the Highest Attainable Standard of Health (Hunt, 2007, p.4) notes, “By supporting communities to set human rights indicators and benchmarks that measure whether their economic and social rights are being realised on the ground, the PPR project is applying two fundamental features of the human rights-based approach to social change”. We suggest that this tool is a particularly effective accountability mechanism for drawing economic and social rights into local contexts.

International human rights law is a powerful framework that can contribute to marginalised communities’ campaigns for change on the ground. However, it is a framework that should be at the service of rights-holders who can benefit from articulating, both for themselves and as an influential tool, their concerns as rights-based
demands for change. With significant barriers to domestic enforcement of economic and social rights through traditional mechanisms, we suggest drawing human rights standards and provisions into community-driven campaigns offers potential for meaningful implementation.
References


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I. Introduction

Fred Rooney is the Director of the International Justice Center for Post-Graduate Development at Touro Law Center. As the inaugural director of the City University of New York (CUNY) School of Law’s Community Legal Resource Network (CLRN), he pioneered the first law-school based Legal Incubator (Incubator). In 2012, Mr. Rooney applied for a Fulbright Scholarship with the goal of exporting the Incubator to the Autonomous University of Santo Domingo (UASD) in the Dominican Republic. What follows is an edited transcript of an interview with Mr. Rooney about the creation of the CLRN, the evolution and growth of legal incubators, and his experience launching the Community Legal Services Center (Centro Comunitario de Servicios Legales or CECSEL) at the UASD. Included in the text are comments from the Attorney General of the Dominican Republic, Francisco Domínguez Brito, an avid supporter of the program, as well as comments from three of the lawyers at CECSEL: Isabel Cabrera, Luis Calcaño, and Katherine Quezada.

Keywords:
Legal Pedagogy, Incubators, Dominican Republic.

4 All interviews were conducted by Justin Steele, Executive Articles Editor of the UMass Law Review, 2013–2014, and transcribed by Michael Covey, Staff Editor of the UMass Law Review. Translations of the questions and answers of the Attorney General were conducted by Dr. Xavier Echarri-Mendoza, Assistant Professor of Spanish, of the University of Massachusetts–Dartmouth. Special contributions and translations were made by Isabel Saavedra, J.D. Candidate, UMass School of Law (2014).
II. The CUNY Incubator: The Beginning of a New and Powerful Trend in Legal Pedagogy

A. What is the Community Legal Resource Network and how did it begin?

The CLRN was created in 1998 to address a crisis in access to justice in New York City.\(^5\) We did so by providing professional support to CUNY Law graduates interested in creating solo or small-firm practices in underserved communities.\(^6\) CLRN began providing training in two areas: professional skill development and small firm management.

The unfortunate reality was, and still is, that compassionate and talented lawyers—even those with a deep commitment to working in underserved communities—need to learn how to run a practice quickly or be forced to close up shop. The CLRN designed a network of several hundred CUNY Law alumni lawyers who were encouraged to offer low-cost legal services in communities underserved by private attorneys, legal service centers, and bar associations.\(^7\) CLRN has helped its members to garner business-management skills, access computer technology, and become adept at negotiating everything from ordering online legal research to renting office space.

CLRN also has an active listserv through which member attorneys share their work product, pose questions to colleagues on substantive areas of law or procedural matters in various local jurisdictions, or simply find referrals for clients. Through funded community service projects administered by CLRN, member attorneys have opportunities to provide services to low-income clients while enhancing the quality of their practices.

While the bulk of CLRN’s efforts is focused on its members, the impact is ultimately felt by the countless number of working and middle-class New Yorkers who rely on CLRN members to provide affordable legal services.

B. How did you start the Incubator?

Since its inception, CUNY Law has trained students in upholding the principles of “liberty and justice for all.” The graduates ensure competent legal counsel to individuals with limited incomes, similar to the counsel individuals with the greater financial means may receive. That was the impetus for creating an incubator in 2007—to provide a core of skilled practitioners interested in creating economically viable law practices in underserved parts of New York City.\(^8\)

The Incubator was launched at a time when the economy was still fairly stable. However, during the 2008

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5 See Faces of CLRN, supra note 2, at 3.
6 Id.
7 Id.
economic crisis, there was an ever-growing number of law students graduating with no job possibilities. This was a turning point for the incubator idea as it became not only about creating successful law practices in underserved communities, but also about helping CUNY graduates become more marketable lawyers.

Since 2009, dozens of American law schools have debated the pros and cons of launching their own incubators or residency programs, and numerous post-graduate programs have cropped up across the United States. The principles of the original incubator have now become ubiquitous: help graduates improve employment opportunities and, in turn, help individuals living in underserved communities with unmet legal needs.

C. Are you associated with all of these programs?

I’ve been fortunate to travel extensively across the United States to talk about the value of post-graduate programs and, whenever possible, help get them off and running. While I have not been directly involved with all of them, I have worked closely with many schools to help them conceptualize their incubators and get them off the ground. For instance, I recently spent time helping Thomas Jefferson Law School and California Western Law School launch incubators. Though I was not directly involved, it was particularly interesting to watch Pace Law School turn our incubator model into a successful residency program.

D. How do you help schools launch their incubator programs and what are some of the challenges you’ve faced?

I am generally invited by someone from the law school community to speak with members of the faculty and administration about the logistics and practicalities of setting up an incubator. My biggest challenge is helping convince the powers-that-be that the initial costs of creating an incubator are well worth the practical support it offers law graduates.

Sometimes the members of the faculty and administration need to be convinced that these programs are not only needed but also relatively easy to launch. They don’t realize that once in place, incubators benefit almost every

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11 According to Mr. Rooney, there are about seventeen post-graduate programs sponsored by either law schools, bar associations or bar foundations. See Incubator/Residency Programs Directory, A.B.A., http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_directory.html (last visited Oct. 4, 2013) (noting at least fourteen programs linked to the ABA). Other incubators include: the Brooklyn Law Incubator & Policy Clinic and Touro Law’s Community Justice Center.


13 See CUNY Expanding Incubator Program for New Grads with Cal Western, Thomas Jefferson, supra note 12; Semeraro, supra note 12.

14 See Tierny Plumb, A Law School Run Law Firm, 15 preLaw 22 (2012) (discussing the creation of a CUNY-incubator-style law firm that is run by Pace Law School).
aspect of a law school. The law schools become more competitive in the world of legal education because they continue training long after their students walk across the stage on graduation day. This is what I refer to as a “longitudinal” law school experience wherein legal education is provided on a continuum.

More often than not, the schools I visit decide to create incubators. Before I accepted my current position, I was invited to meet with the dean and the faculty of the Touro Law Center in Central Islip, New York. During my presentation, I talked about the CLRN and about the growth of incubators across the United States. Shortly after my visit to Touro Law, the dean and faculty unanimously approved a plan to start an incubator for Touro graduates. As of this interview, I am working on the development of Touro’s incubator as well as its newly formed International Justice Center for Post-Graduate Development.

E. How do incubators get funding?

In order to provide these services, the school either has to allocate or secure outside funding to cover start-up costs for furnishing and equipping the incubator—copier/fax/scanner, Internet service, etc. In New York, CUNY Law has been very fortunate to get discretionary funds from the New York City Council. When I travel to law schools, I talk about the ways to forge partnerships with elected officials to serve the unmet legal needs of their constituents and, at the same time, provide new lawyers with increased opportunities.

Essentially the pitch to elected officials is, “If you provide us with some discretionary funds, we will bring our lawyers into your district and pay them to provide counseling and legal support for your constituents.” Once the lawyers in the incubator have the professional skills needed to effectively serve a given community, we send them to legal clinics, senior centers, grass-root NGOs, and religious and community organizations that are identified by the elected officials.

By providing funds for a legal incubator, the elected officials look great because a corps of lawyers is brought into their districts to serve their constituents. Furthermore, the constituents are grateful because they gain access to lawyers, sometimes for the first time. For CUNY, this really helped reinforce its mission of "law in the service of human needs."

15 For example, incubators help bring in law school applicants, so they have a positive impact on admissions. They also provide opportunities for students who intern with incubator lawyers, impacting positively on career services. Furthermore, they generate a deep sense of good will with graduates as alumni understand that their alma mater actually cares about their well-being and professional development.


17 See Touro Law Announces International Center for Post-Graduate Development & Justice, supra note 1.


20 A particularly “attractive” constituency is senior citizens because these constituents have some of the highest turnouts among eligible voters. See, e.g., Emily Brandon, Why Older Citizens are More Likely to Vote, U.S. News (Mar. 19, 2012), http://money.usnews.com/money/retirement/articles/2012/03/19/why-older-citizens-are-more-likely-to-vote (providing that 61% of US citizens voted in the November 2010 elections).

F. What kind of legal work is done at incubators?

At CUNY, incubator lawyers are commissioned to work at community centers, not-for-profits, churches, mosques, temples, or senior citizen centers once or twice a week. This allows people from the community to come in and meet face-to-face with an attorney. The lawyers deal with almost every legal issue imaginable, which means they gain tremendous experience in a wide breadth of legal issues. Because there is never enough money to provide full-scale representation, the lawyers do whatever they can to resolve an issue without going to court.

A good deal of the work comes from senior citizens. The lawyers may be called on to draft wills, powers of attorney, living wills, or whatever they need. Many seniors have limited, fixed incomes, and the incubator provides them with the kind of services they would never be able to afford from a private attorney.22

There is also a lot of landlord-tenant work. Beginning in 2009, elected officials became concerned with the increasing gentrification of areas in their communities. Seeing a great opportunity to obtain higher rents, landlords began driving out rent-controlled and rent-stabilized tenants23 who often pay a fraction of the actual fair market value.24 This was often done by making life so miserable for the tenants that they would leave the premises.25 The Incubator’s intensive training enabled our lawyers to become top-notch tenant advocates.

Our efforts were rewarded when we noticed the increasing number of halted evictions.26 For instance, Pedro Rivera, one of our incubator lawyers, secured a year of rent abatements for twenty-six families living in a substandard apartment building in Northern Manhattan.27 This is a prime example of the power of post-graduate training for committed and compassionate lawyers and the role they can play in defending the rights of vulnerable members of the community.

The CUNY Incubator does extensive immigration work. The New York City Council funds these efforts because of ongoing abuses of both documented and undocumented immigrants, who are particularly vulnerable groups

22 There are many organizations that recognize the glut of legal services available to senior citizens. See, e.g., NAELA Public Policy Guidelines: Legal Services, NAELA (Mar. 2013), https://www.naela.org/PublicAdvocacy_PublicPolicy/Public_Policy/Legal_Services.aspx (“NAELA recognizes that millions of seniors and people with disabilities cannot afford private legal services. One of NAELA’s missions is advocating for quality legal services for seniors and people with disabilities including those who are unable to pay for such services.”).


27 Id.
in our society.\textsuperscript{28} The lawyers who represented immigrants dealt with issues such as filing residency petitions, applying for citizenship, and applying to change immigration status.\textsuperscript{29} In sum, it really has been a win-win for all parties involved.

III. The Dominican Model: A New Twist on a Tried and True Method

A. What inspired you to start an incubator in the Dominican Republic?

Seeing how incubators helped underserved communities throughout the United States,\textsuperscript{30} I began to consider how they might help under-represented people around the world. The Fulbright Scholarship provided me with the perfect opportunity to see if the CUNY Incubator model could be reproduced outside of the United States. I wanted to experiment and see just how far the model could be taken.

I chose the Dominican Republic because it is close to the United States—three hours by plane—and because there is a huge problem with access to justice.\textsuperscript{31} I have strong connections to the Dominican communities of New York City and of Allentown, Pennsylvania from my work with both for many years. That work left me with a deep admiration for the Dominican community. In my experience, Dominicans are hardworking, have a strong sense of family, and a deep sense of faith. Having been to the Dominican Republic on many short visits, I embraced this opportunity to become more fully immersed in the country, its people, and its culture.

B. How did UASD become the sponsoring law school?

UASD was a natural choice. They have campuses throughout the Dominican Republic,\textsuperscript{32} and the administrators expressed a strong desire to have us launch incubators in conjunction with these other campuses.

The law department at UASD is the oldest in the western hemisphere.\textsuperscript{33} UASD is the Dominican Republic’s largest public provider of post-secondary education, and a large percentage of students choose UASD because

\textsuperscript{28} See generally Immigrant & Non-Citizen Rights, CUNY School of Law, [URL] (last visited Sept. 28, 2013) (explaining an overview of a student practice course and the involvement of students in representing documented and undocumented immigrant in a variety of legal issues.); see also Southern Poverty Law Center, Close to Slavery: Guestworker Programs in the United States (2007), [URL] (providing a detailed analysis of the conditions under which guestworkers exist, whether documented or undocumented, in the United States).

\textsuperscript{29} See Press Release: City Council Speaker Quinn, Council Members Dromm, Recchia & CUNY Announce Free Citywide Legal Services for Immigrants, Council of the N.Y.C. Office of Commun’c (Sept. 3, 2012), [URL]; CUNY Citizenship Now, About Us, [URL] (describing the progress of setting up alternative dispute resolution centers across the Dominican Republic to increase access to justice).


\textsuperscript{31} See Autonomous University of Santo Domingo, [URL] (last visited Oct. 7, 2013) (listing all satellite campuses).

\textsuperscript{32} See Autonomous University of Santo Domingo, [URL] (last visited Oct. 7, 2013) (listing all satellite campuses).

\textsuperscript{33} UASD is the oldest university in the Western Hemisphere. See History of the University, Autonomous University of Santo Domingo, [URL] (last visited Nov. 26, 2013) (noting that on October 28, 1538, Pope Paul III authorized elevating the original seminary university to the University of Santo Domingo, which was split into four schools: medicine, law, theology, and arts).
it is affordable and much more accessible for students from moderate to low-income families.\textsuperscript{34} This is similar to CUNY—a publicly funded university system that has been a beacon of hope for students of modest means.

I also wanted to bring the incubator system to a school with students that would use it to improve their society. UASD students have strong feelings about politics and are passionate about the future of their country.\textsuperscript{35} Students don’t simply attend the UASD, they live and breathe it. UASD was exactly what I was looking for.

\section*{C. Once you arrived at UASD, what was the process of setting up CECSEL?}

Shortly after arriving, I came in contact with a group of highly committed students who were concerned with the inequities in their legal system. They wanted to use their skills and privileges in society to help underserved communities. Over the course of several months, I developed a strong relationship with them and grew to respect them in so many ways. These relationships became the foundation that helped me conceptualize the incubator and get it running.

I knew the incubator model needed to be tailored to the country to which it was being exported. CECSEL is unique because, rather than supporting solely individuals licensed to practice law, we developed a hybrid model including five students—who would be the equivalent of second semester 3L law students in the United States—and five law graduates\textsuperscript{36} awaiting admission to practice.\textsuperscript{37}

We incorporated students in addition to graduates because clinical education is virtually non-existent in the Dominican Republic.\textsuperscript{38} For law students in particular, getting any practical experience is difficult, if not impossible. The five students who came into the incubator would get a taste of what clinical education is like in the United States. Working side-by-side with law graduates and lawyers in the same training programs allows students to develop very strong professional skills as well as the business skills that they can eventually use as
small-firm practitioners.39

D. What were the most significant challenges you faced in setting up CECSEL?

The biggest challenge was trying to maneuver within a system that is drastically different from ours. In the Dominican Republic, it generally takes a lot longer to get things done. For instance, it took longer to secure funding to launch CECSEL. When funding was in place, it took longer to actually receive the funds. All of that put me at a disadvantage because by the time we were up and running on April 10, 2013, I only had a month left on my Fulbright Scholarship. Despite the challenges, we did open the incubator and it continues to operate successfully.40

I have never been in a situation where I helped give birth to a program and then left shortly after the delivery. Now my biggest challenge is making sure there is a strong enough commitment on the ground to ensure that CECSEL continues to be successful both financially and in terms of educating the incubator participants.

E. How does the incubator model fit into the current pedagogy in the Dominican Republic?

It is completely outside of the box—a new concept for the country. In the United States, long before I started the first law school-based incubator, there were incubators for graphic designers and start-up companies in Silicon Valley.41 In the Dominican Republic, very few incubators exist at all,42 let alone ones for lawyers.

Yet from the outset people were very supportive of my ideas. The dean of the law school was willing to learn about incubators and allowed me to pitch the idea to the faculty. The faculty was willing to experiment and see how it would impact the students and graduates. In many ways, CECSEL has been more successful than anything else I have accomplished in my professional life. Even Attorney General Domínguez Brito came to the opening and spent an hour talking about his support of this concept and its articulated goals of increasing access to justice.43 He has been and continues to be one of our strongest allies.

More people jumped onboard after we articulated the mission of the incubator in simple, understandable Spanish.

39 According to Mr. Calcaño and Ms. Quezada, students serve as interns in essentially a paralegal capacity—doing research and assisting the attorneys with their cases for several months. When their internship is finished, a new group rotates in to replace them. At the end of the two rounds, the lawyers choose the best of the interns who will then become the next incubator lawyers. As the current members’ tenures end, they will then look for the students or graduates with exceptional grades and a demonstrated commitment to social justice to repopulate CECSEL. While the current admissions process is fairly informal—no forms, business plans, or paperwork is required—a goal is to create a more structured admissions process.

40 For instance, Mr. Calcaño has already worked on several low bono and pro bono matters:

I worked with a man that was being wrongfully evicted by his landlord. In the end, the landlord was not even the real owner of the property and had no standing. We helped the tenant get his first trial, which saved him around $40,000 thousand Dominican pesos (U.S. $960). I also recently helped a woman who was denied wages—about 30,000 Dominican pesos—by her employer. Now we are suing to get the workers’ benefits.

Interview with Luis Calcaño, Sub Coordinator, CECSEL, via email (Oct. 3, 2013).

41 Other types of incubators such as business incubators have been around since 1959 and have helped new business owners access the resources and assistance they need to grow successful firms. See David A. Lewis et al., Incubating Success: Incubation Best Practices That Lead to Successful New Ventures 5 (2011), http://www.edairncaucito.org/pdf/Master%20Report_FINALDownloadPDF.pdf


43 Id.
Furthermore, the media was very generous, providing time to outline our goals on television, radio programs, and in dozens of newspaper articles. There was tremendous interest in and support for a new model that was developed to help increase access to justice.\(^{44}\)

1. Comments from the Attorney General of the Dominican Republic Regarding CECSEL’s Impact on Dominican Education and Legal Practice

Many of the same questions were posed to the Attorney General Domínguez Brito. He largely echoed Mr. Rooney’s sentiments about CECSEL’s purpose and impact: “CECSEL... carries out two essential duties: first, free legal services to marginalized groups; and second, practical training to law students and professionals. It is my understanding that the center promotes community ethics and responsibility, and a true calling to public service for law professionals. In addition, these centers inspire citizens’ confidence in justice.

“CECSEL’s work definitely has an impact on increasing the levels of access to justice in our country. I understand that CECSEL allows young lawyers to put their knowledge into practice and, at the same time, it offers legal advice to those who do not have enough resources to pay for a private lawyer, therefore I think that CECSEL expedites the practice of the law.”\(^{45}\)

2. Comments from CECSEL Members on the State of Legal Pedagogy in the Dominican Republic

Mr. Calcaño made the following observation: “CECSEL unquestionably changes the traditional approach to legal education in our country. This university is the only public law school in the country. There are many other law schools, but all of them are private universities. They do not have clinics or incubators and the traditional approach does not offer any practical experience. CECSEL is a way for us to gain day-to-day practical legal skills and experience. The incubator is so progressive and I am sure that it is going to infuse a great change in the Dominican Republic, particularly with the traditional way that our lawyers view their role in society.”\(^{46}\)

Ms. Quezada stressed the practicality of the lessons noting that the most important things she learned were how to deal with actual clients and how to run a small firm, critical lessons not available in the classroom.\(^{47}\) She also noted that, at CECSEL, the lawyers get routine workshops that help prepare them for private practice.\(^{48}\)

Ms. Cabrera provided an even deeper critique of the Dominican education system. According to her, CELSE’s hands-on and practical approach is distinct from anything in the Dominican education system,\(^{49}\) which is almost exclusively based on memorization—from elementary school all the way to college.\(^{50}\)

\(^{44}\) See, e.g., Inaugurates Legal Services Personas de Escasos Recursos, supra note 42; Bethania Apolinar, Asistirán a Personas en Problemas Legales, Listin Diario.com (April 25, 2013), http://www.listindiai.com/la-republica/2013/4/24/274603/Asistiran-a-personas-en-problemas-legales
\(^{45}\) Interview with Francisco Domínguez Brito, Attorney General, Dominican Republic, via email (Aug. 22, 2013) (trans. Dr. Xavier Echarri-Mendoza).
\(^{46}\) Interview with Luis Calcaño, Sub Coordinator, CECSEL, via Skype (June 30, 2013).
\(^{47}\) Interview with Katherine Quezada, Lawyer, CECSEL, via Skype (Jul. 18, 2013).
\(^{48}\) Id.
\(^{49}\) Interview with Isabel Cabrera, CECSEL member, via Skype (June 30, 2013).
\(^{50}\) Id.
All the members of CECSEL emphasized that the incubator system will help alleviate the absence of practical experience in Dominican education by offering concrete training.\(^5\) There appears to be a general consensus that this will also make UASD law graduates much more competitive with other law graduates,\(^5\) including graduates from more prestigious schools. CECSEL “graduates” will not need as much post-law-school training to become contributing lawyers at firms or successful solo practitioners.\(^5\)

**IV. CECSEL’s Substantive Issues**

**A. What are the legal issues being dealt with by the lawyers at CECSEL?**

In the Dominican Republic we secured funding through the U.S. State Department and the U.S. Embassy in Santo Domingo. When I explained to embassy officials how we trained New York lawyers around the articulated needs of funders, the embassy decided to provide funding to train CECSEL participants in the areas of gender-violence\(^5\) and LGBT rights.\(^5\)

\(^5\) Ms. Cabrera’s concern for Dominican law graduates having never taken a practice class or doing an internship is very similar to current concerns about U.S. law graduates. See, e.g., Erwin Chemerinsky, *Rethinking Legal Education*, 43 Harv. C.R.-C.L. L. Rev. 595, 596 (2008); Id.

Meaningful reform requires that law schools do far more to emulate the way medical schools train doctors... For example, my goal is that at the new University of California, Irvine School of Law, every student will participate in a law school clinic or have the equivalent experience, such as through a carefully selected externship. A clinical experience for every student in the third year will solve a problem that plagues every law school: how to make the third year of law school meaningful and useful for students.

Id.

\(^5\) Similar to the United States, the Dominican Republic has a distinct hierarchy of law schools. In fact, according to Ms. Quezada, there are law firms that explicitly state that graduates from AUSD need not apply. Even more surprising, some of those firms have AUSD graduates in senior partner positions, yet still refuse to look at new AUSD graduates. See Interview with Katherine Quezada, supra note 47.

The hope that incubators will make graduates from “lower ranked” schools more competitive for law firms is, of course, very similar in the United States. However, there are some who believe that no amount of “practice ready” law graduates will replace the old method of hiring from Harvard, Yale, and Stanford, etc. See generally Elie Mystal, *The Myth of The ‘Practice Ready’ Law Graduate, Above The Law* (Sept. 3, 2013). http://abovethelaw.com/2013/09/the-myth-of-the-practice-ready-law-graduate/

Sure, hiring partners might talk a good game at legal education conferences when a law school asks what they can do to get more students hired by their firm. But that’s because saying ‘produce practice-ready graduates’ sounds a lot better than ‘nothing... we’re going to hire people from the most prestigious schools we can, and maybe bring in your valedictorian for an interview if we’re feeling generous.’

Id.

\(^5\) Domestic violence is a major issue in the Dominican Republic. According to a recent article, in 1997 the Dominican government passed Law 24-97 to curb domestic violence. See Mercedes Perez, *Legislative Reform and the Struggle to Eradicate Violence against Women in the Dominican Republic*, 14 Colum. J. Gender & L. 36, 36 (2005) (internal citations omitted). The law sought to criminalize domestic violence and provide equal protection to women under the law. Id.

A recent report by Amnesty International notes that in 2011, 733 women were killed by partners or former partners. See Amnesty International, Dominican Republic Submission to the UN Human Rights Committee 104th Session of the Human Rights Committee, 12-30 Mar. 2012 10–11 (2012), http://www.amnesty.org/en/library/asset/AMR27/001/2012/en/0902a75-5244-4dbb-9b3a-820d70482652/amr270012012en.pdf It also notes that battered women’s shelters, which are to be funded and set up by the government per Law 88-03, are seriously underfunded and lacking resources. Id. at 11.

\(^5\) LGBT rights are another major issue in the Dominican Republic. Although homosexual relationships are legal, there are no laws to protect homosexuals from discrimination. See Immigration and Refugee Board of Canada, Dominican Republic: *Treatment of Homosexuals, Including Protection Offered by the State and the Attitude of the Population, 22 January 2007*, Refworld.org, http://www.refworld.org/docid/469c65c8c.html (last visited 29 September 2013).

As such, a significant portion of training is designed to enable participants to better represent the legal needs of women, and occasionally men, who are survivors of domestic violence. Additional training focuses on helping individuals from the LGBT community who face discrimination or harassment on the job or in society.

At the same time, the lawyers are working with people who come in with issues related to labor law, contract law, and other common legal matters. Just as we were able to use public funding to pay the lawyers in New York to represent tenants or immigrants, funding received from the U.S. State Department enables us to pay Dominican lawyers who represent individuals from the core groups mentioned above.

B. Are there other legal issues in the Dominican Republic that you hope CECSEL will confront?

One area of serious concern is the legal status of thousands of Haitians living and working in the Dominican Republic. Recent changes to the Dominican Constitution in 2010 and a ruling by the Dominican Constitutional Court have put many Haitian immigrants' citizenship into question.\[56\] As of now, children who are born to undocumented Haitian migrants do not have a right to Dominican citizenship.\[57\] While they technically have the right to Haitian citizenship,\[58\] they are considered nevertheless stateless because the Dominican government will no longer grant them citizenship because the mother was undocumented.\[59\] It is terrifying to wake up and discover that the only place you've ever called home no longer recognizes your citizenship.

Worse yet, without documentation, Dominicans are unable to register for school,\[60\] or even, in some cases, secure


On Thursday, September 26, 2013, the Constitutional Court of the Dominican Republic ruled in favor of the new Constitution, "stripping" citizenship from thousands of people born to migrants who came illegally, a category that overwhelmingly includes Haitians brought in to work on farms.” Associated Press, Dominican Ruling Strips Many of Citizenship, N.Y. Times (Sept. 26, 2013, 6:37 PM), http://www.nytimes.com/aponline/2013/09/26/world/americas/ap-cb-dominican-republic-stripping-citizenship.html?_r=1&

Additionally, “[t]he decision cannot be appealed, and it affects all those born since 1929.” Id.

\[57\] See Open Soc’y Rep., supra note 56, at 16. Specifically, Article 18 of the new Constitution provides that “Persons born on national territory, with the exception of the sons and daughters of foreign members of diplomatic and consular delegations, and foreigners who find themselves in transit or reside illegally on Dominican territory. Foreigners shall be considered as being in transit as defined in Dominican laws.” Id.


In 2005, the Inter-American Court of Human Rights issued a landmark judgment against the Dominican Republic affirming that these policies discriminated against Dominicans of Haitian descent and left them vulnerable to statelessness. The case, Dílécia Yean and Violeta Bosico v. Dominican Republic, was brought by two young girls of Dominican descent who were denied Dominican birth certificates even though their mothers were born in the Dominican Republic and possessed valid cédulas. In its judgment, the Inter-American Court found that the Dominican Republic was misapplying the “in transit” constitutional exception to deprive children of Haitian descent of their right to Dominican nationality, making them vulnerable to statelessness.

\[60\] See Open Soc’y Rep., supra note 56, at 11.
medical treatment.\textsuperscript{61} There are also thousands of Haitian immigrants and Dominicans of Haitian decent who are undocumented because their births were never registered.\textsuperscript{62} Now, as children, adolescents or even adults, they have no formal identification.\textsuperscript{63} That is a huge problem for the Dominican government and international foundations,\textsuperscript{64} and we would like to address the issue. I have applied for funding to do just that.

1. Comments from the Attorney General Concerning New Legal Issues for CECSEL and Current State Assistance for the Poor

Attorney General Domínguez Brito hopes to see CECSEL focus on general domestic issues: “I would like CECSEL to focus on all areas of private law because people here have more economic difficulties when they look for private lawyer services. For example, a person with few financial resources who has been sued and forced to pay money that [s/]he does not have, or a person whose properties have been seized, would both have serious difficulties [obtaining] justice.”\textsuperscript{65}

He also provided insight into what the Dominican government offers in terms of legal aid to the poor, and how CECSEL complements these services. “CECSEL complements the state’s role of organizing free legal assistance programs and services to people who lack financial resources to get legal representation, and it is for this reason we have decided that the Attorney General’s Office will provide economic support to the Center.”\textsuperscript{66}

“[One State program is t]he Oficina Nacional de Defensa Pública (National Office of Public Defense)[. This] is an institution that provides free legal defense services through a staff of highly qualified lawyers aimed at people denied their liberty or involved in a juridical process that do not have economic resources to pay a lawyer, or people who for any other reason do not have a lawyer.”\textsuperscript{67}

“[T]here is [also] the ‘Dirección Nacional de Atención a Víctimas’ (Victims Assistance National Department), which is a state office that is part of the Procuraduría General de la República (Solicitor General’s Office). [It] devotes efforts without discrimination in favor of anyone who is a victim of ill-treatment, economic or hereditary abuse, the slave trade, sexual abuse, gender violence, or domestic violence.”\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{61} See Peace Corps Initiative: Declaro mis Derechos, FOTDR.ORG, \url{http://www.fotdr.org/site/DominicanRepublic/PeaceCorps/PeaceCorpsInitiatives/tabid/484/Default.aspx} (last visited Sept. 28, 2013) (“Without an officially recognized birth certificate, a child in the Dominican Republic can’t go to school, receive medical care in a public hospital or, when he or she turns 16, apply for a national identity card (cédula”).
\item \textsuperscript{63} See Open Soc’y Rep., supra note 56, at 6.
\item \textsuperscript{64} Per Caitlin Stilin-Rooney, a consultant for the Dominican Association for Women’s Rights, ONU-ACNUR, Manos Unidos, Progresio, Christian Aid, Entreculturas, Advenient, Trocaire, Misereor, Economistas sin Fronteras, The Butler Foundation, Banco Munidal (Dominicano), Christian Relief Services, Jesuits, UNDEF, OIM, and Women’s Refugee Services are all actively working with Haitian immigrants in the Dominican Republic. See Email from Caitlin Stilin-Rooney, Consultant, ADOPEM (Asociación Dominicana para el Desarrollo de la Mujer), to Justin Steele, Executive Articles Editor, UMass Law Review (Sept. 29, 2013) (on file with author).
\item \textsuperscript{65} Interview with Francisco Domínguez Brito, supra note 45.
\item \textsuperscript{66} See Karas, supra note 38.
\item \textsuperscript{68} Dirección Nacional de Atención a Víctimas, \url{http://www.dnav.gov.do/} (last visited Oct. 1, 2013).
\end{itemize}
2. **Comments from CECSEL Members**

When this question was directed toward the CECSEL members, each made it clear that gender violence and LGBT issues were of paramount concern to them. Ms. Quezada emphasized that, although LGBT citizens are supposed to have equal treatment under the law, there is no substance behind that principal. She also shared Mr. Rooney’s concern for Haitian immigrants. Ms. Cabrera felt particularly inspired to help women assert their rights because of personal connections to abuse victims. Mr. Calcaño echoed the sentiments of his colleagues.

**C. What prevents CECSEL from taking on these other issues?**

The biggest obstacle is funding. Normally, when I am onsite, I can knock on doors to secure additional funds. Fortunately, there is a strong interest on the part of Dominican and U.S. officials to open another incubator in Santiago, in the northern part of the country. I imagine we will eventually obtain funds to tackle these issues and expand programming throughout the country.

An alarming number of people in the Dominican Republic lack the economic means to defend a claim or assert their rights in court. Publicly funded programs are simply unable to meet the legal needs of Dominicans across the island, which is of course similar to the plight of millions in the United States. However, in the United States, even as funding for legal assistance programs is slashed, it is easier to design inexpensive programs that assist pro se litigants. In the Dominican Republic, the incubator is looked upon with the hope of being replicated throughout the island.

**D. The attorneys in CECSEL are dealing with issues that often impact politically underrepresented classes in the Dominican Republic. Has there been any negative response from people in the government about utilizing a state-sponsored school for this purpose?**

On the contrary, many of the governmental and legal organizations have been heralding CECSEL as a beacon of hope expanding access to justice. These organizations are aware of the challenges Dominicans face with access to justice. A group of organizations that could conceivably be adversely impacted by the incubator would be the private bar associations but, for the most part, the communities we are looking to serve are communities many lawyers would be inclined to overlook.

In Queens, New York, we initially received pushback from the bar association after they expressed concern that

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69 For instance, according to the ABA, “Courts in Washington, California, and Florida have established courthouse facilitators who assist with detailed procedural information and form preparation on a one-to-one basis. Other courts have established desks staffed by volunteer lawyers who provide similar individual information.” A.B.A. Standing Comm. on the Delivery of Legal Servs., An Analysis of Rules that Enable Lawyers to Serve Pro Se Litigants 5 (2009) (citations omitted).

70 See Inauguran Centro de Servicios Legales para Personas de Escasos Recursos, supra note 42.

The Center is funded by the Embassy of the United States of America with the support of both governmental institutions and civil societies such as the Ministry of Youth, Ministry of Women, the Attorney General’s Office, CentroBono, COIN, Women and Health Collective... Representatives of these institutions were present at the opening ceremony.

Id.

71 See, e.g., Interview with Francisco Domínguez Brito, supra note 45. However, according to the World Justice Project, the Dominican Republic actually ranks fairly well out of the developing world, but fifty-ninth out of ninety-seven countries surveyed for access to the civil justice system and fifty-third out of ninety-seven out of countries surveyed for access to the criminal justice system. World Justice Project, Rule of Law Index 45, 83 (2012).

72 Asistirán a Personas en Problemas Legales, supra note 44.
we would rob members of paying clients. I remember saying to bar officials, "If your members can handle the cases that are coming our way, we will back out. The only reason we are doing this is because your members are not."

E. Are there other countries in which you are looking to start incubator programs?

I have been to Ecuador a number of times and talked to law schools about creating incubators. I recently received an inquiry from Argentina discussing the possibility of launching an incubator outside of Buenos Aires. There has also been interest in starting incubators throughout the Caribbean, in Africa, and in India. Once we can demonstrate the success of the Dominican model and show that it has been effectively backed by USAID funding, it will be easier to set up incubators in different parts of the world.

It is really exciting because I have wanted to internationalize not only the incubator but the emerging concept of post-graduate education. Through CECSEL we are pioneering the concepts of clinical education and post-graduate education. What we are doing will reverberate in different parts of the world. In a matter of time we will get calls from embassy officials, law school deans, and government officials who have looked at our success in the Dominican Republic and wish to replicate it in their own schools or countries.

Our greatest challenge is launching new programs on shoe-string budgets. At a time when we question the logic of government funding for wars and other financially debilitating endeavors, it has been refreshing to see U.S. taxpayer funds being used to launch a program that strengthens democracy and helps invigorate a renewed respect for law and justice. Funding programs that increase access to justice for marginalized or vulnerable individuals and communities offer a compelling alternative to programs or policies that foster conflict.


Our assistance develops the markets of the future; long-time aid recipients have become strong trade partners and are the fastest growing markets for American goods. USAID is developing partnerships with countries committed to enabling the private sector investment that is the basis of sustained economic growth to open new markets for American goods, promote trade overseas, and create jobs here at home.

Id.


75 There are numerous organizations that are helping to set up legal clinics and post graduate clinical work in countries outside the United States. See generally Richard Wilson, Training for Justice: The Global Reach of Clinical Education, 22 Penn St. Int'l. Rev. 421, 423–27 (2004) (listing numerous NGOs and private organizations that provide funds for legal clinics in the developed and developing world).

IV. Conclusion

A. What are your plans for future incubator development or other forms of post-graduate support now that you are at Touro Law?

In my opinion, incubator programs are the newest example of how law schools can respond to changing professional and community needs. The ongoing trend in the legal profession indicates a decrease in the number of paid lawyer positions. 77 Additionally, lawyers are needed in community-based practices to fill in the gap created by the significant decrease in federally and locally sponsored legal services. 78

My goal when I started at the Touro Law Center was to help launch an incubator for recent graduates and build the International Justice Center for Post-Graduate Development (“the Center”). I was particularly attracted to Touro because of the administration’s commitment to quality legal education that encourages students to examine the moral goals of the law while promoting social justice and community service. 79 The mission of the Center is rooted in the mission of Touro Law, and it was created to further the school’s belief in post-graduate legal education that enables new lawyers to deepen their commitment to social justice as they build solo practices, small firms, and not-for-profit organizations. 80 Additionally, the Center and incubator are logical extensions of the administration’s commitment to preparing students and graduates for success in a challenging legal marketplace. 81

The Center’s focus will not just be on Touro graduates. The Center plans to work with other schools with the common goal of helping alumni set up and manage community-based practices in legally underserved communities. 82 On November 12, 2013, Touro launched the first law school-based incubator on Long Island. 83

Being a solo or a small firm practitioner is especially important to Touro Law graduates because many choose to return to their hometowns and neighborhoods on Long Island as solo practitioners. With the incubator in place, Touro Law is in a perfect position to train students to understand that they can use their privileged roles to be catalysts for social change and to ensure greater equity in access to justice.

When CUNY Law’s clinical professor, Sue Bryant, and I sat in her office in 2007 and made the decision to jumpstart an incubator, we had little idea that what began as a dream would eventually evolve into a movement. I feel privileged every time I am given the opportunity to assist law schools and bar associations design strategies to launch their own unique incubator or residency programs. My experience at CECSEL tells me that it is not just law schools in the United States that need these programs. Just as CECSEL will be a model for the Dominican Republic and other Latin American countries, my hope is that the Center and the Touro Incubator will serve as models to law schools in this country. I truly believe that, within the next ten years, legal education in this country and across the globe will be forced to design and implement more practical approaches and post-graduate support. The incubator model will, no doubt, be a cornerstone of that movement.

77 See, e.g., Katy Murphy, Too Many Lawyers, Too Few Jobs, Seattle Times (Oct. 8, 2013, 6:26 PM), http://seattletimes.com/html/business/technology/202194037_lawschoolsxml.html (noting that in 2012, 46,000 law students graduated and, after nine months, only 27,000 had full-time jobs as lawyers).

78 See Jenifer B. McKim, Cuts in Legal Aid Hit Poorest, Boston.com (Aug. 6, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/08/06/cuts_in_legal_aid_hit_poorest/ (noting that in Massachusetts, cuts to legal aid programs have forced many layoffs of lawyers and a significant shortage in access to justice for poor people in the Commonwealth).


80 Id.

81 Id.

82 Id.

The Emergence of Justiciable Social and Economic Rights in The European Court of Human Rights

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Abstract

While the European Convention on Human Rights traditionally protected civil and political rights, the Court has in certain historic circumstances allowed for the protection of social and economic rights where a textual right has been materially affected. Recent case law from the Court suggest that this trend is gaining significant momentum and the reluctance of the Court to allow claims based on social and economic rights violations succeed is diminishing. Significantly the Court is placing obligations upon member states to rectify social and economic violations and, as such, is elevating social and economic rights to within the justiciable sphere.

This article examines the developing case law through Articles 2, 3 and 8 of the European Convention on Human Rights demonstrating an emerging trend within the Court allowing social and economic rights violations to be adjudicated upon through the Convention.

Keywords:
Introduction

The European Convention on Human Rights, adopted in 1950, was drafted in the wake of the Second World War and provided a statement of the principles which united the West in the face of the communist advance.\(^1\) It was a document which protected the civil and political rights championed by the West and largely ignored social and economic rights.\(^2\) The Convention confers rights on the individual, and established the European Court of Human Rights whereby individuals could bring an action against a State where the State had failed to protect and vindicate any of the rights contained within the Convention.

Despite the fact that, with the exception of education, the Convention exclusively protected civil and political rights, the Court has been activist in approaching its analysis of civil and political rights in a manner which includes contemplation of social and economic rights.\(^3\) The court acknowledged an overlap between the two sets of rights in \textit{Airey v Ireland} and this is a view which can be seen consistently in the jurisprudence of the Court.\(^4\)

The Impact of the Margin of Appreciation on the Recognition of Social and Economic Rights

The Court operates under a Margin of Appreciation Doctrine. In brief terms, this Doctrine affords member states an area of discretion within which they are free to deal with certain issues without interference from the court.\(^5\) It has been argued successfully in cases involving areas of the law where there is no consensus among states, where the issue is one of particular sensitivity or where it involves the distribution of resources. Social and economic rights most commonly fall within the latter category. Cakmak believes that the margin of appreciation has weakened the impact of the Court and allowed subjective elements to taint the interpretation of the convention.\(^6\) Further, as Follesdal points out, the exercise of what he terms a ‘weak review’ allows the Court to declare a domestic law incompatible with the Convention while not invalidating that law.\(^7\) These criticisms have some basis; the doctrine has allowed states to undermine Convention Rights in numerous ways by appealing to the Court’s reluctance to interfere in matters pertaining to on morality or religion. Nevertheless, the Court has been active in incorporating social and economic rights considerations into the existing textual rights of the Convention. This article examines the expansive interpretations of Articles 2, 3 and 8 where certain social and economic rights violations have been addressed in the European Court.

The European Court of Human Rights has indirectly ruled on issues involving social and economic rights as far back as \textit{Airey v Ireland}, by reading the right into the Convention.\(^8\) In \textit{Airey}, the Court found that Ireland breached Article 6 of the Convention by not establishing a legal aid system for civil law matters. While this clearly involved the distribution of resources, it was necessary in order to give effect to the right to a fair trial. This is a trend which

\(^2\) With the exception of the right to Private Property and Education protected in Protocol 1.
\(^3\) The Right to Education is contained in Protocol 1 to the European Convention on Human Rights.
\(^4\) (1979) 2 ECHR 305.
\(^8\) (1979) 2 ECHR 305.
has continued since this judgement. Where Convention rights are adversely affected, the Court will adjudicate on matters, even if this strays into an area typically considered to be within the margin of appreciation. Palmer notes that there are two main reasons for the continued activism of the Court in this area. The first is the emerging international consensus that social and economic rights should be judicially protected and the second is the Court’s treatment of the Convention as a dynamic instrument capable of evolving and adapting to meet the needs of changing societies.9

The Court has accepted that many of the textual rights in the Convention have an impact on social and economic rights: “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”.10

Though not restricted to any one Article when interpreting the Convention in the light of social and economic rights, three Articles primarily pave the way for these rights to gain the protection of the Court, being Articles 211, 312 and 813.14 I will examine each in turn.

**Article 2 of the Convention: Life**

The European Court has repeatedly stated that, first and foremost, it protects civil and political rights and as such there has been a general reluctance to allow social and economic rights permeate the structure.15 This is premised upon the underlying principle that the Court will leave certain matters within the margin of appreciation of the State which is best placed to manage the distribution of resources. The Court has shown its reluctance to impose positive obligations upon the State to provide for the impoverished.16

Article 2 of the Convention protects the right to life, is non-derogable and imposes positive obligations on the state.17 Thus, the heart of the debate in relation to this Article is the level of obligation that the Court is willing to impose on the State. O’Cinniede believes that the true potential of Article 2 can be seen in the case of Oneryildiz v Turkey18 where state inaction, in failing to protect slum dwellers against the threat of methane gas explosion, resulted in a breach of the right to life where such an explosion resulted in the death of the applicant’s relatives:

11 The Right to Life.
12 The Right to be free from torture, inhumane and degrading treatment.
13 The right to respect for private and family life.
15 Recently reiterated in *N v UK* No. 26565/05.
16 Most recently in *M.S.S v Belgium and Greece* No. 30696/09 the Court at para 249 stated “Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home. Nor does Article 3 entail a general obligation to give refugees financial assistance to enable them maintain a certain standard of living”.
17 Article 2.1 “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided for by law” Protocol 6 to the Convention requires that the death penalty be restricted to times of war or imminent threat of war.
“While the State has no general responsibility under Article 2 to provide an effective system of healthcare or to guarantee the lives of the poor, it may be under a specific responsibility in particular circumstances to protect the destitute against knowable threats to their lives”.  

The State does not have a general duty to eliminate all risks to life however there are certain limited circumstances in which such a duty arises. Examples of such can be seen in Kemaloglu v Turkey20 and Kayak v Turkey.21 In Beru v Turkey, a case which concerned the death of a child following an attack by stray dogs which were known to be dangerous, the Court did not find a breach of Article 2. Here the Court found that there was no evidence to suggest that the State should have been aware of an immediate threat to life. The Court further found that the incident happened by chance and that the State’s responsibility could not be engaged without extending such responsibility in a manner it deemed to be excessive.22

In certain cases the Court has read the right to health into Article 2. This operates to impose an obligation on the state to remove the causes of disease. It has been long established by the Court that there is a positive obligation on the state to “make regulations compelling hospitals to adopt appropriate measures for the protection of their patient’s lives”.23 Therefore, early case law relating to the healthcare and the right to life dealt with the procedural aspects of whether or not there were sufficient safeguards and systems in place to deal with complaints, investigations and remedies.24

While in Pentiacova v Moldova25 the Court refused to establish a right of free health care, there has been tentative recognition that in certain limited circumstances, the State’s acts or omissions which expose impoverished persons to a threat to their life, may engage Article 2 of the Convention.26

In the case of Cyprus v Turkey the court held that Article 2 may require a minimum level of protection on the right to health.27

More recent cases are showing a growing trend of the European Court to link the right to adequate and emergency healthcare with the right to life, in some way following the jurisprudence of the Indian Supreme Court. While the Indian Courts has expressly linked the right to life with the right to health,28 the European Court has been more reluctant to make this express link, instead preferring to rely on a somewhat arbitrary procedural link to tie the two rights together.

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20 No 19986/06 decision dated 10th April 2012 The Court held a violation of Art 2 where the applicant’s seven year old froze to death in a blizzard when the shuttle bus failed to arrive to take him from school.
21 No. 60444/08 Judgment dated 10th July 2012 The Court held a violation of Art 2 when a student was stabbed in front of the school whereby authorities had failed to ensure adequate supervision.
22 No 47304/07 Judgment dated 11th January 2011.
23 Calvelli and Ciglio v Italy No 32967/96 Judgment dated 17th January 2002.
24 For example see Sîth v Slovenia No 71463/01 Judgment dated 9th April 2009 where the Court found a violation of Art 2 on account of the inefficiency of the judicial system in establishing the cause of and liability for the death.
26 For example see Powell v UK (2000) 30 EHRR.
27 No. 25781/94.
Two recent cases bear evidence that perhaps the judiciary of the European Court of Human Rights is paying more than a cursory glance at the jurisprudence of the Indian courts in their approach to the protection of social and economic rights. In *Oyal v Turkey* the Court began by finding that there was a violation of Article 2 where a new-born was infected with HIV as a result of a blood transfusion.\(^\text{29}\) It then decided that an award of damages was insufficient and ordered that the State provide the applicant with free medical care for the remainder of his life.\(^\text{30}\) While the Court has limited powers to enforce this order, what is striking is that in giving such an order, the Court is engaging in an expansion of its remedies to ensure that the social and economic violations at issue are being addressed.\(^\text{31}\)

The recent case of *Mehmet Senturk and Bekir Senturk v Turkey*\(^\text{32}\) also bears a striking resemblance to the Indian case of *Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors.*\(^\text{33}\) In Senturk, the applicant’s wife was eight months pregnant and, having been admitted to hospital with severe pain, was informed that the foetus was deceased and that she would need to undergo surgery to remove it. She and her husband were asked to pay a deposit for the surgery and, when they could not afford to do so, were discharged from the hospital. The applicant’s wife died shortly after being discharged from hospital. Here, the European Court found a violation of Article 2 for failure to provide emergency medical care.\(^\text{34}\) It appears from this case that the European Court is giving effect to the “minimum content” of the right to health which, although not legally binding, establishes the basic minimum level of healthcare that an individual can expect from the State and makes specific reference to maternal care.\(^\text{35}\)

In summary, therefore, it is possible to utilise Article 2 of the Convention to bring social and economic rights within the Courts jurisdiction in two ways. Firstly where one can show that an applicant belongs to a unique group and that the circumstances were such that the State knew of the danger and failed to act to protect the applicant from this risk to life. The second, specifically in relation to the right to health it would seem, is where there is a failure to satisfy the minimum obligation on State’s to provide emergency medical treatment where such failure results in death. In both of the abovementioned factual scenarios, it is like that the Court will find a breach of Article 2.

### Article 3 of the Convention: Torture, Inhumane and Degrading Treatment

Article 3 provides that a person has the right to be free from torture, inhumane and degrading treatment and places a positive obligation on the State to ensure no person is subjected to conditions which breach Article 3.\(^\text{36}\) Therefore, in order to bring social and economic rights within the rubric of Article 3, the question must be asked as to whether poverty-stricken conditions may invoke the protection of Article 3. Originally, cases brought under Article 3 focused on conditions which detainees were forced to endure at the hands of the State. These encompassed many social and economic rights such as the rights to health, food, clothing and adequate

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29 No. 4864/05 Judgment dated 23rd March 2010.
30 No. 4864/05 Judgment dated 23rd March 2010 at 102.
31 See also *Panaitescu v Romania* No 30909/06 Judgment 10th April 2012 where the State was found to be in violation of Art 2 for failing to provide free anti cancerous medication.
33 High Court of Delhi, judgement delivered on June 4 2010, Case No. 8853 of 2008.
34 Full judgment is only available in French. Summary in English is available at [http://www.hudoc.echr.coe.int/webservices/content/pdf/003-4321152-5174396](http://www.hudoc.echr.coe.int/webservices/content/pdf/003-4321152-5174396)
36 Article 3 “No one shall be subjected to torture or to inhumane or degrading treatment or punishment.”
shelter. In *Dougoz v Greece* the court held that overcrowding without adequate food and exercise breached Article 3.\(^{37}\) In *Price v UK* the court further noted that if a detainee is disabled, there is an obligation on the state to provide facilities for her.\(^{38}\) There is also an obligation to provide medication and treatment. In *D v UK* the court also recognised health as a right where the State intended to deport an AIDS sufferer to a nation where he would not receive treatment; the Court found that such deportation would amount to inhuman and degrading treatment.\(^{39}\) Further, in *Nevmerzhitsky v Ukraine*, the applicant’s allegation that conditions of his detention, including bed bugs and lice which caused him to develop an acute skin disease, breached Article 3 was accepted by the Court.\(^{40}\) Thus, the early cases centred on the treatment and conditions directly provided by the State.

### An Expansion of Article 3

However in *Ireland v UK* the Court recognised that inhumane and degrading treatment can have a wider application than that which is directly and intentionally inflicted by agents of the State.\(^{41}\) Later cases have extended this principle, making it applicable to cases where the individuals concerned were not directly in State care, thus placing a positive obligation on the State in a broader range of circumstances. For example in *Z v UK* the Court held that the failure of the State to prevent children being subjected to abuse in the home amounted to a breach of Article 3.\(^{42}\) As such, a distinct position is emerging in the jurisprudence of the Court which may be summed up as follows: “Suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3 where it is or risks being exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measure, for which the authorities can be held responsible”.\(^{43}\)

Therefore, it seems that extreme poverty may result in Article 3 being invoked where such poverty results in degrading treatment of the person afflicted.\(^{44}\) O’Cinneide observes that the next question to be addressed is whether there are circumstances in which state responsibility for such suffering is engaged:

> If state responsibility can be triggered in respect of failures to protect children against abuse by third parties and in respect of deportees where there would be a denial of essential health care in receiving countries, then there would appear to be no intrinsic reason why state responsibility for degrading treatment that stems from poverty could not exist in some circumstances.\(^{45}\)

The Court appears to have accepted this as a possibility at least.

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37  No. 40907/98.
38  No. 33394/96.
39  1997 24 EHRR 423.
44  See X v Hounslow LBC [2008] EWHC 1168.
The Standard Applicable to Trigger a Breach

In *Von Volsem v Belgium*, a case involving the deprivation of social and economic rights was declared inadmissible for failing to reach the requisite standard of deprivation necessary to engage the protection of Article 3.\(^{46}\) Notably, the Court did not dismiss the possibility that such deprivation may reach the threshold necessary to so engage Article 3. This decision has been criticised for vagueness as to the precise level of deprivation required before treatment becomes inhuman and degrading and therefore, engages Article 3.\(^{47}\) The Court considered a case involving violation of social and economic rights again in *O’Rourke v UK* and found that a period of homelessness, following eviction from temporary accommodation, did not reach the requisite level of severity.\(^{48}\) A mitigating factor in this case, the Court noted, was that the applicant had been offered several alternate temporary accommodations and each had been refused. Accordingly the Court determined that he was somewhat the maker of his own misfortune and ‘largely responsible for his own deterioration following his eviction’.\(^{49}\)

In *Larioshina v Russia*, while in principle accepting that a claim could fall within Article 3, the Court found that a pension of 653 roubles per month was not sufficiently severe to amount to inhumane and degrading treatment.\(^{50}\) This amount is the equivalent of €25 per month. Extreme poverty has been defined by the World Bank as living on less than $1.25 per day which has become the internationally accepted definition.\(^{51}\) Within the European Union however this monetary amount has been disregarded as being arbitrary. A recent report suggests that in order to determine extreme, severe or persistent poverty that deprivation factors such as the inability to buy food, clothing, provide shelter and healthcare should be taken into consideration.\(^{52}\) Regardless of which definition is preferred, it could be argued that €25 per month, in wholly insufficient and results in the Applicant languishing in extreme and persistent poverty. The Court, however, did not agree that the necessary threshold had been reached in the case.

The foregoing decisions have all been made at the admissibility stage and, they have all accepted in principle that Article 3 could be invoked for instances of social and economic rights deprivations. The case of *M.S.S v Belgium and Greece* decided in the Grand Chamber appears to clarify the position somewhat.\(^{53}\) The case involved a challenge by an Afghan Asylum seeker who was, under the Dublin Regulation, removed from Belgium to Greece to have his asylum claim determined by the Greek Authorities.\(^{54}\) The Court examined taking cognisance of the practice of detainees asylum seekers in Greece “from a few days to a few months” examined the reports which describe the conditions of the facilities to include varying degrees of overcrowding, dirt, lack of space, lack of ventilation, little or no possibility of taking a walk, no place to relax, insufficient mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care.\(^{55}\)

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\(^{46}\) No. 14641/89.

\(^{47}\) For example See Antonio Cassese, “Can the notion of Inhuman and Degrading Treatment be applied to socio-economic conditions”, (1991) 2 EJIL 141.

\(^{48}\) No. 39022/97 decision dated 26 June 2001.

\(^{49}\) No. 39022/97 decision dated 26 June 2001.

\(^{50}\) No. 56869/00 decision dated 23 April 2002.

\(^{51}\) World Bank determines extreme poverty as measured by those living on less than one dollar a day.


\(^{53}\) No. 30696/09 decision dated 21st January 2011.

\(^{54}\) The Dublin Regulation (Regulation 2003/343/CE) provides an asylum seeker may be returned to the first member state to have their claim decided by that authority.

\(^{55}\) No. 30696/09 decision dated 21st January 2011 para 162.
The Court further examined reports of Human Rights Watch, Cimade, the Council of Europe Commissioner for Human Rights, Amnesty International and Medicins sans Frontieres all of which detailed appalling conditions which asylum seekers were forced to endure in the Greek facilities to include access to adequate shelter, food, clothing, healthcare, water and sanitation together with evidence of abuse by authorities. When released from detention, despite an obligation on the state to provide accommodation for asylum seekers, no information or accommodation was provided leaving the asylum seeker homeless and living in a state of constant fear and deprivation on the streets of Greece.

The Court in taking into account the lack of accommodation, and the failure to provide for the essential needs for the applicant, found that his living conditions amounted to inhuman and degrading treatment and a breach of Art 3 of the Convention.

The judgment is significant as it has now placed positive obligations on the state arising out of extreme poverty. However there are two elements that limit this significance. Firstly, the fact that Greek law itself imposed this obligation on the authorities to provide accommodation and assistance to asylum seekers effectively means that the European Court was simple enforcing and giving effect to the domestic law. Therefore it is not clearly creating an obligation to provide an adequate standard of living, rather ensuring that domestic law is applied in a manner compatible with the Convention. Secondly, in finding a breach of Art 3 in this case the Court reiterated the principle that Art 3 may be engaged where a person who depends solely on the State is living in conditions of extreme poverty. The judgment of Judge Sajo explains this further that where the State affords asylum seekers a genuine opportunity to take care of themselves, there would be no state responsibility.

Therefore where one can show that they are particularly vulnerable and dependant solely upon the State, and find themselves existing in a state of extreme poverty, the precedent has been set that the Court can find a violation of Art 3.

**Article 8 of the Convention: Private and Family Life**

The third Article, which may be utilised in order to engage otherwise unprotected social and economic rights of the person, is Article 8 which requires respect for ones private, family life, home and correspondence.

Article 8 is unlike the previously discussed Articles 2 and 3 as it is not an absolute right. Generally speaking, it places negative obligations on the State in that it requires only that the state refrain from interfering with the rights contained within Article 8. Article 8.2 provides that this right of respect without interference may be limited or

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56 No. 30696/09 decision dated 21st January 2011 paras 163 -166.
57 No. 30696/09 decision dated 21st January 2011 para 263.
58 See Budina v Russia No. 45603/05.
60 8.1 “Everyone shall have the right to respect for his private and family life, home and correspondence”.
61 8.2 “there shall be no interference by a public authority with the exercise of this right such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.
62 In certain circumstances Art 8 may also require that positive obligations on the part of the State are engaged. For example see Storck v Germany (2005) 43 E.H.R.R 6.
withdrawn in certain circumstances. As it is not an absolute right under the Convention, the State may limit the right and must then show that such a limitation or denial was proportionate to achieve legitimate aims necessary in a democratic society.

It would appear that extreme poverty would engage Article 8 of the Convention and require the State to justify its action or inaction based on Article 8.2. O’Cinneide again reiterates that the key issue is whether State responsibility has been engaged.\(^{62}\) In \textit{Andersson and Kullman v Sweden} the Court firmly established that Article 8 did not give rise to a right to financial support to maintain a certain standard of living.\(^{63}\)

### The Interpretation of Article 8 together with Article 14

The Court has affirmed that there is no right to social security under the Convention; however, the Court has taken Article 8 in conjunction with Article 14 in order to ensure that when social security is provided for by the state that it is done in a non discriminatory manner.\(^{64}\) Therefore the European Court will not determine that such a right exists, rather where a member State provides social security, the Court will intervene to ensure that it is implemented in a non discriminatory manner, the landmark case of \textit{Petrovic v Austria} dealt with parental leave entitlements of fathers.\(^{65}\) The Court determined that while there was no obligation on the State to provide entitlements such as parental leave under Article 8, the fact that Austria granted such entitlements showed its respect for family life and failing to implement such allowances in a non-discriminatory manner was a breach of Article 8 when interpreted together with Article 14. Notwithstanding this, the Court held that the State had not exceeded its margin of appreciation in the matter as there was no general consensus among member states.\(^{66}\)

Despite the fact that this case was ultimately unsuccessful, it paved the way for further cases such as \textit{Neidzwiecki v Germany} where the Court held that there was a violation of Article 8 in conjunction with Article 14:

\textit{The Court does not discern any sufficient reason justifying the different treatment with regard to child benefit of aliens who were in possession of a stable residence permit on the one hand and those who were not on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention.}\(^{67}\)

The court again, in the recent case of \textit{Markin v Russia}, held that the failure by Russia to give the same parental leave entitlement to servicemen as was given to servicewomen amounted to a breach of the convention with Article 14 taken with Article 8:

\begin{itemize}
  \item \textit{The Court does not discern any sufficient reason justifying the different treatment with regard to child benefit of aliens who were in possession of a stable residence permit on the one hand and those who were not on the other. It follows that there has been a violation of Article 14 in conjunction with Article 8 of the Convention.}\(^{67}\)
\end{itemize}

\begin{itemize}
  \item (1986) 46 DR 251.
  \item Art 14: ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured 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’.
  \item Judgement of 27 March 1998.
  \item Judgement of 27 March 1998 at 37.
  \item Judgment 25 October 2005 at 33.
\end{itemize}
The Court considers that the exclusion of servicemen from the entitlement of parental leave while servicewomen are entitled to such cannot be said to be reasonably or objectively justified. The Court concludes that this difference in treatment, of which the applicant was a victim, amounted to discrimination on the grounds of sex.68

The Court here noted that the foregoing case of Petrovic was unsuccessful on the grounds of a lack of consensus between member states which did not now exist as the majority of member states had legislation in place which provided for parental leave for both parents.69

There appears, therefore, to be an emerging trend within the jurisprudence of the European Court when adjudicating upon cases involving the right to social security.

While the Court is careful to reiterate that the Convention does not give rise to a right to social welfare or to any forms of financial support, where the State has chosen to implement such support, the Court will insist that it be implemented on a non-discriminatory basis, provided that there is a similar consensus throughout the remainder of the member states. It appears, as a result, that financial assistance is an area in which a diminishing margin of appreciation is being afforded to member states.

The Jurisprudence of the Court on the issue of Housing

The issue of housing, particularly in relation to evictions, has been extensively dealt with under Article 8 of the Convention.

The case of Botta v Italy, while ultimately unsuccessful, opened the door to imposing positive obligations on the State to provide for those afflicted by disabilities.70 The Court stated that the “essential object of Article 8 is to protect the individual against arbitrary interference by public authorities”. It was further stated that “there may be positive obligations inherent in effective respect for private or family life.”71 Therefore, as Kenna suggests, while there may not be an obligation to provide a home for everyone, there may be certain circumstances where such a positive obligation is placed on the State.72 This is illustrated further in the Marzari v Italy case where the Court held that, while the Convention does not guarantee a right to have housing problems solved by the authorities, a failure to assist one suffering from an illness or disability will result in a violation of Article 8.73

While reiterating that the Convention does not provide a right to be housed when homeless,74 the Court has had to engage in a difficult balancing act in with regard to the actions of state officials and the obligations under the Convention. The case of Moldovan v Romania illustrates this point where 13 homes belonging to members of the...

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68 No 30078/06 judgment dated 22 March 2012.
69 No 30078/06 judgment dated 22 March 2012 At 99.
73 1999 28 EHR 175.
Roma community were destroyed, leaving the applicants living in extreme, cramped and unsanitary conditions. They alleged State involvement in the destruction of their homes and as such claimed that the State had a positive duty to restore their previous living conditions. The Court found there to be a breach of Articles 3 and 8 and made the following statement regarding the living conditions:

*It furthermore considers that the applicants’ living conditions in the last 10 years, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicant’s health and well being, combined with the length of the period during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement. The Court has consistently held that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interferences. There may in addition to this, be positive obligations inherent in an effective respect for private or family life and the home. These obligations may involve the adoption of measures designed to secure respect for these rights.*

It appears therefore that there are certain circumstances wherein the Court will place a positive obligation on the State to provide a home, however the exact parameters of this obligation remain unclear. It would seem, at a minimum, the Court requires that the applicant has a disability or some other condition which makes him more vulnerable and requiring of State protection and that, while homelessness in itself will not engage the protection of Article 8, homelessness that has been caused by State officials may. Harris however believes that this lack of clarity positively impacts the jurisprudence of the Court as it allows the Court to

*‘develop the interests protected to take into account changing circumstances and understanding without being confined by an established theoretical framework’.*

In cases relating to evictions, however, the Court has been much more forthcoming in making determinations of violations as these are seen, perhaps, as enforcing more of a negative obligation than a positive one. In other words, the Court is not requiring that the State provide homes for individuals, rather the Court will not allow the State to take away a home which an individual already owns or occupies without ensuring that adequate justification and safeguards are in place.

In *Connors v UK*, the Court held that there had been a violation of Article 8 in relation to the eviction procedures adopted by the State. The parties agreed that Article 8 was engaged and what was left to the Court was a determination as to whether such action on the part of the State was necessary and justified. The Court stated that the general principle applicable is that a restriction could be necessary in a democratic society if it is: (1) pursuing a legitimate aim, (2) answers a pressing social need, (3) is proportionate in its aim, and (4) will

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generally fall within the margin of appreciation afforded to the State.\textsuperscript{80} However, the Court then stated that, given the serious interference with the applicant’s rights, interference of such a magnitude could only be justified by weighty reasons of public interest and, as such, the margin of appreciation is narrowed. The Court found that the lack of procedural safeguards which the applicant could rely on was significant in its finding of a violation of Article 8: “The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal”.\textsuperscript{81}

The further case of \textit{McCann v UK} heralded a significant expansion of the principles espoused in \textit{Connors} and the protections required when evictions of Council tenants are taking place and, in particular, in relation to security of tenure.\textsuperscript{82} The case arose from the domestic application of what Davis and Hughes term the ‘McGrady Principle’.\textsuperscript{83} This principle derives from the case of \textit{Greenwich LBC v McGrady} wherein the Court of Appeal held that, in joint periodic tenancies, the continuing desire of the joint tenants to continue the tenancy was needed, so that a notice to quit by one determined the interests of the other.\textsuperscript{84} Davis and Hughes identify the inherent danger in this principle which gives one joint tenant the capacity to, unilaterally and without safeguards or restraints, remove the legal rights of the remainder.\textsuperscript{85}

In the McCann case, following the breakdown of the tenants’ marriage, the wife and children of the family were no longer residing in the Council property, having been rehoused elsewhere following domestic abuse from the former husband and applicant in this case. The Applicant re-entered the property and continued to live there, and some time later, made an application for an exchange of housing which was supported by his wife. The Applicant’s wife was asked to sign a formal notice to quit, relinquishing her rights in the property, which she duly did, being unaware of the implications for the Applicant. The Applicant’s wife sought, unsuccessfully, to withdraw with consent the following week. The Applicant was then served with a Notice to Quit, the surrender of the tenancy by the Applicant’s wife being sufficient to surrender the tenancy as a whole. The Applicant challenged the ensuing Possession Order.\textsuperscript{86} The County Court found that the Applicant had been denied the chance of determining the reasonableness of making a possession order in breach of Article 8 of the Convention. On appeal from Birmingham City Council, it was held that Article 8 was not available to the Applicant, the Court having particular regard to the judgment of the Court of Appeal in \textit{Qazi} in which it was specifically held that Article 8 could not be used to defeat a local authority’s proprietary or contractual rights in order to gain possession.\textsuperscript{87} The appeal to the European Court was successful, with the Court reiterating the need for procedural safeguards to be implemented. The Court rejected the State’s assertion that the Connors case should be confined to its facts and that such safeguards should only be available to members of the gypsy community. The court stated:

\textsuperscript{80} No. 66746/01 Judgment dated 27 May 2004 para 81 and 82.
\textsuperscript{81} No. 66746/01 Judgment dated 27 May 2004 at 94.
\textsuperscript{82} No. 19009/04 judgment dated 13 May 2008.
\textsuperscript{83} Martin Davis and David Hughes, “Gateways or barriers? Joint Tenants, possession claims and Article 8”, Conveyancer and Property Lawyer 1 (2010) at 59.
\textsuperscript{84} (1983) 6 H.L.R 36; 81 L.G.R 288, CA.
\textsuperscript{85} Martin Davis and David Hughes, “Gateways or barriers? Joint Tenants, possession claims and Article 8”, Conveyancer and Property Lawyer 1 (2010) at 60.
\textsuperscript{86} Possession Order made pursuant to s84 and Ground 2(a) of sch. 2.
\textsuperscript{87} \textit{Qazi v London Borough of Harrow} [2003] UKHL43.
The loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.\(^88\)

The Court was particularly critical of the finding in Qazi that the County Court cannot adjudicate upon matters pertaining to Article 8 once domestic law has been complied with, save in exceptional circumstances, and further, that judicial review was not appropriate to deal with the nuanced facts of the case. It determined:

*Under the summary procedure available to the Landlord where one joint tenant serves a notice to quit, the applicant was dispossessed of his home without any possibility to have the proportionality of the measure determined by an independent tribunal. It follows that, because of the lack of adequate procedural safeguards there has been a violation of Article 8 of the Convention in the instant case.*\(^89\)

The Court again reiterated its position in relation to the procedural safeguards that are required in *Kay and Others v UK* where again a violation of Article 8 was found.\(^90\) The Court did, in that case, acknowledge that there has been recent case law in the UK adopting a more flexible approach and more stringent safeguards. Nonetheless, at the time the Applicants herein were dispossessed of their homes, without the benefit of such safeguards, there had been a violation of Article 8.

While these cases are of considerable significance, they do not substantially impose positive obligations on the State. They do however progress the recognition of social and economic rights, particularly the right to housing, by placing safeguards in the form of negative obligations. The Court does not state in any of the cases heretofore that one has a right to a house and, in fact, is at pains to ensure that its judgments cannot be interpreted as such. Instead, it restricts itself to finding that where one is housed by the State, any eviction procedure undertaken by the State must be accompanied by the appropriate safeguards whereby such evictions may be challenged on their merits before an independent tribunal. In other words, one cannot be arbitrarily evicted by the State.

However a more recent case of *Bjedov v Croatia* appears to be changing the landscape in relation to state responsibility of housing.\(^91\) In this case, the Applicant became a co-holder of a specially-protected tenancy as a result of her husband’s illness and, following his death she was absent from the property for a number of years before ultimately re-entering it. She then applied to purchase the property under a national scheme which allowed for the purchase of properties classed as specially-protected tenancies. When no response to this application was received, the Applicant applied to the Court to have the matter ruled upon and the housing authority applied for the tenant’s eviction. Throughout the proceedings, the national courts found that the Applicant herein could lawfully be evicted from the property as she had not complied with the national legislation.

The Court first had to determine whether the property in question could be considered to be the Applicant’s home having regard to her 10 year absence from the property. On the facts of the case, the Court found that there were

\(^88\) No. 19009/04 judgment dated 13 May 2008 at 50.

\(^89\) No. 19009/04 judgment dated 13 May 2008 at 55.

\(^90\) [2010] ECHR 1322.

\(^91\) No. 4250/09 [2012] ECHR 886.
sufficient links to the property for it to be deemed to be the Applicant’s home.

The Court then had to determine whether the interference with her right was justified and ultimately found that the State had breached Article 8 of the Convention. What is significant in this case is that the Applicant was unlawfully resident in the property at the time; her absence without good reason for the period of 10 years made her tenancy under national law unlawful and, as such, her eviction lawful. The European Court however held that the protection of Article 8 extends to those who are not in lawful possession of tenancies as well as those in lawful tenancies who are contesting their evictions. The Court held that ‘The State’s legitimate interest in being able to control its property comes second to the Applicant’s right to respect for her home’.

While the Court has on numerous occasions stated that what will be deemed to be a ‘home’ will depend on the factual circumstances of each case, this judgment differs from the cases of McCann and Kay above in that, prior to the eviction in each of those cases, the tenancy was lawful. In the instant case, the tenancy was unlawful and had been since 1992.

This case affirms the previous stance taken by the Court with one difference, the legality of the tenancy at national law. The position remains in relation to housing that one does not have a right under Art 8 to be housed by the State. Rather the Court has focused on negative obligations, restraining the State from unjustifiably taking housing away. However the distinction is a nuanced one. By ordering that appropriate safeguards are in place in relation to evictions, they are in fact imposing a positive obligation. The State then has to take positive steps to put the safeguards and procedures in place. Coupled with the fact that the Court has recognised that in certain limited circumstances the State may have a positive obligation to provide housing to particularly vulnerable persons, they also have an obligation, arguably a positive obligation, to ensure that adequate safeguards are in place in relation to evictions.

92 No. 4250/09 [2012] ECHR 886 at 70.

93 Enforcing and protecting social and economic rights through negative obligations has found favour in the Canadian Courts. The Canadian Charter does not refer expressly to social and economic rights, however they have been read in through an expansive interpretation of Art 7 and 15 of the Charter protecting Life, Liberty and Security of the Person and Equality respectively. See Victoria City v Adams 2009 BCCA 563 and Canada v PHS Community Service [2011] 3 S.C.R 134.
Conclusion

From the foregoing, it is clear that the European Court of Human Rights is affording social and economic rights justiciability where they impact on one or more of the other rights contained within the Convention. It is by no means a comprehensive protection however; it does provide a certain level of protection for these rights. If an applicant can show that, due to the breach of a social and economic right, an existing convention right is adversely affected to such a degree that it breaches the textual right, there is a good chance that their application will succeed. There appears to be an emerging trend within the jurisprudence of the European Court in relation to social and economic rights. While they are not being given definitive protection, if an Applicant can show that the denial of a social and economic right is sufficiently severe that it impacts upon an existing textual right in the Convention, the claim may succeed. Using an expansive interpretation of the textual rights of the Convention, the Court has broadened its application beyond civil and political rights and is expanding its remit into the area of social and economic rights, imposing positive and negative obligations on the State, in this regard. As Kenna observes

“social democracy has moved from the notion of human rights from a negative obligation on the state preventing interference with property or capital ownership or accumulation, to one where it was recognised that rights involved state positive obligations to ensure individual welfare for all its citizens”\(^4\).

Case Study:

Social Welfare Law
Social Welfare Law - A Case Study

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Social Welfare Casebase

Northside Community Law and Mediation Centre (NCLMC) launched Casebase in 2006 with the aim of providing the public and in particular community organisations with access to Social Welfare Appeals Office decisions in cases taken by the Law Centre. Casebase is the only database of Social Welfare Appeals decisions in the Republic of Ireland.

By providing a database of decisions the Law Centre aims to provide greater clarity on the reasons for an Appeals Officer’s decision, assist the Social Welfare Appeals Office to take a consistent approach to cases, and assist members of the public and voluntary organisations/NGOs in deciding to appeal decisions and in the preparation of appeal submissions. The decisions published on Casebase relate to a range of social welfare benefits, and are classified under the various types of payments. Individual Casebase reports highlight the rationale for a particular decision, and can assist individuals or NGOs who may have a similar case. All decisions published on Casebase are anonymous.

For more information on Casebase go to http://www.nclc.ie/casebase/default.asp

Background to Case

NCLMC represented an Appellant, a non-EU national, before the Social Welfare Appeals Office in respect of an application she made for Child Benefit in June 2011 which was disallowed. The application was refused on the grounds that the Appellant was not lawfully resident in the State and therefore could not satisfy the Habitual Residence Condition. This decision was appealed on the grounds that the Appellant derived a right of residence from her son, an Irish and EU citizen, under Articles 20 and 21 TFEU as per the decision of the European Court of Justice in Ruiz Zambrano v Office national de l’emploi.

The appeal was partially allowed and the Appellant was deemed entitled to Child Benefit from the 1st of December 2006. The Appellant was subsequently successful in her applications for Rent Supplement and One Parent Family Payment and was awarded arrears of payments dating back to 2006 which amounted to approximately €16,000.

Right of Residence and Habitual Residence

An applicant must be habitually resident in Ireland to qualify for the following Social Welfare payments: Blind pension, Carer’s Allowance, Child Benefit, Disability Allowance, Domiciliary Care Allowance, Guardian’s Payment (Non-Contributory), Jobseekers Allowance, One Parent Family Payment, State Pension (Non-Contributory), Supplementary Welfare Allowance, Widow’s Widower’s or Surviving Civil Partner’s (Non-Contributory) Pension.
With effect from December 2009, an applicant who does not have a legal right to reside in the State will not be regarded as being “habitually resident”. Social Welfare Consolidation Act 2005, as amended by section 15 of the Social Welfare and Pensions (No.2) Act 2009, provides: Notwithstanding subsections (1) to (4) and subject to subsection (9), a person who does not have a right to reside in the State shall not, for the purposes of this Act, be regarded as being habitually resident in the State.

For the purpose of determining if an applicant is habitually resident, a Deciding Officer must have regard to all the circumstances of the claimant with particular reference to five factors as set out at s. 246 of the Social Welfare Consolidation Act 2005.

Northside Community Law & Mediation Centre’s Input

NCLMC provided representation to the Appellant and appeared before the Social Welfare Appeals Office on behalf of the Appellant in respect of an oral hearing. Given the complexity of the case which involved issues of EU Law, the Law Centre instructed Counsel in the case who also appeared before the Appeals Officer at the oral hearing. NCLMC obtained the client’s file under the Freedom of Information Act and prepared legal submissions in the case based upon EU Law and caselaw, arguing that the Appellant had a right to reside based upon EU law and in particular the Zambrano decision of the CJEU and therefore did satisfy the conditions, in particular the habitual residence condition, for receipt of child benefit. Given the complexity of the legal issues involved, the Appellant would have found it difficult to successfully represent herself.

Relevant Evidence relied upon by Applicant

It was noted that on the 12th of July 2012, the Appellant applied to the Department of Justice, Equality and Law Reform for residence permission based on her son’s rights under Article 20 and 21 TFEU. She was granted permission (Stamp 4) for a period of three years on the 3rd October 2012. It was submitted that this residence permission affirmed the Appellant’s pre-existing rights of residence. It was submitted that the Appellant has a right to reside in the State on the basis of her son’s rights as an Irish and as an EU citizen under Article 20 and 21 TFEU.

Reference was made to the decision of the European Court of Justice in Zambrano. In this case, the father (a Non-EU national) of a Belgian National was deemed entitled to reside in Belgium as a consequence of his child’s rights as a Belgian and EU citizen deriving from the TFEU. In addition, the father’s right of residence included the right to work in the State. It was submitted that the Appellant’s right of residence is not dependent on recognition by the State and the Appellant should be regarded as lawfully resident in Ireland from the time of her arrival in Ireland in 2006 with her son. Reference was again made to the decision of Cooke J in Decsi. It was also submitted that the refusal of Social Welfare entitlements to the Appellant (the parent of an Irish and EU citizen) was contrary to;

- The duty to ensure the child’s best interests are given primary consideration as per Article 24.2 of the Charter of Fundamental Rights
- The prohibition on discrimination on any ground including birth and parentage as per Article 21 of the Charter of Fundamental Rights
- The right to equal treatment under Article 40 of the Constitution of Ireland, Article 8 and 14 of the European Convention on Human Rights and Article 1 of the First Protocol to the Convention.
- The entitlement to social security benefits under Article 34 of the Charter of Fundamental Rights.
It was submitted on behalf of the Appellant that she was entitled to Child Benefit from 2006. A supplemental submission was submitted to the Social Welfare Appeals Officer on the 11th of October 2012 establishing her son’s Irish citizenship.

**Conclusion and Impact**

The case was successful and substantial arrears were awarded to the client in respect of backdating child benefit payments and arrears of One Parent Family payment which when combined came to a total €16,000. In making her determination the Appeals Officer relied on the law applicable in 2006, the effective date of award. In so doing, the Appellant’s right to Child Benefit was established with reference to the question of habitual residence only and the Appeal’s Officer therefore was not required to consider whether the Applicant had a right to reside. It seems that in making this decision, the Appeals Officer accepted that the client’s application for Child Benefit should be treated as a late claim. In so doing, the Appeals Officer examined the claim as if it had been made on an earlier date – in this case, November 2006. In 2006, eligibility for Child Benefit was not subject to the Applicant having a right to reside in the State. The legal authority to make this determination is set out in s. 241 (4) of the Social Welfare Consolidation Act [as amended] of 2005.

The Appeals Officer noted that, having regard to the duration of the period of the Appellant’s residence in Ireland prior to the birth of her son, the Appellant did satisfy the condition of being habitually resident with effect from 1st December 2006. The Appellant was awarded Child Benefit from 1st December 2006 in arrears amounting to approximately €11,000 and was also subsequently awarded Rent Supplement and arrears in respect of One Parent Family Payment of approximately €5,000.

The Appellant in this case was severely affected by the length of time taken in dealing with her appeal. The Appellant applied for Child Benefit in June 2011 and received no payment until January 2013. Neither did she receive any other payment despite applying for Rent Supplement and One Parent Family Payment. This put the Appellant, a single mother, under immense financial pressure and as a result was at risk of homelessness and considered leaving Ireland as she had no means to sustain herself here. The financial circumstances of the Appellant were emphasised in the submission from NCLMC on 12th July 2012 and in a letter dated 27th July 2012. However in a letter dated 9th August 2012, the Social Welfare Appeals Office, highlighting the increased number of appeals to their office, stated that appeals are dealt with in strict chronological order.

It is submitted that it would be preferable to have in place some provision for expediency where an applicant’s circumstances so warrant. It should be noted that in this case an application was successfully made to the local Community Welfare Officer for exceptional needs payments.
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