

## Caging the Tiger: Strengthening Socio-Economic rights

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On the day of the last European Union elections, a third of Irish electors failed to avail of their right to vote. But, how many of them would have chosen to go without shelter or food on the same night? Yet, the right to vote is justiciable, while there is no constitutional right to shelter or housing. It is increasingly apparent that the existing divide between rights which are justiciable (civil and political) and those which are not (social and economic), needs to be rethought and redefined. This is needed to put more effective curbs on rampant market forces which favour the strong over the weak, to better protect key aspects of human dignity such as access to decent housing, and to reduce poverty more effectively.

Engaging in rhetoric is usually risky – it tends to highlight the gap between aspiration and reality. But occasionally the risk is in the opposite direction. Sentiments, principles, goals, originally uttered perhaps to placate and deflect, may despite everything inspire and keep alive, through hard times, the hope that they may somehow be realised and acted on.

Rights language is of this sort. The uncompromising claim that every one has rights, that rights trump other claims, has often been rejected or derided as 'idealistic', unrealistic, and unattainable except to a limited degree. Yet, time and time again, rights have shown the resilience of a bog fire, smouldering unseen beneath the surface, and capable of bursting into flame unexpectedly.

We are now at an interesting stage, to put it no more highly, in the evolution of rights. In the past, a certain cleavage between different categories of rights was widely accepted in the West as proper and necessary. Only one category, that of civil and political rights, was determined to be enforceable in law. Such rights as health or housing were denied legal enforceability, not only in national constitutions, but also in the international human rights instruments.

In the Irish constitution, as is well known, while a number of 'Directive Principles of Social Policy' were stated in Article 45, they were specifically stated to be non-cognisable by the courts, and have had little

practical effect. The constitution of India, drawing on the example of its Irish predecessor, also included similar non-cognisable provisions. However, the Indian Supreme Court showed in a number of judgments that these, even if non-cognisable, could be used in a positive sense to advance social and economic rights.

The divide between the two categories of rights is very apparent at European level. While the European Convention on Human Rights allows the individual to take a case to the Court of Human Rights, no such possibility exists under the European Social Charter (1961) or its updated successor, the Revised European Social Charter of 1996. At UN level, neither category of rights is justiciable.

In Ireland, the 1996 *Report of the Review Group on the Constitution* dismissed in less than two pages the proposition that anti-poverty rights be included in the Irish constitution. It re-stated two of the main arguments on which the denial of justiciability to social and economic rights is usually based: (i) that it would be a distortion of democracy to transfer decisions on major issues of 'policy and practicality' from the government and Oireachtas, elected to represent the people and do their will, to an unelected judiciary; (ii) that it would not accord with democratic principles to confer absolute personal rights in the constitution in relation to social or economic objectives, however desirable in themselves, and leave the Oireachtas 'with no option but to discharge the cost, whatever it might be, as determined by the judiciary'.

Both arguments reflect the prevalent assumption (shared by liberals and conservatives alike) that civil and political rights are essentially negative rights, obliging the state to refrain from doing something, or guaranteeing the citizen freedom to do something. This type of right is contrasted with social and economic rights, which are classed as essentially positive, requiring the provision of resources for their implementation. Therefore, it is argued, elected governments rather than the courts should properly decide the rationing and allocation of scarce resources between competing uses, since governments are responsible to the electorate, and the courts are not.

These arguments are less and less tenable. The assumptions underlying them are increasingly challenged. One is that civil and political rights are basically cost-free; this is patently not so. Another is that the courts would run amok in adjudicating socio-economic rights. This has not happened in the 60 years since the right to free primary education was given constitutional status in Ireland. Indeed it is remarkable that the Review Group ignored completely the Irish experience in this regard, which completely belies their fears about constitutional enumeration.

From another direction, much work has been done especially within the UN, in developing the content and internal structure of social and

economic rights. The UN's Committee on Economic, Social and Cultural Rights, which monitors the reports of states parties to the covenant of the same name, have defined a three-fold aspect to such rights. States have a duty to respect, that is, not to violate or infringe the rights in question by their actions; to protect them, that is to prevent their violation by third parties; and to promote and fulfil them, that is, to ensure their progressive implementation as circumstances change and resources permit.

The first two requirements, to respect and to protect, do not depend primarily on the provision of resources. A justiciable right to health or housing would be important in the context of guaranteeing respect and protection for the health of individuals. As for the resource question, this is of course related to existing levels of economic and technological development – but so to a significant extent is the right to life and to bodily integrity. It is not necessary to assume that, if made justiciable, a given right must inevitably be left for the courts to treat as totally open-ended. The UN committee has emphasised that what is at issue here is a *minimum* standard, which the courts would if necessary enforce. In a path-breaking judgement the Swiss Federal Court in 1995 found that there was an unwritten constitutional right to a basic minimum of subsistence, based on or derived from fundamental human rights. There were, it said, elements which, although not expressly enumerated in the (Swiss) constitution, nevertheless acted as pre-conditions for the exercise of other rights, to liberty or justice, which were enumerated in the constitution or which otherwise appeared as indispensable elements of a state based on democratic principles and the rule of law. The guarantee of elementary needs such as nourishment, clothing and shelter was 'absolutely necessary for human existence and development', it stated.

The line of argument used in the Swiss judgement is relevant in an Irish context. The Federal Court showed itself acutely aware that judges have to be aware of the functional boundaries of their competence. It stated specifically that, in view of the restraints of state resources, judges do not have the competence to set priorities for the allocation of resources. Consequently, the courts could only determine minimum levels of state performance. But, after making very clear the limits to the courts' competence in resource determination, the Federal Court, nevertheless found unequivocally that 'what constitutes the inalienable pre-condition of dignified human existence is clearly recognisable and susceptible to investigation in legal proceedings'. Only when the legislative framework (in this case of Switzerland) failed to meet the minimum claim required under the rights stated in the constitution was it to be set aside, the court stated.

Ireland is a party to the UN Covenant on Economic, Social and Cultural Rights, which includes the rights to health, shelter, adequate standard of

living, and access to adequate nutrition. The UN monitoring committee for this Covenant has laid down that 'there is a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [in the Covenant] which is incumbent on every State Party'.

Everyone understands that although the right to life is justiciable in the Irish constitution, this does not make the state liable to guarantee life everlasting. In the same way, a right to health or housing, if constitutionally enumerated, would be construed in the light of prevailing standards, technology, and resources. It would not and could not be interpreted to guarantee everyone the right to live in a king's palace. It could and should be interpreted, however, as guaranteeing that we do not have to sleep in ditches; that by whatever means are appropriate, the state would ensure that we enjoyed at least the minimum conditions of shelter required to satisfy the 'inalienable pre-condition of dignified human existence', as the Swiss judgement puts it.

In crude terms of Gross National Product per head, our wealth in Ireland increased by 66 per cent between 1993 and 1999. By the end of the current year we are expected to exceed German per capita income, putting us second from the top, after Luxembourg, in the league of eleven countries in the Euro zone. Current forecasts are that, although slackening somewhat, the Irish economy will continue to grow at an exceptionally high rate over the next several years. It is less and less convincing to argue that we cannot afford to make core social and economic rights justiciable.

By doing so, by inserting them in the constitution, we would proclaim that we intended to have, not a regime of first and second class rights, but a true republic of rights. We would be saying that we valued people first, and that our national priorities were to safeguard in a holistic way the well-being of all citizens.

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