

The Incorporation of Economic, Social and Cultural Rights into the Irish Constitution

Irish Human Rights and Equality Commission
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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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Introduction

The Irish Human Rights and Equality Commission ('the Commission') was established by the *Irish Human Rights and Equality Commission Act 2014*. We have a statutory remit to protect and promote human rights and equality in the State, to promote a culture of respect for human rights, equality and intercultural understanding and to promote understanding and awareness of the importance of human rights and equality.¹ We are tasked with reviewing the adequacy and effectiveness of law, policy and practice relating to the protection of human rights and equality and with making recommendations to Government on measures to strengthen, protect and uphold human rights and equality accordingly.²

After the historic crisis of the Covid-19 pandemic, and as we turn to face the new challenges of the 21st century, there is an opportunity to ensure that Ireland's future is built on a firm foundation of commitment to human rights and equality. We must not only address crises as they arrive, but use them as an opportunity to futureproof our rights commitments, to ensure that future crises—be they environmental, public health, or something else entirely—are responded to in a way that respects these values. The future of Ireland, grounded in an unwavering commitment to human rights and equality, is ours to shape.

For a long time, there have been calls, in Ireland and elsewhere, for the robust protection of economic, social and cultural ('ESC') rights. The recent Citizens' Assembly on Gender Equality shows how Irish people are committed to care and welfare—including pay for carers and a publicly funded childcare system—and their willingness to support this, if necessary, by paying

“higher taxes, based on the principle of ability to pay”.

95.6% of the Assembly's members supported this commitment.³ One of its most important recommendations is the insertion of a new Article 41.2 of the Constitution that, as well as being gender neutral:

¹ Section 10(1)(a)-(e) of the 2014 Act.

² Section 10(2)(b) and section 10(2)(d) of the 2014 Act.

³ See “[Recommendations of the Citizens' Assembly on Gender Equality](#)” April 24th, 2021; [Full Report of the Citizen's Assembly on Gender Equality](#), June 2021 p. 87.

“obliges the State to take reasonable measures to support care within the home and wider community.”⁴

This clearly suggests placing a socio-economic constitutional obligation on the State.⁵ The Commission has supported this recommendation before the Joint Oireachtas Committee on Gender Equality, and is of the view that the current wording of Article 41.2 does not conform to Ireland’s international human rights obligations.⁶ We must do more to adequately support, value and share the work of caring for one another. Greater recognition of the economic and social importance of care is at the core of our Strategy Statement 2022-2024, as is addressing economic inequality, which affects all structurally vulnerable groups⁷ and prevents the realisation of many human rights.⁸ Another core element of the Strategy Statement is ensuring provision of adequate and appropriate housing for all, including protection of housing as a human right.⁹ As a core part of the process of renewal and rejuvenation following the pandemic, we are of the view that ESC rights must be protected in the Irish legal order. Taking into account the available options, we consider that the best way to effectively ensure adequate protection of these rights in practice is the incorporation of these rights at a constitutional level, backed by appropriate supplementary statutory protections and policy measures.¹⁰ It is crucial that they be included in the core rights provisions of the Constitution, as justiciable rights—rights that can be enforced in court.¹¹ Judicial protection provides a crucial backstop and safeguard for these rights, and ensures

⁴ [Final Report of the Citizen’s Assembly on Gender Equality](#), June 2021 p. 12.

⁵ Indeed, the citizens specifically requested stronger language for this recommendation when a previous proposal suggested only a commitment to a principle. Members voted to make the language “stronger and more binding on the Government.” Ibid 55.

⁶ See [Opening statement](#) by the Irish Human Rights and Equality Commission, Joint Oireachtas Committee on Gender Equality, Thursday 10 March, 2022. We made a subsequent submission in November 2022, outlining our recommendations for constitutional reform and possible wording. For the final report of the Committee, see: Houses of the Oireachtas, [Unfinished Democracy: Achieving Gender Equality Final Report December 2022](#) (2022).

⁷ We define a structurally vulnerable person as someone who is particularly vulnerable to violations of their rights due to political, economic, social and cultural structures. Instead of focusing on the personal characteristics of individuals and groups and viewing them as lacking agency or inherently vulnerable, ‘structural vulnerability’ refers to the structures in place which render certain sectors of the population particularly vulnerable to human rights abuses.

⁸ Irish Human Rights and Equality Commission, [Strategy Statement 2022-2024](#) (2012) 11.

⁹ Irish Human Rights and Equality Commission, [Strategy Statement 2022-2024](#) (2012) 11.

¹⁰ The Commission has previously expressed its view that socio-economic rights should be enshrined in the Irish Constitution. See IHREC, [The provision of emergency accommodation to families experiencing homelessness](#) (May 2017), p. 4; IHREC, [Submission to the Citizens’ Assembly on Gender Equality](#) (March 2020), pp. 31-32; IHREC, [Submission to the Third Universal Periodic Review Cycle for Ireland](#) (March 2021), p. 15; and IHREC, [Comments on Ireland’s 19th National Report on the implementation of the European Social Charter](#) (2022), p. 5.

¹¹ See generally Jeff King, ‘The Justiciability of Resource Allocation’ (2007) 70(2) *Modern Law Review* 197.

that they are taken seriously as core rights concerns, and not treated as lesser than other rights protections.

There are often misunderstandings about what the protection of such rights really means.¹² A right to housing does not mean, as some critics suggest, that the State provides everyone with a house. It is, rather, a State and societal commitment to ensuring that—gradually, by various means, and within available resources—the State works towards ensuring that housing needs of all people are met. It acknowledges and accommodates the difficulties of governance and the challenges of meeting the needs of all people. But, it also ensures that the State cannot unreasonably, irrationally or unfairly pursue policies that exclude certain structurally vulnerable groups and disregard their fundamental interests.

It is important to stress at the outset that constitutional change, though very important, is just the first step to ensuring the full and practical realisation of ESC rights. Changing constitutional text is not enough—we also have to change culture. We need to make sure judicial and political actors, as well as the public, understand and appreciate the value and importance of these rights, so that their protection is bolstered and realised by appropriate legislative, judicial, and policy responses. It cannot be the case that constitutional change becomes a symbolic but not practical vindication of these values—their vindication must be felt by everyone who enjoys them. For this, we need to make sure that our legislature and Government take rights seriously, and promote their realisation with appropriate policy measures and resource allocation. We need to make sure that the judiciary embraces their role as enforcers of these rights. We need, furthermore, to promote access to justice and ensure that people can access the courts to vindicate their rights, and to ensure that oversight bodies defend rights for those who may be unable to vindicate their rights themselves. All this means that pursuing constitutional change must be just one part of a broader integrated agenda of promoting consciousness and vindication of ESC rights and equality protections.

In this policy statement, we set out the importance of ESC rights; the failure to protect them in Ireland and the consequences of this; the means by which these rights could be protected in the Irish legal order; and answer the major concerns about the incorporation of these rights into the

¹² James Nickel “Poverty and Rights” (2005) 55 *Philosophical Quarterly* 385; Frank Michelman, “The Constitution, Social Rights, and Liberal Political Justification” (2003) 1 *International Journal of Constitutional Law* 13.

Constitution. It concludes with a series of recommendations to advance the protection of these rights.

The fundamentality of ESC rights

Rights in contemporary western legal systems—especially common law systems like Ireland’s—are often divided into two major categories: civil and political rights (‘CPRs’) and ESC rights. CPRs relate to western liberal-democratic freedoms and include speech and assembly; the right to vote; rights against interference with life, person and bodily integrity; protections against discrimination; procedural fairness and trial rights. They are often referred to as “first generation rights” or “negative” rights, as they generally seek a zone of freedom from certain types of State action or interference. ESC rights, sometimes referred to as socio-economic rights, “positive” rights, or “second generation rights” are the second major category.¹³ These relate to fundamental aspects of human life, and the ability for people to live and thrive in a society. The most commonly cited social and economic rights are rights to health; housing; education; food; shelter; water; a right to work in fair and reasonable conditions; a right to social security; and a right to an adequate income or standard of living. The most common cultural rights include language rights/minority language protections; rights to cultural protection/recognition; the recognition/protection of ethnicity; and rights to cultural participation. Some rights of disabled people would also be included within the category, such as the right to reasonable accommodation, and the right to accessibility, protected in the UN Convention on the Rights of Persons with Disabilities,¹⁴ and cultural/linguistic protections for sign language users.¹⁵ CPRs are typically protected in the Constitution or other enforceable rights instruments and subject to oversight by the judiciary. ESC rights are generally not subject to this same standard of legal oversight. This division of rights into two groups is replicated in international human rights law,¹⁶ it is long-entrenched and prevalent in legal discourse, and is a large part of why ESC rights are less enforceable than CPRs. Crucially, however, this division is not conceptually sound: though

¹³ A third generation of rights, focused on collective cultural and environment entitlements, have been postulated.

¹⁴ See Articles 5 and 9 of the Convention. Other entitlements, such as the right to live independently and be included in the community in Article 19, and the right to health in Article 25, have ESC elements. Article 4.2 of the Convention obliges State Parties to progressively vindicate ESC rights.

¹⁵ Irish Sign Language, and the right to use it, are officially recognised in the *Irish Sign Language Act 2017*, but it does not enjoy constitutional protection as an official language in Article 8.

¹⁶ For example, the ECHR does not include core ESC rights, and had to be supplemented later by the (quite different) European Social Charter; similarly, the International Covenant on Civil and Political Rights is distinguished from the International Covenant on Economic, Social and Cultural Rights.

these two sorts of rights differ in practical ways, they are not *fundamentally* different.¹⁷ That this is a longstanding distinction does not mean that we should accede to it. It is:

“premised on analytical distinctions that have long been criticised.”¹⁸

Treating them as if they are different marginalises the interests of various structurally vulnerable groups that are particularly in need of protection by this second category, ESC rights.

Both sets of rights are fundamental and essential, and deserve equal status and recognition. The foundational basis of all human rights lies in dignity, autonomy, and self-realisation, and protecting ESC rights is essential to realise these values.¹⁹ Human dignity is a foundational value of the Irish Constitution, mentioned in the Preamble, and found by the courts to be fundamentally linked to the recognition and protection of constitutional rights.²⁰ Yet there has been a repeated failure to properly protect ESC rights in Irish domestic law, and to honour fully Ireland’s international commitments in this respect.

¹⁷ See detailed argument in Gerry Whyte, *Social Inclusion and the Legal System* (2nd ed, IPA, 2015); Katherine G Young *Constituting Economic and Social Rights* (OUP, 2012); Paul O’Connell, *Vindicating Socio-economic Rights: International Standards and Comparative Experiences* (Routledge 2012); and Jeff King *Judging Social Rights* (CUP, 2012).

¹⁸ Young (n 17) 5.

¹⁹ Young (n 17); James Nickel “Poverty and Rights” (2005) 55 *Philosophical Quarterly* 385; and Frank Michelman, “The Constitution, Social Rights, and Liberal Political Justification” (2003) 1 *International Journal of Constitutional Law* 13.

²⁰ See *NHV v Minister for Justice* [2017] IESC 35; *Simpson v Governor of Mountjoy Prison* [2019] IESC 81.

Ireland's failure to protect ESC rights in domestic law

Ireland has long been a party to the International Covenant on Economic, Social and Cultural Rights, but has not, despite repeated calls by the Commission, incorporated this agreement into domestic law.²¹ Other international and transnational rights instruments protect various aspects of ESC rights and have developed our understanding about the content of such rights.²² Treaty oversight bodies also perform a very useful role in overseeing the Irish State's human rights record.²³ However, these international instruments cannot fully protect Ireland's core ESC obligations unless incorporated into domestic law.²⁴ This is because of Ireland's tradition of dualism, where international instruments do not have domestic legal effect on ratification, but require additional implementation.²⁵

At the same time, the Irish Constitution does not protect many enforceable ESC rights in its text. It features only two core rights: language rights of Irish speakers, protected by virtue of Article 8's provision of Irish as the national and first official language; and the right to free primary education in Article 42. Neither of these rights has been afforded very robust protection as ESC rights.²⁶

There is also one unenumerated/derived ESC right, of limited scope, in the right to earn a livelihood/seek employment.²⁷ The courts specifically disclaimed, in 2001, the ability to recognise

²¹ See IHREC, [Report to UN Committee on Economic, Social and Cultural Rights on Ireland's third periodic review](#) (March 2015), p. 6 and IHREC, [Submission to the UN Committee on Economic, Social and Cultural Rights for the List of Issues on Ireland's Fourth Periodic Report](#) (December 2021), p. 1. The Committee on Economic, Social and Cultural Rights has also called on Ireland to incorporate the Covenant in its domestic legal order: Committee on Economic, Social and Cultural Rights, [Concluding observations on the third periodic report of Ireland](#) (2015) E/C.12/IRL/CO/3, p. 2. In March 2022, the Committee asked the State again to provide information on measures it has taken to incorporate the provisions of the Covenant in its domestic legal order: Committee on Economic, Social and Cultural Rights, [List of issues in relation to the fourth periodic report of Ireland](#) (2022), para 1.

²² The Committee on Economic, Social and Cultural Rights has published a number of [General Comments](#), expanding on the content of the rights protected by the Covenant and the State's obligations in implementing them in practice.

²³ See for example, Committee on Economic, Social and Cultural Rights, [Concluding observations on the third periodic report of Ireland](#) (2015) E/C.12/IRL/CO/3.

²⁴ The ECHR does not protect many ESC rights, but the European Social Charter supplements it in this respect. The Charter, however, does not have domestic effect in Ireland. The EU Charter of fundamental rights includes some ESC rights, but it only applies when States are applying EU law. Other international instruments that include such rights—the UN Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights—have not been incorporated into domestic law.

²⁵ See generally Kelly [5.3.124]-[5.3.1131]; Article 29.6 of the Constitution provides that “no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

²⁶ See e.g. Hazel Bergin, 'Gaeilge Bhriste: Irish Language Rights in *Ó Maicín v Ireland*' (2015) 18 Trinity College Law Review 214; *Sinnott v Minister for Education* [2001] 2 IR 545; and Gerard Whyte, “The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman” (2006) 28 DULJ 1.

²⁷ See *Murtagh Properties v Cleary* [1972] 1 IR 330; *NHV v Minister for Justice* [2017] IESC 35.

additional, implied ESC rights in the Irish Constitution.²⁸ In general, the courts' approach to any cases involving distributive questions is very cautious and conservative.²⁹ Article 45 of the Constitution, entitled "Directive Principles of Social Policy", includes principles similar to ESC rights. It lists principles to be used for the "general guidance of the Oireachtas". These are explicitly non-justiciable: the Article states that the application of the principles "shall be the care of the Oireachtas exclusively", and are not "cognisable by any Court under any provision of the Constitution." They have not had any significant judicial use, and are hardly ever mentioned in the Houses of the Oireachtas.³⁰ More generally, the Irish courts, in the landmark case of *TD v Minister for Education*, limited the scope for judicial enforcement of ESC rights, even ones recognised by the Constitution.³¹ This is reflective of a judicial culture that is reluctant to engage with rigorous ESC rights adjudication, at least without more explicit constitutional authorisation to do so. This has resulted in significant gaps in the protection of ESC rights in Ireland, many of which were highlighted by us in our 2021 submission to the UN Committee on Economic, Social and Cultural Rights.³²

These include:

- **Cultural rights:** there is no constitutional protections for cultural minorities or ethnic groups, including for traveller ethnicity and cultural participation.
- **Language rights:** though the rights of Irish speakers are given some protection by way of Article 8, these are not framed as personal rights, and their vindication has been imperfect. Nor are there protections for any minority language rights in the Constitution. The rights of Irish Sign Language users are protected in statute in the *Irish Sign Language Act 2017*.
- **Right to education:** though there is a textually-protected right to primary education, it is limited in how the courts can vindicate it; other forms of education have limited or no constitutional protection.

²⁸ *TD v Minister for Education* [2001] 4 IR 259, 287-288, per Keane CJ.

²⁹ Gerry Whyte, "A Tale of Two Cases – Divergent Approaches of the Irish Supreme Court to Distributive Justice" (2010) 32(1) Dublin University Law Journal 365.

³⁰ See discussion in David Kenny, "[Directive Principles of Social Policy: between rights and politics?](#)", Presentation at *Social Equality at Stake* conference, University of Göttingen, June 2019.

³¹ *TD v Minister for Education* [2001] 4 IR 259; see generally Gerard Hogan, Gerry Whyte, David Kenny, and Rachael Walsh JM Kelly: *The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) [7.3.283] et seq. (hereinafter Kelly).

³² IHREC, [Submission to the UN Committee on Economic, Social and Cultural Rights for the List of Issues on Ireland's Fourth Periodic Report](#) (December 2021), 5-27.

- **Rights to work:** though the Irish Constitution protects rights to seek employment and earn a livelihood,³³ it does not—outside of Article 45—provide any protections for rights to decent work, or conditions of employment. It would be desirable to have protections that would include access to work; adequate earnings; employee voice; equal opportunity and treatment; health and safety; and security and stability of work.³⁴
- **Right to housing:** there is a substantial need for this right, either to be independently vindicated by the courts, and/or to balance the property rights in Article 43. Such a right could guarantee reasonable provision of quality housing that is accessible, affordable, secure, culturally appropriate, and with access to appropriate services.³⁵
- **Right to health:** the Irish Constitution does not protect a right to health in any express or direct way.³⁶ Protecting such a right could serve as an important rhetorical or practical addition to reform and improvement of the health system, and may improve public health protections.
- **Right to social security:** public interest litigation can address unfairness in the social protection system for example, but in the absence of constitutional rights protection, it is limited in scope and decisions can be overturned by legislation.
- **Disability rights:** while enjoying legal protection in many respects, these rights could be protected more robustly *as rights*.³⁷

³³ See *NHV v Minister for Justice* [2017] IESC 35 and *Murtagh Properties v Cleary* [1972] 1 IR 330 respectively.

³⁴ A 2021 report published by IHREC and the Economic and Social Research Institute ('ESRI') identifies these six key dimensions of work and corresponding indicators. The dimensions are based on a review of international approaches and a consultation process with 33 organisations. See, F. McGinnity, H. Russell, I. Privalko & S. Enright, [Monitoring Decent Work in Ireland](#) (IHREC and the ESRI: 2021).

³⁵ A 2021 IHREC and ESRI report on monitoring adequate housing in Ireland proposes six dimensions of adequate housing: accessibility, affordability, security of tenure, cultural adequacy, housing quality, and location (including accessing to services and local environment). These dimensions are based on international standards and feedback from a consultation event with key stakeholders. H. Russell, I. Privalko, F. McGinnity & S. Enright, [Monitoring Adequate Housing in Ireland](#) (IHREC and the ESRI, 2021).

³⁶ A right to health would include public health protections, insofar as such an individual right would include, in appropriate cases, review of broad public health policies and measures. For example, in the South African case of *Treatment Action Campaign v Minister for Health* (1) 2002(10) BCLR 1033 (CC), the Constitutional Court found the State's approach to HIV/AIDS treatment unreasonable generally, rather than in the context of any one patient or case.

³⁷ See J. Banks, R. Grotti, É. Fahey and D. Watson, [Disability and Discrimination in Ireland](#) (IHREC and the ESRI, 2018). As noted above, there are various ESC rights in the UN Convention on the Rights of Persons with Disabilities. Though the entitlements at the core of these rights are generally protected by Ireland's legal and policy regimes, we could improve their vindication and protection, and protect them as justiciable constitutional rights with additional legal

These gaps are not mere legal oversights; there are real costs and consequences to this failure to protect these rights. Since we value rights as our highest ideals, and limit rights protections to CPRs, this contributes to the decentring of ESC values in our politics. Compelling arguments have been made that this has contributed to the vast socio-economic inequality of contemporary societies.³⁸ Since the Irish Constitution is the repository of our highest rights and values, the omission of these rights makes a statement about our priorities as a society. The Irish legal order essentially denies ESC rights any parity of protection with other rights that we protect as fundamental to our society, and by implication suggests that they are not as important as—or not important in the same way as—CPRs. It is likely that this has an impact on how we treat these values in law, politics, and public life.³⁹

Recent Irish history evidences repeated failures to vindicate these rights in practice.⁴⁰ High profile litigation showed persistent failure of the Government in the 1990s and 2000s to vindicate the rights of structurally vulnerable children in care, and the courts held that they were unable to intervene to rectify the situation.⁴¹ We have had a persistent crisis in healthcare, and an acute housing crisis since 2014.⁴² It was thought necessary to offer constitutional protection to children in 2012 to help redress State failures in child protection, though this did not expressly extend to ESC rights.⁴³ Since the Irish legal order does not protect some of the most fundamental human entitlements as *rights*, and denies access to judicial remedies, this leaves these matters to a political system that has, in the past, failed in respect of social inclusion in socio-economic policy and cultural protection. It is incumbent that these rights are protected in Ireland's legal order. The Constitutional Convention in 2014 considered the question of including ESC rights in the Irish Constitution, and by large majority recommended amending the Constitution to include

remedies, rather than just as statutory entitlements. See for an overview of the limited role of Constitution in protection of such rights, Gerry Whyte, "Constitutional Litigation And Disability Rights" (2012) 48 Irish Jurist 202.

³⁸ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (OUP, 2018).

³⁹ Catherine McGuinness notably pointed out that the protection of family rights—without independent protection of children's rights—might have consciously or unconsciously affected the way authorities dealt with family welfare cases, and that this might be addressed by the additional of express children rights. *Kilkenny Incest Investigation* (Government Publications Office, 1993) 96. This was one of the factors that led to the insertion of such rights.

⁴⁰ This is not uniform; some rights enjoy more protection in practice in domestic law than others. See detailed analysis in Whyte (n 17).

⁴¹ See *TD v Minister for Education* [2001] 4 IR 259.

⁴² Eoin O'Sullivan, Aisling Reidy, Mike Allen [Focus on Homelessness Report, Vol 4.](#), Focus Ireland, February 2021.

⁴³ See generally on the context of this referendum: Oran Doyle and David Kenny, "Constitutional Change and Interest Group Politics: Ireland's Children's Rights Amendment" in Richard Albert, Xenophon Contiades, Alkmene Fotiadou (eds.), *The Foundations and Tradition of Constitutional Amendment*, (Hart Publishing, 2017) 199.

protection for socio-economic rights (85%), including rights to: housing (84%); social security (78%); health care (87%); rights of disabled people (90%); linguistic and cultural rights (75%); and rights encompassed by the International Covenant on Economic, Social and Cultural Rights (80%).⁴⁴ There have been many proposals in the Oireachtas, including in 2021 and 2022, to amend the Constitution to protect various ESC rights.⁴⁵ Civil society organisations have also called for Ireland to incorporate its international obligations on ESC rights.⁴⁶

⁴⁴ See *Eight Report of the Constitutional Convention: Economic, Social and Cultural (ESC) Rights*, (March 2014) 6. In 2015, IHREC recommended that the State consider the relevance of the recommendation of the Convention on the Constitution in its approach to the legal status of economic, social and cultural rights under Irish Law. See IHREC, [Report to UN Committee on Economic, Social and Cultural Rights on Ireland's third periodic review](#) (March 2015), p. 7. IHREC also published a nationally representative poll of over 1200 people in December 2022, which showed that 64% of people in Ireland believe that the right to housing should be enshrined in our Constitution. See IHREC, [Robust Support Continues for Refugees Says New National Survey on International Human Rights Day](#) (10 December 2022).

⁴⁵ See for example, Joint Oireachtas Committee on Housing, Planning and Local Government, [Right to Housing: Discussion](#) (5 July 2022); Second Stage debate on the [Thirty-seventh Amendment of the Constitution \(Economic, Social and Cultural Rights\) Bill 2018](#), Dáil Debates vol. 1003 no. 5 (27 January 2021).

⁴⁶ See Home for Good, [For the Common Good: The Housing Crisis and a Proposal to amend the Irish Constitution](#) (January 2020) 4; Amnesty International, [Bringing ESC Rights Home: The Case for the Legal Protection of Economic, Social and Cultural Rights in Ireland](#) (2014); Social Justice Ireland, [Seven Economic, Social and Cultural Rights](#), 13 March 2020; Free Legal Advice Centres, ["Protection of Economic, Social & Cultural Rights in Ireland"](#) (2016); Public Interest Law Alliance, ["Justiciability of economic, social and cultural rights in Ireland"](#); and Age Action, "Human rights for all people" *Aging Matters*, December 2014 – January 2015. This list is far from exhaustive.

Protecting ESC rights in the Irish Constitution

Protecting ESC rights in Irish domestic law could be done in several different ways. It could, in principle, be done at a sub-constitutional level. The European Convention on Human Rights ('ECHR') has been incorporated in this way, and various jurisdictions protect, for example, the right to housing at a statutory level.⁴⁷ However, we are of the view that this approach should not be favoured as the primary way to protect ESC rights. First, the ECHR Act 2003 has perhaps not been fully successful in respect of strong judicial application;⁴⁸ protecting ESC rights in this way would likely have the same result. Secondly, the Constitution provides much stronger remedies in many cases: unlike constitutional rights, statutory rights cannot result in the invalidation of laws, and there are limitations to other remedial tools that could be provided for in law.⁴⁹ Constitutional protection should thus be favoured. The potential for statutory rights/duties should not be underestimated, however, and they would be an excellent supplement to the constitutional protection of ESC rights.⁵⁰

In terms of constitutional protection, we are of the view that it is preferable to add ESC rights to a new standalone article of the Constitution—an Article 40A, perhaps— rather than to integrate them into the existing constitutional text. There are several reasons for this. First, it allows the new rights to be given an express identity as ESC rights (including in the title of the article, and from their grouping together) rather than leaving the nature of these entitlements to be implied by their wording. Secondly, it avoids the risk that these rights could be watered down or misinterpreted because of their integration into existing constitutional text. This would be a risk with a right to housing being inserted into Article 43's property rights guarantees, or language

⁴⁷ Mercy Law Resources Centre, [Second Report on the Right to Housing: The Right to Housing in Comparative Perspective](#) (2018) 11-12, 15-17.

⁴⁸ See Fiona de Londras, "Neither Herald Nor Fanfare" in Egan, Thornton, and Walsh (eds.) *Ireland the ECHR: 60 Years and Beyond* (Bloomsbury Professional, 2014).

⁴⁹ For example, a legal—rather than constitutional—protection could never provide any mechanism to invalidate a law; this is only available as a constitutional remedy. Moreover, there may be a limit to what a law could provide in terms of interpretive obligations—instructing courts to interpret laws consistently with rights—as it can never allow the interpretation of the law in a manner that departs from its literal meaning, as this would be judicial law making. This is why Ireland's interpretive provision in the ECHR Act 2003 has been less robust in practice than its equivalent in the UK Human Rights Act. Moreover, in terms of reviewing policy making and policy decisions, the courts would be reluctant to engage with any oversight of ESC decisions on foot of a legislative—rather than a constitutional—mandate, as they have held that reviewing such policy is not currently a part of the judicial function (*TD v Minister for Education* [2001] 4 IR 259). Therefore, constitutional change is necessary.

⁵⁰ The *Irish Sign Language Act 2017* provides an example, as it provides, in s. 3, for rights-based recognition of the language and its users.

rights and cultural rights inserted into the early articles on nation and state. Thirdly, a standalone provision would allow—if necessary—for specific text making it clear that the rights were justiciable, and any limitations or directions in terms of judicial enforcement.

While articulation of full wording for such a provision must include consultation with stakeholders and the participation of those affected, it is possible to suggest that the following elements be included in any final proposal:

- the rights should be justiciable, and included in the personal rights provisions of Articles 40-44;
- the text should suggest or invite a reasonableness approach, or a progressive realisation approach, for vindication of ESC rights;⁵¹
- certain rights—such as basic accommodation and emergency healthcare—should be protected as minimum core entitlements which should never be denied to anyone;⁵²
- the rights should be protected directly by the text, without intermediation of “provision may be made by law for the protection of”;
- the protections should not be limited to “citizens”, as some of the rights in Article 40-44 are, but expressly apply to all persons;⁵³
- the text should suggest remedial flexibility for the judiciary in enforcing them.

Contrary to the contentions of some, inserting these rights into the Irish Constitution would be an evolution—not a revolution—in the constitutional order. It is often alleged that ESC rights are not known to the Irish constitutional order; that they, uniquely amongst constitutional rights, would cost money and require active policy intervention to vindicate; and therefore that these rights are categorically different from the CPRs that the Constitution protects. This is not the case. The Constitution already protects the ESC right to free primary education, and includes protections for

⁵¹ This approach is notably—and effectively—adopted in South Africa. See Denis Davis, “Transformation: The Constitutional Promise and Reality” (2010) 26 SAJHR 85.

⁵² The minimum core obligations set out in standards such as ICESCR are applicable in a global context; ongoing domestic interpretation of the minimum requirements is needed in the context of a wealthy country like Ireland. See H. Russell, I. Privalko, F. McGinnity & S. Enright, [Monitoring Adequate Housing in Ireland](#) (IHREC and the ESRI, 2021), p. 5.

⁵³ Most provisions of the Constitution refer to the rights of the citizen, but are enjoyed by all persons in the State unless something about their nature relates intimately to citizenship; see *Kelly* (n 31) [7.1.28]-[7.1.36].

the Irish language. These rights cost large sums of money to vindicate, and require active policy interventions from the State. Moreover, the Irish Constitution protects CPRs—notably the right to criminal legal aid—that cost vast sums of money and require a complex policy scheme to vindicate.⁵⁴ There is no categorical difference between ESC rights and those the Constitution now protects.

Protecting ESC rights would be a development of our constitutional order, but one that is consonant with it and its underlying values, and extends—rather than upends—its protection of rights. As noted above, ESC rights are hugely important, relating as they often do to fundamental and basic entitlements necessary to live and to live well. The Constitution should thus be receptive to these rights. Relatedly, because these rights are so fundamental, and often protect structurally vulnerable groups, it is crucially important that their vindication be insulated from the vicissitudes of ordinary politics through constitutional entrenchment and judicial enforcement.

⁵⁴ See Whyte (n 17) for detailed analysis and discussion of this and similar points.

What vindicating ESC rights means

It is important to clarify what it means to vindicate, or violate, an ESC right. These rights are, like almost all rights, subject to qualification and limitation. Rights in general may be infringed, limited, or not vindicated once this is justified.⁵⁵ This would be just as true with ESC rights, and justification for limiting or not fully vindicating these rights would include, for example, the State having inadequate resources to do this, or there being more important competing priorities.

Moreover, protecting a right to housing or healthcare in a constitution does not mean that everyone is entitled to a house directly, or provision of any healthcare service in any circumstances.⁵⁶ It is, rather, a guarantee that your rights in these respects are vindicated insofar as possible, within available resources, and not unreasonably ignored, regressed, or denied.⁵⁷ As highlighted above, a constitution may also protect a certain minimum core of these rights—essential entitlements like a right to basic shelter, a right to emergency medical intervention—in an even stronger way.⁵⁸ But it is wrong to assume that constitutional protection of these rights requires government to vindicate them no matter what; it allows for the difficult realities and trade-offs of government to be taken into account.⁵⁹ Only if there is unreasonable policy or a persistent failure to protect the rights will the rights be found violated, and consequences to follow from this.⁶⁰

⁵⁵ See *Kelly* (n 31) [7.1.42] et seq.

⁵⁶ See e.g. the South Africa case of *Soobramoney v Minister for Health* 47 [1998] (1) S.A. 765 (CC). See generally Sandra Liebenberg, “Adjudicating Social Rights under a Transformative Constitution” in Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 75.

⁵⁷ See Davis (n 51).

⁵⁸ John Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now*, Nordic Trust Fund/ World Bank Research Paper, October 2017.

⁵⁹ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009).

⁶⁰ David Landau, “The Reality of Social Rights Enforcement” (2012) 53(1) *Harvard International Law Journal* 198.

Judicial oversight of constitutional ESC rights

It is clear that constitutional protection of ESC rights must allow for judicial enforcement. Ireland has experience of non-enforceable ESC principles in Article 45, and their impact has been minimal.⁶¹ It is essential that these rights are taken seriously, and judicial enforcement is how this can be ensured.

The judiciary are entrusted to defend our constitutional order as the branch of government separate and independent of the making or execution of law. Independent of the political branches, they vet laws and executive actions for compliance with the Constitution. Courts are an apt actor to defend and vindicate constitutional rights in last resort. Though we should and do expect all branches of government to take rights seriously, and law and policy is essential to vindicating rights, the judiciary can ensure that the other branches do not fail in this regard. Judges are not subject to incumbency, and do not need to worry about their popularity or their fate at the next election.⁶² They can thus defend constitutional rights even if it is unpopular to do so. The judicial process, where there is a right of access to the courts to raise complaints, allows structurally vulnerable and marginalised groups—that might be excluded from, ignored by, or insufficiently accounted for in the political process—to raise rights complaints that politics has failed to heed. Of course, the judiciary can only aid such groups where a right of access to justice is meaningful, not just notional. There are many barriers to accessing the judicial process, from cost, to lack of legal aid, to its complexity, to people's awareness of it. Access to justice is a strategic priority for the Commission, and improving this would be an essential component of making ESC rights real.⁶³ We stressed this point in our latest submission to the UN Committee on Economic, Social and Cultural Rights.⁶⁴

The courts have drawbacks too when it comes to ESC rights. They are not elected; they do not have the policy expertise and support that the elected branches have; they do not have any

⁶¹ See David Kenny, "[Directive Principles of Social Policy: between rights and politics?](#)", Presentation at Social Equality at Stake conference, University of Göttingen, June 2019. For consideration of some recent judicial consideration of their role, see James Rooney, 'International Human Rights as a Source of Unenumerated Rights: Lessons from the Natural Law' (2018) 42 *Dublin University Law Journal* 141.

⁶² See Gerry Whyte, "The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman" (2006) 28(1) *Dublin University Law Journal* 1.

⁶³ IHREC, [Strategy Statement 2022-2024](#) (2022) 13.

⁶⁴ IHREC, [Submission to the UN Committee on Economic, Social and Cultural Rights for the List of Issues on Ireland's Fourth Periodic Report](#) (December 2021), 2.

experience of, or sight of, the overall budgeting processes of government.⁶⁵ When they make judgments in cases involving such rights, they pass judgment on—and may demand change in—law and policy that is complex, financially consequential, and made by accountable, elected representatives. It is regularly argued that courts are thus ill-equipped to take on this task, and it would be democratically illegitimate for them to do so.⁶⁶

These charges are unfair, and misunderstand the way in which courts would, in practice, enforce these rights. They would not take on the role of policymaking, or general, interventionist policy oversight. Looking to the Constitutional Court of South Africa—the model for an apex court engaged in this area of rights protection—one sees the Court overseeing “progressive realisation” of rights: looking not for perfect vindication, but for plans and policies that seek to achieve the right for all people gradually, over time, and within the other resource demands placed on the State.⁶⁷ The Constitutional Court assesses the reasonableness of government policy to ensure that no group is unreasonably excluded, or the government has not made irrational and indefensible policy choices, but this is far from micro-managing policy or budgets. It is rather an oversight role to make sure that the State is in fact doing its best, even when this is far from perfect. This has led, on occasion, to very major interventions, holding policies unreasonable and insisting on new ones, but only in response to equally large State policy failures.⁶⁸ It has also seen the Court encourage constructive negotiation between the State and those whose rights have not been respected to work out suitable solutions.⁶⁹ Such protection would also ensure a degree of non-regression: that standards of rights protection, once achieved, should not be allowed to decline.⁷⁰

Therefore, it not the case that courts defending ESC rights make the details of policy, and overturn

⁶⁵ See Michael McDowell SC, “[Social and Economic Rights in the Irish Constitutional Order](#)” 14th October 2008. This argument was also made to the Constitutional Convention by Mr McDowell.

⁶⁶ Adrian Hardiman, “The Role of the Supreme Court in our Democracy” in Muholland (ed) *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (MacGill Summer School, 2004) 32; Frank B. Cross, “The Error of Positive Rights” (2001) 48 *UCLA Law Review* 857; Kent Roach and Geoffrey Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just, and Equitable?” (2005) 122 *SALJ* 325.

⁶⁷ See Sandra Liebenberg, “Adjudicating Social Rights under a Transformative Constitution” in Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 75; Cass Sunstein, “Social and Economic Rights – Lessons from South Africa” (1999) 11(4) *Constitutional Forum* 123.

⁶⁸ *Grootboom v Oostenburg Municipality* (2000) (3) *BCLR* 277 (CC); *Mazibuko v City of Johannesburg* [2007] *BCLR* 239 (CC); *Minister of Health v Treatment Action Campaign* (1) 2002(10) *BCLR* 1033 (CC).

⁶⁹ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] *ZACC* 1. See Lilian Chenwi, “A New Approach to Remedies in Socioeconomic Rights Adjudication” (2009) 2 *Constitutional Court Review* 371.

⁷⁰ See Markus Vordermayer-Riemer “Progressivity And Non-Regression In International Human Rights Law: Going Up On The Escalator” in *Non-Regression in International Environmental Law* (Cambridge University Press, 2020) 33.

budgetary allocations. Ireland, in protecting ESC rights, can follow the South African model, seeking progressive, reasonable realisation of these rights, with the courts there as a last resort if the State is failing to do this or allowing rights to regress. If judges need further training or research support to make these determinations, then this is something that can and should be provided. The *Judicial Council Act 2019* has—for the first time—provided for a formally organised and well-resourced system of judicial education that can aid with this.⁷¹ There is no reason to think that, if entrusted with this responsibility by the people in a referendum, that our courts would not be willing and able to take it on.

It should again be noted that constitutional protection of ESC rights is not a magic bullet: it will not solve all potential problems, or every failure to fully realise and vindicate ESC rights. It will instead ensure their gradual and progressive realisation over time. Progressive realisation, it should be stressed, is not a licence for apathy or inaction, but demands gradual improvement and no regression.⁷² But it will mean that various circumstances will arise where these rights are not well realised and the courts will not be able to help. This is simply a consequence of trying to solve incredibly complex social policy problems that never admit of easy or perfect solutions. This makes it all the more important that constitutional and judicial protections are accompanied by related statutory and policy measures, adequate resourcing, and renewed political commitment to vindicate these important rights.

⁷¹ See section 17 of the *Judicial Council Act 2019*, setting up a new Judicial Studies Committee to ‘facilitate the continuing education and training of judges with regard to their functions.’ This Committee has been established and its members appointed.

⁷² See Committee on Economic, Social and Cultural Rights, [General Comment No. 3: The Nature of States Parties’ Obligations](#) (Art. 2, Para. 1, of the Covenant) (1990), para 9.

Separation of powers and democracy

This reality of how rights would be defended in practice puts to rest concerns that are sometimes raised that protecting ESC rights would upend the separation of powers. No one—not even the most committed advocates for ESC rights—envisages the judiciary taking the lead role in protecting and realising ESC rights. It is obvious that such rights will always require complex law making and policy making to vindicate them. The legislature and executive’s respective roles are never going to be usurped and taken away by the courts. Instead, as with other constitutional rights, legislation and executive action will be influenced and shaped by ESC rights as interpreted by the courts.

This means that concerns about the separation of powers are misplaced: protecting rights of this sort does not place the courts on top of a constitutional hierarchy where previously there were equal branches of government. The courts will augment, but not usurp, the powers of the other branches. There is no reason to think that the courts will overstep the proper bounds of an unelected judiciary and engage in primary policy making. If necessary, the language of the constitutional amendment can be shaped to make clear how these rights should be vindicated, and that the competence and remit of each branch should be respected. Moreover, even if this is a minor augmentation of our current separation of powers, this separation is not static and fixed for all time. It exists to help protect the constitutional order, including the rights we think most important, and it can be altered and tweaked by the people to better pursue their constitutional aims and priorities. Indeed, the Supreme Court, in a recent landmark judgment, tentatively suggested more openness to constitutional review of environmental policy than ever before, which might suggest more openness to moderate policy oversight.⁷³

Similarly, if inserted by referendum, and if capable of removal by referendum, judicial vindication of ESC rights would not be undemocratic. If the people decide to impose an additional judicial check on the representative democracy that governs them, this is not anti-democratic but a working out of new checks and balances in our democratic order. If concerns remain, mechanisms such as legislative override for ESC rights judgments could be considered.⁷⁴

⁷³ Friends of the Irish Environment v Government of Ireland [2020] IESC 49.

⁷⁴ For example, S 33 of the Canadian Charter of Rights and Freedoms provides that the legislature may declare that a statute “shall operate notwithstanding a provision... of this Charter.” That is, the law will take effect even though it may violate a Charter right. Such a law can only last 5 years before it must be re-enacted. It would be possible, if

Conclusion and recommendations

The Commission is of the view that, at this pivotal moment in history, when the foundations of the future of Ireland can be laid, we should put protection of rights and equality at the core of our vision for what the Irish State can and should be. We should make sure that the future challenges we face are always met with a rights- and equality-conscious response. We should commit ourselves to social and economic equality, and creating a caring society. Central to this is amending the Irish Constitution to insert justiciable ESC rights. To bring this about, and ensure this is a meaningful change in practice, we recommend:

- that a Joint Oireachtas Committee on Constitutional Amendment for ESC rights be established with terms of reference giving it a clear mandate to produce a draft constitutional text for such an amendment for consideration by the Oireachtas and the Government;
- that the Committee's terms of reference instruct it to consider and build on the recommendations of the Constitutional Convention;
- that the Committee's work includes participation of those who have experienced deprivation of core ESC rights, so that their lived experience will be central in developing these proposals;
- that the Committee formulate constitutional language that will guarantee justiciable and enforceable ESC rights, while having due regard to the functions of each branch of government;
- that any housing referendum that might take place before this Committee process — through the current work of the Housing Commission,⁷⁵ for example — insert a justiciable and enforceable right to housing;

desired, to include some mechanism like this for ESC rights in the Irish Constitution, though it would hardly seem necessary.

⁷⁵ The Commission wrote to the Housing Commission in September 2022 as part of its public consultation on a Referendum on Housing in Ireland to set out our views on the constitutional recognition of ESC rights, including the right to housing. We note that the Housing Commission's recommendations on the wording for a referendum on a right to housing are due to be submitted to Government in early 2023.

- that the constitutional changes suggested by the Citizen’s Assembly on Gender Equality—that Article 41.2 be replaced with a non-gender specific clause that obliges the State to take reasonable measures to support care within the home and wider community—be considered in the context of the addition of ESC rights more generally;⁷⁶
- that any move to insert ESC rights into the Constitution is buttressed and supplemented by appropriate policy and statutory measures, including:
 - non-judicial oversight processes, such as a standing Oireachtas Committee on Human Rights and Equality, to ensure that ESC rights are protected for all whom they should protect, and to monitor the efficacy of State policy in this area;
 - reform of litigation procedures⁷⁷ and the provision of judicial training and education to enable litigation and adjudication on ESC rights;
 - improving access to justice to enable vindication of ESC rights, including through improved access to legal aid,⁷⁸ as well as additional legal and independent advocacy supports;
 - protecting certain rights—such as housing and health—as statutory rights in addition to their constitutional protection, to more specifically instantiate them and guide the actions of the administrative branches of government in vindicating these rights;
 - incorporation, at sub-constitutional level, of the obligations in the International Covenant on Economic, Social and Cultural Rights into Irish domestic law.

It is important to stress again that protecting and vindicating ESC rights requires many things beyond the judiciary: legislation, policy, proper resourcing, and ongoing monitoring of the effectiveness of different interventions. Affirming these rights in our Constitution and our law, and

⁷⁶ See [Final Report of the Citizen’s Assembly on Gender Equality](#) (June 2021) 53-58.

⁷⁷ Examples of such reform would be broader third party amicus/intervenor participation to help with the gathering of complex evidence; reconsideration of *locus standi*/ripeness/mootness rules to ensure appropriate opportunity to bring cases on ESC rights; and broader rules on class actions.

⁷⁸ We welcome the Minister for Justice’s commitment to review the Civil Legal Aid Scheme and the announcement of a public consultation with key stakeholders. Despite some delays to the commencement of the Review, we encourage the inclusion of affected groups which must be adequately resourced and given sufficient time to participate.

putting in place means by which they can be judicially enforced where appropriate, is an essential part of making them real. But it is not a panacea. Protecting these rights requires a genuine commitment in our political culture and in the public mind to taking them seriously. Constitutional protection, without more, cannot guarantee this.

It can, however, ensure that these rights will not be forgotten; that the political branches can never ignore them; that they will always be part of our political and public discourse.

Constitutional protection, then, is a crucial step in building and then buttressing a robust culture of ESC rights protection in Ireland, and is the obvious place to begin.



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**
Irish Human Rights and Equality Commission

The Irish Human Rights and
Equality Commission
**16 – 22 Sráid na Faiche,
Baile Átha Cliath, D07 CR20**
16 – 22 Green Street,
Dublin, D07 CR20

Íosghlao/Lo-Call 1890 245 245
Guthán/Phone + 353 (0) 1 858 3000
Ríomhphost/Email info@ihrec.ie
Idirlíon/Web www.ihrec.ie
🐦 @_ihrec
📷 /irishhumanrightsequality