The Irish Community Development Law Journal

The Irish Community Development Law is an online journal, published twice a year by Community Law & Mediation, (formerly 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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**Address**

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# The Irish Community Development Law Journal

**Volume 3  Issue 2  Index**

## Introduction

### Editorial

Roslyn Palmer and Amy Deane

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## Book Review

**Asymmetric Engagement: The Community and Voluntary Pillar in Irish Social Partnership**

By Joe Larragy. Reviewed by Holly Pratt, Trinity College Dublin

## Instructions for Authors

Submission Guidelines
Welcome to Volume 3 Issue 2 of the Irish Community Development Law Journal. In light of the austere trend in budgetary policy over the past number of years, the theme of this issue focuses upon Economic, Social and Cultural Rights in times of economic and social crises, with particular emphasis on Social Welfare Rights. The issue aptly opens with Dr. Mary Murphy’s article on Lone Parents, which examines in particular, the effect of the climate of austerity on the social assistance provided to Lone Parents. The author uses gender typologies, feminist principles and social and economic human rights frameworks in her analysis, in order to document and discuss policy developments, before and after the economic crisis. The author acknowledges the “double burden of care and paid work” often faced by lone parents, and alludes to the feminisation of poverty of lone Mothers. The article goes to the core theme in this Issue, and presents a thematically appropriate opening to this issue of the Community Development Law Journal.

The next article by Dr. Liam Thornton explores the largely controversial issue of the direct provision system pertaining to Asylum Seekers. The currency of the issue is underlined by the author, who traces the development of the direct provision system and addresses the question of whether the system complies with the fundamental human rights norms and frameworks. Globalisation means that the issue of how our welfare state provides for asylum seekers is becoming of ever increasing relevance. The author acknowledges the tensions between immigration control and welfare state provision, concluding that the system creates inequalities for those individuals seeking asylum.

The fourth article in this edition again ties in neatly with the theme of the article. Pia Janning examines the links between a state’s budgetary policy and its human rights obligations. The article is of extreme currency in aftermath of the financial crisis and the measures adopted during periods of austerity and the author rightly acknowledges that human rights are often excluded from the debate surrounding these issues. Focusing specifically on economic, social and cultural rights, the author examines the fundamental importance of the principles of participation, transparency and accountability in the context of budgetary policy and processes.

The penultimate article is co-authored by Rosemary Hennigan and Molly Joyce, and discusses the right of access to justice as an antecedent right to vindicating many personal rights. The right of access to justice is especially important in times of austerity, and ties in with the theme in this regard. The authors examine the barriers to justice that exist to prevent individuals from accessing justice, as well as making suggestions to strengthen the right of access.

This issue concludes with Holly Pratt’s book review of Joe Larragy’s book *Asymmetric Engagement: The Community and Voluntary Pillar in Irish Social Partnership* the book is a comprehensive study of the Community and Voluntary Pillar in both practical and academic terms.
Articles:

Economic Social and Cultural rights focusing in particular upon Social Welfare Rights
Ireland’s lone parents, social welfare and recession

Dr. Mary P. Murphy

Lecturer in Irish Politics and Society,
Department of Sociology, NUI Maynooth
Email: Mary.P.Murphy@nuim.ie

Abstract

This paper analyses recent changes to the structure of Ireland’s One-parent Family Payment (OFP) as an example of how austerity has not only impacted on Ireland’s most vulnerable but also structurally changed Ireland’s social welfare system. We use various analytical tools including gender typologies, feminist principles and economic and social human rights frameworks to make sense of recent policy developments for Irish lone parents and key social security features of austerity budgets and to examine the recent trajectory of welfare changes for Irish lone parents and how it is transitioning to a more conditional employment focused regime for lone parents. We conclude that, given Ireland has been relatively slow to embrace this type of regime; it is not too late to learn from lessons elsewhere which show that forced labour market participation of lone parents does not alleviate child or adult poverty.

Keywords

Lone parents, social security, austerity, adult worker, feminist, employment.
**Introduction**

This paper analyses recent changes to the structure of Ireland’s One-parent Family Payment (OFP). Reforms to lone parent payments during Ireland’s economic crisis provide a useful test-case to examine the impact of austerity reforms on women’s rights to social security, and to consider recent policy shifts being pursued in relation to the double burden of care and paid work in Ireland’s social welfare and labour market. Irish One Parent Family Payment is to some degree an outlier in contemporary welfare states in that until very recently Irish lone parents could claim means-tested income support until their youngest child was 18 years, or 22 if still in full-time education (Murphy 2012). The paper uses analytical tools to make sense of recent policy developments including gender typologies, feminist principles and economic and social human rights frameworks as well as tracing ideological discourses. The paper first briefly reviews the gendered development of Irish social security and describes the evolution of the OFP in a male breadwinner liberal welfare regime. It then sketches the key social security features of austerity budgets before describing the recent trajectory of welfare changes for lone parents. Feminist principles and human rights frameworks are then utilised to analyse the shifts between these reforms. An analysis of policy discourse exposes political compromises between these positions and explains the ambiguity and contradictions in OFP policy shifts.

**History**

Gender segregation has always been a feature of the Irish social welfare system. Pre independence the 1838 Irish Poor Law was administered according to gender and there was overt gender discrimination in the 1911 UK National Insurance Act. Social insurance remained gender segregated post independence, with lower contributions and payments, of shorter payment durations for women for most of the history of the Irish Republic. Irish social policy’s distinctive gendered differentiation is reflected, for example, in women’s marginalisation in means-tested Home Assistance, and the 1952 Social Welfare Act, which consolidated a male breadwinner system. Irish gender segregation is reflected in social welfare systems elsewhere in Europe, but was reinforced in a Catholic and conservative Irish state, which provided in the 1937 Constitution (Article 41.2.2) that the “State shall … endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home”. (Ireland 1937)

Reform in the early 1970’s attempted to address the reality of women’s poverty. The establishment of an Unmarried Mothers Allowance was consistent with the male breadwinner model, classifying women in relation to their marital and family status. The 1980’s were characterised by pressure from both the feminist movement and the EEC Directive on equality in social security to introduce greater gender equality. Some reforms led to direct gender equality in social protection; reforms also gave men access to payments for contingencies previously presumed the sole preserve of women (e.g. lone parenthood and widowhood). However, reforms were introduced in a minimalist manner, creating new poverty and unemployment traps that directly impact on low income women and their families. The minimalist approach was reflected in two key policy decisions (Murphy 2003). Firstly, equal treatment required that the state define the concept of dependency. Adult dependents – overwhelmingly female – were defined as spouses earning £50 or less per week.

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This arbitrary and sharp cut-off point created poverty and unemployment traps, effectively restricting women to low paid and/or marginal employment. Secondly, to contain the cost of equal treatment, and maintain economies of scale implicit in family-based payments, the ‘limitation’ rule was introduced. This meant that even where both spouses met unemployment eligibility criteria, the value of the welfare payment was ‘limited’ to that of an adult plus an adult dependent. This discouraged women from becoming labour market active and led to household formation barriers for low income couples, who lose a portion of an adult payment on cohabitation or marriage and crucially women lose economic independence. Despite changes in language, from ‘adult dependant’ to ‘qualified adult’, or from ‘unmarried mother’ to ‘one parent family’, the concept of the male breadwinner is very much alive in Irish social security policy. While equal treatment ruled out direct discrimination, there remains a very definite legacy of indirect gendered discrimination which values maternal care and wifely labour in the Irish social welfare system.

Gender Typologies and Feminist Principles

Core feminist principles can help assess the nature of social security reforms. We can evaluate social welfare changes according to the degree to which they promote or deny economic autonomy and direct rights, and so enable women’s economic independence where income is both individualised and adequate enough to secure autonomy (Murphy 2003). The payment structure should enable a smooth transition between welfare and work, especially by supporting atypical work more commonly accessed by women. Enabling economic participation also enables women’s future access to pensions. A feminist approach also means recognising the difference between law and practice and paying particular attention to design and implementation to remove hidden gender obstacles (e.g. rules favouring uninterrupted labour market participation or rules blocking re-entry entry after time out of the labour market for caring). Moving from a caring society to an equal society requires avoiding reinforcement of deeply embedded gender differentiated care roles that contribute significantly to women’s inequality. The principle of a gender-neutral approach to care implies a care infrastructure and equal sharing of care obligations, where social and economic policy enable mothers and fathers to share care.

A feminist framework seeks to recognise, but also break down, past path dependencies. Women’s specific needs and interests must be ensured if social and economic rights are to be fully and equally realised, but it is crucial to avoid locking-in historically gendered patterns. An active rights approach means locally integrated delivery of social security, maximally enabling and empowering people’s agency and productive capacity. The approach must challenge rather than accommodate gender inequalities, and inform a framework for social security that helps achieve a more equal world capable of generating normative human rights. Central to this is recognition of women’s care work in the social security system, but in a manner that avoids perpetuating traditional gender divisions (Lynhc and Lodge 2008). The basic feminist model in below is useful in envisaging alternative ways to share productive and reproductive care work, to understand how they inter-relate, and to analyse how to break path dependencies.

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2 The limitation was extended to cohabiting couples following a Supreme Court judgement in the 1984 Hyland case; it was applied to same sex cohabitees following recognition of civil partnerships.
Male focused typologies like ‘male bread winner’ or ‘modernised male breadwinner’ – reflecting deeply differentiated gender roles where women perform ‘wifely labour’ (Shaver & Bradshaw, 1994) – have been replaced by ‘mother / worker’ models that still reinforce gender differentiation in the duplicate roles modern women play as mothers, carers and increasingly as workers. A feminist model favours moving to gender neutral models that can fully accommodate care roles, but also enable labour market participation. This requires avoiding ‘adult worker’ models that do not accommodate a care ethic, and moving towards a ‘carer / worker’ model which does recognise care work (Lewis & Guillari, 2005). Irish lone parents have to date been framed by male breadwinner assumptions where in the absence of the male breadwinner the lone parent is allowed an unconditional welfare payment that does not require any paid employment, over time in the 1990’s the shift is towards a mother worker regime where part time work is facilitated alongside maternal care. The latest shifts from mid 2000’s lone parent policy shifts towards an adult worker regime where the adult is expected to work fulltime with care, in theory, provided by public care or purchased in the market place. The ideal would be a carer-earner model which facilitates an adequate level of labour market participation while also accommodating care choices (Murphy 2012). This is unlikely to be facilitated by a system that privileges or insists on full time employment.

Austerity Budgets

Changes to the OFP have to be seen and understood in the context of wider budget cuts impacting on all social welfare claimants; this section briefly outlines these changes and draws out the gender implications3, before going on to introduce in greater detail the cuts to lone parents payments and analysing them in a gender and rights framework. Reductions in entitlements for people of working age have been a recurring austerity theme. In both 2010 and 2011, all working age social welfare payments including one parent family payment was cut by 4%. The minimum income social assistance safety

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net, Supplementary Welfare Allowance (SWA), was cut by 5.3% in 2011. In May 2009 social assistance payments for unemployed people under age 20\(^4\) were halved; in 2010, reduced rates were extended to the under 25s.\(^5\) Younger lone parents were protected from this age related approach. A series of structural reforms to Jobseeker payments\(^6\) (Table I below) made it more difficult for part-time and atypical workers to qualify for Jobseeker payments, and reduced the level of payment due. These structural changes are gendered: more onerous eligibility criteria make it harder for women – over-represented in low paid, atypical and part-time work – to qualify for payment, and where they do, they receive less income support. These reforms relate to atypical work so have particular consequences for low skilled workers, including many lone parents. A pre-crisis DSFA (2006) review examined the application of Jobseeker conditions to workers employed on a part-time, casual or systematic short-time basis. Instead of accommodating atypical workers, recent changes have had the cumulative effect of excluding more low-paid and precarious workers from social protection. The consequences for women are greater, and suggest a fundamental ambiguity in government policy: despite an aspiration to increase the number of women in employment, policy changes have make it more difficult for women to access sustainable part-time work that accommodates work-life balance.

<table>
<thead>
<tr>
<th>Condition</th>
<th>Was</th>
<th>Now</th>
<th>Implemented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Qualifying: no. of social insurance contributions</td>
<td>No. paid since first started working</td>
<td>52</td>
<td>104</td>
</tr>
<tr>
<td></td>
<td>No. contributions in relevant tax year</td>
<td>Paid or credited</td>
<td>Min 13 paid</td>
</tr>
<tr>
<td>Duration: no. contributions paid</td>
<td>260 or more</td>
<td>15 months</td>
<td>9 months</td>
</tr>
<tr>
<td></td>
<td>Less than 260</td>
<td>12 months</td>
<td>6 months</td>
</tr>
<tr>
<td>Entitlement to a full payment: determined by average earnings</td>
<td>Rate of payment</td>
<td>Earnings band</td>
<td></td>
</tr>
<tr>
<td></td>
<td>45%</td>
<td>&lt;€80</td>
<td>&lt;€150</td>
</tr>
<tr>
<td></td>
<td>65%</td>
<td>€80 &amp; &lt;€125</td>
<td>€150 &amp; &lt;€220</td>
</tr>
<tr>
<td></td>
<td>78%</td>
<td>€125 &amp; &lt;€150</td>
<td>€220 &amp; &lt;€300</td>
</tr>
<tr>
<td></td>
<td>100%</td>
<td>€150 +</td>
<td>€300 +</td>
</tr>
<tr>
<td>Casual &amp; part-time workers</td>
<td>Unemployment week</td>
<td>6 days</td>
<td>5 days</td>
</tr>
<tr>
<td></td>
<td>Sunday working</td>
<td>Not included</td>
<td>Assessed</td>
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Budget 2012 saw controversial cuts in social assistance entitlements related to disability and caring. Entitlement to Carer’s Allowance was made more restrictive for non-residential carers (80% of recipients are women). Income received as a home help is now assessed in means-tests, as are social welfare

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\(^4\) Claimants with dependent children or in approved training or education programmes were exempted.

\(^5\) The €100 rate was extended to people up to age 21; a €150 rate was introduced for 22-24 year olds.

\(^6\) In addition, employment on Sundays is now assessed in the Jobseeker’s Allowance means-test, reducing payments for atypical workers.
payments for carers; again some lone parents combine both caring and parenting roles. Budget 2013 announced a cut in the Respite Care Grant. As 64% of carers are women, these changes too have a gendered impact. Budget 2014 was announced on October 15th 2013 (a change of date occasioned by the new European Semester) and the overall focus of the budget was to reduce younger and older people’s income supports but also saw a specific lone parent tax credit worth €1650 pa restricted to main carer (where previously it was available to two parents as long as both shared a parenting role). Treoir (2013), critiqued the blanket approach which would apply to all fathers regardless of their level of involvement in the lives of their children and which is clearly a disincentive to co parent and a loss of €30 or more per week for the second parent.

Rent Supplement (RS), an income support for low income tenants in the private sector, has also been a focus of austerity reforms. Tenants’ minimum contribution to their rent was increased twice in 2009, and again in 2010 and 2012, while maximum allowable rents were reduced in 2009, 2010 and 2012. In 2009, access to RS was restricted to those eligible for social housing or who were already renting for at least 6 months. At the same time, the capital budget for social housing construction was severely curtailed. These reforms may ‘ghettoise’ the most vulnerable tenants seeking lower rents; and there is evidence of an increase in homelessness. Lone parents comprise a significant proportion of both the social housing list and rent supplement and these changes impacted disproportionately on lone parents. Ireland’s austerity regime has also seen severe cuts in child income supports. Budget 2009 announced a phased withdrawal of universal Child Benefit (CB) for children aged 18. Universal Early Childcare Supplement was halved, then abolished at the end of 2009; however in 2010, a universal (school) year of free half-time pre-school Early Childhood Care and Education (ECCE) was introduced. CB was cut by a further 10% in 2010. Up to this point, social welfare dependent families had been protected from the impact of CB cuts with increases in other child related entitlements. But from 2011, when CB rates were cut by a further 7%, the poorest families were not protected. Budget 2012 announced the phasing out of higher CB rates for larger families and introduced cuts in mean-tested child income supports. Further CB cuts were implemented in 2013, so that cumulatively, rates have been cut by 22% for smaller families, and by a third for larger families. Further cuts in means-tested child income supports were implemented in 2013.

**Austerity budgets and their impact on one parent families**

Pre crisis, income support for lone parents was delivered through One Parent Family Payment (OPF) a means tested social assistance payment for single parents living alone with children aged up to 18 (or 21 if in full time education). Substantial reforms in both 1994 and 1997 introduced a substantial income disregard to encourage participation in paid employment for those in receipt of the precursor

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9 For children under 6.
10 8% for families with three or more children.
11 Income support for back to school costs was withdrawn for pre-school children, and the allowance was cut by 18-25%. Child allowances in households claiming social insurance payments for people with long-term disabilities, carers and pensioners was withdrawn where the ‘qualified adult’ had earnings over €400 per week, in line with Jobseeker’s Benefit.
12 Income supports for back to school costs were further reduced by 20-33%.
of the OFP. These reforms sought to incorporate the cost of child care into earned income disregards. In May 2013 there were 87,586 recipients and the payment cost approximately €1b per annum. While 36% of recipients work in paid employment such work tends to be part time (reflecting both childcare responsibilities, job supply and the structure of income disregards which incentivise part time work). 98% of lone parents are women, 13% aged under 24, 56% are between 25 and 39 while 31% are aged between 40 and 66. The vast majority have one or two children. Ireland remains an outlier in not imposing some form of work conditionality on lone parents, up to 2014 lone mothers whose youngest child was 21 was still exempted from work obligations (Murphy 2012). This section outlines key gendered social security debates in Ireland and uses gender rights frameworks to assess recent (pre, early and late crisis) social security change.

The 1990’s brought little structural change in the gendered division of social welfare but did see significant change in gender expectations concerning care and employment, particularly a shift in the perception of mothers, from carers to workers (Coakley, 2005). This shift is reflected in reforms to earnings disregards for both adult dependents (1996) and lone parents (1994 and 1997) to encourage participation in paid employment. This move in the role of social protection, from providing social protection to promoting economic connection, is consistent with the experience of other European and liberal welfare states. In 2006, the Department of Social and Family Affairs (DSFA) proposed making labour market participation compulsory for lone parents and qualified adults whose children were over a certain age (five or seven years). This was consistent with a Developmental Welfare State which grounds social inclusion in labour force participation and education. While such reforms were generally well received, women’s groups raised significant concerns. These related to Ireland’s under-developed childcare infrastructure, the quality of work available to low skilled women, gendered issues concerning access to social insurance, pensions and in-work benefits, and a failure to appreciate the nature of the challenge in combining paid employment with the reality of parenting alone. Any political momentum associated with this was sidelined by the 2007 financial crisis and the austerity budgets that followed.

A first set of changes was signalled in DSP (2010) proposals for a single social assistance payment for people of working age (SWAP). The primary motivation for this reform was to tackle long benefit duration for working age claimants, particularly lone parents, by closing gaps between Jobseeker and other working age payments (Martin, 2011). A parliamentary report (OCJSPE, 2012a), while approving of a SWAP in principle, recommended delaying introduction because the necessary supports, activation opportunities and quality jobs were not yet in place. The issue of SWAP was then consideration by the Advisory Group on Tax and Social Welfare (AGTSW), their 2014 proposals on working age supports were forwarded to the Minister for Social Protection in July 2014 but never published, the agenda and appears to be losing political momentum for the broad working age population.

There was however considerable momentum for changes to the One Parent Family Allowance. Two key structural reforms to the OFP were announced. Firstly income disregard for OFP allowance were to be made equivalent to Job seeker income disregards. Secondly, eligibility for the payment was restricted to parents of younger children.
1 Reducing higher earning disregards for lone parents

First, the higher earnings disregard for lone parents – in recognition of high childcare costs – was reduced. Budget 2012 announced phased reductions that will see it cut by 60% by 2016, levelling it down in line with Jobseekers Allowance. The weekly OFP earnings disregard are reduced from €146.50 as follows: €130 (2012); €110 (2013); €90 (2014); €75 (2015); €60 (2016). When these reforms were announced, no specific proposals were made in relation to addressing the high childcare costs that impact severely on lone parents’ return from employment. Various arguments were made that the OFP earnings disregard was badly structured. Martin (2011) argued disregards were not restricted to those who actually paid for childcare and had the unintended consequence of incentivising part-time work, limiting the gains from longer working hours. As well as cost savings the primary policy rationale appeared to be to shift one parent family recipients from a pattern of part to full time work. As Figure A shows, cutting the disregard does redress this imbalance towards more even rewards from full time work, but it dies this at the expense of reducing the overall return from work, particularly part-time work.

Figure A  impact of loss of income disregards

This reform means significant reductions in household income for lone parents in paid employment, for example, a lone parent with one or two children, earning a weekly wage of €300, stands to lose €74 per week. Thus the net impact of the reform is to reduce the financial return from paid work, thereby weakening the incentive for lone parents to return to the labour market. A lone parent’s decision to return to paid work must take account of implications for care and domestic work, and other time costs, as well as the cost of childcare (where this applies); the figures above would be further reduced by childcare costs. The SWAP reforms did not include a mechanism to recognise the higher childcare

13 In addition, the savings resulting would be significantly offset by an increase in Family Income Supplement (FIS) payments – Ireland’s in-work benefit.
costs associated with lone parenthood, nor is there any acknowledgement that many mothers want, and choose, part-time employment to achieve work life balance. Without a more comprehensive, and effective, solution to high childcare costs, reform of social protection is unlikely to secure increased labour market participation by lone parents, and may indeed reduce it. Whatever their optimal work-life balance combination, lone parents will have less social protection. It is ironic that policy change ostensibly motivated by the goal of increasing transitions from welfare to work will in practice worsen welfare-to-work outcomes. It is clear that many women, if forced to choose between full-time care and poorly paid full-time work, with little accommodation of work life balance, will choose full-time care. ESRI analysis suggests that careful monitoring of the incentives facing this group is warranted, given the significant shift in policy, the fact that childcare costs are especially relevant for this group, and international evidence that the labour supply of lone parents tends to be more responsive than that of other groups (Callan et al 2014 p19).

It should also be noted that the income disregards occur alongside the range of other cuts, some impacting on all groups like rate cuts others impacting on all but disproportionately on lone parents (rent supplement), others impacting on families with children (Child Benefit cuts and cuts to Back to School Footwear and Clothing Allowance) as well as abolition of eligibility for half-rate social insurance payments (e.g. Jobseeker’s Benefit) was withdrawn. Entitlement to a second payment for lone parents who were Community Employment participants – an active labour market programme with high rates of lone parent participation – was also withdrawn. These cumulative cuts have had a severe impact on these families (Murphy 2012). In an important partial reversal of the policy it was announced in November 2014 that the income disregards for One-Parent Family Payment will not reduce in 2015 and the income disregard will remain at €90. This means up to €90 per week can be earned without impact on the full One-Parent Family Payment. Half the remainder of gross earnings up to €425 per week is assessed as means.

2 Reducing access to One Parent Family Payment

From April 2011, the age threshold of parents youngest child was reduced for eligibility to the one parent family payment was reduced from 18 (or 21 in full time education) to 14 years. A series of panicked short term expenditure saving decisions saw the age further reduced – to age 7 by 2014 – in Budget 2012. This was consistent with reductions in the earnings disregard and the original SWAP report which had proposed extending Jobseeker work availability and job search conditions to OFP recipients.

Jobseekers are required to be capable of, available for, and to genuinely seek full-time employment, and to have no paid work on at least three days in any consecutive six. Many lone parents of young children manage work-life balance, and avoid high childcare costs, by working during school hours. However, these job search criteria exclude such working patterns: lone parents could be denied eligibility if they said they wanted to work part-time, and even if seeking full-time work, would also be ineligible if, for example, they worked five mornings a week during school hours.

14 Changes were to be phased in over four years for existing claimants. Some exceptions were made for lone parents of a child with disabilities, and for recently bereaved parents.

15 Jobseekers can accept part-time work if offered it, but they must be seeking full-time work.

16 This has since been changed to four days in any consecutive seven, see next section.
Clearly the proposed reforms had fault lines which could result in lone parents giving up part-time work, or being denied income support for refusing to take up offers of full-time work. Such outcomes were politically untenable and the ‘seven is too young campaign’ galvanised public support. As the date for reduction of the age threshold approached, and in light of the political difficulties identified, new transitional arrangements were announced in May 2013 and applied to the 70% of lone parents who will lose entitlement to the OFP by 2015. This was accompanied by a childcare investment package intended to provide 6,000 after-school places for over 27,000 lone parents in the Jobseeker transitional category. The Department’s briefing document identified four different transition possibilities for lone parents who lose OFP eligibility:

- **About one in twelve are currently receiving a half rate Carer’s Allowance payment and would transfer to this payment exclusively.** These lone parents will continue to manage a dual burden of care, both parenting alone and providing full-time care and attention to another person; however they would receive a lower level of income support.

- **A further 15% were in paid employment of sufficient hours to qualify for the in-work benefit Family Income Supplement (FIS) as a ‘top-up’ to their OFP.** These lone parents will transfer to the FIS scheme exclusively; however this provides a lower level of income support than they currently receive.

- **Over a fifth of current recipients have no child under 14 years, and would transfer to Jobseekers Allowance, where they will have to comply with full conditionality requirements.**

The final group were lone parents whose youngest child is over the age of 7 (and therefore no longer eligible for OFP) but under age 14, accounting for over 40% of recipients. The Department announced a ‘Jobseeker Transitional’ arrangement for this group, temporarily exempting them from some Jobseeker conditionality requirements. They will not be required to seek full-time work, and can continue a part-time work pattern of more than three days a week (qualifying for a reduced Jobseeker payment subject to means). However, they will not be eligible for Job Plus – the primary incentive for employers to recruit Jobseekers – nor will they be included in the formal claimant count of unemployment, the Live Register. When their youngest child reaches age 14, they will transfer to full conditionality under the main Jobseeker scheme.

**Implementation Challenges**

Political targets for lone parent activation have shifted over time, from when the youngest child reach aged 7 in 2006, to 14 in 2009, to 12 in 2010, and back to age 7 in 2011. This political inconsistency and hesitancy means a very complicated implementation timetable, likely to cause significant confusion for both claimants and DSP staff. Table 2 below shows the transition targets and stages, with transition dates dependent on when lone parents first claimed the OFP payment and the age of their youngest child; Table 3 shows the DSP estimation of the numbers affected. Target dates for transition for various cohorts of lone parents are as follows.

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17 D/SP (May 2013) *Briefing for the Lone Parent Representative Groups on the Transition of One-Parent Family Payment recipients as a result of the reforms to the Scheme.*
Table 2  Time frame for when OFP ends (youngest child reaches the specific age)

<table>
<thead>
<tr>
<th>OFP payment commenced:</th>
<th>OFP ends when youngest child reaches age:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 27-Apr-11</td>
<td>18</td>
</tr>
<tr>
<td>Between 27-Apr-11 and 2-May-12</td>
<td>14</td>
</tr>
<tr>
<td>After 3-May-12</td>
<td>12</td>
</tr>
</tbody>
</table>

Table 3  DSP estimation of numbers of OFP recipients affected by reform

<table>
<thead>
<tr>
<th></th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number OFP affected</td>
<td>9,300</td>
<td>7,782</td>
<td>46,020</td>
<td>63,202</td>
</tr>
</tbody>
</table>

The 2013 transition is now complete and appears to have been implemented smoothly; consultations were conducted directly with lone parents and their representative groups, DSP staff were informed and trained and help lines were equipped with additional staff. Reaction has been muted, with less feedback or resistance than anticipated. Early analysis shows that almost half (2,700) of the 5,600 claimants affected moved to Jobseekers Allowance or Jobseekers Transition, while 300 opted to retain Carers Allowance. A quarter (1,400) have remained in employment supported by FIS (more than anticipated by the DSP) and small number appears to have decided to regularise their relationships, becoming qualified adults on partners’ claims. An unknown number have applied for disability or health related payments and a significant number are unaccounted for; while some may have prompted to leave the social protection system (perhaps regularising relationships or employment), it may also be the case the some vulnerable lone parents may be 'lost in transition'. There appears to be no infrastructure for meaningful monitoring and tracking. Data relating to the 2014 transition cohort has not yet been released; the scale of transition in 2015 remains daunting.

Can lone parents find decent employment?

A significant body of evidence shows that including lone parents in conditional activation programmes can lead to a ‘precarity trap’ where workers, particularly women, are caught in vicious cycles – being churned from welfare to precarious work and back again without impacting on the level of poverty experienced by lone parents and their children (Jaherling et al 2104, Wright 2012, Eurofound, 2010, Dobbins 2012, Loftus 2012, Murphy 2012, Daly 2010, Dean 2012). Increased activation, decreased social protection, and increased prevalence of atypical work could mean very negative outcomes for the most vulnerable workers. There are insufficient safeguards in the form of employment protection legislation to limit negative and perilous forms of atypical work and protect claimants and potential workers from being forced into and/or trapped in such work and caught in a precarity trap.

The incidence of Irish precarious employment is increasing and is extending beyond occupations and sectors traditionally assumed vulnerable to precarity. Internationally there is a growing focus on mini-jobs, micro-jobs and the idea of ‘bundling’ ‘slivers of time’ to create a working week. While such flexibility can be attractive to professionals and freelancers it less likely that low income, low skilled workers will
be able to creatively manage or control the design of their working week (Pennycock 2013). The wrong part-time jobs can cause a triple trap locking women into precarity, poverty and domesticity (Murphy 2012). Tackling this precarity trap means concerted and coordinated effort at three levels. Labour legislation is needed to rebalance regulatory flexibility and removing legal incentives for employers to create precarious jobs. The low income trap for workers can be addressed through recognising and accommodating the reality of precarious work while working to progress workers towards better jobs, by developing more flexible in-work benefits, and by addressing the issue of sanctions with safeguards to ensure activation into decent work. The low skill trap can be addressed through retraining and up skilling focused on needs of precarious workers. Ultimately what is required is a focus on decent work, both part-time and full-time. The nature of the Irish jobs strategy has so far been focused on high-end high quality jobs, many of which have to be filled by migrant labour with IT or language skills. Job creation strategies need more integration with activation policies in terms of the balance of high and low-paid jobs, and full and part-time jobs, in local economies. Incentivising employers to create decent part-time jobs will have gendered implications for employment distribution. This is highly relevant in a time of weak economic growth. Increasing the number of net jobs means increasing incomes in low-paid households; this raises aggregate demand and can contribute to growth.

Human Rights Approach: applying ICESCR non - retrogression scrutiny

What does all this mean for the human rights of lone parents and their children? It is very clear that Ireland fails even the most basic of tests that assess changes in budgetary policy, including changes to OFP, from a human rights perspective. The International Covenant on Economic Social and Cultural Rights offers principles for monitoring retrogression of progress in progressive realisation of human rights: an adequate budgetary governance process would require transparent reasonable justification, examination of alternatives, genuine participation, a focus on non-discrimination, and on-going commitment to sustained impact and realisation of rights and independent review mechanisms. The discrimination indicator enables examination of the gender impact of cuts and retrogressive measures. The Center for Economic and Social Rights (Holland, 2012) find most vulnerable populations are suffering the human rights impacts of the crisis disproportionately. The brief assessment in the Table below shows that one parent family austerity measures fail the test of proving that ‘they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant’. In most cases, reasonable justification for the measures cannot be identified, nor has there been serious consideration of alternatives, even when they have been identified in government sponsored reports. There are substantive concerns about the discriminatory nature of many austerity reforms.

Table 4  Human Rights Proofing Social Security in Ireland –ICESR non-retrogression approach

<table>
<thead>
<tr>
<th>Key Changes</th>
<th>Reasonable justification</th>
<th>Alternatives examined</th>
<th>Genuine participation</th>
<th>Discriminatory Equality/grounds</th>
<th>Sustained impact Realisation rights</th>
<th>Independent review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cuts to rate of working age payments</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes, working age</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Rent supplement caps and minimum contribution increases</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Imposition of conditionality for youngest 14 years +</td>
<td>No / some</td>
<td>No</td>
<td>No</td>
<td>Yes: age</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Lone parent payments loss of income disregards</td>
<td>No / some</td>
<td>No</td>
<td>Yes</td>
<td>Yes: women, family status</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

The analysis shows that Irish austerity measures fail the test of proving that “they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant”. In most cases, a reasonable justification for the measures cannot be identified, nor has there been serious consideration of alternatives. While lone parent representative groups have been consulted, the reforms do not reflect an accommodation of the concerns raised. CESR (Holland 2012:4)

“The substantive human rights principles of progressive realization, use of maximum available resources and non-retrogression, along with the procedural principles of transparency, accountability and participation have... been largely ignored in Ireland’s recovery measures, which have socialized losses incurred by incautious banks in a strategy that risks limiting the country’s economic wellbeing, and the social rights of its population, for many years to come”.

Further, CESR’s (Holland 2012:4) assessment of Ireland’s policy efforts

“indicates that the government is not taking all necessary steps to comply with its international obligations to respect, protect and fulfil economic and social rights. In particular, fiscal policies (both budget and tax-related) do not appear to be in line with the obligation to devote the maximum of available resources to fulfil economic and social rights progressively, and to guard against retrogression and ensure the rights of the most vulnerable, even in times of scarcity”.

Conclusion: Ambiguity in Policy Making

The period reviewed shows that OFP reform policy has been developed in a series of stop-start moves in three clear stages: 2006, 2010 and 2013. Each stage was qualitatively different from the other, the changes triggered by a mixture of changing political administrations and consequent subtle shifts in ideologies, the reality of fiscal pressure occasioned by crisis, failure to invest in childcare, fears about capacity to implement and, crucially, pressure from lone parent and women’s groups. The policy confusion and ambiguity in outcome shown above is evidence of competing ideologies, with policy outcomes resulting from a compromise between competing ideologies. Policy changes are an amalgam of three ideologies, each of which actively influences policy, with strong implications for gendering work and care (Nicaise, 2012). A social democratic approach champions the right to work but also the obligation to participate in employment and the need for high levels of participation and full employment. A neoliberal approach assumes that ‘rational’ humans will take up paid employment if it pays to do so and focuses on incentivizing low paid work ignores the care ethic that informs choices between paid employment and unpaid care. A conservative approach focuses on the moral imperative to work and avoid intergenerational joblessness and a ‘dependency culture’, stressing behavioural obligations and sanctions.

Pre-crisis reform proposals appear dominated by a social democratic approach to paid employment (consistent with the developmental welfare state language in use at the time). The early crisis reform proposals reflect a hardening of ideology and the more neo-liberal tone that accompanied crisis. While largely driven by the austerity imperative, later crisis transitional arrangements, along with a childcare investment package are in part reflective of a social democratic ideology; this coexists with a more conservative ideology that seeks to reinforce the role of other mothers (wives) in the home and to undervalue co parenting (Treoir 2013). The debate about these proposals highlights the considerable ambiguity in Ireland surrounding the issue of mothering, welfare and paid work. On the one hand, proposals to support women’s economic participation are welcomed; paid employment offers the potential to overcome the lack of financial power that is fundamental to any discussion of women’s poverty and also women’s civic and political participation. On the other hand women are reluctant to undervalue the important role of care-giving relative to paid employment or to divorce policy aimed at increasing economic participation from policy debate about accommodating care, unpaid work and work-life balance.

All stages reflect patriarchal values and an inadequate recognition by the state of the double burden of care and paid work faced by lone parents and mothers more generally. The incapacity and unwillingness of the state to provide adequate support for care work, while reducing the financial return from paid employment, reflect a deep ambivalence on the part of the state towards the double burden of care and work faced by women; their poverty is seen as an acceptable risk and economically viable. The very name ‘Jobseeker Transition’ and the absolute lack of engagement with activation of partners or spouses suggests a society in an ambiguous stage with clear reluctance to leave behind home based child rearing, and an economy that wants adult workers but that remains ambiguous about investing in sufficient quality childcare to enable adults with caring responsibilities to work in paid employment. Ireland is therefore only on a partial and somewhat reluctant transition to an adult worker regime.

Jarehleing et al (2014) review the macro experience of the past decade and its focus on supply-side measures aimed at increasing labour market participation. Ireland comes late to this approach and can benefit from lessons elsewhere that show the limitations of measures that rely solely on the income-
raising effects of increasing labour market participation. They are clear that in the changed context of the income ‘norm’ being set by two earner parents, lone parents will always struggle to maintain relative living standards. (Lewis et al, 2008) In the changing context of the transition to a dual earner world substantial and continuous labour market integration may be necessary however as far as the risk of poverty during the single-parent phase is concerned additional income measures targeted directly at single parents’ income are necessary. Without these the poverty risks of single parenting are likely to become even more significant.

Watson and Maitre (2012) show a significant impact of the crisis has been a phenomenal growth in jobless households with Ireland having 23% (over twice the European average) of jobless households and with children living in the majority 53% of these jobless Irish households. They also find that over the time of the crisis we see a structural shift in the number of children living outside two parent families.

| Table 5 | Number of children and adults living in coupled and other households |
|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|-----------------|
|                | Children        | Adults age 18-59 |                   |                   |                   |                   |
| In couple household | 80% | 77% | 74% | 70% | 73% | 72% |                   |                   |                   |
| Not in couple household | 20% | 23% | 26% | 30% | 27% | 28% |                   |                   |                   |


The degree to which children are living in one parent households and often jobless households does mean we need to seriously focus on the labour market participation of lone parents. However the move to make lone parents income support conditional on participation on full time employment and restrict income disregards to the equivalent to single people is going in the wrong direction. Despite Budget 2015 being coined ‘the recovery budget’ lone parents are due a further cut in income disregards in the 2015 social welfare bill and the subsequent 2016 budget and social welfare bill. There is still time to pull back this policy direction and recognise the reality of lone parents life and what can be achieved with 24 hours to combine care, parenting, work and everything less any one might aspire to live a flourishing life.
- Dean H (2012) Welcome relief, or indecent subsidy the implications of wage top up schemes Policy and Politics 40 (3) 305-322
- Dobbins, T. (2010) Ireland and flexible forms of work and very atypical’ contractual arrangements European Working Conditions Observatory IE0812019Q
- DSP (May 2013) Briefing for the Lone Parent Representative Groups on the Transition of One-Parent Family Payment recipients as a result of the reforms to the Scheme
- Eurofound (2010), ‘Working poor in Europe’, Dublin, Eurofound,
- Ireland (1937) Buntreacht na HEireann, Dublin Stationary Office
- Ireland (2006) Review of the application of the Unemployment Benefit and Assistance schemes conditions to workers who are not employed on a full-time basis. Dublin: Stationary Office.
- Murphy M.P. (2012) From careless to careful activation: making activation work for women, Dublin NWCI
- Nicaise I 2013 Social protection: between rights and duties, between dependency and social investment Alliances against poverty Lisbon, 23-24 May 2013
- Pennycook M G Cory and V Alakeson 2013 A matter of Time. The rise of zero hour contracts Resolution Foundation, UK 2013
The Rights of Others: Asylum Seekers and Direct Provision in Ireland

Dr. Liam Thornton*

Lecturer in law and Director of Clinical Legal Education at the School of Law, University College Dublin University College Dublin
Email: liam.thornton@ucd.ie

Abstract

The system of direct provision for asylum seekers is 14 years old. Direct provision is where asylum seekers are provided with bed and board, along with a weekly allowance of €19.10 per week per adult or €9.60 per week per child. Asylum seekers are not entitled to any other social welfare payments and cannot seek or enter employment, on pain of criminal sanction. Direct provision, introduced in April 2000, came at a time of considerable moral panic about ‘welfare abuse’ by asylum seekers in Ireland. For over 14 years, this system has existed on an extra-legislative basis and without any in-depth examination, from the Legislature, the Executive or the Judiciary on the impact of direct provision on the civil, political, economic, social and cultural rights of asylum seekers. Hanna Arendt, in The Origins of Totalitarianism noted that the world sees noting sacred in “the abstract nakedness of being human”. Using Arendt’s views as a starting point, this paper explores Ireland’s legal obligations towards those seeking protection in Ireland. Examining our international, European and domestic obligations, the paper will seek to explore whether the system of direct provision complies with fundamental human rights law and norms. With a judicial review of the totality of the direct provision system currently before the High Court, this paper provides an analysis of how ‘the right to have rights’ for asylum seekers is limited.

Keywords:
Asylum Seekers, Direct Provision, applications, immigration, supplementary welfare allowance.

* Dr Liam Thornton, (BCL (Int.), PhD, NUI; PgCHEP (Ulster)) is a lecturer in law & director of clinical legal education at the School of Law, University College Dublin (e-mail: liam.thornton@ucd.ie). This paper is partly based on my forthcoming monograph, The Social and Economic Rights of Asylum Seekers in International and European Law, to be published by Routledge in 2016. This paper was first presented at a seminar, The Ethics of ‘Home’: Direct Provision, Homelessness and Ireland’s Housing Policies organised by Dr Ronni Greenwood (University of Limerick) as part of the President of Ireland’s Ethics Initiative.
A. Introduction

The hallmark feature of the Irish reception system for asylum seekers has been the continual withdrawal and diminution of social rights on the grounds of preserving the integrity of immigration controls and protection of the welfare state from those who are viewed as not having a definitive right to be within the country. From a country of mass emigration to a country of net immigration, Ireland only began to experience appreciable asylum flows in the last decade. Since 1998, there have been 82,190 asylum applications made in Ireland up to April 2014. Throughout this period there has been a tendency to exclude asylum seekers from supports that are seen as essential to allowing citizens and legal residents to live with a basic degree of dignity. From an inclusive welfare system that considered need over immigration status, asylum seekers in Ireland have little in the way of definitive legal rights or entitlements to the separated system of welfare support, known as direct provision. Asylum seekers, who have authorised presence within the Ireland, have been greatly affected by the exclusion from the traditional structures of the welfare state. Justifications have been proffered for a separate welfare system for asylum seekers, on the basis that

“[v]oters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth.”

Within Ireland, asylum seekers exist as a unique category of immigrant, wherein there are no statutory right to social support. Support is provided on the basis of ministerial circulars, wherein parliamentary scrutiny for the whole system of reception for asylum seekers is absent. The mode of delivery of social supports for asylum seekers do not sit well with the Irish government’s supposed commitments to social inclusion, solidarity, multiculturalism and anti-racism.

1 The term asylum seeker in this paper refers to those who have made a claim for refugee status or subsidiary protection, but where no final determination of the protection claim has been made. See, Refugee Act 1996 (as amended) and See S.I. No. 518 of 2006, European Communities (Eligibility for Protection) Regulations 2006 and S.I. No. 423 of 2013, European Union (Subsidiary Protection) Regulations 2013.

2 Please see http://www.orac.ie/ for a breakdown of the Irish statistics on asylum applications (last accessed, 05 November 2014). These particular statistics are from, ORAC, Monthly Statistical Report, April 2014 and various annual reports of ORAC.


4 Section 8(1)(a) of the Refugee Act 1996 (as amended).


That those seeking asylum have differentiated social rights entitlements to citizens is not surprising. Hannah Arendt in *The Origins of Totalitarianism* stated:7

“The world found nothing sacred in the abstract nakedness of being human.”

Reflecting on this in June 2014, President Michael D. Higgins noted:8

“[T]he national appropriation of ‘human rights’ – their entanglement with citizenship – has given rise to new categories of persons without rights, such as refugees, displaced and stateless persons. How are we to conceive of the rights of these people, whose number is in the millions in the world today?”

This paper seeks to trace the development of the system of direct provision for asylum seekers and asks whether the rights of this ‘other’ are protected in Irish law, policy and practice. In Part B, I outline the legal and political nature of the system of direct provision. In Part C, I consider the socio-economic rights of asylum seekers in international and European Law. In the final section, part D, I contextualise the nature of rights for ‘others’ in Ireland, drawing upon recent developments as regards government instigation of discussions on reform of the direct provision system.

### B. The System of Direct Provision

#### 1. What is Direct Provision?

With asylum seekers prevented from entering employment, and therefore having all means of self-sufficiency denied,9 initially asylum seekers were entitled to rely on the social assistance system on the same basis as Irish citizens.10 Direct provision was introduced so as to prevent asylum seekers from accessing social assistance payments. Utilising the ability to provide supplementary welfare allowance *in kind*,11 the system of direct provision provides asylum seekers with bed and board accommodation and a payment, known as direct provision allowance. The initial legal basis for the system of direct provision and dispersal was based on provision, in-kind, of supplementary welfare allowance and Department

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8 Higgins, M.D. “International Human Rights and Democratic Public Ethics”, *Royal Irish Academy: Summer Discourse*, University of Limerick, 06 June 2014.
9 Section 9(4)(b), Refugee Act 1996.
11 This was originally introduced under Section 170 of the Social Welfare (Consolidation) Act 1993. Since the introduction of direct provision, a new social welfare consolidation act was introduced, so now see Chapter 9 of the Social Welfare (Consolidation) Act 2005, in particular Sections 187-189 and Section 200.
of Social Protection Ministerial Circular 04/00 of 10 April 2000\textsuperscript{12} and Circular 05/00 of 15 May 2000 (now repealed).\textsuperscript{13} Under direct provision and dispersal, bed and board accommodation is provided by the Reception and Integration Agency (RIA)\textsuperscript{14} in hostels, guesthouses and holiday camps around Ireland. Asylum seekers are dispersed throughout the country, and cannot choose where to live.\textsuperscript{15} A weekly stipend of €19.10 is paid to each adult and a sum of €9.60 for each dependent child. The level of payment has not changed since 2000.\textsuperscript{16} Two exceptional needs payments of €100 are given per year to asylum seekers, however there are cases where this payment is not made, where asylum seekers are suspected of having other means of support.\textsuperscript{17} Those under 18 are provided with free schooling as a legal right.\textsuperscript{18} Medical care is provided to all asylum seekers under the medical card scheme. The payment of direct provision allowance is administered by community welfare officers.\textsuperscript{19}

In 2009, 6,494 people were resident in direct provision accommodation centres.\textsuperscript{20} At the end of June 2014, the last date to which the RIA have provided monthly statistics, there are 4,296 people in direct provision.\textsuperscript{21} Of these, 1,527 are children. There are 3,243 persons, who have spent two or more years in direct provision. There are 2,441 people who have spent four years or more in direct provision.\textsuperscript{22}

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{11}
\item DSFA, SWA \textit{Circular 04/00 on Direct Provision} to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (10 April 2000).
\item DSFA, SWA \textit{Circular 05/00 on Direct Provision} to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (15 May 2000).
\item In Ireland, the non-statutory Reception and Integration Agency is the discrete agency responsible for dispersing and accommodating asylum seekers. It is separate and distinct from the traditional welfare agency of the state, the Department of Social Protection. The Reception and Integration Agency, rather than being responsible for the day to day running of direct provision accommodation centres, contracts this role to private service providers. For a full list of the private bodies that the Reception and Integration Agency currently deal with, see RIA, Monthly Statistics Report, December 2013, pp 14-16 and FLAC, \textit{One Size Doesn’t Fit All} (Dublin: Printwell Cooperative, 2009), pp. 26-31.
\item DSFA, Circular 04/00 (10 April 2000), para. 1. See also, DSFA, Circular 05/00 (15 May 2000), para. 1.
\item \textit{Supra}. fn. 12, no paragraph/section numbers can be directly referred to.
\item With thanks to Saoirse Brady (Children’s Rights Alliance) author of the FLAC report for pointing this out to me, see, \textit{One Size Doesn’t Fit All} (Dublin: Printwell Cooperative, 2009), p. 47.
\item Section 31 of the Education (Welfare) Act 2000 sets the minimum school leaving age at 16 years.
\item Community welfare officers are responsible for the day to day administration of the supplementary allowance scheme, in terms of taking decisions and exercising discretion as to payment. While community welfare officers are now known as “Department of Social Protection representatives”, I will continue to use the designation ‘community welfare officers’ as much of the material on which this article is based relates to their role within the Health Services Executive. The Health Services Executive (HSE) was established in 2004 and is responsible for the provision of health care and other social services in Ireland. Between 1996-2004, the relevant functions of the HSE as regards asylum seekers and payment of direct provision allowance were carried out by individual health boards. See, Health Act 2004. Since 2011, the HSE no longer has any role as regards payment of direct provision allowance.
\item Reception and Integration Agency, \textit{Annual Report 2009}, p. 5.
\end{enumerate}
\end{footnotesize}
2. Establishing Direct Provision: Ignoring Rights, Ignoring Legality

Claims of abuse of the welfare system by asylum seekers and establishing systems of surveillance to monitor the actions and activities of asylum seekers seems to be the core purpose of direct provision. Spurred on by media reports, changes to the reception of asylum seekers in the United Kingdom and recommendations from other European Union states, various state agencies were informed of the establishment of the direct provision accommodation system, direct provision allowance rates, and the policy of dispersal on 10 December 1999 (International Human Rights Day).

Concerns were expressed by those charged with administering the direct provision system and trade union officials as to the lack of a legislative basis for direct provision and the ‘manipulation’ of the supplementary welfare allowance system. Legislation was introduced in 2003 to prevent asylum seekers from receiving rent supplement. This prevented community welfare officers from placing any asylum seeker outside of the direct provision system. With the introduction of the habitual residence condition to Irish social welfare law in 2004, it was assumed that since asylum seekers had newly arrived in the

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24 Ministerial letter, D. Ahern, DSCFA to J. O’Donoghue, DJELR, 24 June 1998, on the need for more co-ordinated government response to the increasing numbers of asylum seekers in the area of welfare and housing and D. O’ Sullivan, DJELR, sending on note from Department of the Environment and Local Government to all members of the Interdepartmental Committee on Immigration, Asylum and Related Issues, 03 July 1998 on accommodation options for asylum seekers outside of the greater Dublin area. Press and Information Office, DJELR, “Minister for Justice, Equality and Law Reform announces that asylum seekers will be dispersed throughout the country’, 19 October 1999; Letter from Planning Unit (DSCFA) to B. O’Neill, Asylum Policy Division (DJELR), 04 November 1999 on the implications of direct provision for the DSCFA.

25 Ministerial letter, D. Ahern, DSCFA to J. O’Donoghue, DJELR, 24 June 1998, on the need for more co-ordinated government response to the increasing numbers of asylum seekers in the area of welfare and housing;


27 The UK report that reference is made to is, Secretary of State for the Home Department, Firmer, Fairer, Faster: A Modern Approach to Asylum and Immigration (Stationary Office, July 1998).


29 Letter from B. Ó Raghallaigh (DSCFA) to all Health Boards (managerial level), 10 December 1999, confirming the rate of direct provision allowance rates for asylum seekers. While the letter used the words ‘comfort payments’, from 2001 onwards the terminology used was ‘direct provision allowance’. To avoid confusion, I will use the latter term, or DPA.

30 Email from M. Walsh (Community Services Programme, Eastern Health Board) to J. Murphy (Senior Administrative Officer, Community Welfare, Eastern Health Board), 02 February 2000, on concerns regarding legality of direct provision and payment of direct provision allowance and Letter from F. Mills, General Manager, Homeless, Asylum Seekers and Travellers section, East Coast Area Health Board to SWA Section (DSCFA), 20 March 2000 on payment of supplementary welfare allowance to asylum seekers and legal problems arising. B. Ó Raghallaigh, Planning Unit, (DSCFA) to N. Waters, Director, DASS (DJELR), 25 July 2000 on asylum seekers supported outside of direct provision. Letter from B. Ó Raghallaigh (DSFA) to D. Costello, Principle (DJELR), 10/07/2002 on community welfare officers and trade union discomfort with direct provision system.

31 Section 13 of the Social Welfare (Miscellaneous Provisions) Act 2003 inserted section 174(3) and (4) into the Social Welfare (Consolidation) Act 1993 and prevented payment of rent supplement to those unlawfully in the State and also to those who had made an application for refugee status. This section is now contained in section 198(3) of the Social Welfare (Consolidation) Act 2005. See also, Circular 02/03 of 20 May 2003, replacing SWA Circular 05/00 (see above fn. 13). Circular 02/03 reflected the legislative changes which occurred in the Social Welfare (Miscellaneous Provisions) Act 2003 (as amended).
State, they would not be entitled to any other form of social welfare benefit, expect direct provision.\textsuperscript{32} Relying on advice from the Attorney General, the Department of Social Protection argued that the system of direct provision accommodation and payment of direct provision allowance needed to be placed on some statutory footing.\textsuperscript{33} Attempts to do this, in 2004\textsuperscript{34} and in 2007,\textsuperscript{35} failed due to the objections by the Department of Justice and Equality. Concerns raised by the Department of Social Protection that they had no power to pay direct provision allowance, going so far as to say it was \textit{ultra vires} their powers, were ignored by the Department of Justice and Equality.\textsuperscript{36} When the automatic exclusion of asylum seekers from proving habitual residence was successfully challenged before the Chief Appeals Officer of the Social Welfare Appeals Office in 2009,\textsuperscript{37} legislation was introduced to wholly exclude asylum seekers from ever being considered habitually resident.\textsuperscript{38} Therefore, since 2009, I contend that legislation demands that those in receipt of supplementary welfare allowance (whatever the level of payment/in kind provision) would need to prove habitual residence. Since direct provision allowance is a supplementary welfare payment, the Department of Social Protection have knowingly continued to make this unlawful payment. In 2008,\textsuperscript{39} 2009,\textsuperscript{40} 2010,\textsuperscript{41} and 2011,\textsuperscript{42} the Department of Social Protection as part of its public expenditure budget classified direct provision allowance as a “Supplementary Welfare Payment”. There is no mention of direct provision allowance in any of the government budgetary documents for 2012, 2013 or 2014.\textsuperscript{43}


\textsuperscript{33} Minutes of a meeting between ministerial officials and civil servants from the DJELR, DSFA and DHC discussing habitual residence condition and direct provision, 13 July 2004. Access to the advice of the Attorney General is not permitted under the Freedom of Information Act 1998 (as amended).

\textsuperscript{34} Draft Direct Provision Allowance Circular 01/2004 (28 August 2004), obtained by the author under Freedom of Information legislation.

\textsuperscript{35} Draft section 24 of the Social Welfare Bill 2007, sought to insert Section 202A(1) into the Social Welfare Consolidation Act 2005. This information is gleaned from a document I received entitled ‘Supplementary welfare allowance-direct provision supplement’. No information as regards the date of drafting etc. was included, nor was this document attached to any dated letter. However, from other correspondence, in particular: Letter from D.Watts, Principal Officer (DSFA) to N. Dowling (DJELR), 02 May 2007, on transfer of responsibility for payment of DPA to the DJELR, it appears to have been drafted in 2006.

\textsuperscript{36} Letter from J. Hynes, Secretary General (DSFA) to S. Aylward, Secretary General (DJELR), 05 May 2006 on \textit{ultra vires} actions of DSFA in paying direct provision allowance and requesting DJELR to take responsibility for this payment and Letter from S. Magner (on behalf of S. Aylward, Secretary General) (DJELR) to J. Hynes, Secretary General (DSFA), 30 May 2006 on DJELR’s response to DSFA on DPA.

\textsuperscript{37} \textit{Case ‘A’: Review of the Appeal Officer’s Decision under Section 318 of the Social Welfare Consolidation Act 2005}, Decision of the Chief Appeals Office of the Social Welfare Appeals Tribunal, 12 June 2009. There were several other cases, wherein similar arguments had been made by the Department of Social Protection that the applicants were not habitually resident. I do not have access to these decisions. I would like to express my thanks to Saoirse Brady (FLAC) and Michael Farrell (FLAC) for making an anonymised version of this decision available to me.

\textsuperscript{38} Section 15 of the Social Welfare and Pensions (No.2) Act 2009.


3. Judicial Challenges to Direct Provision in Northern/Ireland

The courts in Ireland have had limited interaction with issues relating to the direct provision system. Mr. Justice Adrian Hardiman in the Supreme Court in January 2003 noted that the State makes available legal advice and representation to asylum applicants, as well as either social welfare payments or direct provision. In 2008, a challenge to the direct provision system was settled out of court. On 09 April 2014, the system of direct provision was challenged on a number of grounds in C.A and T.A. (*a minor*) *v Minister for Justice and Equality*. The grounds for challenge included: (i) a lack of statutory basis for the direct provision system, (ii) a violation of the separation of powers doctrine due to its administrative nature, established by the Government without any primary legislation from the Oireachtas and (iii) violation of human rights under *inter alia* the Constitution and the ECHR Act 2003, due to the level of surveillance and social control of intimate aspects of personal autonomy and family life, including rights of the child. A decision on this challenge is expected shortly.

In Northern Ireland, the system of direct provision was considered in the Northern Ireland High Court in *Judicial Review by ALJ and Others*. The applicants’ claims for refugee status in Ireland on the basis of persecution of non-Sudanese Darfuris in Sudan had been rejected. The applicants subsequently sought subsidiary protection in Ireland in April 2011. However, in July 2011, the applicants entered Northern Ireland and applied for asylum. The UK Border Agency sought to return the applicants to the Republic of Ireland under the Dublin II Regulation. This decision was challenged *inter alia* on the basis that a return to the Republic of Ireland and to the system of direct provision, would subject the applicants to inhuman and degrading treatment and violate their rights to private and family life as protected by the European Charter of Fundamental Rights (EUCFR). Although not “systematically deficient”, Stephens J. stated that Ireland’s low rate of recognition of protection seekers was “disturbing”. Stephens J relying extensively on the Irish Refugee Council’s report *State Sanctioned Child Poverty and Exclusion* accepted the significant hardships asylum seekers in Ireland face.

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44 The only detailed examination was in the case of *Munteanu v Minister for Justice, Equality and Law Reform*, Unreported judgment of the High Court, 30 July 2002, 2002/381JR (Transcript). This case revolved around the obligations of the DJELR in deportation cases, and obligations of asylum seekers to inform the DJELR of any change of address. The High Court held that it was not reasonable for the applicant to assume that the RIA would inform the Department of Justice of her new address.


47 C.A and T.A. (*a minor*) *v Minister for Justice and Equality, Minister for Social Protection, the Attorney General and Ireland* (Record No. 2013/751/JR). For an examination of this case, see Liam Thornton, Direct Provision System Challenged Before the Irish High Court: Day 1, Human Rights in Ireland, 29 April 2014, Liam Thornton, Direct Provision System Challenged Before the Irish High Court: Day 2, Human Rights in Ireland, 30 April 2014, and Liam Thornton, Direct Provision System Challenged in the High Court: Days 3-11, Human Rights in Ireland, 16 May 2014. All these short commentaries are available on www.humanrights.ie (last accessed, 05 November 2014).

48 Other grounds for challenge relate to the right to work for the adult applicant (who is having her subsidiary protection claim processed).

49 *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88 (Stephens J, 14 August 2013). Other issues relating to the fairness and appropriateness of the status determination system for those seeking asylum and/or subsidiary protection in Ireland, will not be discussed, see paras. 53-70.


These hardships included: inability for the adult applicants to seek or enter employment; the low rate of direct provision allowance; the communal nature of accommodation and the hostile environment towards family life. Ultimately, Stephens J was not prepared to find that this constituted a violation of the EUCFR.

However, the UK Border Agency, were statutorily obliged to “promote the welfare of children who are in the United Kingdom”. In paragraphs 102-103 of his decision, Stephens J noted that if the child applicants’ were returned to the Republic of Ireland:

a. Their mother and Child A (who is now over 18) would be unable to work in the Republic of Ireland, but could possibly work in Northern Ireland;
b. The family would be forced to live in a communal direct provision hostel in the Republic of Ireland, however have their own accommodation and budget and can cook their own meals in Northern Ireland.
c. The minor children, B and C, could “develop their own sense of belonging and separate identity” in Northern Ireland, which they could not do in direct provision centres in the Republic of Ireland;
d. There are significant physical and mental health issues amongst asylum seekers in direct provision in Ireland due to the significant amount of time they have to spend in this system.
e. As a matter of UK policy, the children would not be returned to Sudan, but this is not automatically the case in Ireland.

As the decision in ALJ was firmly grounded in interpretation of domestic legal obligations as regards the rights of the migrant child, reading this decision as being transformative would be unwise. Only if the decision in ALJ had been firmly based on an interpretation of the EUCFR, would this decision have had a more profound impact.

Core responses to challenging direct provision, judicially, politically and through public campaigns, have sought to emphasise that if Ireland fully respected domestic, European and international human rights law, the system of direct provision would not be maintained. However, as I explore below, the issue is somewhat complex, and it is not fully clear the extent to which the socio-economic rights of asylum seekers in Ireland could be better protected by strict adherence to international and/or European law.

53 In the Matter of an Application for Judicial Review by ALJ and A, B and C [2013] NIQB 88, para. 84.
54 Section 55, Borders, Immigration and Citizenship Act 2009 and the UK Supreme Court’s interpretation of this duty in ZH(Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166.
55 At paragraph 73, Mr Justice Stephen’s stated, “[a]sylum seekers are legally required to ‘reside and remain’ in the Direct Provision accommodation centre... It is a criminal offence to breach this requirement.” This is not the case and asylum seekers are free to leave direct provision, once they inform the Office of Refugee Applications Commissioner of their new address. However, if they do leave, they are not entitled to the payment of €19.10 per week per adult/€9.60 per week per child. Further on in paragraph 102 (and again in para 73 & 75), Mr Justice Stephen’s states: “[c]hildren of asylum seekers are not entitled to a state education once they are 16.” This too is incorrect and children of asylum seekers or child asylum seekers are entitled to remain in secondary education until completion of their Leaving Certificate.
C. The Socio-Economic Rights of Asylum Seekers: International & European Law

1. International Human Rights Law

The International Bill of Human Rights (which includes the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) recognises the vast array of civil, political, socio-economic, and cultural rights that individuals possess. These rights inhere in all individuals “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”\(^57\) While political rights are expressly limited to citizens,\(^58\) socio-economic rights, including the right to social security, the right to work and to fair conditions of work, the right to an adequate standard of living, including food, water, clothing and shelter and medical care and the right to elementary education, inhere in “everyone”.\(^59\) While there is still controversy regarding the legal-juridical nature of socio-economic rights,\(^60\) the international system of rights protection proclaims the indivisibility of all rights.\(^61\) In the other main thematic human rights treaties on the Elimination of Racial Discrimination, Rights of Women, Children, Migrant Workers and those with Disabilities\(^62\) civil and political rights, along with economic, social and cultural rights were dealt with side by side.

Socio-economic rights are those rights recognised under international law as forming part of the corpus of human rights. These include (but are not limited to) the following:\(^63\)

- The right to social security (art. 22 UDHR, art. 9 ICESCR),
- The right to work and to fair conditions of work (art. 23 UDHR, arts. 6 & 7 ICESCR), The right to rest and leisure (art. 24 UDHR),
- The right to an adequate standard of living, including food, water, clothing and shelter and medical care (art. 25 UDHR, arts. 11 & 12 ICESCR),
- The right to elementary education (art. 26 UDHR, art. 13 ICESCR),
- The family has a right to adequate social protection since it is the “natural and fundamental group unit of society” (art. 10 ICESCR).

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\(^{57}\) Art. 2 UDHR, art. 2(1) ICCPR and art. 2(2) ICESCR.

\(^{58}\) Art. 21 UDHR, Art. 25 ICCPR.

\(^{59}\) Arts. 23-27 UDHR and Arts. 7, 8, 9, 11, 12, 13 & 15 ICESCR. The exception which exists for developing countries restricting economic rights to citizens need not be discussed in the context of this paper.


\(^{63}\) These rights are also protected under various other thematic treaties on Race, Women, Children and Disability, as well as being protected (to a great degree) by the European Social Charter and under the European Charter of Fundamental Rights (EUCFR).
The primary actors and the primary rights bearers and duty holders within the international system of law continues to be states. State parties to international human rights instruments expressly agree to protect the rights provided for in those treaties. However, the interpretation and application of human rights treaties treaty provisions can vary. The Committee on the Rights of the Child has seemingly rejected any attempt to differentiate between the socio-economic rights of children in asylum-like situations. Distinctions in treatment in the fields of health, social welfare and education, between citizen children and non-national children have been frowned upon. In relation to the right of a child to an adequate standard of living, the Committee has expressed concern where vulnerable children were living in situations where the household income remains significantly lower than the national mean. Asylum seeking children, be they in the care of their parents, or unaccompanied, should also have full access to a range of services and asylum seeking families should not be discriminated against in provision of basic welfare entitlements that could affect the children in that family. The Committee on Economic, Social and Cultural Rights have stated that differences in treatment in the enjoyment of socio-economic rights may be justified where these differences are reasonable, objective and proportionate. It is not fully clear whether nationality or asylum status in and of itself would be reasonable, objective and/or proportionate means of restricting access to socio-economic rights. In the Committee’s General Comment on Social Security, it seems to be implicitly recognised that there can be differences in the enjoyment of social security between different groups within society. The Committee has stated that social security systems should not infringe on the right to an adequate standard of living for immigrants, including asylum seekers, and has raised concerns about the living conditions of asylum seekers in reception centres and their exposure to racial discrimination. The most recent examination of the UK’s record on the economic, social and cultural rights of asylum seekers and those seeking protection is examined in one paragraph.

64 See generally, Article 18, Article 19 and Article 31(2) of the Vienna Convention on the Law of Treaties, U.N.T.S., Vol. 1155, 331, Article 27. The Vienna Convention of the Law of Treaties (VCLT) is seen as, in the main, being declaratory of existing customary international law. The ICJ sees such a statement as uncontroversial and has declared it customary in Territorial Dispute (Libya v Chad) (1994) ICJ Reports, para. 41 and Oil Platforms (Iran v United States) (1996) ICJ Reports, para. 23.


67 Concluding Observations, CRC, Ireland, UN Doc. CRC/C/IRL/CO/2 (September 2006), para. 56.

68 Ibid. para. 64. See also, Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/GBR/CO/4 (2008), paras 70-71.

69 Concluding Observations, CRC, United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/121 (2002) 23, para. 142(b); Concluding Observations, CRC, Canada, UN Doc. CRC/C/15/Add.215 (2003), para 47(e).


72 Ibid., see in particular, para. 9, para. 24, para. 37 and para. 64.


76 Concluding Observations, ICESCR, United Kingdom, UN Doc. E/C.12/GBR/CO/5 at para. 27 (2009).
While the Committee “encourages” the UK to allow asylum seekers to access the labour market, there is an implicit acceptance that there can be differentiation in mode of delivery of social services for asylum seekers. While welcoming the introduction of additional voucher support to particularly vulnerable asylum-seekers,\(^7\) there was no discussion of the fact that asylum seekers socio-economic rights are markedly less than those of UK citizens and other legal residents. However, when discussing Australia’s report, the Committee expresses concern that asylum seekers and those seeking protection do not enjoy universal coverage for social security payments (including non-contributory payments).\(^7\)

In 2011, commenting on Germany’s and the Russian Federation’s reports on socio-economic rights, the Committee expressed “deep concern” for the situation of those seeking asylum or protection and their lack of access to adequate healthcare and social security.\(^7\) The Committee stated that asylum seekers must enjoy “equal treatment in access to” the labour market, healthcare and non-contributory social security benefits.\(^7\) This confusion surrounding applicability of seemingly universal socio-economic rights for asylum seekers is mirrored by other UN human rights treaty bodies.\(^7\) The inability of human rights instruments to fully pierce the veil of State sovereignty within the field of socio-economic rights continues to have a profound effect for those seeking asylum.

2. European Human Rights Law

In the last decade, the Council of Europe\(^8\) and the European Union\(^9\) have played a key role in developing a pan-European normative framework as regards the protection of socio-economic rights of asylum seekers in Europe. Legislative action by the European Union,\(^8\) coupled with judicial interpretation of cases relating to the socio-economic rights of asylum seekers by the Court of Justice of the European Union\(^9\) and the European Court of Human Rights,\(^9\) has seen asylum seekers recognised as rights bearers in accessing accommodation, education and a basic standard of living. This came about due to the presence of EU law on issues relating to ‘reception conditions’ of asylum seekers.

\(^7\) Ibid. The Committee goes on to express concerns relating to “the low level of support and difficult access to health care for rejected asylum-seekers.” The social rights of rejected asylum seekers are outside the scope of this thesis.

\(^7\) Ibid. The Committee expresses concern that asylum seekers and those seeking protection do not enjoy universal coverage for social security payments (including non-contributory payments).


\(^8\) See in particular, Joined cases C-411/10 and C-493/10, N.S. v Secretary of State for the Home Department, M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [2012] 2 Common Market Law Reports 9 and Case C-79/13, Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others, judgement of the CJEU, 24 February 2014.

\(^9\) The seminal decision on the socio-economic rights for asylum seekers is Application no. 30696/09, M.S.S v Belgium and Greece, judgement of the ECtHR, 21 January 2012.
The Reception Conditions Directive (RCD)\(^{87}\) and the successor Recast Reception Directive (RRD)\(^{88}\) are unique, in that a very basic standard of living has been set down from those considered outside the European polity. It has been estimated that the total cost across 25 member states (excluding Ireland and Denmark) for providing reception conditions to asylum seekers (and in some cases those seeking subsidiary protection as well as third country non asylum applicants) is €1.5 billion.\(^{89}\) Ireland is not bound by the Reception Conditions Directive or the Re-Cast Reception Directive. As permitted by the Lisbon Treaty, Ireland has an opt-in clause to measures relating to inter alia EU immigration and asylum law. The core reason that Ireland did not choose to opt-in to these reception directives, is due to the (limited) recognition of the right to work.\(^{90}\)

In the EU’s recent Recast Reception Directive (RRD),\(^{91}\) two recitals of note emerged that should cause us to reflect on the interaction and interplay between international and European systems of human rights protection and EU law.

**Recital 9 of the RRD states:**

“In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively.”

**Recital 10 of the RRD states:**

“With respect to the treatment of people falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party.”

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90 Mr. Alan Shatter TD, Minister for Justice and Equality, Written Answers 593 and 594: EU Directives, 30 April 2014.

Throughout, the concept of human rights, along with the concept of dignity\textsuperscript{92} or dignified treatment,\textsuperscript{93} is referred to in the Directive. However, it must also be noted that at no stage is any reference made to the concept of ‘socio-economic rights’ for those seeking protection in Europe.

Some of the obligations under the Reception Directives include:

- Recognition of a dignified standard of living,\textsuperscript{94}
- Highly circumscribed freedom of movement rights,\textsuperscript{95}
- The right to be provided with some form of shelter,\textsuperscript{96}
- Material reception conditions,\textsuperscript{97}
- A circumscribed right to education for children under 18,\textsuperscript{98}
- Protection of particularly vulnerable asylum seekers,\textsuperscript{99}
- A limited right to work.\textsuperscript{100}

The socio-economic rights highlighted above, should not be seen as a wholly rights based approach towards the socio-economic rights of asylum seekers\textsuperscript{101} or without practical problems of implementation.\textsuperscript{102}

\textsuperscript{92} The concept of dignity is mentioned as regards detention of international protection applicants (see Recital (18) RRD), something which is beyond the scope of this paper and in Recital (35). In Recital (35), it is stated that the RRD seeks to respect the concept of human dignity in light of cited provisions of the Charter of Fundamental Rights of the European Union (EUCFR) (2010) O.J. C. 83/389; including: human dignity (art. 1); prohibition of torture, inhuman and degrading treatment (art. 4); right to liberty and security (art. 6); respect for family life (art. 7); right to asylum (art. 18); non-discrimination (art. 21); rights of the child (art. 24) and right to an effective remedy and fair trial (art. 47). There is no mention or reference to Chapter Four, Arts 27-38 EUCFR. The rights protected under this chapter of the EUCFR include \textit{inter alia}, the right of workers to information and consultation from employers, right to collective action, fair and just working conditions, protection from exploitation, the Union “recognises and respects the entitlement” to social security and social assistance if needed, right to access health care and also to environmental and consumer protection.

\textsuperscript{93} See Recital (11) and Recital (25) where a ‘dignified standard of living’ is mentioned. The only appearance of this phrase in the core text of the RRD is in Article 20(S) RRD, where it is stated that decisions for withdrawal or reduction of material reception conditions, Member States ‘shall under all circumstances…ensure a dignified standard of living.”

\textsuperscript{94} Preamble recital 7 RCD and Premable recital 9 and 10 RRD.

\textsuperscript{95} Article 7 RCD/Article 7 RRD.

\textsuperscript{96} Article 14 RCD/ Article 18 RRD.

\textsuperscript{97} Article 13 RCD/Article 17 & 18 RRD.

\textsuperscript{98} Article 10 RCD/Article 14 RRD. In relation to the possibility of separate education for children of asylees (or possibly asylum seekers themselves), Chalmers comments that educational provision “is only on terms of 1950s Mississippi”, Chalmers, D. (editorial) “Constitutional treaties and human dignity” (2003) 28(2) European Law Review 147.

\textsuperscript{99} See Article 16-19 RCD and Article 21-25 RRD.

\textsuperscript{100} Under the RCD, a right to work was granted (Article 11(2) RCD) if an asylum applicant’s first instance decision was not rendered within one year. This is to be reduced to 9 months under Article 15 RRD. Priority can still be given to EU citizens, EEA nationals and ‘legally resident’ third country nationals.


In the drafting of the Recast Reception Directive (as with the Reception Conditions Directive (2003))\textsuperscript{103} previously, there was institutional push back to adopting a more rights orientated system of reception for asylum seekers.\textsuperscript{104} As is evidenced from the progression of the proposals from 2008 to 2011, concerns about abuse of the asylum and protection system led to significant downgrading of core elements of socio-economic rights protection within the RRD. In this regard, the European Parliament and Council of the European Union,\textsuperscript{105} were central in arguing for a less rights orientated and more punitive approach to material reception conditions for asylum seekers.

The precise impact of the obligations upon States due to the EU’s Reception Conditions Directive has been considered in a number of cases before the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).\textsuperscript{106} In \textit{M.S.S v Belgium and Greece},\textsuperscript{107} M.S.S lived in extreme poverty while awaiting the outcome of his asylum claim, which had been lodged in June 2009 and still had not been decided upon on the date of the ECtHR judgment.\textsuperscript{108} No information on accommodation or subsistence was provided to M.S.S.\textsuperscript{109} The applicant was living in a park with other Afghan asylum seekers, did not have any sanitation or opportunities to maintain his appearance or hygiene, and relied on churches and other individuals and organisations for food.\textsuperscript{110} The conditions of his stay in Greece, the applicant argued, violated inter alia his rights under Article 3 ECHR, as this amounted to inhuman and degrading treatment. Greece argued that the applicant had a ‘pink card’ which enabled him to work and also to obtain medical assistance free of charge. Greece stated that had the applicant remained in the country, rather than going to Belgium (from which he was later returned), he would have had ample resources to rent accommodation and cater for his needs.\textsuperscript{111} Greece further argued that to find that the applicant’s Article 3 ECHR rights were violated by a failure to provide for material reception conditions,


\textsuperscript{105} See above.


\textsuperscript{107} Application no. 30696/09, \textit{M.S.S v Belgium and Greece}, judgement of the ECtHR, 21 January 2011.

\textsuperscript{108} \textit{Ibid.}, para. 235.

\textsuperscript{109} \textit{Ibid.}, para. 236.

\textsuperscript{110} \textit{Ibid.}, para. 238.

\textsuperscript{111} \textit{Ibid.}, paras. 240-243.
would place an undue burden on the state in the midst of its worst ever financial crisis.\textsuperscript{112}

The ECtHR began by emphasising that Article 3 ECHR does not provide the right to a home\textsuperscript{113} or the right to a certain standard of living.\textsuperscript{114} The ECtHR stated that the obligation to provide accommodation and decent material conditions to impoverished asylum seekers is due to “positive law”, namely the EU’s Reception Condition’s Directive.\textsuperscript{115} The ECtHR also noted their decision in \textit{Budina v Russia},\textsuperscript{116} where it was stated that in a situation of severe deprivation, a contracting state may have obligations under Article 3 ECHR. The ECtHR emphasised that asylum seekers were a particularly vulnerable group\textsuperscript{117} and while the ‘pink card’ gave the applicant the opportunity to work, this was not realisable due to his poor command of Greek, the administrative hurdles in being registered as an employee, and the general unfavourable economic climate in Greece.\textsuperscript{118} It is important to note that the ECtHR only found such a violation due to Greece’s legal obligations under the RCD. Judge Roazakis, in a concurring opinion, stated that the RCD ‘weighed heavily’ on the court.\textsuperscript{119}

In \textit{N.S. and M.E.} the Court of Justice of the European Union,\textsuperscript{120} in essence adopted the approach of the ECtHR in its \textit{M.S.S.} decision. Here the Court noted that the asylum applicants could not be returned to Greece from Britain and Ireland respectively. The CJEU held:\textsuperscript{121}

“...to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’... where they cannot be unaware that systemic deficiencies... 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...”

\textsuperscript{112} \textit{Ibid.}, para. 243.


\textsuperscript{114} See, \textit{Muslim v Turkey} (2006) 42 EHRR 16.

\textsuperscript{115} \textit{Supra} fn. 85 at para. 250.

\textsuperscript{116} Application No. 45603/05, \textit{Budina v Russia}, Unreported judgment of the ECtHR, 18 June 2009.

\textsuperscript{117} \textit{Supra}. fn. 85 at para. 251, see also Application No. 15766/03, \textit{Orsus v Croatia}, Unreported judgement of the ECtHR, 16 March 2010 at para. 147.

\textsuperscript{118} \textit{Ibid.}, para. 261.

\textsuperscript{119} Individual concurring opinion of Judge Roazakis, \textit{supra}. fn. 85. There are no paragraph numbers to which direct reference can be made. In November 2014, the European Court of Human Rights held that Switzerland would be in breach of Article 3 ECHR, if individual assurances were not provided for (and followed) by Italy, as regards reception conditions for a number of asylum seekers. See also, App. no. 29217/12, \textit{Tarakhel v Switzerland}, decision of the Grand Chamber of the ECtHR, 04 November 2014.

\textsuperscript{120} Joined cases C-411/10 \textit{NS v Secretary of State for the Home Department et. al.} and C-493/10 \textit{ME v ORAC et al.}, judgment of the CJEU, 21 December 2011.

\textsuperscript{121} \textit{Ibid.}, para. 94.
In Saciri, the CJEU held that the level of material reception conditions available to asylum seekers, where an EU Member State decides to provide financial allowances in the form of vouchers or monetary payment, must:

“ensure that the total amount of the financial allowances covering the material reception conditions is sufficient to ensure a dignified standard of living and adequate for the health of applicants and capable of ensuring their subsistence, enabling them in particular to find housing, having regard, if necessary, to the preservation of the interests of persons having specific needs...”

In both international and European systems for the protection of rights of asylum seekers, enforcing absolute destitution on asylum seekers is prohibited. However, this does not equate with provision of a similar level of services. While Ireland is bound by its international human rights treaty obligations, it is not bound by the EU’s Reception Condition’s Directive or Recast Reception Directive. The severity of the conditions outlined in the cases from the ECtHR and CJEU as regards the treatment of asylum seekers in Greece, has not been reached within direct provision in Ireland. However, the decision of the Northern Ireland High Court (discussed above) that the system of direct provision is incompatible with the protection of the welfare of the child in a family seeking asylum, shows the potential of human rights based approaches to judicial decision having some impact. Overall, international and European human rights law is a creature of state agreement and state acceptance of decisions or comments made on domestic human rights regimes’. Decisions of the ECTHR and the CJEU are not as easily set aside or simply ignored by States as comments from various UN human rights treaty bodies can be.

122 Case C-79/13, Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others, judgement of the CJEU, 24 February 2014.

123 Case C-79/13, Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and others, judgement of the CJEU, 24 February 2014, para 46.
D. The Rights of Others: Asylum, Direct Provision & Ireland

1. The Limits of Rights Discourse?

In 1992, at the very start of the creation of the EU asylum legal system, Weiler stated that:

“[t]he treatment of aliens...has become a defining challenge to an important aspect of the moral identity of the emerging European polity and the process of European integration.”

Some ten years later in 2000, Colin Harvey noted that

“[t]he picture emerging from the EU is grim. The asylum seeker is routinely constructed as a threat to the area of freedom, security and justice.”

Honig points to the increasing hysterical reaction of the citizenry in Western Europe to provision of socio-economic rights to aliens. She points out the contradiction that, at a time when (most) European welfare states contracted, foreigners were depicted as wanting to “...come ‘here’ to take ‘our’ welfare...”

While human rights seek to protect the weak, marginalised and vulnerable, there is often a presupposition amongst human rights scholars that asylum seekers and those seeking protection automatically have the same socio-economic rights as citizens and others. Cosmopolitan conceptions of rights protection can either argue for recognition of rights, or seek to re-orientate current understandings of human rights, while seeking inclusive legal protections for all, regardless of citizenship or residency status within a nation. Cosmopolitanism has received greater attention in recent years due to the growing cultural, economic and legal ties which exist between states within a globalised world. The restrictions on the right to work, freedom of movement, privacy and segregation of asylum and protection seekers from the host community all offend against notions of cosmopolitanism. National systems relating to reception conditions for asylum and protection seekers, utilize concepts of national belonging to justify limiting

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129 Cosmopolitanism has a number of diverse other meanings, from love of fellow man to following certain moral ideals of humanity, decency, honesty and fair dealings, see Waldron, J. “Cosmopolitan Norms” in Benhabib, S. et al. Another Cosmopolitanism (Oxford: OUP, 2006) at pp 83-85.
enjoyment of economic and social rights. While Benhabib argues that human rights law refuses to permit any exceptions to norms of human rights, this fails to recognise the cautious approach adopted by many of the human rights treaty bodies towards full equality in the enjoyment of rights for those seeking asylum or protection. The UDHR, Benhabib argues, is “the most comprehensive international law document in the world.” However, in reality, it does not deal substantively with issues such as differentiation in rights protection for those whose legal status in a state is unclear. Benhabib’s analysis of international human rights law is still useful, in that it holds a mirror to the supposed standards of international human rights law, and contrasts this to state practice and the approach of international human rights bodies. It is clear that an individual’s citizenship, and legal and settled residence status within a state, continues to have a profound effect on the enjoyment of socio-economic rights and the legal protection of such rights.

While there is much merit in the cosmopolitan view of international human rights law, it does not reflect the reality, recognised by treaty bodies and the UNHCR, that differing standards of reception conditions for asylum and protection seekers may not necessarily violate international human rights standards. The Committee on the Rights of the Child has been the only treaty body to rule out any distinctions in the enjoyment of rights for asylum and protection seekers. The approach of the Committee on Economic, Social and Cultural Rights appears to be shifting as regards equal and non-discriminatory enjoyment of rights for those seeking asylum and protection. The various other human rights treaty bodies and UNHCR, while accepting the indivisibility of rights and also seeking to ensure asylum and protection seekers are recognised as rights bearers, nevertheless have accepted that there may be differences in treatment and in the socio-economic rights enjoyed by asylum seekers. This is evidenced by the acceptance of measures that separate asylum and protection seekers from host communities, and where asylum and protection seekers do not enjoy the same standard of living compared to others who are dependent on social assistance within states. It is not always clear when differences in levels of socio-economic rights protection for asylum seekers are legitimate, reasonable and proportionate. It might be accepted that asylum seekers may be subject to a separate welfare or social security regime upon arrival in a state. However, over time, such separation becomes more difficult to justify, in particular, when there are significant differences in the mode of delivery and monetary level of social supports, despite similarities in terms of levels of need. At present, the requirements of international human rights law are not clear.

The ‘culture of suspicion’ that surrounds asylum seekers has existed for many years, and its development can be seen in the debates surrounding the 1951 Refugee Convention. However, this culture of suspicion has substantially eased within international human rights law, which is evidenced by increased engagement by the treaty bodies on issues which affect asylum seekers and those seeking

other forms of protection. However, as outlined above, problems still remain. The protections afforded to asylum seekers provide a test case for the cosmopolitan commitments of international human rights law.\(^{137}\) There remains a lack of clarity as to the precise scope and content of socio-economic rights and entitlements for asylum seekers under international human rights law. This, it is argued, has had knock on effects, in European human rights law and in the minimum standards in reception conditions specified for asylum seekers within the European Union. Within the domestic sphere, with particular relevance to Ireland, the lack of clarity has resulted in separated systems of support at lower monetary levels for asylum seekers and exclusion from mainstream social welfare systems. The extent, to which the limited protections afforded by international human rights law to asylum and protection seekers, has contributed to this position, should not be under-emphasised.

2. The Limits & Potential of Human Rights in Challenging Direct Provision in Ireland

Since its inception in 2000, asylum seekers have challenged the system of direct provision through protest highlighting the inherent inhumanity of this system.\(^ {138}\) Irish human rights organisations\(^ {139}\) have continuously pointed out the significant legal and social problems with placing asylum seekers in direct provision.\(^ {140}\) The Special Rapporteur for Children,\(^ {141}\) the former Ombudsman, Emily O’Reilly,\(^ {142}\) and former Supreme Court judge, Catherine McGuinness\(^ {143}\) have all highlighted significant concerns with the system of direct provision.\(^ {144}\) Despite these concerns, and the concerns raised in the Oireachtas,\(^ {145}\) the Department of Justice and Equality had, until July 2014, remained steadfast in support of direct provision.
provision. In July 2014, the UN Human Rights Committee stated that Ireland must “ensure that the duration of stay in Direct Provision centres is as short as possible.”

In October 2014, the Minister for State at the Department of Justice and Equality, Mr Aodhán Ó Riordáin TD appointed a working group to “examine improvements to the Protection process and the Direct Provision system”. The terms of reference for this Working Group are narrow. Firstly, the working group is tasked with recommending improvements in the processing of protection applications. That this has been included is interesting of itself, given that Minister Ó Riordáin has indicated that a new Protection Bill will be introduced in January 2015, before the working group’s final report. As regards direct provision, the working group is tasked with making recommendations for

“showing greater respect for the dignity of persons in the system and improving their quality of life by enhancing the support and services currently available...[ensuring] the overall cost of the protection system to the taxpayer is reduced or remains within or close to current levels and that the existing border controls and immigration procedures are not compromised.”

While there has been acceptance, in some government circles, that direct provision is “inhumane”, it has also been made very clear that whatever the outcome of the Working Group’s deliberations, direct provision is not going to be abolished. Therefore, there may be little transformative impact on the socio-economic rights of asylum seekers in Ireland. The lack of clarity from most international human rights treaty bodies on what precisely constitutes proportionate, objective and reasonable limitations on the social and economic rights of asylum seekers has contributed to domestic systems, like Ireland, offering significantly lesser protection of socio-economic rights for asylum seekers. The solution to this lies neither in law nor in strategic litigation.

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147 Concluding Observations, ICCPR, Ireland, UN Doc. ICCPR/C/IRL/CO/4 (July 24, 2014), para.19. See also, ICCPR: Human Rights Committee, List of Issues in Relation to the Fourth Periodic Report: Ireland, UN Doc. CCPR/C/IRL/Q/4 (November 22, 2013). See also, Ireland, Replies by Ireland to List of Issues, UN Doc. CCPR/C/IRL/Q/4/Add.1 (February 27, 2014). See also, L. Thornton, The System of Direct Provision & Ireland’s Obligations under the UN International Covenant on Civil & Political Rights (ICCPR), (Dublin: Seanad Éireann Public Consultation Committee, 2014) and Seanad Éireann Public Consultation Committee, Observations and Recommendations to the UN Human Rights Committee (June 2014).

148 The UN Human Rights Committee also stated that an independent complaints mechanism must be introduced, see further, Concluding Observations, ICCPR, Ireland, UN Doc. ICCPR/C/IRL/CO/4 (July 24, 2014), para.19.


150 The working group comprises of representatives of civil society organisations, academics and various appointees from Government departments. There is one member who previously resided in direct provision, with no current members of the working group resident in direct provision accommodation centres.

151 Speech by Minister of State Aodhán Ó Riordáin T.D, Private Members Business, Counter Motion on Direct Provision, 1st October 2014, available at www.merrionstreet.ie (last accessed, 03 November 2014).

152 Ibid.

While these are important in achieving broader aims and seeking to use law to promote human rights; only a fundamental re-evaluation of society’s approach to asylum seekers in Ireland will result in the recognition of, what Arendt terms, “the right to have rights.” To date law and administration has been used to justify exclusion, separation and distancing of asylum seekers from Irish society and placing people in the direct provision system. Until there is more fundamental societal introspection, it appears that Irish society is doomed to repeat the mistakes of the past.  

Ireland’s economic, social and cultural rights obligations and budgetary policy

Pia Janning

Email: pjanning@amnesty.ie; piajanning@hotmail.com

Abstract:

Bringing ESC Rights Home: applying Ireland’s economic, social and cultural rights obligations to budgetary policy, is the latest in a series of three publications by Amnesty International (AI) Ireland, aimed at strengthening the protection of economic, social and cultural (ESC) rights in Ireland. The paper focusses on the linkages between a state’s budgetary policy and its human rights - in particular ESC rights - obligations. It outlines how human rights based budgeting can help achieve efficient, outcomes-focussed use of limited resources, and provides a framework to helps states deliver on elements of their ESC rights obligations such as ‘minimum core’ obligations and ‘progressive realisation’ while taking into account equality and non-discrimination. This article lays out some of the key points raised in AI Ireland’s paper, together with the main conclusions and recommendations.

Keywords:

ESC rights, budgetary policy, participation, transparency, accountability.
Introduction

Amnesty International (AI) Ireland recently published the third in its series of three papers entitled *Bringing ESC Rights Home*. The papers were published as part of AI Ireland’s programme of work dedicated to strengthening the protection of economic, social and cultural (ESC) rights in Ireland.

The first paper considered the case for making ESC rights legally enforceable in Ireland.\(^1\) The second paper laid out the arguments in favour of Ireland ratifying the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP ICESCR), which provides an avenue for complaints of alleged ESC rights violations to be made directly to the UN.\(^2\) The third and final paper in the series entitled, *Bringing ESC Rights Home: Applying Ireland’s economic, social and cultural rights obligations to budgetary policy*, focuses on the linkages between a state’s budgetary policy and its human rights - in particular ESC rights - obligations. This article lays out some of the key points raised in AI Ireland’s final paper, together with the main conclusions and recommendations.

As is noted in the AI Ireland paper and highlighted by a range of experts and organisations,\(^3\) the global economic and financial crises, and the austerity measures adopted by numerous governments in response, have affected the enjoyment of many ESC rights. However, human rights have largely been excluded from the debate on these crises.\(^4\) Moreover, it has been observed that “human rights have not been integrated in any meaningful way to recovery efforts”\(^5\) by states.

With the recent publication of Budget 2015 in October, a discussion on what human rights based budgetary policy looks like according to international human rights standards is timely.

The three main obligations of the State under international human rights law, as outlined in the AI Ireland paper, are characterised as the obligation to respect, protect and fulfil human rights.\(^6\) ESC rights are given specific protection in the International Covenant on Economic, Social and Cultural Rights (ICESCR). This is the main UN treaty which protects these rights. Ireland ratified the ICESCR in 1989, thereby agreeing to be legally bound by its provisions.

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Obligations specific to the ICESCR deriving from Article 2 and further elaborated by the UN Committee on Economic, Social and Cultural Rights (CESCR) through its statements and General Comments, are: the obligation to progressively realise ESC rights subject to the state’s maximum available resources; the immediate obligations of non-discrimination, taking steps to progressively achieve the full realisation of the rights in the ICESCR and the minimum core obligation to ensure minimum essential levels of the rights in the ICESCR; and the obligation not to adopt any retrogressive measures in the enjoyment of the rights in the ICESCR. What these obligations mean in practice are considered in detail in AI Ireland’s paper.⁷

In this article I will now briefly focus on three other interlinked human rights principles which the State should observe. These are participation, transparency and accountability, each of which are fundamental in the context of budgetary policy and processes.

**Participation**

The principle of participation requires states to ensure that rights holders are able to express their views and concerns and to influence decision making that affects them.⁸ States have the duty to ensure that those affected by a state’s fiscal and economic policy are able to participate in a meaningful way. As the UN Human Rights Council’s then Independent Expert on the Question of Human Rights and Extreme Poverty observed:

“In order to satisfy their human rights obligations and thus ensure participation and transparency in policy formulation, States should construct permanent structures and pathways for consultation with individuals, civil society, community organisations, grassroots movements and the academic community. They should also take measures to invest in the capacity of these groups to contribute to and participate in policy formulation.”⁹

**Transparency**

The principle of transparency requires that the State devises its policies in a transparent manner. This includes the duty to ensure that those affected by these policies can exercise their right to accessible, relevant and timely information.¹⁰ The Government must justify decisions according to human rights standards concerning the allocation of resources and in particular policy approaches that affect the most vulnerable.

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¹⁰ Footnote 50 AI paper budgets.
States also have an obligation to ensure transparency and access to information under their civil and political rights obligations. For example, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to freedom of expression which includes the freedom to seek, receive and impart information. Article 25 of the ICCPR protects the right to take part in the conduct of public affairs. The right to accessible, relevant and timely information about policies affecting a person’s life is also protected under the European Convention on Human Rights (ECHR).

Regarding the right to take part in the conduct of public affairs, the Commissioner for Human Rights of the Council of Europe has highlighted that:

“The right to be informed about and participate in public affairs implies a duty on states to conduct their economic and social policy in transparent ways and allow for public participation in its design, implementation and monitoring... Timely access to such key information as budget and tax policies would better enable citizen groups, parliamentary commissions, national human rights structures and courts to monitor and provide oversight of crises responses”.

**Accountability**

The State must establish appropriate means of ensuring accountability and for providing remedies and redress. This includes government accountability but also accountability of third party actors (the obligation to protect), such as the banking sector.

As is stressed in the AI Ireland paper, accountability is not just a means through which we react to or repair failure or wrongdoing. It is a vital tool for those charged with making complex and difficult decisions; one that can guide and strengthen decision-making and the development of law, policy and practice. Real accountability requires for instance that those in positions of authority who make decisions which impact significantly on the lives of others should consult with and be accountable to those same people in making such decisions and implementing them. Allowing for open and public debate about budgeting priorities as well as meaningful participation by civil society in the budgetary process is an important way of strengthening transparency and accountability. In this way accountability becomes a tool to inform good decision-making and ensure that policy decisions serve the people they most affect.

**To what extent are these principles reflected in the State’s budgetary policy and process?**

In its Programme for Government 2011 the Government stated that it would “open up the Budget process to the full glare of public scrutiny in a way that restores confidence and stability by exposing and cutting failing programmes and pork barrel politics”.

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Despite this commitment, while the Department of Finance accepts pre-budget submissions,\(^\text{14}\) the Department of Social Protection is the only Government department which regularly consults civil society as part of its own budgetary considerations, through a Pre-Budget Forum.\(^\text{15}\) It is also the only department that publishes social impact assessments.\(^\text{16}\) It is unclear what weight is given to pre-budget submissions made to these departments, how they influence general budget decisions and regarding the Department of Social Protection, whether or not important decisions have already been made by the time the Pre-Budget Forum takes place.

A recent welcome development is the opportunity for civil society organisations to make presentations to the Joint Oireachtas Committee on Finance, Public Expenditure and Reform.\(^\text{17}\) The Committee publishes the outcome of the consultation but it is unclear what weight is given to its recommendations in the executive government’s budgetary decisions.\(^\text{18}\) The Oireachtas Committee on Health and Children and the Committee on Education and Social Protection also conduct pre-budget hearings. Again it is unclear what weight is placed on the submissions made at these hearings in budgetary decisions.

Another issue which impacts upon the transparency of the budgetary process is the role of the Economic Management Council (EMC), a small sub-group of the Cabinet made up of the Taoiseach, Tánaiste, Minister for Finance and Minister for Public Expenditure and Reform. The EMC has been criticised by opposition politicians\(^\text{19}\) and Government Ministers\(^\text{20}\) on the ground that it makes important decisions on the budget without the input of Cabinet or the Oireachtas more generally.\(^\text{21}\)

While some progress has been made by the current Government to facilitate a more transparent and participatory budgetary process, there is much room and need for improvement.

The Free Legal Advice Centres (FLAC) which contributed to the AI Ireland paper, noted that its consultations with civil society organisations showed that many feel that the lack of transparency surrounding the budgetary process means that it is difficult for those affected by budget cuts, to engage with decision-


\(^{21}\) Article 17.2 of the Constitution which prevents the Dáil from passing a vote or resolution or enacting any law, involving the appropriation of revenue or other public monies unless this has been recommended to the Dáil by a message from the Government, signed by the Taoiseach. For criticism of this see for example Kildare street website at: [https://www.kildarestreet.com/debates/?id=2014-04-16a.397&s=62budget+reform%22](https://www.kildarestreet.com/debates/?id=2014-04-16a.397&s=62budget+reform%22) accessed 3 September 2014 and the Oireachtas website at: [http://www.oireachtas.ie/documents/bills28/bills/2014/3314/b3314df.pdf](http://www.oireachtas.ie/documents/bills28/bills/2014/3314/b3314df.pdf) accessed 3 September.
makers and to highlight potential oversights or long term negative consequences. In its contribution to the AI Ireland paper, FLAC observed that:

“Using the human rights and equality approach to budgeting would provide the Government with a clearer picture enabling all involved to see who is disproportionately impacted by particular policy measures, and who is experiencing inequality or violations of their human rights as a result of specific measures”.

How can the Government move towards a human rights based budgetary process?

At both an international and regional level Ireland is legally bound by treaties protecting ESC rights. The ESC rights obligations of the State do not diminish in times of economic challenge. If anything, ensuring adherence to ESC rights becomes all the more important when difficult decisions must be made about the allocation of resources.

However, there is little evidence that ESC rights obligations of the State have guided policy making in the wake of the economic crisis. Such obligations include: evidence based, transparent, non-discriminatory and participatory decisions making, using the maximum amount of resources available to the State, and ensuring accountability. The State should also refrain from adopting any measures that lead to retrogression in the enjoyment of ESC rights. If such retrogressive measures are unavoidable then the state must show that these measures can be fully justified.

The ESC rights obligations of the State should not be seen as a burden but rather as providing valuable guidance for the Government in making budgetary decisions. A rights based approach to budgeting can help to safeguard the rights of the most vulnerable and to achieve fairer, more equal outcomes for all.

A number of states have taken steps at a national or provincial level towards human rights and/or equality budgeting. This includes, but is not limited to Scotland, Canada, the US, Brazil and South Africa. These examples can provide guidance in considering how human rights based approach to budgeting could be adopted in Ireland.

22 Amnesty International Ireland, *Bringing ESC Rights Home: Applying Ireland’s economic, social and cultural rights obligations to budgetary policy* (Amnesty International Ireland, 2014) p. 34.

23 Amnesty International Ireland, *Bringing ESC Rights Home: Applying Ireland’s economic, social and cultural rights obligations to budgetary policy* (Amnesty International Ireland, 2014) p. 34.

24 At an international level see the International Covenant on Economic, Social and Cultural Rights. See also the Convention on the Rights of the Child. At a regional level see The European Social Charter (Revised).


The Scottish example shows how governments and civil society can work together in the budgetary process. A yearlong advisory group (the group has the opportunity to input throughout the full course of the budget cycle), the Equality Budget Advisory Group (EBAG), made up of members of the public and representatives of organisations are given a real chance to directly input into how the budget impacts on people.27

Human rights budgeting can build on equality budgeting which uses equality and non-discrimination or specific equality schema as the main framework to analyse budget decisions. Human rights budgeting provide a framework that takes into account equality and non-discrimination but also other elements of ESC rights obligations such as minimum core obligations, progressive realisation, availability, accessibility, acceptability and quality of goods and services related to human rights and so on.

AI Ireland makes a number of recommendations in its paper, directed at a range of actors, which can help to achieve a human rights based approach to budgeting and more generally to strengthen the overall protection of ESC rights in Ireland. These recommendations include but are not limited to:

- The Government should ensure access to information on budget and fiscal policy, promoting fiscal literacy among the population and ensuring a full understanding of the budgetary process.
- The Government should create avenues for increased involvement by civil society in the budgetary process possibly taking the form of an advisory group similar to that in Scotland. Members of the public and representatives of organisations could participate in such an advisory group with a genuine opportunity to directly input into how the budget impacts on marginalised people.
- Proposed budgetary measures should be tested against the provisions of the ICESCR (along with Ireland’s other international human rights obligations). This includes ensuring that measures identified are non-discriminatory and do not disproportionately impact the most vulnerable.
- The Government should ensure and demonstrate that in the design and implementation of budgetary measures, it is actually progressively realising ESC rights in terms of measureable and meaningful outcomes.
- All Government departments – particularly when budget cuts and/or tax increases are proposed - should carry out pre-budget impact assessments from a human rights and equality perspective. Impact assessments should be made available to the Oireachtas, the general public and the EMC to inform budgets and to ensure that the most vulnerable in society are affected least adversely by the budgetary process.
- Each Government department should hold a pre-budget forum similar to that which the Department of Social Protection organises for civil society. Recommendations from the forum should be considered for incorporation in the budgetary process and those involved in the consultation should be able to identify how recommendations were considered.
- Government departments should ensure that state resources are effectively used by clearly identifying outcomes to be achieved from expenditure, tracking expenditure from departmental

27 The Equality Budget Advisory Group (EBAG)’s remit is to help shape the Government’s equality approach to the Budget. The Government is working with EBAG to:
- provide advice on considering the equality implications of budgetary decisions across all policy areas
- contribute to mapping the pathway between evidence, policy and spend
- improve the presentation of equality information in the Scottish budget documents
- contribute to improved commitment to, and awareness of, mainstreaming equality into policy and budget processes.
vote to programmatic spend, and having effective reporting procedures in place on expenditure against allocation and agreed outcomes.

- While the opportunity to present submissions to some Oireachtas Committees is a welcome addition to the budgetary process, clarity should be provided about the weight given to submissions in budgetary decisions and the regard given by the executive to those committees’ recommendations.

More broadly, AI Ireland believes that ESC rights should be given greater legal protection in Ireland and the paper also includes recommendations to this end. These include:

- The State must ensure that there are adequate remedies available for people when their ESC rights are violated. This includes access to remedies at a national and international level.
- Regarding remedies at an international level the State should ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP ICESCR) and other instruments providing an international remedy for violations of ESC rights, such as the Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP UNCRPD), following ratification of the UN CRPD.
- Regarding remedies at a national level, the Irish Constitution should be updated to give greater protection to ESC rights. The Government should accept the Constitutional Convention’s February 2014 recommendation that greater protection be given to ESC rights in Bunreacht na hÉireann. It should engage robustly in determining the best method of enshrining constitutional ESC rights and should ensure full transparency and clear timelines in any measures adopted to deliberate further on how best to implement this Constitutional Convention recommendation.
- ESC rights related legislation should be framed in human rights language, guided by the provisions of the ICESCR, the General Comments of the CESCR and the work of other relevant UN procedures. For instance, any legislation underpinning healthcare provision should expressly reflect Ireland’s human rights obligations such as accessibility based on need not ability to pay.

Further information can be found in AI Ireland’s series of ESC rights publications:

- Bringing ESC Rights Home: The case for legal protection of economic, social and cultural rights in Ireland.
- Bringing ESC Rights Home: Applying Ireland’s economic, social and cultural rights obligations to budgetary policy.
Public Interest Litigation & Access to the Courts: As Far as Practicable?

Rosemary Hennigan & Molly Joyce

Email: rosemary.hennigan@gmail.com; mojoyce@tcd.ie

Abstract

This article examines Article 40.3 of the Constitution and discusses recent case law suggesting the need to properly vindicate the personal rights of the citizen. Such vindication of the broader panoply of personal rights guaranteed by our Constitution is not possible, however, without first vindicating the right of access to justice. In this way, the right of access to justice acts as a kind of antecedent right, which must be vindicated before any further rights can be considered. Thus, this article goes on to examine the current barriers that exist and prevent individuals from accessing justice as well as make suggestions for the improvement and strengthening of the right of access to justice. It is then argued that, in so expanding access to justice, ordinary citizens will be empowered to demand vindication of their personal rights under the Constitution before the courts. It is hoped that this increase in public interest / constitutional litigation will in turn eventually lead the court to more carefully and more forcefully protect the constitutional rights of the person.

Keywords

Access to justice - Article 40.3.1° - public interest litigation - personal rights of the citizen - vindicating constitutional rights - positive action - class actions - legal aid.
Introduction

Since the foundation of the State, the judicial arm of government has been instrumental in defining the parameters between the citizen and the State. Much of this has been achieved through the identification of constitutionally protected personal rights which, by placing limitations on the State, protect the individual from injustice. But for this system to be effective, the personal rights of the citizen must be supported through a mechanism for holding parties to account where the breach of a right occurs. The Irish system envisages that this is achieved through the provision of a system of courts in which cases can be brought and justice can be administered. However, access to the courts is not an easy proposition in Ireland, especially with respect to matters of public interest where litigants generally do not stand to gain financially. Barriers to access to the courts present a significant impediment to the vindication of rights. In practice, the existence of a formal right of access is not enough. Unless access to the courts is treated as a core, positive right on which the vindication of all constitutional rights rest, the practical significance of constitutional rights is lost, becoming merely aspirational.

A first step towards vindicating individual rights is ensuring that cases in which rights have been breached can be heard. When it comes to personal rights, access to the courts constitutes an opportunity to address wrongs, to remedy breaches and, where necessary, to redefine the nature of the relationship between the citizen and the State by requiring the State to account for its actions and omissions. Barriers to access to the courts are a fundamental flaw in this constitutional system. By virtue of Article 40.3, the State has pledged to ‘defend and vindicate the rights of the citizen as far as practicable’. We contend that this pledge requires the State to do more to reduce the barriers to access to the courts in order to ensure that, in the case of injustice done, the citizen has recourse to a forum in which they can seek to vindicate their personal rights under the Constitution, regardless of their means. Access to the courts is antecedent to the vindication of all personal rights and, if Article 40.3 pledges the State to vindicate those rights, then the first step must be to address those barriers to access which prevent citizens from pursuing their rights through the courts.

This article will first look at the judicial interpretation of vindication under Article 40.3 and the implications which this has for the right of access to the courts. We will then examine some of the barriers to access which predominate and the ways in which these barriers might be surmounted.

I Vindicating the Personal Rights of the Citizen

i. Vindicating Personal Rights and Article 40.3

The State’s pledge in Article 40.3 to vindicate and defend the personal rights of the citizen is best known for its association with the unenumerated rights doctrine and the expansive interpretation of the words ‘in particular’ which led to the recognition of certain fundamental freedoms. The doctrine is now widely regarded as suspect. But perhaps it is due to this focus on the use of Article 40.3 for the recognition of implied rights and the unenumerated rights doctrine that little analysis of the meaning and significance

1 Ryan v Attorney General [1965] IESC 1 [22].
of the express wording has been undertaken to date. As Hogan and Whyte have said, ‘the rather large terms of the provision occasionally tempt judges to invoke it, mantra-like without any elaboration, in support of implied rights’. The dominant use of Article 40.3 in Irish jurisprudence has been for this recognition of implied rights but this may have been at the expense of an analysis of the express wording of the provision. The express wording requires the State, not merely to defend but to vindicate the personal rights of the citizen.

It may be surprising that there has been little judicial engagement with what this obligation means, particularly given that the implications could be broad in nature. The obligation in Article 40.3.2 requires the State to ‘in the case of injustice done, vindicate the life, person, property and good name of the person’. If given an expansive meaning, encapsulating a duty to actively engage in a process of vindicating rights on behalf of citizens, the obligations on the State could be substantial. And although the meaning and implications of the term ‘vindicate’ have rarely been considered in this light by the judiciary, during the consultation process for the drafting of the Constitution, the implications of this Article 40.3.2 pledge raised anxious questions, with Gerard Hogan quoting one of the heads of Department who asked, ‘if a man is slandered, is the State really bound to vindicate his good name? Is that guarantee carried out by the existing device of providing a Court in which he can, at his own risk, sue his slanderer?’

As it transpired, neither the seminal cases considering the interpretation of Article 40.3 nor more recent cases which are discussed below have adequately addressed this question.

One rare case in which the Supreme Court did analyse the meaning of ‘vindicate’ is Grant v Roche Products. In that case, Hardiman J looked at both the Oxford dictionary meaning and the direct translation from the Irish text before concluding that the meaning to be derived for the term ‘vindicate’ is to ‘defend against encroachment or interference’ and ‘clear of blame, justify by evidence or argument’.

The substantive case concerned a wrongful death action brought by the family of a deceased alleging that an acne treatment produced by the defendant company had caused the deceased to become suicidal. The matter at issue before the Supreme Court was a motion brought by the defendants for a stay of proceedings on the grounds that continuing the case would constitute an abuse of process since the relief sought by the plaintiff had already been proffered in a settlement offer which they had refused. Counsel for the plaintiff argued that what was at issue in the case was the vindication of personal rights under Article 40.3, claiming that ‘one way in which the State met its constitutional obligation to vindicate those rights was by the provision of suitable forms of civil action’. The Supreme Court agreed, finding that ‘the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights’.

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7 ibid 75.
8 ibid 39.
9 ibid 80.
It follows, then, that access to the courts is an essential first step if the vindication of rights through the use of litigation is to be made real. This is of vital importance in the area of public interest law where availing of the tools for the vindication of constitutional rights can present a significant problem for would-be litigants.

**ii. Vindicating Personal Rights and Access to the Courts**

The problems associated with the representation of minority and vulnerable interests in our political system\(^{10}\) force many public interest groups, as well as private individuals, to seek ways of achieving their objective through the courts rather than by directly petitioning elected representatives for legislative reform. However, significant barriers to accessing justice prevent many impoverished persons and vulnerable groups from pursuing litigation as a means of vindicating their rights.\(^{11}\) The State’s pledge, contained in Article 40.3, to vindicate and defend the personal rights of the citizen, as far as practicable, would seem to require, at the very least, that the courts be made more accessible. If the idea of vindicating rights in the case of injustice done is to have any meaning, citizens must have access to a forum in which justice is administered; namely, the courts. This makes the right of access to the courts a positive one, requiring action on the part of the State to enable citizens to access the courts and, through the use of the courts, seek to vindicate their rights.

The case of *Macauley v Minister for Posts and Telegraphs*\(^{12}\) lends support to this contention. The facts of the case involved a plaintiff who was unable to take a claim against the defendant alleging that the minister had failed to provide access to postal services. The Attorney General had refused the plaintiff a *fiat* which was required before the plaintiff could take his case. However, this requirement for a *fiat* was struck down by the Supreme Court on the grounds that, when combined with the Article 34.4 provision requiring the courts to administer justice, Article 40.3.1° entailed a right to recourse to the High Court to defend and vindicate a legal right and the requirement of obtaining a *fiat* from the Attorney General was unconstitutional viewed in the light of such constitutional protections. This line of authority suggests that other barriers to access to the courts could also be found to be unconstitutional for the same or similar reasons. Indeed, *Macauley* suggests that the obligation to vindicate the rights of the citizen in Article 40.3 includes a right to access the courts as a first step towards vindicating other rights in the event that a breach has occurred or injustice has been done.

Many of the most noteworthy cases in Irish legal history have involved a rights claim whereby a matter of public interest was brought before the courts for adjudication of the nature of the rights flowing from the constitution to citizens and the corresponding obligations on the State.\(^ {13}\) This system is based around the idea that the vindication of rights is a matter for the administration of justice and, in that regard, one of the rights protected by the Constitution is the right of access to the courts. While such

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11. ibid [280-283].


formal recognition of the right has been established in case law, its antecedent nature requires that it is recognised as a positive right if it is to be rendered effective. The nature of the Irish system means that barriers to access to the courts are also barriers to the vindication of rights. In the absence of effective access to the courts, it is difficult to see how breaches of personal rights can be remedied. For this reason, access to the courts is fundamental to the idea of vindicating rights. Given the Article 40.3 obligation on the State to vindicate the personal rights of the citizen, the State is required to render the primary right of access to the courts effective by removing barriers to such access, as far as practicable.

### iii. Vindicating Personal Rights and the Availability of an Adequate Remedy

The importance of accessing the courts for the purposes of vindicating a right is linked to the requirement of an adequate remedy under Article 13 of the European Convention on Human Rights (the ‘ECHR’). Questions regarding access to the courts and the availability of an adequate remedy have arisen in a number of cases before the European Court of Human Rights (the ‘ECtHR’). In *Airey v Ireland*, the applicant brought her case against the State to the ECtHR, claiming, *inter alia*, that the exorbitant cost of issuing proceedings prevented Ms Airey from taking an action before the courts, and this was found to amount to a breach of the right of access to the courts.

There is some domestic judicial support for linking the vindication of rights with the provision of a remedy. Recent case law of Hogan J lends strength to the argument that Article 40.3 encompasses a right to a remedy, most likely to be provided through the courts. In a series of recent cases discussed below, Hogan J has invoked the obligation on the State under Article 40.3.2°, ‘in the case of injustice done, to vindicate the life, person, good name and property of every citizen’. The particular focus of this line of case law is the idea that vindication of a right requires that rights have remedies in the event that they are breached.

In *GC v DPP*, Hogan J found, *inter alia*, that the State’s obligation to vindicate the person justified proceeding with the prosecution of an accused for the sexual assault of four girls in circumstances where significant prosecutorial delay had occurred. The learned judge found that the State was obliged, by virtue of Article 40.3.2° to pursue the prosecution of the accused in order to vindicate the victims’ personal rights. Hogan J explained the relevance of Article 40.3 in this context thus:

> if the prosecution were halted or prohibited, it would mean that the complainants’ allegations could not be adjudicated on their merits, even though no part of the delay can be attributed to them. The complainants have, of course, a vital interest in this matter, since the allegations are of a serious nature and not least given that they concern the protection

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14 *State (Quinn) v Ryan* [1965] IR 70; *Macauley* (n 9).
15 (1979) 2 EHRR 305.
17 Article 40.3.2°, Bunreacht na hÉireann.
18 Kenny (n 13).
of the person. Here it may be recalled that by Article 40.3.2 the State has given a solemn obligation by its laws to vindicate and protect this express constitutional right.\textsuperscript{20}

In \textit{M v Minister for Justice},\textsuperscript{21} Hogan J expressly identified the Article 40.3.1° pledge as applying in a case where the plaintiff was seeking a certificate of leave to bring an appeal to the Supreme Court under the Illegal Immigrants (Trafficking) Act 2000 (the ‘Trafficking Act’), identifying this Article 40.3.1° pledge with the right of securing effective redress. The learned judge stated that ‘the Constitution is dedicated to securing effective redress for the individual whose rights have been infringed (“The State shall ... in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.”) This is complemented by Article 40.3.1 which obliges the State “to vindicate the personal rights of the citizen”. One of those personal rights is the right of access to the courts...’\textsuperscript{22} Identifying this connection between the right of access to the courts and the Article 40.3 pledge is promising. However, this procedural right of access to the courts is not enough to ensure the vindication of rights due to the existence of barriers that make effective access to the courts a practical impossibility, despite it being possible in theory. But if the vindication of a right requires that a remedy be available, effective access to the courts for adjudication on the merits of the case is a Constitutional necessity.

The Supreme Court is due to hear an appeal in which Article 40.3 was raised in \textit{MEO v Minister for Justice}.\textsuperscript{23} In that case, a question was raised which expressly asked whether Article 40.3 placed a positive duty on the State to safeguard an individual’s life in the event of a life-threatening medical condition. The Supreme Court case is still pending and it will be interesting to see whether the judgment will advance this line of authority and, perhaps, offer some guidance on the interpretation of Article 40.3. If successful, Article 40.3 could provide new avenues of redress by requiring the State to do more to ensure that rights of the citizen are safeguarded and vindicated. Given the difficulties which barriers to access present for public interest litigation, this would be a significant development for public interest groups, creating a broader scope for litigation in the area of personal rights, perhaps including the justiciability of socio-economic rights. While they are distinct, cases involving vulnerable and impoverished litigants and cases involving matters of public importance suffer from the same difficulties associated with accessing the courts as further discussed below. In its current form, our system fails to make allowances for those who do not have the means to pursue litigation through the courts, whether due to their socio-economic circumstances, ignorance as to their rights, difficulties in overcoming issues of standing where representative groups are involved, or fear of the unknown quantum of costs which could be awarded against them.\textsuperscript{24}

Article 40.3 contains within the express words of the provision an obligation on the State to do much more than it is currently doing; it contains a pledge, not only to defend but to vindicate the personal rights of the citizen; not merely to respond but to actively seek to protect and support the personal rights of the citizen. An easy response to this contention is to argue that this places an undue burden on the

\begin{thebibliography}{9}
\bibitem{} \textsuperscript{20} ibid [27].
\bibitem{} \textsuperscript{21} [2012] IEHC 34.
\bibitem{} \textsuperscript{22} ibid [12].
\bibitem{} \textsuperscript{23} [2012] IEHC 448.
\bibitem{} \textsuperscript{24} Whyte (n 10).
\end{thebibliography}
State; that it is not within the resources and ability of the State to vindicate the personal rights of every citizen. But Article 40.3 does not constitute an absolute guarantee; it is a pledge to vindicate ‘as far as practicable’ the personal rights of the citizen and it is this caveat which renders the Article 40.3 pledge workable. It is our contention that removing barriers to access to the courts would be a significant step forward in the vindication of personal rights. In the next section, we will discuss some of the predominant barriers to access and propose a number of ways in which such barriers can be removed.

II As Far As Practicable? Barriers to Access to Justice and Potential Improvements

The following section will identify a number of the potential barriers preventing individuals from accessing justice before discussing the various ways in which such barriers may be removed. It is difficult to properly trace the effect of barriers to access and statistics in this area are scant, however, research in 2003 and 2004 into the proportion of public interest cases heard by the High Court and Supreme Court revealed that only 33 judgments were considered to have constituted public interest cases. The effect of barriers to access is disproportionately felt by vulnerable members of society, given that such barriers often arise out of a lack of means, an absence of knowledge of their rights and fear of lawyers. It is at this juncture that the chasm between the existence of a formal right of access and the effectiveness of this right is exposed. If the vindication of personal rights rests on adjudication by the Superior Courts, then access to the Superior Courts is a prerequisite to the vindication of rights. Where such access is not available to citizens who lack the means to issue proceedings, an intolerable risk arises that breaches of constitutional rights will not be remedied.

i. The Issue of Costs and Protective Costs Orders

Gerry Whyte has identified the cost of obtaining legal services as ‘the most obvious likely factor impeding access to such services for poor people.’ Indeed, Irish law centres have confirmed that public interest cases are not being pursued because of the costs exposures for clients. A significant part of the problem comes from the unknowable burden of costs. The risk of a costs order against an applicant casts a significant chilling effect over potential litigation. Despite this clear impediment for marginalized and vulnerable groups in particular, the granting of pre-emptive and protective costs orders is rare in Irish law.

25 Public interest cases were defined as cases which raise issues beyond any personal interests of the parties in the matter, affecting identifiable sectors of the public or vulnerable groups; seeking to clarify or challenge important questions of law; involving serious matters of public policy or general public concern; and/or involving systematic default or abuse by a public body.


27 Whyte (n 10) [280-281], 28 ibid 281.


In *Village Residents Association Limited v An Bord Pleanala No.2*, Laffoy J found that the High Court has jurisdiction to decide the issue of costs at any stage of the proceedings by virtue of Order 99 of the Rules of the Superior Courts. Laffoy J drew on the decision of Dyson J in *Reg v Lord Chancellor, Ex p CPAG*, specifically adopting Dyson J’s approach with respect to limiting the use of pre-emptive costs orders to cases involving matters of public interest. While she identified the existence of judicial discretion to grant a protective costs order, she declined to grant the application in that case on the grounds that the plaintiff stood to receive a private gain from the proceedings which, the learned judge considered, meant that it could not be considered to constitute a matter of sufficient public interest.

In *Dunne v Minister for the Environment, Heritage and Local Government*, the applicant, who was unsuccessful in his proceedings in the High Court and was in the process of appealing the decision to the Supreme Court, sought a protective cost order. This was opposed by the defendants on the grounds of the practice in this jurisdiction of a procedure whereby costs follow the event. But while Laffoy J did not grant the order in the case, she did accept that the court has a jurisdiction to grant such an order where the case raises a matter of public importance and the applicant did not derive any private gain from the proceedings.

Despite these signs of a growing flexibility towards the award of protective costs orders, it was not to be the beginning of a trend. It remains difficult to foresee what kind of case might be successful. By way of illustration, it was held by Kelly J in *Friends of the Curragh Environment Limited v Trustees of the Turf Club* that protective costs orders should only be granted in exceptional circumstances. In that case, the applicant was categorical in its position, stating ‘in the event of it being unsuccessful in obtaining the costs orders it will not proceed further with the judicial review application’. Costs were, therefore, a barrier which would impede their access to the courts. The plaintiff group were seeking judicial review of planning permission granted to the respondent in circumstances where the principal objects of the company were to ‘preserve, protect and improve the environment and heritage of the Curragh of Kildare by representing the interests of members of the community and owners and users of sheep grazing rights on the Curragh of Kildare and its environs and to take such legal or other actions as may be considered necessary or desirable to promote such interests’. Nonetheless, despite their stated purpose and the apparent absence of private gain, Kelly J did not consider that the case raised matters of sufficient public importance. It is regrettable that he did not elucidate his reasons for so finding. But since the grant or refusal of such an order is within the discretion of judges hearing the application, there is no obligation to do so and this lack of definitive judicial guidance on the issue of protective costs orders makes it difficult to predict whether an application will be successful.

31 [2000] IEHC 34.
32 ibid [24].
33 (1999) 1 WLR 347.
34 Village Residents Association Limited (n 28) [25].
35 ibid [26].
36 [2008] 2 IR 775.
38 ibid [18].
39 ibid [7].
The recent Schrems v Data Protection Commissioner\textsuperscript{40} case, in which a protective costs order was granted, constitutes a positive development in this area. In that case, Hogan J found that Max Schrems’ privacy activism did constitute a matter of public importance justifying the grant of a protective costs order. The difference between the successful Schrems applications and previous unsuccessful applications is difficult to ascertain. The grant of an order falls within the ambit of a broad judicial discretion, and in the absence of judicial guidance on what constitutes a matter of sufficient public importance, the concern is that the success of a protective costs order is an unpredictable matter determined by the opinion of an individual judge. Of course, opinions vary, and despite success for Mr. Schrems, it remains hugely difficult for public interest lawyers to advise clients to take a case without any visibility as to whether or not a protective costs order will be granted and, in practice, this creates a significant barrier to access to the courts.

In terms of ways in which this barrier might be overcome, the Environment (Miscellaneous Provisions) Act 2011 (the ‘Environment Act’) provides legislative basis for the grant of a protective costs order in certain proceedings involving environmental matters. By virtue of section 3 of the Environment Act, a plaintiff can seek an order providing that the parties to the proceedings will bear their own costs. The effect of this is to remove the paralysing risk of a costs order being awarded against the plaintiff and this makes it possible to foresee the costs of litigation and make an informed decision as to whether or not to proceed with the case. The applicant in Hunter v Nurendale Ltd\textsuperscript{41} made an application for a protective costs order under section 3 of the Environment Act and was successful in this regard with Hedigan J noting that ‘an application for a [protective costs order] may be considered a standard form of procedure in future proceedings.’\textsuperscript{42} For plaintiffs, this would constitute a significant step forward. The use of such legislative provisions could be extended to other areas, particularly areas such as social welfare legislation, where the ability to quantify the cost of issuing proceedings at the outset would provide parties of modest means with a clearer view of whether or not issuing proceedings is financially possible.

While these developments in the area of protective costs orders provide some grounds for hope, a recent progressive development in Canada provides an interesting perspective on the Irish situation. It was held by the Canadian Supreme Court in Trial Lawyer’s Association of British Columbia v British Columbia (Attorney General),\textsuperscript{43} that hearing fees which deny citizens access to the courts are unconstitutional.\textsuperscript{44} The impugned rules of court in Canada provided judges with discretion to waive hearing fees where a person is impoverished. This, alone, may be a progressive approach to the issue of access to justice for the impoverished and vulnerable, but the Court went further than this, finding that ‘hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts’.\textsuperscript{45} The court also considered that access to justice and the rule of law are linked, with access to justice being ‘fundamental to the rule of law’.\textsuperscript{46} In effect, the Canadian Supreme Court has made access to the courts a primary right, definitively removing a significant barrier to access, in order to see that access to justice is available.

\textsuperscript{40} [2014] IEHC 310.
\textsuperscript{41} [2013] IEHC 591.
\textsuperscript{42} ibid 10.
\textsuperscript{43} 2014 SCC 59.
\textsuperscript{44} ibid [1]-[2].
\textsuperscript{45} ibid [32].
\textsuperscript{46} ibid [39].
ii. The Provision of Legal Aid

One important and obvious way in which access to justice may be guaranteed is through State provision of legal aid services. Indeed, the importance of legal aid in vindicating personal and civil rights has been recognised in numerous Irish cases. In *State (Healy) v Donoghue* the Supreme Court considered Article 38.1 in conjunction with Articles 34 and 40.3.1º, concluding that in circumstances where a person charged with a crime is unable to ‘defend himself adequately because of ignorance, lack of education, youth or other incapacity’ justice may require that he is granted legal assistance. If a person cannot afford such assistance, constitutional justice requires that the State provide him with legal representation. As stated by O’Higgins CJ, it is ‘only in this way can justice be done, and only by recognising and discharging this duty can the State be said to vindicate the personal rights of the person charged’. This case is largely recognised as confirming the existence of a constitutional right to criminal legal aid and is bolstered by Article 6(3)(c) of the ECHR. Subsequent cases have considered the right to legal aid in the context of civil matters. The *Airey* case, as discussed above, resulted in a finding by the ECtHR that a right to legal assistance existed if indispensable for effective access to the courts and in spite of any social and economic implications it might have.

The more recent case of *O’Donoghue v Legal Aid Board* concerned proceedings taken by a woman who had waited 25 months to receive a legal aid certificate in order to make a maintenance order against her husband. Specifically, the plaintiff sought damages and a declaration against the Minister for Justice and the Attorney General to the effect that her constitutional right to legal aid and to have her application for legal aid dealt with expeditiously had been breached. Kelly J considered the particular circumstances of the plaintiff in this case and concluded that they were such that ‘access to the courts and fair procedures under the Constitution would require that she be provided with legal aid’. He went on to state that the Civil Legal Aid Act 1995 gives substance to the constitutional right to legal aid; while of course the State is entitled to put reasonable limits on that right, it cannot allow the right to ‘be effectively set at nought for years in the manner that it was here’.

Rather, the State must ensure that any scheme it introduces is implemented fairly to all persons and in a manner which fulfills its declared purpose. In reaching this conclusion, Kelly J rejected the notion that he was overstepping the acceptable boundaries of the court’s jurisdiction. Indeed, he believed that this conclusion did no more ‘than what the courts have been doing since at least *Ryan v. The Attorney General*, namely ensuring that a right under the Constitution is protected and given effect’.

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48 ibid 325.
50 See, for example, the following cases: *Airey v Ireland* (1979) 2 EHRR 305; *E v E* [1982] ILRM 49; *MC v Legal Aid Board* [1991] 2 IR 43; *MF v Legal Aid Board* [1993] ILRM 797; *O’Donoghue v Legal Aid Board* [2006] 4 IR 204; *Magee v Farrell & Ors* [2009] IESC 60.
51 *Airey v Ireland* (1979) 2 EHRR 305 [26]-[28].
52 [2006] 4 IR 204.
53 Ibid 234.
54 Ibid.
55 Ibid.
This strong recognition of the importance of legal aid and further recognition of the State’s duty in vindicating the right of access to the courts has unfortunately been somewhat tempered by the subsequent case of Magee v Farrell. This case saw the Supreme Court take a more restricted view of the right to legal aid. In the context of a claim of entitlement to legal aid before a coroner’s inquiry, the Court concluded that while there is a constitutional right to State funded legal aid in the criminal context, this right has not been extended to other proceedings outside of the criminal sphere. In reaching this conclusion, Finnegan J considered O’Donoghue and concluded that the constitutional right recognised by Kelly J in the case was merely the plaintiff’s right, in the circumstances, to have the statutory scheme for civil legal aid administered fairly and in such a way as to fulfil its purpose. Kelly J was ‘not referring to a constitutional right to legal aid on the basis of her unspecified personal right of access to the courts under Article 40’. Ultimately the Court concluded in Magee that there has been no extension of the constitutional right recognised in The State (Healy) to every case in which fundamental personal rights under the Constitution are involved and there is no constitutional right to receive State funded legal representation before a coroner’s inquest.

Considering this more recent judgment, it appears there is little scope for extending the current areas in which legal aid may be obtained. Specifically, the Legal Aid Board is prohibited from providing legal aid in cases relating to, inter alia, defamation, land disputes, conveyancing, claims brought as ‘test cases’ and representative actions. Civil legal aid is also unavailable for representation before the Social Welfare Appeals Office for those persons appealing a refusal of their social welfare application or indeed any similar tribunal (other than the Refugee Appeals Tribunal). Such exclusion of a broad swathe of cases from the remit of civil legal aid has severely curtailed the right of access to justice and can have disastrous consequences for people, particularly in the context of housing disputes and appeals concerning social welfare applications or appeals before the Employment Appeals Tribunal in which people’s livelihood, welfare and/or reputation are at stake. In addition to this restricted category of cases in which civil legal aid is available, the Legal Aid Board lacks the resources to ensure legal aid is rolled out in an efficient and effective manner (as indeed the waiting times discussed in O’Donoghue show).

Suggestions for improving the current system of civil legal aid in Ireland have included conducting studies to identify ‘what legal need should be met, is met and what is unmet in our State’, improving people’s ability to navigate the legal system and administrative systems themselves so that they can

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57 ibid 711.
58 ibid 717.
59 FLAC, ‘Not Fair Enough: Making the case for reform of the social welfare appeals system’ (FLAC October 2012) xi. It may be noted that while legal advice is available for persons going before the Social Welfare Appeals Office, it is rarely if ever accessed.
60 FLAC, ‘FLACSheet: Civil Legal Aid in Ireland’ (FLAC October 2013) 2-3.
62 FLAC has reported that, as of February 2014, the average waiting time for a first consultation with a solicitor is 24 weeks (6 months) and the average waiting time for a second consultation is 30 weeks (7.5 months). While some law centres, however, have a waiting time of 6 weeks, others have a waiting time of 70 weeks. See http://www.flac.ie/priorityareas/civil-legal-aid/ accessed 5 October 2014.
63 Blackwell (n 56).
avoid situations of legal conflict, and increasing the provision of legal information at as early a stage as possible. Such improvements and a stronger recognition of the importance of civil legal aid in ensuring true vindication of the right of access to justice, both by the courts and politically, would go some way in opening up the legal system to those persons currently blocked from accessing it. As highlighted by the 2005 FLAC report on legal aid, the existence of the current civil legal aid scheme shows that the State recognises it has a key role to play in protecting the right of access to justice. However, current restrictions, inadequacies and delays in the current scheme, together with the lack of any proper facility for addressing client or community need, show that only grudging steps have been taken to ensure to every person the right of equality before the law; a right guaranteed by Irish constitutional law and international human rights law.

iii. Multi-Party Litigation

Multi-party litigation or ‘class actions’ may potentially act as a mechanism for improving individual litigants’ access to justice. Indeed, it may be an especially effective means of ensuring poorer and more marginalised litigants gain access to the courts and avail of the opportunity to state their claim, as well as allowing a greater number of public interest cases to be argued before the courts. Already Order 15 rule 9 of the Rules of the Superior Courts 1986 allows for a class action-type procedure known as a ‘representative action’. Representative actions are essentially a mechanism whereby numerous persons who have the same interest in one cause or matter may be represented by one or more persons on behalf, or for the benefit, of all such persons. Such actions are subject to a number of limitations, however, and hence have been rarely utilised in Ireland. These limitations include, first, a requirement that each individual member of the class has authorised the named party to act in a representative capacity. This again may create difficulties where the pool of persons affected by the action is large. Third, there is uncertainty around the issue of damages in representative actions; it appears that any relief granted to a representative plaintiff would be solely declaratory or injunctive in nature. While this limitation has been somewhat relaxed by the English courts in a number of cases, it does not appear Irish courts have followed suit. A fourth limitation is that surrounding the uncertainty of judgment in representative actions. The second limitation is the strict manner in which the courts have applied the requirement that all the members of the class have the same interest in the cause of the action as opposed to a merely ‘common’ or ‘similar’ interest. This again may create difficulties where the pool of persons affected by the action is large. Third, there is uncertainty around the issue of damages in representative actions; it appears that any relief granted to a representative plaintiff would be solely declaratory or injunctive in nature.

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are bound by any judgment or court-approved settlement, persons who are similarly members of the class but did not join the proceedings are free to take their own future action. Furthermore, members of the class joined to the proceedings can actually apply to the court for an exemption from the judgment, a procedure designed to protect parties to a representative action from an unfair or arbitrary result but which undermines the certainty of the representative action procedure. Finally, as mentioned above, there is no legal aid available for persons looking to take a representative action.

These limitations taken together mean that Order 15 rule 9, while suggesting a procedure of ‘wide-ranging application’, in practice has undermined the representative action as a vehicle for potential class claims. This is disappointing, given the beneficial role representative actions could play in promoting access to justice and in allowing cases to be taken by or on behalf of particularly disadvantaged litigants. Such actions would allow parties to share the cost burden of their litigation and arguably provide persons taking an action with a support network of similarly situated persons, helping to demystify the legal process for those involved. Indeed, the Law Reform Commission (the ‘LRC’) has noted that class suits in the US have been particularly successful in the vindication of civil rights against both public and private actors.

Other possible mechanisms for dealing with multi-party litigation in the Irish context, aside from the representative action procedure, includes the use of the joinder procedure or the consolidation of proceedings, the use of the ‘test case’ mechanism, and the establishment of public inquiries and/or compensation tribunals such as, for example, the Residential Institutions Redress Board. There are, however, numerous problems with these mechanisms and none prove entirely effective at capturing the most beneficial aspects of multi-party actions. In addition to these various approaches to multi-party litigation, there are a number of cases in which the traditional rules of locus standi have been relaxed: in Cahill v Sutton Henchy J noted that the rule of locus standi can be relaxed when ‘the justice of the case

71 ibid [1.17].
72 See, for example, comments made regarding reduced litigation costs in group lawsuits in the American context, per Charles Silver, ‘Class Actions – Representative Proceedings’ in B Bouckaert & G De Geest (eds), Encyclopedia of Law and Economics (Vol V, Edward Elgar Publishing 2000) vol V 194 [8].
73 ibid [2.14].
74 This refers to a process whereby the first case to be litigated in situations involving several claims arising out of the same circumstances becomes the benchmark by which all remaining cases are solved. This test case approach was used to resolve many of the claims against the State concerning army deafness, ibid [1.31].
75 For example, the ‘test case’ mechanism, while used successfully in the army deafness cases against the State, is essentially an individualised mechanism in which the plaintiff acts solely on his own behalf as opposed to a class of persons. In addition, the ‘test case’ mechanism is somewhat ad hoc in nature, and can create uncertainty and unpredictability in practice, see Consultation Paper on Multi-Party Litigation (n 63) [1.32]-[1.34]. Note the disadvantages of the ‘test case’ mechanism as outlined by FLAC, see FLAC, Response to Law Reform Commission Consultation Paper on Multi Party Litigation (Class Actions) (December 2004) http://www.flac.ie/publications/response-to-law-reform-commission-consultation-pop/ accessed 13 November 2014. Furthermore, public inquiries and/or compensation tribunals usually do not give claimants a lot of control over the conduct of proceedings. A class action procedure, in contrast, would give litigants greater influence over the proceedings. See Consultation Paper on Multi-Party Litigation (n 63) [1.51].
76 [1980] IR 269. This case arose in the context of a personal injuries claim by a patient against her former doctor. The patient had not taken her claim within the three-year period required and argued that this rule should be relaxed in her particular circumstances where she, as an injured person, had not become aware of the relevant facts, on which his or her claim was based, until after the expiration of the period of limitation or until a short time before its expiration.
so requires’. Indeed, such rules of standing have been relaxed in cases including *SPUC v Coogan* and *Irish Penal Reform Trust v Governor of Mountjoy*. In order to allow an NGO to take a representative action on behalf of a particular group, however, certain conditions must be met. These conditions include: (1) the person(s) represented must not be able to adequately assert their constitutional rights or the case must involve an impugned provision which is directed at, or operable against, a group which includes the challenger, or with whom the challenger may be said to have a common interest; and (2) the representative must be a bona fide group or the rights which are sought to be protected are of general importance to society as a whole. While such cases do indicate a limited potential for particular interest groups to take an action on behalf of especially vulnerable or marginalised persons, they rely on judicial discretion and do not provide a clear and reliable mechanism that can be used in pursuing a public interest claim.

The diversity of potential paths to take in instigating a multi-party action has created uncertainty and a lack of predictability. The LRC has therefore recommended significant reform of this area; while they do not necessarily recommend the abolition of existing procedures such as the representative action or ‘test case’ mechanism, they suggest that a class action procedure similar to that routinely utilised in the US be introduced. The advantages of this procedure include: judicial economy and reduction in litigation costs and duplication of costs; consistency in resolution of similar issues; efficiency; and increased deterrence of wrongdoing. While there are arguably several downsides to class action procedures, including the creation of lengthy, complex and potentially costly proceedings and the loss of autonomy/individual representation for class members, these would overall appear to be outweighed by the benefits class action procedures could provide in terms of ensuring more efficient administration of justice. Indeed, the availability of a class action procedure would provide litigants and representatives of marginalised groups with a clear, delineated and dependable process for bringing public interest claims, ultimately creating greater access to the courts for individuals seeking to vindicate their rights.

77 ibid 285.
78 [1990] 1 IR 273. This case concerned an action taken by the Society for the Protection of Unborn Children (Ireland) Ltd on behalf of the unborn child. In this very particular circumstance, the Supreme Court found that any party who had a bona fide concern and interest, which interest connoted proximity or an objective interest, in the protection of the constitutionally guaranteed right to life of the unborn had sufficient standing to invoke the jurisdiction of the courts to take such measures as would defend and vindicate that right.
79 [2005] IEHC 305. In this case the IPRT sought relief on the basis that the defendants had failed in their constitutional obligation to provide adequate psychiatric treatment and/or facilities and/or services for prisoners in Mountjoy prison. Gilligan J found that the IPRT did have standing in this case to take the action, noting that if they were denied locus standi, the persons whose interests the organisation represented might not have an effective way of bringing the relevant issues before the court. See also the case of Digital Rights Ireland Ltd v Minister for Communications and Others [2010] IEHC 221 for a further example of a case in which the stricter, traditional, rules of standing were relaxed.
81 Consultation Paper on Multi-Party Litigation (n 61) [3.04].
82 ibid [3.17], [3.23].
83 ibid [3.13].
84 Consultation Paper on Multi-Party Litigation (n 63) [3.15].
85 See, for example, the conclusion of FLAC, Response to Law Reform Commission Consultation Paper on Multi Party Litigation (Class Actions) (n 72). FLAC also recommends in this paper that the Civil Legal Aid Act 1995 be amended to allow legal aid for representative actions.
iv. Quasi- or Extra-Judicial Bodies, ADR and Alternative Approaches to the Administration of Justice

In its Consultation Paper on Alternative Dispute Resolution (‘ADR’), the LRC commented that in ‘promoting access to justice, a modern civil justice system should offer a variety of approaches and options to dispute resolution’.

Quasi- or extra-judicial complaint mechanisms and bodies, ADR and arbitration are all examples of ways in which justice may be dispensed without recourse to the courts. Often these mechanisms prove less costly and time-consuming than litigation and may even provide more appropriate results for parties involved in a dispute; in this way, such bodies can be extremely effective in securing the right of access to justice. We will now consider these mechanisms in turn, looking first at quasi- or extra-judicial bodies and its capacity for increasing access to justice before then examining ADR, arbitration and mediation procedures.

a. Quasi- or Extra-Judicial Bodies

A number of administrative bodies have been set up in recent years to deal with specific areas of legal dispute. Employment law is one particular area in which quasi-judicial bodies play an important role and as such will be the focus of this section. Bodies set up in this area include the Labour Court, Labour Relations Commission, Employment Appeals Tribunal (‘EAT’), Equality Tribunal, National Employment Rights Authority (‘NERA’) and Rights Commissioners.

The overlapping roles of these various bodies is somewhat confusing, but essentially they combine to investigate and/or mediate industrial relations disputes as well as investigate individual claims relating to breach of employment rights.

Perhaps most important for the purposes of this article is the EAT, Equality Tribunal and Rights Commissioners. These three bodies all operate to hear individual employment rights claims arising from various specific pieces of legislation, providing recourse to justice for persons looking to vindicate their employment rights. For example, the EAT acts as an informal and inexpensive independent body for people to obtain redress for infringements of a wide range of employment rights. The Equality Tribunal investigates complaints specifically relating to discrimination in employment under the terms of the Employment Equality Acts 1998-2011, as well as more broadly hearing complaints under the Equal Status Acts 2000-2012 relating to discrimination arising outside the workplace. The Rights Commissioner is an independent officer of the Labour Relations Commission and is responsible for hearing individual employment rights claims; the Commissioner’s decisions may be appealed in some cases to the EAT or the Labour Court. The recently established NERA also plays an important role in vindicating the rights of individual workers, insofar as it takes a proactive role in enforcing employment laws.

86 Law Reform Commission, Consultation Paper: Alternative Dispute Resolution (LRC CP 50-2008) [1.12].
88 These include, for example: the Social Welfare Appeals Office (determines appeals based on refusal of social welfare benefit and the decision of a Social Welfare Deciding Officer); An Bord Pleanála (hears appeals regarding the granting/refusal of planning permission); the Press Ombudsman (provides independent press complaints mechanism); the Financial Ombudsman (deals with consumer complaints regarding individual dealings with financial service providers); and the Office of the Ombudsman (investigates complaints from members of the public concerning actions of State bodies).
90 Byrne and McCutcheon (n 77) [8.36].
91 More information about these functions of NERA can be found at: http://www.workplacerelations.ie/en/Workplace_Relations_Bodies/National_Employment_Rights_Authority/ accessed 11 October 2014.
As noted by the LRC, ADR processes such as facilitation, mediation and conciliation play a big role in these various employment bodies. Indeed, the integration and availability of such mechanisms in these bodies “serves to illustrate the potential which ADR provides in this area.”\(^9\) Successes of these various bodies in dispute resolution can be seen in comments to the effect that Ireland is recognised internationally as the “leading benchmark on both dispute resolution and employment law”\(^9\) and favorable client responses to conciliation proceedings.\(^9\)

It may be further noted that reform of these various employment adjudicatory bodies is currently in the works; the Workplace Relations Bill 2014 proposes replacing the Labour Relations Commission, Rights Commissioner, Equality Tribunal, NERA and the first instance levels of the EAT and Labour Court with the Workplace Relations Commissioner (‘WRC’). This WRC will act as a single, first instance decision-maker in cases concerning employment rights and industrial relations. Further reforms will include the publication of reasoned, written decisions of all adjudications and an advice/information service within the WRC to encourage early resolution of disputes in the workplace.\(^9\) Ultimately, these reforms hope to improve a system which has become ‘unwieldy, complex, inconsistent, slow and in some cases expensive for users’.\(^9\) This move is to be welcomed insofar as it demonstrates an awareness of the need to ensure mechanisms for adjudicating and vindicating employment rights are effective and accessible to users. The existence of these quasi- or extra- judicial bodies have significantly increased employees’ power to vindicate their employment rights and are an excellent example of how effective administrative bodies can be in ensuring the right of access to justice. It is submitted that such mechanisms enable ordinary persons who may lack the means to pursue legal proceedings against their employees to make complaints and have their workplace disputes/complaints adjudicated in a regulated and controlled environment. In addition, the fact that these adjudicative bodies ultimately remain subject to legal control and the courts, for example by way of appeal to the courts from such bodies, ensures persons’ right of access to justice is not negated or weakened.\(^9\)

### b. Alternative Dispute Resolution (ADR)

In addition to these bodies, ADR provides an alternative to the more formal court process and is arguably an effective method of dispensing with justice, its focus being on conciliation and mediation.\(^9\) The two basic categories of ADR are mediation and arbitration. Mediation is essentially “a voluntary, informal dispute settlement run by a trained professional called a mediator...a mediator does not judge who is right or who is wrong, but works with parties to help them arrive at a solution to satisfy their needs

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92 Report: Alternative Dispute Resolution: Mediation and Conciliation (n 85) [4.01].
93 Ibid [4.13].
94 Ibid [4.22]. Certain criticisms have been of course recorded by users of these services, though some of these problems are being addressed by the relevant bodies.
97 Byrne and McCutcheon (n 86) [8.11].
98 Byrne and McCutcheon (n 77) [8.74].
and interests." Arbitration, by contrast involves “an independent and impartial third party” who is empowered to make a legally binding decision in the case. While ADR may not be appropriate for all cases, it can be effectively used in conjunction with the civil courts system to more efficiently deal with disputes. Arbitration, for example, possesses a number of advantages over litigation including adjudication by an appointed expert in the relevant field, procedural flexibility, choice of location, and potentially expedited decision-making.

Having said this, it must be noted that there are some dangers associated with the use of ADR in respect of cases concerning adjudication of personal rights. Indeed, some commentators have criticised the fact that mediation does not more closely resemble a traditional trial. This criticism is due to the fact that parties are arguably not afforded the protections offered by rules of evidence and/or constitutional rights in mediation procedures. Furthermore, parties do not usually have a right to counsel in mediation procedures. Thus, “the simplicity of the mediation process and the breadth of autonomy of the parties to determine the outcome might not be attractive features in the instance where one party is weaker than his counterpart and, thus, possibly coerced into settling in the situation in which he does not have the benefit of counsel and/or rules of evidence.” Arbitration by contrast is often more adversarial in nature, with rules of evidence often applied by arbitrators in proceedings.

It is beyond the scope of this article to examine all the potential benefits and/or dis-benefits of ADR. It must be emphasised, however, that problems such as those highlighted above may arise in applying ADR mechanisms traditionally used in resolving private and/or commercial disputes to situations concerning personal rights. Careful examination and possible adaptation of ADR procedures for the particular context of civil rights vindication may therefore be necessary before their extension to this area.

It is sufficient at this juncture to simply acknowledge the potential of ADR mechanisms to provide easier and more efficient resolution of claimants’ issues, and to suggest that further consideration be given to this proposition. Indeed, ADR ties in with a general move towards a more integrated approach to civil justice which acknowledges the need to communicate to citizens their rights and entitlements under law. By educating individuals on these legal rights and providing them with user-friendly and simple procedures through which to vindicate their rights (such as the above-mentioned bodies and ADR mechanisms), the right of access to justice is also vindicated. For this reason, continued monitoring, assessment and ultimately expansion of extra-judicial dispute mechanisms in the State is welcomed.

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100 ibid.
101 For example, the LRC noted that ADR may be inappropriate in disputes concerning allegations of illegality or impropriety. By contrast, ADR may be used to great effect in family law disputes, certain employment law or property law disputes and appropriate commercial and consumer disputes, see Report: Alternative Dispute Resolution: Mediation and Conciliation (n 85) [1.11]-[1.12].
102 ibid [8.03].
104 ibid.
105 Byrne and McCutcheon (n 86) [8.05].
106 Byrne and McCutcheon (n 77) [8.78].
v. ‘No Fee, No Foal’ Agreements

‘No fee, no foal’ agreements refers to a situation where a lawyer and his/her client agree that the former will only recover fees from the latter in the event of the litigation being successful.107 Such agreements are not uncommon in Ireland and may be effective in opening up the courts to persons who may not qualify for civil legal aid but nonetheless would struggle to afford a lawyer’s fees. Indeed, these agreements, also known as the ‘contingency fee’, have been called ‘the key to the courthouse door’ for the poor and the middle class.108 It may be noted that, in line with section 68(2) of the Solicitors (Amendment) Act 1994, such contingency fees cannot be calculated on the basis of a specified percentage or proportion of any damages that may be payable to the client. Rather, any agreed contingency fees must be determined on the basis of a flat rate fee. This contrasts with the situation in the US, where contingency fees are strongly supported and recognised as an extraordinarily powerful tool for ordinary persons who wish to take cases against parties with perhaps extensive resources.109

Interestingly, the English courts have taken a very suspicious view of ‘no fee, no foal’ arrangements.110 Such judicial opposition to these kinds of agreements appears to stem from a fear that allowing lawyers to conduct proceedings in which they have a direct personal financial interest in the outcome could compromise them, particularly in respect of their duties as officers of the court.111 These concerns regarding the use of contingency fee agreements are arguably outweighed, however, by the important role such arrangements can play in facilitating access to justice. For this reason, it is submitted that the Irish courts should refrain from following the English approach.112

Having said this, the effectiveness of such agreements in vindicating the constitutional rights of access to justice must not be overstated: while effective in allowing some litigants access to the courts where they otherwise would be restricted, ‘no fee, no foal’ agreements depend heavily on individual lawyers making and accepting such arrangements. They do not ensure wide-ranging access to the courts for the majority of ordinary people and to over-rely on such agreements as a method of ensuring fulfillment of the right of access to justice would be to absolve the State of its role in ensuring this right is safeguarded.

108 ibid.
109 ibid.
110 See, for example, the following English cases: Simpson v Lamb 7 E and B 84; Pittman v Prudential Deposit Bank (1896) 13 TLR 110; Wallersteiner v Moir (No. 2) [1975] Q8 373.
111 ibid 64-65.
112 ibid 66-67.
Conclusion

Article 40.3 is undoubtedly one of the most important provisions in our Constitution. The article has sparked extensive judicial and academic discussion and is Ireland’s strongest domestic endorsement of what might be termed ‘civil’ or ‘human’ rights. It is therefore perhaps surprising then that there has been relatively little examination of the specific word ‘vindicate’ within the Article 40.3 discourse. To ‘vindicate’ would seem to demand that positive action be taken by the State to ensure the protection of the personal rights of the citizen. Given that, in the Irish context, the responsibility for vindicating the rights of the citizen falls on the courts, it would seem a natural conclusion that in order to properly fulfill its Article 40.3 duties the State must ensure citizens have access to the courts. In this way, the right of access to justice is an antecedent right: without first the power to access the courts or effective administrative bodies, a person cannot go on to vindicate their additional rights. It is for this reason that this article has focused on existing barriers to access to justice and attempted to put forward potential mechanisms for improving access. The various procedures discussed above are by no means comprehensive in highlighting the myriad ways in which access to the courts and justice could be expanded. Such suggestions do, however, provide a useful starting point from which to launch a greater exploration of potential improvements.

It is further acknowledged that enhancing access to justice is only a first step in creating a more robust human rights framework in which various rights, including socio-economic and social welfare rights, are vindicated. There is the very real concern that, once a person gets to court, they will not receive an effective remedy for the breach of their right. The next step therefore in properly vindicating the personal rights of the citizen ‘as far as practicable’ is to have a genuine discussion of the role of the judiciary in doing so. Guaranteeing the right of access to the courts is useful only to the extent that the courts take a more dynamic approach to the determination of rights. A more active judiciary is needed, one that is unafraid of playing a stronger role in defining the relationship between the State and its citizens and in engaging with non-traditional ‘socio-economic’ rights. Purely political institutions have proven inadequate in protecting these rights, especially in respect of those most marginalised in our society, and the courts play a crucial part in ensuring that such persons are not overlooked.

While of course an increasingly active judiciary would result in debate as to whether the courts are acting beyond their Constitutional power, it is submitted that this is a necessary debate to have. Ultimately, it is beyond the scope of this article to fully address this question: it is simply suggested here that it is a necessary prior step to having such a debate that the courts receive greater opportunity to consider human rights issues. This opening up of the courts to a greater number of public interest cases can be partially achieved through vindication of the right of access to the courts.

Indeed, this article is not suggesting that the courts should supplant politics as the means by which we ensure the various rights of the citizen are vindicated; rather, legal proceedings should be pursued in tandem with legislative engagement and lobbying. As Gerry Whyte has noted, litigation might in this way be ‘seen as a support to political work rather than as an alternative’.  

In order for such litigation to actively support the vindication of such rights, however, proper engagement with those rights is required. Ensuring access to the courts, particularly by persons traditionally excluded from the legal sphere, would allow a greater number of relevant and important cases to come before the court, resulting in greater judicial discussion of the relevant rights and, it is hoped, eventually leading to stronger protection of those rights. In this way, the State may be able to say that it is, as far as practicable, respecting, defending and vindicating the rights of the citizen.
Book Review:

“Asymmetric Engagement: The Community and Voluntary Pillar in Irish Social Partnership”
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“Asymmetric Engagement: The Community and Voluntary Pillar in Irish Social Partnership”

Joe Larragy

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Reviewer – Holly Pratt, Trinity College Dublin

In light of the most recent economic crisis following the international financial collapse, it can be useful to look to Ireland’s past experiences of similar such crises and to examine actions taken by the State in trying to negotiate and manage the national economy then. Dr. Joe Larragy has undertaken extensive research of one such aspect of the State’s past actions in this book, by examining the Community and Voluntary Pillar (CVP) of the social partnership agreements in Ireland. Asymmetric Engagement: The Community and Voluntary Pillar in Irish Social Partnership is a case study that focuses on the CVP as a whole entity and as one of the most innovative aspects of Irish social partnership, as well as looking at four of its most prominent and influential associations, namely the Irish National Organisation of the Unemployed (INOU), the Community Workers’ Co-operative (CWC), the Justice Commission of the Conference of Religious in Ireland (CORI Justice) and the National Women’s Council of Ireland (NWCI).

This book provides a comprehensive understanding of how the CVP came about, as well as the role of the four chosen organisations as part of it, and provides an insight into the relevance of the Pillar today. Each chapter introduces another part of the puzzle explaining asymmetric engagement and the book’s layout being clear and practical, makes it a lively and interesting read.

In reading this book, it is important to know its position in the Irish Society series, edited by Rob Kitchin, which undertakes to analyse the many processes and pressures affecting Irish social, economic, cultural and political life, as well as the impact of these on communities and the society as a whole. In doing this, the series seeks to examine the challenges facing Ireland in the future given the present situation and policy instruments. Through this book, the Social Policy Lecturer at Maynooth University contributes to the Irish Society series, the first comprehensive study of the CVP in both empirical and theoretical terms. It gives a new insight into Irish civil society in this context and addresses an important gap in the literature in this area.

The introduction in Chapter 1 sets the tone for the rest of the book as it explains the deficit in regards to research of the CVP that has existed in Ireland, as well as the lack of understanding as to its importance. The rationale for providing an in-depth look at four of the organisations situated in the Pillar is to track the steps leading to their involvement in the community and voluntary sector of social partnership, as
well as to examine what this engagement has meant for the individual organisations regarding their objectives and respective development.

Chapter 2, *Interpretations of Irish Social Partnership*, looks at the criticism and praise which has been directed at social partnership since its establishment as a tripartite national pay agreement regime in 1987. Larragy, in this Chapter, aims to throw light on the presumptions that were drawn in the past as to social partnership, such as it being part of a neo-liberal agenda, and to look at the realities of society at the time of its inception, noting the relatively quiet period of industrial relations and the economic growth which took place after 1987. It is also highlighted that despite the many accounts of social partnership and its effects on society which have been written since 1987, the CVP has been largely unmentioned in literature by sceptics and advocates alike. This Chapter explores Ireland’s model of social partnership from a historical and comparative perspective, and the addition of the Community and Voluntary Pillar as part of this model. Larragy notes that the inclusion of this extra pillar in the Irish model is both unusual and anomalous and was treated with wariness as to its abilities to influence the larger social partners and its effect on democracy.

In Chapter 3, *Associations, movements, governance and power*, a framework for analysis of the significance of the CVP is developed, with a focus on the broader theoretical issues facing associations within the CVP, especially their power and legitimacy. Larragy suggests that the social movements which can be dictated by even small associations lacking leverage are still capable of having an effect on wider society and leading to economic and political change. It is emphasised that the *demos*, in experiencing confusion, hardship and the government’s legitimacy crisis in the 1980s, were almost searching for a vehicle for economic recovery, and social partnership established itself as that vehicle. Interestingly, the notion that political instability and a lack of support for the State from the *demos* allows the rise in importance and influence of smaller players (such as when the government is in a vulnerable position), is discussed and it is also suggested that the reverse is also true: when the government gains the support of the public once more, those smaller players are put at risk and cannot sit on the laurels of their previous successes. The lack of a unanimous opinion as to CVP continues in this Chapter, when it is acknowledged that CVP formation can be viewed from either of two perspectives: that of associational representation from above or that of social mobilisation from below.

Chapter 4 provides almost a further introduction to this research, tying in well with Chapters 5-9, it focuses on the case study carried out in the book, as a whole, as to the CVP and the four constituent organisations. This chapter sets out the rationale for carrying out the case study. The four key concepts of the book are discussed in detail, these four concepts being: community and voluntary sector organisations, the *demos*, modalities of government and asymmetric engagement. As has been mentioned above, the rationale for the case study has roots in the gap in empirical and theoretical research that exists on the subject of the community and voluntary pillar of social partnership, and the need for greater understanding of the dynamics of the pillar and its operation in the wider economic and political landscape. The choice of a case-study in particular as the method of carrying out this research, Larragy attributes to the fact that the pillar is already an unusual feature of a tripartite system and thus requires close scrutiny. The selection of the four organisations to feature as part of this case study is explained in detail, looking at their motivations and paths to involvement in the CVP.
Chapter 5 provides an overview of the emergence of the CVP, from roots as separate organisations starting to focus on particular issues, to their banding together to form the Pillar itself so as to provide a means of communication for those who were voiceless and vulnerable. It examines the way in which smaller groups gained recognition and initiated real change in key areas, such as unemployment and poverty, from a period of economic and social crisis through to a time of growth and development. The setbacks suffered by some of these organisations can be attributed at times to the improved political climate and conditions, and at other times to their own rejection of certain social partnership agreements. Larragy continues by discussing the challenges faced by the CVP as a whole, and by the individual organisations making it up, from its dismissal by some as a mechanism of State incorporation, to the latent tensions internal to the CVP. The author emphasises that the influence of the CVP cannot simply be categorised as a moral one, but is much more than this and can be viewed as inextricably linked to the legitimacy of the political system at any given time. It has been suggested that the power of the CVP and its influence is rooted implicitly in the demos and not in an organisation’s status as a social partner or in its bargaining power.

Chapters 6-9 discuss the four prominent organisations in the pillar which were selected for this case study (in the order of the INOU, the CWC, CORI Justice and the NWCI). Each of these organisations had their own paths to social partnership as well as their own causes upon which they focused. What these chapters provide is an insight into the many obstacles faced by these organisations, as well as the successes they achieved.

Chapter 6 is aptly titled Reversal of Fortune: the Irish National Organisation of the Unemployed. This name reflects the paradox that can occur when organisations such as the INOU accomplish a goal. This paradox is that once an organisation gets a breakthrough, such as a large decrease in the rate of unemployment such as to lead to labour shortages, suddenly the group which advocated this change becomes less impactful as its main cause is no longer at the top of the political agenda or at the forefront of the minds of the public. As such, the focus shifts elsewhere to another group with different objectives more relevant to the times. Chapter 6 discusses the emergence of the INOU (with the support of some trade unions), its engagement in the CVP and its decline due to the changing economic and political climate. It is interesting to note it has been suggested that the INOU reached its peak before it became a social partner, when it was still pursuing its goal through protest rather than through engagement in social partnership.

The CWC is examined in Chapter 7, looking at its path and role in the creation and evolution of the CVP, and a timeline is provided listing important events in the organisation’s history. This is an example of the clear and pragmatic structure that is throughout the book, and which allows for optimum learning and understanding. Larragy describes the circumstances in which the CWC emerged (in a time of social crisis and as a community empowerment tool), the steps it went through pursuing its goal (such as the creation of the Community Platform), the obstacles it faced (exclusion from social partnership and loss of funding in 2002) and finally its readmission to the Pillar. It seems the CWC had a rockier road than most of the CVP organisations, despite its progression from critiquing the government from the outside to inclusion in the Pillar and the National Economic and Social Forum. This Chapter emphasises the steps and moves that an association may have to go through if it is to achieve real change and the opportunity to be in a position of influence, while balancing the need to stay true to its objectives and beliefs.
Chapter 8 provides an interesting read as it describes the manoeuvring of CORI Justice in circumstances in which no other organisation in the pillar would have found itself. Not least did CORI Justice have the initial help in that it was Catholic organisation gaining support and influence in a predominantly Catholic country, it maintained a successful ascent even when the authority and popularity of the Church went into decline. Not only does this Chapter map the journey of CORI Justice in terms of social partnership and engagement therein, but also the evolution of opinions towards religion in Ireland and the issues which appealed most to the public at the time, such as distributive justice. Of particular significance is what CORI Justice decided in the run-up to participation in social partnership: it chose to promote the views of certain groups viewed as unrepresented in the tripartite agreements, a decision not based upon the make up of its own membership but upon its analysis of justice and equality.

The last of the chosen participant associations is examined in Chapter 9, which provides insight into the development of the NWCI as part of the CVP. This Chapter highlights the evolving nature of some of these pillar organisations as it is contended that the NWCI transformed in order to engage with the State, other actors and to participate in social partnership by changing its focus from the middle-class agenda of equal opportunity and breaking of the ‘glass-ceiling’ to the more political struggles which were gaining recognition at the time. Larragy notes, “while that NWCI was not a key player in the beginning, the scene changed very rapidly and the issue of gender became a central one towards the late 1990s”. This chapter provides an insight into the changing attitudes towards women in Ireland in the 1980s and 1990s and the issues which became particularly important at that time as gender roles developed. NWCI is an example of a pillar organisation which retained its independence throughout the social partnership process, this in time leading to tensions and conflicts for the Council. However, its significance in civil society and social partnership endured, reflecting the transformation in family formation and workplace participation that took place at the time, and left the NWCI stronger than ever.

Finally, in Chapter 10, the concept of asymmetric engagement is discussed in detail. Although this is a theme which exists throughout the book, only in Chapter 10 do all the pieces of the puzzle fall into place. Asymmetric engagement is the term chosen by Larragy to describe the dynamics of the engagement between small pillar organisations and the other social partners, namely the state and prominent actors such as the trade unions and employers, in the tripartite agreements. It has been emphasised since Chapter 1 that these smaller associations are capable of change and influence, despite their size and lack of bargaining power and resources. Chapter 10 ties all the ideas regarding the effectiveness of the CVP into one definitive examination of the sector. Many factors are attributed to the successes of the CVP, including the support from the demos, the economic climate and, at times, the favour received from the State for particular issues or organisations (based on their presence in the community or the values they promoted). Larragy emphasises the novelty of the presence of the CVP in social partnership in Ireland, and the lack of academic or other literary attention that has been paid towards examining this aspect of the tripartite agreements, in regards to empirical data or the participation of many smaller organisations within the pillar. The author further addresses the criticisms and praises which have been directed towards the pillar, as well as the contrasting theoretical interpretations of it which have emerged since its establishment (such as to the question of incorporation). Another look is given towards those four pillar organisations in the study as well as to the four concepts identified in Chapter 4.
In conclusion, Larragy identifies the one key goal of the case study was to address the question of the significance of the CVP in Irish social partnership. There can be no doubt that this question was addressed comprehensively through in-depth research, numerous insights and both theoretical and empirical investigation as to the CVP. Finally, Larragy suggests that a significant shift to the left of the demos led to the pillar organisations becoming of such importance to the area of social partnership.

In conclusion, the book is incredibly in-depth as to the history of social partnership and the creation of the CVP, however it is arguable that the focus is almost too historical with a lack of critical analysis as to the relevance of the CVP today, especially in light of the economy improving since the financial crisis of 2008. The view presented is also decidedly pro-social partnership to the extent that any argument in opposition of the scheme is given small chance of being developed or appealing to the reader. This is understandable given the view of the author however it does provide food for thought. Overall this book provides a very broad analysis of the operation of these mechanisms and is an interesting read.
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Community Law & Mediation

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CLM Head Office:
Northside Civic Centre,
Bunratty Road, Coolock, Dublin 17
T (01) 847 7804  F (01) 847 7563
E info@communitylawandmediation.ie

CLM Northside:
Northside Civic Centre,
Bunratty Road, Coolock, Dublin 17
T (01) 847 7804  F (01) 847 7563
E northside@communitylawandmediation.ie

CLM Limerick:
Limerick Social Service Centre,
Henry Street, Limerick
T (061) 536 100  F (061) 536 101
E limerick@communitylawandmediation.ie

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