

# ***Re-Righting the Constitution***

***The Case for New Social and  
Economic Rights: Housing, Health,  
Nutrition, Adequate Standard of  
Living***

**Irish Commission for Justice and Peace  
A Commission of the Irish Catholic Bishops' Conference**

**September 1998**

Department of Health  
A/c No 13397  
JAN 1999  
Shelf Mark QAK R : MV  
Library and Information Unit

# ***Re-Righting the Constitution***

## ***The Case for New Social and Economic Rights: Housing, Health, Nutrition, Adequate Standard of Living***

**Irish Commission for Justice and Peace  
A Commission of the Irish Catholic Bishops' Conference**

**September 1998**

## **Acknowledgements**

This paper was researched and drafted by Jerome Connolly, Executive Secretary, Irish Commission for Justice and Peace. The Commission for Justice and Peace wishes to acknowledge the comments, insights and information received from its members and its Human Rights Working Group, particularly Gerry Whyte, Department of Law, Trinity College, Dublin, and Prof. Patrick Hannon (chair of the Working Group), and from Margaret Burns of the Council for Social Welfare, during discussions on successive drafts. It would like also to acknowledge the assistance received from staff members of Human Rights Unit of the Department of Foreign Affairs, the Department of Health, the Department of the Environment, the World Health Organisation, Mary Killoran of the European Parliament Office in Dublin, Maggie Nicholson and Susan Morgan-Cuny of the Council of Europe, Jean-Claude Huot of the Swiss Commission for Justice and Peace, Jonneke Naber, Netherlands Commission for Justice and Peace, Dr. Giorgio Filibeck of the Pontifical Council for Justice and Peace, and many others, in response to requests for information.

The author would like particularly to thank Breda Farrell, as always, for her great patience and care in proofreading, layout and in many other ways.

Thanks are due also to Barry Morrissey and Brian Connolly for help with translations and to Stephen Connolly and Margaret Burns for help with proofreading.

The opinions and positions expressed are attributable solely to the Commission for Justice and Peace and do not necessarily reflect those of all who helped with comments and information.

**Published by the Irish Commission for Justice and Peace  
A Commission of the Irish Bishops' Conference**

**Printed by Genprint, Dublin, 1998**

**Copyright © ICJP, 1998  
ISBN 0 905911 26 1**

# CONTENTS

<b>Foreword – Bishop Laurence Ryan</b>	<b>iv</b>
<b>I. General Considerations</b>	<b>1</b>
1. Rights as Fundamental Values in the Constitution	1
2. The Scope of Social and Economic Rights	2
3. The Importance of Social and Economic Rights to Human Flourishing	4
4. Does the Enumeration of Social and Economic Rights Indicate a Bias towards a Particular Economic or Political System?	5
<b>II. The Review Group’s Treatment of Socio-economic Rights</b>	<b>6</b>
Examination of the Arguments against Enumeration	6
1. The Distortion of Democracy Argument	7
(a) General Comments	7
(b) The State’s Existing International Obligations	9
2. The Uncontrollable Cost Argument	11
3. The Existing Ultimate Constitutional Protection Argument	12
4. The Argument that Rights are Sharply Divided	13
(a) General Comments	13
(b) Civil and Political Rights also involve Positive and Progressive Implementation by the State	15
5. Further Inconsistencies	17
(a) The Right to Education	17
(b) Protection of the Environment	19
<b>III. The Practical Implementation of Socio-economic Rights</b>	<b>20</b>
1. Obligations of Conduct and of Result	20
2. The Resource Question	20
3. Socio-economic Rights as Minimum Subsistence Rights for All	21
4. Conclusion	21
<b>IV Suggested Criteria for Selection and Drafting New Social and Economic Rights in the Constitution</b>	<b>23</b>
1. Justiciability	23
2. Development	23
3. Reasonableness and Proportionality	23
4. Basis in International Human Rights Law	24
5. Wording should state Co-Relative Duty and Responsibilities of the Individual	24

6.	Giving a Constitutional Standing to Existing Practice	24
7.	Rights already implied in the Constitution	25
<b>V</b>	<b>Suggested Wording for the Four New Rights Proposed.</b>	<b>26</b>
1.	The Right to Adequate Housing	27
2.	The Right to Health	27
3.	The Right to Adequate Nourishment	27
4.	The Right to an Adequate Standard of Living	28
<b>VI</b>	<b>Structure and Interpretation: General Considerations</b>	<b>29</b>
1.	Group Rights	29
2.	Threefold Aspect of State's Duty: to Respect, to Protect and to Fulfil	29
3.	Margin of Appreciation	32
4.	Progressive Implementation	32
5.	Minimum Core Obligations and Resource Constraints	33
<b>VII</b>	<b>Application of the Seven Criteria to the Rights Proposed</b>	<b>35</b>
1.	Justiciability	35
2.	Development	35
3.	Reasonableness and Proportionality	35
4.	International Consensus	37
5.	Duty of the Individual	38
6.	Existing Practice	39
7.	Rights already Implied in the Constitution	39
<b>VIII</b>	<b>The Right to Adequate Housing</b>	<b>40</b>
1.	Introduction	40
2.	The Right to Housing in International Human Rights Instruments	41
3.	The Right to Housing at National Level	47
4.	Constitutional Pointers to a Right to Housing	48
5.	Remedy and Accountability	50
6.	Protection against Market Deficiencies and Changes in the Political Climate	52
7.	Adequacy as Part of the Right to Housing	53
8.	Comments on the Wording Proposed	54
9.	Individual Responsibility	54
10.	Duty to Respect	55
11.	Duty to Protect	55
12.	Duty to Promote and Fulfil	57

<b>IX</b>	<b>The Right to Health</b>	<b>60</b>
	1. Arguments for Constitutional Recognition	60
	2. Constitutional Pointers to the Right to Health	62
	3. Scope of the Right to Health	63
	4. International Sources for the Right to Health	64
	5. The Right to Health at National Level	68
	6. Equity and Health	68
	7. Health a Right, not a Commodity	70
	8. Comments on the Wording Proposed for a Constitutional Right to Health	74
<b>X</b>	<b>The Right to Adequate Nutrition</b>	<b>76</b>
	1. Introduction	76
	2. The Right to Adequate Nutrition in International Sources	78
	3. Comments on the Wording Proposed	79
	4. Right to Water as a Component of the Right to Nutrition	81
<b>XI</b>	<b>The Right to an Adequate Standard of Living</b>	<b>84</b>
	1. Introduction	84
	2. International Sources for the Right to an Adequate Living Standard	87
	3. Justiciability	89
	4. European Union Perspectives	90
	5. Comments on the Proposed Wording	92
<b>XII.</b>	<b>Conclusion</b>	<b>96</b>

## Foreword

This text is a synthesis and expansion of two complementary and consecutive submissions by the Irish Commission for Justice and Peace to the All-Party Oireachtas Committee on the Constitution. They were prompted by the publication of the *Report of the Review Group on the Constitution* in May 1996.

The *Report* will undoubtedly provide an essential reference for debate and discussion on constitutional reform for the foreseeable future. More immediately it will specifically inform the ongoing deliberations of the All-Party Committee on the Constitution. Its importance has been further heightened by the Northern Ireland Peace Agreement, under which the Government is obliged to take the *Report* into account in bringing forward measures to strengthen the constitutional protection of human rights.

Among the most significant and far-reaching parts of the *Report* is its examination of the fundamental rights section of the Constitution. As a body of the Irish Bishops' Conference whose mandate includes the areas of human rights and justice, we studied this part of the *Report* carefully when it appeared. While many aspects of the Review Group's treatment of the articles in this section would command agreement, the Commission for Justice and Peace was particularly concerned that the Group had recommended in general against expanded provision for social and economic rights.

We became convinced that the Group had been seriously mistaken in cursorily dismissing the case for this category of rights since they are so centrally important to human flourishing and to the enjoyment of other human rights. We concluded that there was an urgent need for a reasoned critique of the Review Group's negative conclusions and recommendations in this area and that the general case for expanded provision for social and economic rights in the Constitution should be put forward at some length. This we did in our first submission to the All-Party Oireachtas Committee on the Constitution in December 1996.

Following on this submission the Commission was asked to make an oral presentation to the then Chair of the All-Party Committee, Mr. Jim O'Keefe TD and officials of the Committee. From this the Commission was invited to expand on the general case which it had made, by a further submission to focus on the particular social and economic rights which should be considered for inclusion in the Constitution, and possibly suggesting forms of wording for those rights. In the wake of the General Election of June 1997 a new All-Party Committee was established, and it was to this that the Commission presented its second submission in November 1997.

Since then, circumstances have if anything converged to push the question of social and economic rights further to the fore. The Northern Ireland Peace Agreement explicitly obliges the Irish Government to further strengthen the protection of human rights in its jurisdiction

The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights.... The measures brought forward would ensure at least an equivalent level of protection of human rights as will prevail in Northern Ireland...

In this context it would be difficult to see how, for example, the UN Covenant on Economic, Social and Cultural Rights or the Revised European Social Charter could be excluded from consideration of "other international legal instruments".

The "equivalent level of protection of human rights as will prevail in Northern Ireland" will to a considerable extent be determined with reference to the contents of the Bill of Rights for Northern Ireland which the Agreement commits the UK government to defining in Westminster legislation. The case for including social and economic rights in such a bill will demand consideration. And if such rights are eventually included in a Northern Ireland Bill of Rights, they will *ipso facto* have to be paralleled in the Republic if an equivalent level of protection is to exist there - supposing that similar rights have not already been included in the Irish Constitution.

Another development is the Irish electorate's approval of the Amsterdam Treaty in May 1998. The Treaty marks some modest advance in human rights protection within the European Union but leaves much unaddressed. The growing Europeanisation of the Irish economy highlights the importance of providing adequate rights protection commensurate with the growing power and influence conferred on market forces by and within the Union. The Union will be dangerously unbalanced for as long as its market-based economy remains unrestrained by adequate countervailing safeguards for the poor, the marginalised and the dispossessed. Without such provision the concept of a social Europe remains hollow. The unwillingness of the Union to give appropriate treaty status to social and economic rights (ignoring in this matter the recommendations of the European Commission-appointed Committee of the Wise) is all the more reason why an individual member state like Ireland should take the initiative and provide such protections at least for its own citizens.



The unprecedented and prolonged period of economic growth which the Republic of Ireland is currently enjoying has stimulated widespread concern about certain of the effects which the tiger economy has produced or intensified. While growth has produced growing prosperity for many, it has often exacerbated inequality and marginalisation. As we point out in various places in this document there is no in-built market mechanism to ensure that greater wealth and resources are equitably distributed. Without compensating and countervailing protections the opposite is more likely to happen. Such protections, in the form of constitutionally enshrined social and economic rights, are an essential complement to the civil and political rights which have predominated in the Constitution up to the present.

The Universal Declaration of Human Rights, drawn up 50 years ago this year, makes no distinction between different categories of rights. Regrettably the Cold War, which originated around the same time, became a major factor in subsequently driving a wedge between the two categories of civil and political rights on the one hand, and of economic, social and cultural rights, on the other. Thus rights, along with so many other issues, came to reflect the East-West divide. The distorting effects of the Cold War were a major influence in producing the still-prevalent dichotomy in the West between the two categories of rights. But the Cold War is now over. In its wake the indivisibility of all human rights is increasingly asserted and recognised, as the Vienna World Conference on Human Rights did in 1993. The need to retrieve the balanced approach of the Universal Declaration is a further reason for extending constitutional rights protection in Ireland to include core socio-economic rights.

Catholic tradition has never treated rights and duties as divisible. Its understanding of the human person is holistic and leads naturally to a comprehensive and integrated approach to rights. The classic Catholic statement of this is still *Pacem in Terris* (1963), noteworthy for the inclusiveness of its treatment of rights. For those in the Catholic tradition, this inclusiveness provides a cogent justification to press for a sufficiently adequate constitutional protection for "the means necessary for the development of life" (*Pacem in Terris*, n.11). The case which we have made out for including in the Constitution the rights to health, adequate housing, adequate nutrition and an adequate standard of living is thus rooted in our faith as well as in our citizenship and our common humanity.

**+ Laurence Ryan**  
**Bishop of Kildare and Leighlin**  
**President, Irish Commission for Justice and Peace**

*September 1998*

# I. General Considerations

## I.1 Rights as Fundamental Values in the Constitution

The Constitution is much more than a neutral set of operating instructions to regulate the technical functioning of the State. It represents a privileged source and statement of values both in the State and in the wider society from which the State arises. While the Constitution can never be the sole or always necessarily the best way to secure basic values in society, as the antecedent source and framework of positive law it is appropriate that it be grounded in clearly set out fundamental values.

Today, in democratic states under the rule of law, fundamental constitutional values will be expressed above all in the form of rights statements. More than a decade before the Universal Declaration of Human Rights, the 1937 Irish Constitution already gave a clear and crucially important enumeration of basic rights. These rights and the jurisprudence based on them are an integral part of our contemporary inheritance.

However, in the sixty years since the Constitution was drafted there have been numerous developments nationally and internationally relevant to the consideration of constitutional protection of rights. Among the most important questions discussed by the Review Group is undoubtedly that of the extent to which the statement of fundamental rights in the Constitution should or could be revised in the light of such developments.

Among the general considerations which the Review Group on the Constitution decided were germane to its overall task were "the evolution of socio-political thinking, the desire for greater inclusiveness, the implications of membership of the European Union and any other relevant considerations<sup>1</sup>".

We suggest the following are of particular relevance to the consideration of the rights to be enumerated in the context of constitutional revision:

- the development in the course of the intervening years of international agreement on the definition of core rights, social and economic as well as civil and political;
- the greatly enhanced capacity of the State to meet socio-economic needs now in comparison with sixty years ago, reflected in general improvements in the standard of living and life expectancy, the extension of free education and improved health care in terms both of knowledge and resources. (It is appropriate in this regard to acknowledge the outstanding personal contribution of the Review Group's chairperson to the social and economic development of modern Ireland);

---

<sup>1</sup> *Report of the Constitution Review Group* 1996 Dublin, Stationery Office, Foreword, par. 9

- the fact that since the 1950's the State has accepted an extensive and continually expanding set of treaty-based human rights obligations at international level;
- although European Union laws are binding in Ireland, the EU does not as yet possess an adequately developed human rights protection system. No citizen of any EU member state, including Ireland, can appeal to the European Convention on Human Rights if the Union breaches his or her rights.

A major concern of the Irish Commission for Justice and Peace, and we believe of many others, is to ensure that in any revision of the Constitution the fundamental human dignity of the weak and the powerless be given the greatest possible constitutional protection. The subject of socio-economic rights is of fundamental importance to human flourishing. We believe that, in this context, the inclusion of social and economic rights in the Constitution is not only morally compelling but also legally feasible and politically practical.

Their omission from the 1937 Constitution is understandable in terms of the legal, political and human rights environment of the time. Today, in the light of changes in the national and international understanding of human rights, the absence of an expanded enumeration of social and economic rights from the Constitution is increasingly difficult to justify, all the more so if they were to be expressly excluded in the context of a systematic review of the Constitution as a whole. We believe that the decision of the Review Group to recommend against enumerating such rights in the Constitution calls for radical reconsideration.

## **I.2 The Scope of Social and Economic Rights**

The Review Group acknowledges that there is in the Constitution a "disparate set of rights which does not correspond to the broadly expressed and wide-ranging fundamental rights expressed in the international conventions" (p. 247). It might be thought therefore that the Group would have proceeded by first systematically itemising the main social and economic rights which might be considered as candidates for inclusion, followed by a case by case examination of the merits and demerits of each. Instead it simply lists in summary form (in under two pages) the arguments for and against the general proposition that provision should be made for economic rights in the Constitution, without attempting to analyse or discuss the arguments as a whole or apply them to particular rights. For this reason we concentrate first on establishing the general case for including socio-economic rights (Sections I-III), and then address the question of which particular rights should be considered (Sections IV-XII).

Before addressing the general case it may be useful to indicate briefly the scope and nature of the social and economic rights expressed in international conventions and

other relevant sources

- (i) The revised European Social Charter, adopted by the Committee of Ministers of the Council of Europe in April 1996, expands the list of rights in the 1961 Social Charter (to which Ireland is already a party). The additional rights now stated in the Charter include:
- the right of the elderly to social protection;
  - the right to protection against poverty and social exclusion;
  - the right to decent housing.
- (ii) In an EU context a proposed Constitution for the European Union, drafted by a committee of the European Parliament, includes the following in its listing of rights:
- the right to education and training;
  - effective access to justice, including legal aid, to those who lack resources;
  - protection of the family, including the right of the family to enjoy legal, social and economic security;
  - the right to medical and social assistance for those without resources;
  - the right to shelter and assistance in housing, from public authorities, for those unable through no fault of their own to house themselves with dignity;
  - the right to respect and protection of one's natural environment.
- (iii) The United Nations Convention on Economic, Social and Cultural Rights (CESCR), to which Ireland is a party, includes:
- the right of everyone to social security, including social insurance;
  - the right of everyone to be free from hunger;
  - the right to enjoyment of the highest attainable standard of physical and mental health;
  - the right of everyone to an adequate standard of living for themselves and their family, including adequate food, clothing and housing;
  - States Parties guarantee that all rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, social origin, property or other status, etc.

The UN Committee which supervises the Covenant has published a number of "General Comments" for the guidance of States Parties, addressing among other themes the right to adequate housing, the economic, social and cultural rights of older persons, the protection of the family and the right to an adequate standard of living.

### **I.3 The Importance of Social and Economic Rights to Human Flourishing**

Socio-economic rights are most denied to the poorest and least powerful in society. These are the groups and persons whose voice is least likely to be heard in the Oireachtas. To include socio-economic rights in the Constitution would give constitutional support and sanction to fundamental values of human dignity, human rights and solidarity.

In the words of the Parliamentary Assembly of the Council of Europe, "marginalisation and exclusion of the most economically vulnerable are symptoms of an erosion of the moral and cultural bases of our societies: they are contrary to - and may put at risk - the principles of a healthy democracy".<sup>2</sup>

The provision of effective remedies to persons denied social, economic and cultural rights is an obligation on the State. The measures required to discharge this obligation must include the provision of judicial remedies anchored in the Constitution to the greatest extent possible. The Ministers of the Council of Europe member states have themselves acknowledged that

if [the rights of the very poor] are to have any real and practical significance for them, they must effectively be in a position to determine what their rights and obligations are and, if appropriate, to assert or defend their interests in proceedings before the competent authorities.<sup>3</sup>

The European Ombudsman, Jacob Soderman, noting that a number of social rights have been ruled on over the years by the European Court of Justice, supported the affirmation of such rights in any new Treaty that might emerge from the Inter-Governmental Conference.<sup>4</sup>

The Review Group's Report gives the impression of tending towards a somewhat minimalist understanding of democracy, understood as the expression of the will of whatever coalition of interests dominates the political system at a given moment. If this perception is accurate, such an approach risks emptying out the notion of a common good from the Constitution and would be as ideological in its own way as any ideology it might seek to replace.

---

<sup>2</sup> *Recommendation 1196 on Severe Poverty and Social Exclusion: Towards Guaranteed Minimum Levels of Resources*, text adopted by the Parliamentary Assembly of the Council of Europe on 7 October, 1992 (20<sup>th</sup> sitting), in *Council of Europe Information Sheet* No. 32, Strasbourg, Council of Europe, 1994, p.174

<sup>3</sup> *Recommendation No. R (93) 1 of the Committee of Ministers to Member States regarding Effective Access to the Law and to Justice for the Very Poor: Explanatory Report*, Strasbourg, Council of Europe, 1993, par 5

<sup>4</sup> *Defending European Citizens' Rights: Papers Delivered at a Joint Conference of the European Parliament Petitions Committee, the European Ombudsman and the Irish Ombudsman, Dublin, March 1996*, Dublin, European Parliament Office in Ireland, 1996, p.30

The common good includes the effective protection of the rights of all citizens and others living within the State, the peaceful settlement of conflicts of rights, the protection of public peace and order and the protection of public morality. This concept, we hope, is the one which will be consulted and reaffirmed in any revision of the Constitution, rather than that recently, and rightly, censured by the Anglican Bishop Mark Santer of Birmingham, referring to a document drawn up by senior officials in the UK Treasury, which stated:

Treasury officials have a high level of commitment to the efficiency of the market mechanism: to neo-classical welfare economics and to the utilitarian ethics on which they are based... the Treasury accepts the analysis that everything is tradeable and ultimately has a price and that all that is needed is a sensible allocation of property rights<sup>5</sup>.

The liberal proposition of the need to respect the liberty of the individual is morally and ethically justifiable in a social and economic context only when and if it is balanced by the guarantee of other essential rights to individuals, family and other social groups. These might otherwise find themselves excluded, marginalised or disadvantaged by social and economic factors outside their control from access to and enjoyment of the minimum necessary to live with dignity. In a decent society not everything is tradeable.

To omit fundamental socio-economic rights from any revision of the Constitution would give them less protection than other categories of rights and convey a clear message that they are somehow secondary. Violations of socio-economic rights are as serious as those of civil and political rights.

The problems of effective access to the law and to justice for the very poor are not only a matter of social justice or national policy, but also fall within the sphere of human rights and fundamental freedoms, which arise from the recognition of the inherent dignity of human beings.<sup>6</sup>

The systematic exclusion of socio-economic rights on principle from the Constitution would serve to aggravate inequality, exclusion and poverty, by denying those who suffer from them the possibility of seeking constitutional redress for aspects of their condition.

#### **I.4 Does the Enumeration of Social and Economic Rights indicate a Bias towards a Particular Political or Economic System?**

We pose this question because many people may decide for or against inclusion for

---

<sup>5</sup> *The Tablet*, 19 October 1996, p.1386

<sup>6</sup> *Effective Access to the Law and to Justice for the Very Poor*, op. cit., par. 7

reasons which have less to do with the merits or demerits of the case than with a preconception that some rights (e.g. civil and political) are “good” because they go with one sort of political and economic philosophy, and others (e.g. social and economic) are “bad” because they go with another sort of philosophy. It would be a grave mistake to believe that this is so. As the UN Committee on Economic, Social and Cultural Rights has stated in regard to the rights enumerated in the Covenant on Economic, Social and Cultural Rights:

In terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of, a socialist or a capitalist system, or a mixed, centrally planned or *laissez faire* economy, or upon any other particular approach. In this regard the Committee reaffirms that the rights recognised [...] are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised in the system in question<sup>7</sup>.

## II. The Review Group’s Treatment of Socio-Economic Rights

The Review Group addresses the question of whether or not socio-economic rights should be included in the Constitution in the context of its discussion of Issue 12, “*Whether there should be provision for specific economic rights as a counterweight to economic inequality*” (pp.234-6). After setting out four “Arguments for the provision of specific economic rights” and six “Arguments against including in the Constitution a personal right to freedom from poverty or specific economic rights”, the majority of the Group recommends against the inclusion of such rights. We believe this approach is unsatisfactory in a number of aspects:

- the summary arguments advanced against inclusion of socio-economic rights in the Constitution do not sustain a more detailed scrutiny in the light of contemporary human rights practice and understanding;
- there are serious inconsistencies in some of the positions and approaches adopted;
- the Group appears to underestimate or ignore the extent and significance of the international obligations which the State has already incurred in regard to socio-economic rights;
- the concept of socio-economic rights which appears to underlie the Group’s

---

<sup>7</sup> “General Comment No. 3, (1990)” in Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session (26 November - 14 December 1990)*, Economic and Social Council, Official Records, 1991, Supplement No. 3, United Nations, New York, 1991, E/1991/23, E/C.12/1990/8, Annex III, s.8, p.85

approach is mistaken.

The Commission for Justice and Peace believes that the brevity with which the arguments are presented and the absence of detailed grounds for the conclusion reached by the Review Group substantially fail to do justice to the importance of the point at issue. We hold that on the contrary there are cogent and serious grounds to justify the inclusion of such rights. We now address these.

## **Examination of the Arguments against Enumeration**

### **II.1 The Distortion of Democracy Argument**

**II.1. (a) General Comments** - The Review Group appears to believe that the judicial activism of the Supreme Court in actively developing the rights content of the Constitution is an encroachment on democracy and on the powers and functions of the Oireachtas. The implementation of socio-economic rights, it is held, is properly a matter for political decision, involving as it does the allocation of scarce resources (Arguments 1, 2 and 3 against inclusion, pp. 234-5).

Argument 1 against inclusion states that the main reason why the Constitution should not confer personal rights to freedom from poverty, or to other specific economic or social entitlements, is that

these are essentially political matters which in a democracy it should be the responsibility of the elected representatives of the people to address and determine. It would be a distortion of democracy to transfer decisions on major issues of policy and practicality from the Government and the Oireachtas, elected to represent the people and do their will, to an unelected judiciary (p.235).

It is difficult to see the force of this argument since the insertion of socio-economic rights in the Constitution could be effected only by the decision of the people through a referendum. This would confer a mandate at least as democratic as a decision of the Oireachtas. Subsequent judicial interpretation of any such additional rights would be no more problematic than the Irish courts' interpretation of rights already stated in the Constitution. It would be necessary simply to ensure that the wording of the right included suitable qualifying phrases, which could also ensure the role of the Oireachtas in interpreting, developing and reviewing the implementation of the right as needed. That this is eminently feasible is actually demonstrated by the Review Group itself in its recommendation on a right to free secondary education (see below).

More broadly, the suspicion of judicial activism evinced by the Review Group in this context appears somewhat at odds with the Group's own positive assessment earlier (p.214) that



the fundamental rights provisions have, generally speaking, proved to be an effective method of safeguarding individual rights so that 'the overall impact of the courts on modern Irish life, in their handling of constitutional issues, has been beneficial, rational, progressive and fair' (Kelly, *The Irish Constitution*, Dublin, 1994, at xcii)

While fundamental rights should be identified in the Constitution as far as possible, as the Review Group emphasises (Foreword, par.12), such identification cannot and need not attempt to be exhaustive. The history of rights is one of continuous evolution and the concept of unenumerated rights as developed by the Supreme Court has considerable merit from this point of view. The Review Group states that developments in the doctrine of unenumerated rights "arise partly from the fact that the list of fundamental rights specifically protected by the Constitution is relatively short. They also reflect changes in social attitudes and concepts of justice and fairness that have occurred since 1937" (pp.246-7). It is reasonable to expect that such attitudes and concepts will continue to change and consequently that the judicial development and enumeration of rights will remain necessary regardless of whether further rights are or are not specified in the Constitution. We would assert furthermore that such changes have in fact been in the direction of greater acceptance of and demand for social and economic rights, which should now receive a more adequate recognition and protection in the Constitution.

In considering Article 40.3 and Article 43 the Review Group refers to criticisms that the articles in question are particularly open to subjective judicial appraisal, referring as they do to such broad concepts as "principles of social justice" and "exigencies of the common good". Nonetheless the Review Group concedes that whatever formulation might be devised to replace the articles, "it could probably not avoid entrusting a degree (even a high degree) of subjective appraisal to the judiciary" (p.358). Despite this admission, the Review Group proposes the addition of a new qualifying clause which would propose that property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions "provided that these are required in the public interest and accord with the principles of social justice" (p.366). Thus the inevitability of "subjective judicial appraisal" appears in this instance to present no obstacle to the Group's own desire to retain in the Constitution two concepts as broad and open-ended as those of the public interest and social justice: Why then should similar judicial appraisal of specific socio-economic rights present any greater difficulties? It would appear that the Group had forgotten its own earlier reminder, while discussing Article 35.2.5, that

no one - neither judges nor others - can ever be completely independent and objective in their approach to the issues which they may have to decide. Many factors help to shape and influence individual attitudes, such as social class, gender, age, professional background, religion. Awareness of these influences is a

matter of special relevance for judges who in the course of their work have to determine serious issues affecting the lives of people from a very wide variety of backgrounds (p.181).

The Review Group seems to assume that where socio-economic rights are concerned judicial subjectivity would tend to favour broader rather than narrower interpretation of the scope and resource implications of such rights. Given what the Review Group itself has said about the factors influencing judges' attitudes, and the reality that they are appointed from within the establishment and generally come from more privileged social strata, this does not seem a present danger.

In discussing the right to property the Review Group recommends replacement of Article 40.3.2 (insofar as it concerns property rights) and Article 43 by a single self-contained article dealing with property rights. As noted already the majority view favours a new qualifying clause providing that property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions, conditions and formalities, "provided these are duly required in the public interest and accord with the principles of social justice" (p.366). The reference to social justice repeats the existing provision in 43.2.1. However, by endorsing this clause the Review Group *ipso facto* accepts that the Supreme Court should continue to enjoy the potentially far-reaching power to adjudicate on the content and implications of social justice principles in their bearing on the legal regulation of property rights. The Commission for Justice and Peace supports the continued inclusion of reference to social justice principles as a criterion by which the legal regulation of property rights is to be guided and points out that it would be equally feasible to make socio-economic rights subject to regulation in the light of the same or other relevant criteria.

## II.1. (b) The State's Existing International Obligations

"The direct incorporation or application of international instruments recognising economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases."<sup>8</sup>

The interpretation of democratic legitimacy put forward by the Review Group does not in our view acknowledge the implications of the fact that the Irish State, as represented by successive governments of all hues, has already incurred substantial international human rights obligations without referring to the people through referenda, or even

---

<sup>8</sup> "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (January 1997) in *Economic, Social and Cultural Rights: A Compilation of Essential Documents*; Geneva, International Commission of Jurists, 1997, pp.79-91, at p.89.

securing the express approval of the Oireachtas. It has done this through adhering to various international human rights treaties.

While such treaties are not self-executing in terms of Irish domestic law, they involve far more than aspirations. For example by ratifying the UN Covenant on Economic, Social and Cultural Rights in 1989 the Irish State has accepted the treaty obligation that primary education shall be compulsory and available free to all; by ratifying the UN Convention on the Rights of the Child the State bound itself to provide certain types of special care to disabled children free of charge; under the same Convention Ireland recognises the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, moral or social development (Art. 32); it is consequently bound to provide for a minimum age or minimum ages for admission to employment (Art. 32.2(a)) and to provide for appropriate regulation of the hours and conditions of employment (Art. 32.2(b)). Elsewhere in the same Convention States Parties recognise the right of every child to benefit from social security, including social insurance (Art. 26.1). These examples could be multiplied.

As a consequence of ratifying this body of treaties (and more ratifications are in prospect), the State has made itself extensively subject to the judicial arbitration and activism of the European Court of Human Rights and to the examining process in relation to other international instruments such as the UN Convention on Economic, Social and Cultural Rights. The Review Group does not advert to this development, which over time has conferred on courts and other bodies outside the country the right to adjudicate and pronounce on many different aspects of Irish law and policy. It seems therefore somewhat anomalous that the Group should nevertheless jib at the Supreme Court's role in constitutional interpretation.

In the light of the Review Group's affirmation that the right of access to the courts is already present as an implied personal right in the Constitution, it is pertinent to recall that it was not the Irish Supreme Court but rather the European Court of Human Rights (in the *Airey* case) which ultimately compelled the State to establish and therefore resource a scheme of civil legal aid.

Judges should apply domestically international human rights norms in the field of economic, social, and cultural rights. Where there is ambiguity in a local constitution or statute or an apparent gap in the law, or inconsistency with international standards, judges should resolve the ambiguity or inconsistency or fill the gap by reference to the jurisprudence of international human rights bodies.<sup>9</sup>

---

<sup>9</sup> "Bangalore Declaration and Plan of Action" (October 1995), sect.18.5.4, in *Economic, Social and Cultural Rights: A Collection of Essential Documents*, op. cit., pp.93-103, at p.103.

## II.2 The Uncontrollable Cost Argument

A fundamental strand of the Review Group's reasoning against inclusion is encapsulated in the following statement (Argument 3 against inclusion):

It would not accord with democratic principles to confer absolute personal rights in the Constitution in relation to economic or social 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* (p.236, emphasis added).

This, we believe, is a serious misinterpretation of the nature of socio-economic rights. The passage cited appears to assume that there is no middle way between stating socio-economic rights in a totally open-ended manner, or excluding them from the Constitution altogether. To pose such a stark choice is misleading. It is quite practicable to state socio-economic rights in a form which will avoid the putative nightmare of leaving the Oireachtas with no option but to discharge the cost "whatever it might be", as determined by the judiciary. Indeed, as we show further on, the Review Group itself does exactly this in two important instances.

In its formulation of Argument 3 the Review Group refers to the danger of granting "absolute personal rights" in relation to economic or social objectives. There is a puzzling inconsistency here, since it is the Group itself which provides the answer to this very difficulty a little later on when it discusses Art. 40.3.1 (in which the State guarantees in its laws to respect and as far as practicable to vindicate the personal rights of the citizen). The Group points out that this Article

obliges the State in its laws to respect, defend and vindicate the citizen's personal rights. Laws in this context cover not only legislation but also the common law. The obligation upon the State is not absolute in that its obligation is only to defend and vindicate the personal rights as far as practicable. *Thus the subsection acknowledges the fact that there is no absolute guarantee for the personal rights of the citizen.* (p.247, emphasis added)

This statement appears to remove the grounds for fears about "absolute personal rights" expressed earlier by the Group.

An inconsistency in the Review Group's approach to the possible resource implications of making provision for social and economic rights in the Constitution is also apparent in its discussion of the right of access to the courts. In recommending that this right should receive express enumeration in the Constitution the Group accepts that to do so involves providing resources, for example to fund free legal aid (pp.236-238). Nonetheless it is able to conclude (by majority) "there is no need to go

further and specify in the Constitution how the Oireachtas might give practical effect to the right of access” (p.238). How could the Group be satisfied in this case to recommend that a right, which they know has resource implications, nonetheless be stated in general terms only, leaving it to the Oireachtas to decide how it is to be implemented in practice, while rejecting precisely the same approach in regard to other rights with resource implications?

The approach adopted by the Review Group to property rights would appear to go against the arguments which it found persuasive on pp.235-6. In discussing the question of private property (pp.357-67) it approves retention of the existing Article 43.2.1. in which the State recognises that the exercise of property rights ought to be regulated by reference to the principles of social justice, and of Article 43.2.2 which provides that the State may delimit the exercise of these rights by law with a view to regulating their exercise so as to meet the exigencies of the common good. In this context the Review Group observes that, if the State is to function,

property rights must yield to a wide range of countervailing interests, among them the redistribution of wealth, the protection of the environment, the necessity for consumer protection. This means that the State must have extensive taxation powers, powers of compulsory acquisition and a general capacity to regulate (and even in some cases to extinguish) property rights. (p.359)

It is difficult to see why similar countervailing considerations would not or could not apply equally to other constitutionally enshrined socio-economic rights and permit their judicious regulation by the Oireachtas in the same way as property rights.

### **II.3 The Existing Ultimate Constitutional Protection Argument**

Having come down on the side of the arguments against inclusion, the Review Group then appears to ignore them in the section immediately following, where it discusses whether there should be a separate provision in the Constitution for a right of effective access to the courts. Although noting that this is already protected as an implied personal right by virtue of Art. 40.3.1, the Group still recommends that it be expressly enumerated in the Constitution. With reference to the rights to food, shelter and clothing, however, the Review Group, while acknowledging that it is “obviously important” that no one should be allowed to fall below a minimum level of subsistence (Argument 6, p.236), asserts that if this should ever happen, despite the social welfare system, “the Constitution appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity” (p.236). This can only mean that the constitutional right to life and to bodily integrity imply or include, ultimately, rights to food and shelter. If so, what is the problem in making these basic rights explicit, as the Group has already not hesitated to recommend should be done in regard to the right of effective access

to the courts?

## II.4 The Argument that Rights are Sharply Divided

**II.4. (a) General Comments** - In its approach to different types of rights the Report of the Review Group assumes a sharp divide between them. That the divide is as acute as the Review Group appears to believe is at best debatable. Although holding that, in general, constitutional recognition “should be sparingly accorded on the basis that the Constitution should concern itself predominantly with the strategic elements in the organisation of the State” (Foreword, par. 11) the Review Group took the view that “rights should be identified and specified *as far as possible*, in fundamental and positive law, that is, in the Constitution” (Foreword, par. 12, emphasis added). However the Review Group appears to draw a sharp distinction between different types of rights; in general it favours extension of constitutional recognition only for civil and political rights, while preferring (with a couple of significant exceptions which we comment on below) to withhold it from socio-economic rights.

The principle of the universality, *interdependence, indivisibility and inter-relation* of all human rights has long been accepted by the United Nations and within the Council of Europe, and was forcefully reiterated by the UN at the 1993 Vienna World Conference on Human Rights and at the Summit on Social Development in Copenhagen in 1995. This principle acknowledges the reality that the enjoyment of civil and political rights, such as those enshrined particularly in Article 6, par. 3.c and Article 13 of the European Convention on Human Rights, is not effective if economic, social and cultural rights are not equally protected, as the Committee of Ministers of the Council of Europe has pointed out.<sup>10</sup> Both sets of rights are deeply complementary; homeless people will in practice find it more difficult to vote than those with a settled domicile; the exercise of the right to education can be jeopardised by socio-economic deprivation, and so on.

In 1996 in the 2<sup>nd</sup> UN Conference on Human Settlements (Habitat II), the States of the world including Ireland called *inter alia* for access to appropriate preventative and curative health care and improved shelter. The Conference stated that these environmental issues are as important to the health and quality of life of the population as is the clinical response to disease.<sup>11</sup> Here is another pertinent instance of the international recognition by States’ representatives of the indivisibility of human rights, and of the way in which the right to life cannot be divorced from socio-economic issues such as preventative health care and shelter.

---

<sup>10</sup> *Effective Access to the Law and to Justice for the Very Poor*, op. cit.

<sup>11</sup> *Report of the United Nations Conference on Human Settlements (Habitat II)*, Istanbul, 3-14 June, 1996, United Nations Conference on Human Settlements (Habitat II), A/Conf.165/14, 7 August 1996, par. 128

The European Convention on Human Rights is widely assumed to confine itself narrowly to the sphere of civil and political rights. In reality this is not the case, as the European Court of Justice pointed out as long ago as 1974. In its judgement in the *Airey* case in that year the Court stated that many of these rights have extensions of an economic and social character. It stated further that it did not see it as necessary to separate such and such an interpretation for the simple motive that by adopting it one would risk stepping into the sphere of social and economic rights. There is, the Court said, no watertight barrier separating this from the domain of the Convention.<sup>12</sup> In the *Airey* judgement the Court stated that the obligations of States under the Convention go beyond mere non-interference and include taking concrete steps to ensure that the dignity of the human being is preserved. More recently the Committee of Ministers of the Council of Europe has acknowledged this from another angle:

The situation of severe poverty continues to deprive men and women of the effective enjoyment of human rights which must be secured for all *without distinction*, in accordance with Article 14 of the European Convention on Human Rights.<sup>13</sup> (emphasis added)

In 1989 the Norwegian Government decided in principle that the international human rights conventions binding on Norway should be made part of Norwegian law and a Committee was appointed to consider and recommend proposals for embodying the principal human rights conventions in Norwegian law. It reported in 1993.<sup>14</sup> After examining a number of regional and UN Conventions, the Committee in its report determined, that three – the European Convention on Human Rights, the UN Covenant on Civil and Political Rights, and the UN Convention on Economic, Social and Cultural Rights, should be regarded as forming the foundation (*grunnstamme*) of the international protection of human rights. Even though the provisions of the human rights conventions are often very general, the report concluded that this in itself could not be an obstacle to incorporation. Particularly unspecific were provisions which were formulated as objectives the State should endeavour to achieve rather than as specific obligations. Such rules opened the way for considerable discretionary assessment and raised questions of priorities. It could be argued, the report said, that this was not a question of law, and that it was not natural for Norwegian judges to sit in judgement on the budgetary policies of the authorities. On the other hand, the very fact that the formulation of these provisions left so much to discretion would result in the courts rarely being able to ascertain any conflict between them and Norwegian law.<sup>15</sup> The Committee concluded that even though some of the provisions in the UN Convention on Economic, Social and Cultural Rights are very general, some of the

---

<sup>12</sup> European Court of Human Rights, *Airey* case, decision of 9 October 1979, Series A, No. 32, p.15, n.2.

<sup>13</sup> *Effective Access to the Law and to Justice for the Very Poor*, op. cit.

<sup>14</sup> Quotation from the English language summary of the *Report on Incorporation* given in **NOU** [Nordes Offentlige Utredninger] 18: Oslo, 1993, pp.193-9.

<sup>15</sup> *Ibid.*, p.195

rights in that Convention must be regarded as equally as suitable for implementation as the rights granted by the CCPR and the ECHR. It proposed a general constitutional provision which would "take care of the equality in principle of the two groups of rights [*i.e. civil and political, and economic, social and cultural*]" and the need to give an effective signal that they merit equal respect".<sup>16</sup>

**II.4. (b) Civil and Political Rights also involve Positive and Progressive Implementation by the State** - There is a widespread perception that the "classic" (*i.e. civil and political*) rights differ from socio-economic rights in not involving positive action by the State and therefore, by and large, in not exposing the State to the possibility of open-ended resource commitments to ensure their implementation. Some reflection will show that this difference is to a significant extent illusory. If the reserve shown by the Review Group towards the inclusion of social and economic rights in the Constitution is due in any way to the belief that the classic civil and political rights have no financial or economic consequences, or that they do not involve elements of progressive implementation, then it is a belief which is clearly mistaken.

Some social rights such as the right to strike or to participate in companies, and trade union rights in general, depend on the same regime as the classic freedoms, and the realisation of many civil rights entails positive actions by the State. An example is the system of criminal legal aid, which is demand led, and therefore open-ended. A cognate instance is the Beef Tribunal, in which, because the inquiry in question was set up by the State, the legal costs of various parties to the inquiry were defrayed by the State in pursuance of its obligation to ensure a fair hearing and the right to be represented. Although the eventual costs were far greater than anticipated, due to the unexpected length of proceedings, they had to be met from the public purse regardless. More recently the court judgements in the spate of army deafness claims have imposed a significant financial cost on the State, as have compensation payments to victims affected by the hepatitis-C affair.

The right to life is often assumed to be a, perhaps *the*, classic civil and political right. In human-rights jurisprudence this right is not to be interpreted narrowly or restrictively. Its vindication requires extensive and positive social and economic policies. As the UN Committee on Human Rights has pointed out, its protection obliges States to adopt positive measures.<sup>17</sup>

It is difficult to see how in a modern society the right to life could be regarded as adequately safeguarded without a comprehensive judicial system, backed up by a police force and prison service, and, behind that, by the defence forces. One could

---

<sup>16</sup> Ibid., p.197

<sup>17</sup> *General Observation 6 (16)*, Report of the Committee on Human Rights, Doc. UN A/37/40 819829, p.104, n. 5



add many other elements such as the ambulance services, public sector and local authority back-up (Departments of Justice, Defence, Health, etc) education and training systems, and so on. All require the allocation of resources, and over time one can see how such allocations vary in response to circumstances and policy. The vindication of the right to life in its various dimensions is in reality no more cost-free than the right to housing or to health.

As the content of the right to life, which includes the right not to be subject to inhuman or degrading treatment, is unfolded in practice, the fact that it entails substantial resource implications quickly becomes apparent. As applied to prisons, for instance, ensuring respect for the right involves complying with health, nutrition, accommodation and other standards which are as much in the social and economic domain as they are in the civil and political. All involve judgements of what level of conditions constitutes compliance with the requirements of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), another international treaty to which Ireland is a party, and all have obvious and direct resource implications. Under the rubric of civil and political rights the Irish prison system is subject to the detailed and ongoing scrutiny of the European Committee for the Prevention of Torture, a body established under the convention in question. The Committee has already required responses and clarification from the Irish State in regard to the provision of work for prisoners, expenditure on improved sanitation, reduction of overcrowding (and hence expenditure on provision of new accommodation), standards of cell accommodation in Garda stations, the improvement of medical services to prisoners and so on. These have "major" resource implications for the enhanced training programmes for prison staff currently being developed in the wake of the CPT Report on its 1993 visit to Ireland, as the Government's Follow-up Report notes.<sup>18</sup> Does it therefore make sense to acquiesce in conferring such powers on an international treaty-based instance, while wishing to restrict the competence of the Supreme Court, which is at least as well situated to judge the practical requirements of the right to life in relation to prevailing Irish standards and resources?

---

<sup>18</sup> *Follow-up Report of the Irish Government in Response to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its Visit to Ireland from 26 September to 5 October 1993*: Strasbourg, Council of Europe, 19 September 1996, CPT/Inf (96)23, p.7

## II.5 Further Inconsistencies

**II.5 (a) The Right to Education** – In a sense, the strongest counter-argument to the Group's position is the fact that one of the most important socio-economic rights is already in the Constitution, and has been so for sixty years, without any of the negative consequences feared by the Group. Logically the arguments put forward by the Group against inclusion of socio-economic rights in general could, and should, have been levelled against the existing constitutional right to education in particular. Here is a prime example of a major socio-economic right which is not constitutionally defined as to content, carries with it substantial resource implications, and, most importantly for the case at issue, is already stated in the Constitution. Given the Group's own arguments it is also a matter of surprise that the Group sees no problem in recommending the extension of the existing wording to include a right to free secondary education, even though to do so would clearly impose on the State a constitutional obligation, which does not exist at present, to provide the necessary resources to substantiate the right. The Group's general case is therefore additionally vitiated by its failure to address the actual Irish constitutional experience of the right to education.

One of the major anomalies in the Group's approach to socio-economic rights is the manner in which, by recommending a significant expansion of the right to education in particular, it appears to contradict its own general opposition to expanded Constitutional enumeration. The Group is not content, as it might have been, simply to recommend that the right of every child to free primary education should continue to be explicitly stated in the Constitution. It goes a significant step further by recommending that the Oireachtas should seriously consider extending the right to free education to include secondary education *as this may be defined by law* (p.353). Even though it is already Government policy to provide free education up to the end of secondary school, the resources required are very large by any standards. Provision for secondary education in the 1997 Estimates amounted to almost £860m.<sup>19</sup> To enshrine freedom of secondary education as a constitutional right has obvious and far-reaching resource implications.

The Constitutional wording recommended by the Review Group, should the right to free education be extended to secondary level, is significant in a wider context:

Every child has a right to free primary and secondary education. The State shall provide for such education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, where appropriate, provide other educational facilities or institutions (p.353).

Of particular note here, in the light of the Review Group's earlier concerns about the

---

<sup>19</sup> This is more than double the defence budget for 1997 (£391m.), a third greater than the total Department of Agriculture budget (£603m.), and a quarter greater than that of the combined estimate for police, prison service, courts and Department of Justice (£680m).

possibly open-ended nature of socio-economic rights, is the way in which the suggested wording succeeds perfectly adequately in reconciling two essential requirements which have to be met in any enumeration of such rights: firstly, to state the right, and secondly, to qualify it to ensure that it is not unrealistically open-ended.

The Review Group meets the latter requirement straightforwardly by including such terms as "endeavour", "supplement", "reasonable", "where appropriate", "provide other". In the case in point the Group appears to see no difficulty in drafting what it obviously regards as a constitutionally acceptable but at the same time politically realistic form of words for a major socio-economic right. If this is possible for the right to free education, where the resource demands are among the heaviest of any socio-economic right, is it not equally possible for other socio-economic rights?

Despite the Review Group's comment that though the right of education is recognised in many international covenants, "what it connotes is not clear", this in no way inhibits the Group itself from concluding that not even the scantiest definition of education is necessary in the Constitution (pp.354-6). The Review Group based its conclusion on two grounds: (a) the belief that "the Constitution should, where possible, endeavour to state propositions at a sufficient level of generality to permit of evolution and development" (p.355); (b) the fact that the Group considers that "the Oireachtas should have the express power to define by law the meaning of this term" (p.355). The conclusion is telling, as it might well be thought that failure to insert a definition of education in the Constitution could indeed open the door to unlimited resource demands. In the context of the Group's earlier fears about open-ended rights, the very fact that a socio-economic right as important as free primary education has been provided in the Constitution, without definition, for over 60 years, without either undermining democracy or leading to unmanageable resource demands dictated by the courts, is, we believe, persuasive on this point. There would appear to be no reason why the Oireachtas could not equally have the same power to define in law the content of other constitutionally enumerated social and economic rights.

Any conceptual or administrative difficulties which might be urged as grounds for the exclusion of socio-economic rights in general from the Constitution can equally be urged against the inclusion of a right to education in particular, especially in the expanded form advocated by the Group. If it is justified to include the right to education in the Constitution, as it undeniably is, the burden of proof rests on those who would seek on principle to exclude other socio-economic rights.

The Group recommends drawing on the European Convention on Human Rights and other international human rights conventions (p.219) in deciding where and how to amend the fundamental rights provisions of the Constitution. It notes that the right to education is recognised in many international declarations and conventions, and in many national constitutions (p.351). It could as readily, and with equal justification, have acknowledged that education is only one of a number of other important socio-economic rights recognised in this way.

**II.5(b) Protection of the Environment** - Towards the very end of the Report (pp. 432-4) the Review Group recommends the inclusion of a completely new provision on the environment. We draw attention to this not because we disagree with such a provision, but because it displays a similar inconsistency of approach to the general question of enumerating new rights.

Although the Group judges that it would be “incautious” to insert unqualified personal rights in relation to the environment into the Constitution, as “the gates might be opened to a flood of claims on public funds for damage attributed to alleged defects in air, water, roads or other aspects of the environment” (p.434) it nonetheless still proceeds to recommend a form of wording notable for its breadth and open-endedness. If adopted the Group’s wording would impose “a duty on the State and public authorities *as far as practicable* to protect the environment, to follow sustainable development policies, and to preserve special aspects of our heritage” (p.434, emphasis added). The proposal to impose an obligation on the State to follow “sustainable development policies” is surely one of the broadest and most open-ended pieces of constitutional drafting ever envisaged. By comparison the inclusion of a right to housing, for instance, appears quite sober, if not positively conservative.

The main body of the section on the environment consists largely of summaries of three international documents - the Rio Declaration on Environment and Development, adopted at the UN Earth Summit of 1992, Article 130r of the Maastricht Treaty, and the concept of sustainable development as described in the Review Group of the World Commission on Environment and Development (1992). But if it is legitimate to refer to sources as general as these to support its recommendation in regard to the environment, why does the Review Group ignore other sources, of equal or greater legal authority and which in addition Ireland has formally ratified or subscribes to (such as the UN Convention on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child, the European Social Charter, the World Programme of Action on Human Rights - Vienna Declaration - or numerous other documents), which could be quoted in support of particular and much longer established socio-economic rights?

### III The Practical Implementation of Socio-economic Rights

#### III.1 Obligations of Conduct and of Result

The international community has dealt with the practical aspects of enshrining social and economic rights in international human rights treaties for many years. Ireland is a party to most of these treaties, and in the context of constitutional revision it is relevant to inquire how the theory and practice of, for example, the UN human rights monitoring machinery might be helpful in a national context.

It is customary to distinguish two types of obligations on states in regard to their obligations under international human rights conventions: those of *conduct* and those of *result*. While the UN Convention on Economic, Social and Cultural Rights (CESCR) provides for progressive realisation of the socio-economic rights which it enumerates, and acknowledges the constraints due to the limits of available resources, at the same time it imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States' obligations in regard to the socio-economic rights in the CESCR. They are the undertaking to guarantee that relevant rights will be exercised *without discrimination* and the undertaking to *take steps*.<sup>21</sup>

The Committee notes that the enjoyment of the rights recognised, without discrimination, will often be appropriately promoted, in part, through the provision of "judicial or other effective remedies" (General Comment 3, par. 4). The same Comment points out that States Parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2, pars. 1 and 3, 3 and 26) to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognised in that Covenant are violated "*shall have an effective remedy*". It notes further that there are a number of other provisions in the CESCR, including arts. 3, 7(a)(i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which "would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would be difficult to sustain" (Gen. Comment 3, par. 5).

#### III.2 The Resource Question

We recognise that there could well be a general apprehension on the part of

---

<sup>20</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No.3*, New York, United Nations Economic and Social Council, Official Records, 1991, Supplement No.3, E/1991/23.E.C.12/1990/8, Annex 3, par. 1

Government and of elected representatives that the inclusion of socio-economic rights in the Constitution might lead to uncontrollable and inflated demands for implementation. At first sight such anxiety is not unreasonable. However, as a matter of political reality States have already faced this problem in drafting international conventions and would not have ratified them if such problems could not be overcome. Experts given the task of elaborating the draft protocol (to the European Convention on Human Rights) ended up admitting that from a technical point of view, it would be possible to include certain rights of an economic, social and cultural nature in an additional protocol to the European Convention on Human Rights. They mainly opposed it for other reasons especially the unwillingness of States to see their existing obligations in this area increased. However, as the Limburg Principles point out (par. 23), the obligation of progressive achievement of socio-economic rights (in this case under the UN Covenant on Economic, Social and Cultural Rights) exists independently of the increase in resources. It requires in the first place the effective use of those resources available, which is quite a different matter.

### III.3 Socio-economic Rights as Minimum Subsistence Rights for All

The UN Convention on Economic, Social and Cultural Rights obliges States Parties to ensure respect for minimum subsistence rights for all, regardless of their level of economic development. The Committee on Economic, Social and Cultural Rights states that “a minimum core obligation to ensure the satisfaction of, at the very least, *minimum essential levels* of each of the rights is incumbent upon every State Party”.<sup>21</sup> Thus the Committee has declared that a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is, *prima facie*, failing to discharge its obligations under the Covenant. As the Committee points out, if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token the Committee notes that any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. A form of wording to ensure a *minimum level of obligation* could be stated in the Irish Constitution without implying any undue or unreasonable increase in provision by government.

### III.4 Conclusion

For the reasons advanced above, we believe that the general case against a comprehensive enumeration of socio-economic rights in the Constitution, as set out in the Group's Report, is fundamentally flawed. The case for inclusion is both morally

---

<sup>21</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No.3*, op. cit., par. 10, emphasis added

compelling and legally and politically feasible. We believe the arguments set out above more than adequately justify the general proposition that the fundamental rights section of the Irish Constitution should be revised to include an expanded list of social and economic rights; that these should be worded so as to provide a constitutional guarantee of minimum levels of enjoyment of the rights so enumerated, and impose a corresponding minimum level of obligation on the State; and that they should be drafted so as to permit interpretation by the courts and by the legislature in the light of prevailing resources and standards. In the following sections we address in detail the question of what rights should be considered, suggest wording for each of the four rights proposed and discuss the scope and contents of each right.

## **IV. Suggested Criteria for Selecting and Drafting New Social and Economic Rights in the Constitution**

As the range of possible rights which might be considered for inclusion is wide, it may be helpful to begin by proposing criteria for selecting and drafting new social and economic rights and the duties and responsibilities which correspond to them. We propose the following as reasonable and relevant.

### **IV.1 Justiciability**

The right should be specified in such a way as to be capable of being arbitrated, determined and enforced by the courts, i.e. they should be justiciable or judiciable. This is essential since the experience of sixty years has made it clear that the relegation of certain matters to the non-justiciable scope of Article 45 of the Constitution ("Directive Principles of Social Policy") has largely marginalised their constitutional impact.

### **IV.2 Development**

The right should be stated in the Constitution in a broad sense. Too much detail should be avoided. While any right stated should be justiciable and capable of being exercised immediately in some substantive way, it must also be capable of being scrutinised by the courts in terms of its progressive implementation, to take account of increasing resources, the developing capabilities of the State, evolving standards and changing needs in society. The Constitution Review Group appreciated this when it laid down that "[t]he Constitution should, where possible, endeavour to state propositions at a sufficient level of generality to permit of evolution and development".<sup>22</sup>

### **IV.3 Reasonableness and Proportionality**

The right should be worded in such a way that claims made of it will be interpreted and discharged - by the community, the State, individual claimants and by the courts - in due proportion to current standards and to the resources currently available within the community. In general, the test of *reasonableness* should apply. Common sense would suggest that the same or similar qualifying phraseology as used in the existing rights articles of the Constitution should be employed as far as possible in drafting

---

<sup>22</sup> *Report of the Constitution Review Group*, op cit, p.355



new articles, and we have endeavoured to do so. The courts could be expected to be familiar with existing wording, some of which is already likely to be the subject of constitutional jurisprudence. The precedent satisfactorily established by the constitutional phrasing of the right to education, grounding as it does a sector which historically involves substantial State resources, is especially relevant in considering wording for other social and economic rights.

#### **IV.4 Basis in International Human Rights Law**

The rights in question should preferably be able to claim international consensus as rights. In general the rights we propose enjoy such consensus and references are given in the appropriate sections. International human rights instruments, once ratified, have the status of international treaties (under the Vienna Convention on Law of Treaties).

#### **IV.5 Wording should state Co-relative Duty and Responsibilities of the Individual**

In a responsible and healthy society people should, within reason, be able, enabled and expected in the first place to provide for their needs through their own efforts. The role of the State is to make good unavoidable inadequacies or deficiencies of the individual or family, not to supplant or inhibit individual and group initiative and effort. This criterion reflects that principle and also complements the criterion of reasonable limitation and proportionality. We have endeavoured to formulate wording which recognises that there is a commensurate responsibility with every right.

#### **IV.6 Giving a Constitutional Standing to Existing Practice**

New rights as stated should desirably reflect some measure of existing practice and be already stated or recognised in whole or in part in existing legislation. The fact that proposed new rights (new, that is, only in a constitutional sense) are to a large extent already enjoyed and resourced in practice, and have been given a basis in statute law, gives the community, the legislature and government additional confidence that putting them on a constitutional footing is not tantamount to signing a blank cheque. Examples are the existence of a far-reaching social welfare system including social insurance, legislation which imposes certain obligations on local authorities in regard to housing and shelter and the universal availability of health care provision.

## IV.7 Rights already implied in the Constitution

Although not essential, it would obviously be helpful if elements of the rights in question could reasonably be held to be implicit in or derivable from rights already stated in the Constitution. The Review Group suggests that some rights, e.g. to food, shelter and clothing, are already protected as implied personal rights in the Constitution. Should someone fall below a minimum level of subsistence, despite the existence of our social welfare system, the Constitution “appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity”.<sup>23</sup> It is also arguable that grounds for the new rights proposed may already be found to some extent in elements of the existing Constitutional text and where appropriate we note some possible sources for the rights put forward.

---

<sup>23</sup> *Report of the Constitution Review Group*, op. cit., p. 236

## V Suggested Wording for the Four New Rights Proposed

We propose that four new rights - the right to **health**, the right to **adequate housing**, the right to **adequate nutrition and clean water**, and the right to an **adequate standard of living** - be included in the Constitution.

In putting forward these rights in particular we would not wish to imply that they exhaust the list of those eligible for consideration in any review of the rights section of the Constitution. We are aware that, for example, the Review Group on the Constitution has already recommended certain other rights, e.g. on discrimination or the environment, for inclusion. At the same time we recognise that an ill-considered expansion of the number of rights specifically enumerated in the Constitution could devalue their moral and legal authority. There are, however, substantial reasons for proposing these four rights in particular:

- they are rights which derive directly from the right to life, being concerned with the "means necessary and suitable for the proper development of life"<sup>24</sup> and indeed there are grounds for holding that they are already implied in the existing constitutionally recognised right to life, as the Report of the Review Group on the Constitution has indicated (p.236, see above);
- their content is such that they naturally complement and reinforce each other;
- they relate to areas which for a long time have accounted for a major proportion of State expenditure. By and large the areas in question are already the subject of substantial legislative protection and programmatic expression which have developed organically over a long time;
- they are substantially recognised in international human rights texts as core social and economic rights;
- finally, and perhaps most importantly, they are rights which, if constitutionally enshrined, could be directly invoked by and on behalf of the neediest and most vulnerable of our community, in a way in which the existing right to property, for example, cannot. They respond to the demands of distributive justice, which is the obligation that falls on society to meet the reasonable expectations of its members so that they can realise and exercise their fundamental rights. They concern basic goods and values which all human beings share because we share the gift of human life. If established constitutionally, they would be a significant concrete expression of a "social order free of oppression and based on a spirit of co-operation and solidarity".<sup>25</sup>

---

<sup>24</sup> John XXIII, Encyclical *Pacem in Terris*, (1963), n. 11

<sup>25</sup> John Paul II, Encyclical *Centesimus Annus* (1991), n. 61

Conscious that any constitutional formulation deserves the most careful thought and discussion before being definitively adopted, we propose for consideration the following wording:

### **V.1 The Right to Adequate Housing**

*All persons have the right to have access to adequate housing for themselves and their dependants and if necessary to assistance in housing. The enjoyment of this right should in the first place be ensured by the initiative and efforts of each person. The State shall endeavour to supplement and give reasonable aid to private and corporate initiative in the provision of housing, including assistance in housing where necessary.*

*Where persons or their dependants are unable adequately to exercise or enjoy the right to shelter or to house themselves and their families with dignity, the State shall ensure that this right is adequately respected and protected.*

*As guardian of the common good the State shall take reasonable steps to promote the general and progressive enjoyment of this right in view of actual conditions, resources and standards.*

### **V.2 The Right to Health**

*Each person has the right to health including the right to emergency medical assistance. The enjoyment of this right should in the first place be ensured by the initiative and efforts of each person. Where individual persons or their dependants are unable adequately to exercise or enjoy the right to health, the State shall ensure that this right is respected and protected.*

*As guardian of the common good the State shall take reasonable steps to promote the general and progressive enjoyment of this right, in view of actual conditions, resources and standards.*

### **V.3 The Right to Adequate Nourishment**

*Each person has the right to the nutrition necessary to a dignified existence. The enjoyment of this right should in the first place be ensured by the initiative and efforts of each person. Where persons are unable adequately to exercise the right to adequate nourishment the State shall ensure that this right is adequately respected and protected.*

*As guardian of the common good the State shall take reasonable steps to promote the general and progressive enjoyment of this right, in view of actual conditions, resources and standards.*

#### **V.4 The Right to an Adequate Standard of Living**

*All persons have the right to an adequate standard of living for themselves and their families. The enjoyment of this right should in the first place be ensured by the initiative and efforts of each person. The State shall endeavour to supplement and give reasonable aid to private and corporate initiative in this regard.*

*Where a person's means prove inadequate to meet his or her needs or those of his or her dependants, the State, as guardian of the common good, shall defend and vindicate this right as far as practicable, in accordance with the principles of social justice, through appropriate legislative and other means, including the provision of social security and social assistance.*

*As guardian of the common good the State shall take reasonable steps to safeguard and promote the general and progressive enjoyment of this right in view of actual conditions, resources and standards.*

## **VI Structure and Interpretation: General Considerations**

Because the rights in question involve different obligations and policy considerations and cannot be uniformly implemented, we believe it is preferable to state them separately rather than group them in a single composite article. There exists a substantial and growing jurisprudence in regard to each of the rights at international level and by enumerating them separately the courts would be better able to develop appropriate jurisprudence in regard to each.

### **VI.1 Group rights**

The question might be asked whether, in addition to defining new rights, consideration should also be given to defining specific groups for whom particular protection is thought desirable, for instance children, women, the elderly, the travelling community, the disabled. We believe that it is preferable at this stage in the constitutional development of rights to focus on rights to which all citizens, regardless of their group or status, would be entitled. The elderly, for instance, would be protected by defining a right to health or to housing, as they would by any other of the new rights proposed. It should also be borne in mind that the Constitution already refers to “the natural and imprescriptible rights of the child” (Art. 42.5), and devotes a complete article to the family.

### **VI.2 Threefold Aspect of State’s Duty: to Respect, to Protect and to Fulfil**

In suggesting wording for each of the rights proposed we have followed the typology first suggested by Asbjörn Eide in his study for the UN’s Sub-commission on Prevention of Discrimination and Protection of Minorities, on the right to food. He distinguishes three aspects of a State’s obligations: to respect, to protect, and to promote/fulfil.

*To respect:* It is essential, we believe, to state and understand the general right in a positive sense first, i.e. as a basic essential for human flourishing, and one which, like the right to life, people should possess and enjoy as a matter of course. This has some important consequences. By stating a “right to health” or a “right to access to housing”, for example, the primary duty thereby placed on the State is to respect that right, which for the majority of people will be pre-existing (right to health), or which would normally be provided through their own efforts (right to housing, right to food).

The obligation to respect requires the State to refrain from doing anything that violates the integrity of the individual or infringes a person’s freedom, including the freedom

to use the material resources available to the individual in whatever way he or she finds best to satisfy the basic need in question. Under this aspect, therefore, none of the rights proposed would necessarily be expected to entail any significant resource implications.

To state an obligation on the part of the State to respect a right does not mean that an individual can expect an absolute, unqualified entitlement to, or exercise of, that right. Even as fundamental a right as that to life, already recognised in the Constitution, does not guarantee freedom from death by illness or accident, by murder, negligence or war. And it still leaves open the difficult problem of balancing one person's right to life against that of others (in pregnancy, emergencies, or allocation of scarce medical resources, for instance). In resource terms the constitutional right to life does not confer on the individual an entitlement to unlimited medical resources or expenditure. To take another example, the right to vote means only that the free exercise of that right is reasonably respected; it does not mean that a government is prohibited from calling an election before checking that all voters will in fact be in the country and not incapacitated by illness on the proposed election day. Similarly, the enumeration of a right to health would oblige the State to undertake to refrain from itself doing anything which would unjustifiably or unreasonably threaten persons' health, but the right would not and could not be interpreted to confer an absolute and indefinite guarantee of good health on everyone.

Any additional rights included in the Constitution would have to be interpreted and balanced by reference where appropriate to rights already stated in the Constitution. As an instance, the right to housing could well be interpreted also with reference to the right to property and/or the right to life.

*To protect:* the wording proposed for the rights in question would oblige the State to protect their exercise or enjoyment against the action or inaction of other individuals or groups. Under this aspect the State would offer the individual protection and redress against such violations of the rights in question such as unjust eviction, polluted drinking water, or untested pharmaceuticals. The obligation to protect would require the State and its agents to take measures necessary to prevent other individuals, groups or bodies from violating the integrity, freedom of action or other human rights of the individual including the prevention of infringement of the enjoyment of material resources. Under this aspect also none of the rights proposed would be expected to entail any significant additional resource implications.

*To fulfil:* the third element of the wording lays an obligation on the State to fulfil and to promote. It requires the State to take measures needed to ensure opportunities for each person to exercise and enjoy the satisfaction of the needs underlying each right which cannot be provided by the personal effort and initiative of the individual. This requires at least a minimum provision of resources or other necessary elements for those who, through no fault of their own, are unable to enjoy or exercise the right in

question up to a defined minimum standard. It is in defining what should be the appropriate minimum that the Oireachtas rather than the courts would come into its own. Thus the existing battery of social welfare legislation already operates to provide a resource floor for individuals and categories of persons who have been identified as lacking resources or capacities needed for the enjoyment of a basic level of human dignity. In a rights context, the totality of social welfare legislation and the programmes to which it has given rise can be understood as the expression of a cumulative judgement on the part of the community at large, successive governments, and experts and activists in various fields, of what is both due and feasible in the face of human need, on the one hand, and, on the other, what constitutes a reasonable adjudication between competing claims for scarce resources.

In a sense, the third aspect of economic and social rights, as set out in the preceding paragraph, is the communal expression and discharge of the duty of care which Irish law already recognises as a duty of the individual in certain circumstances. Underlying it, we would argue, is the concept of the "common good" which is already stated in the Constitution. More than that, it may be seen as the concrete expression of social responsibility for each other, but especially for those who through no fault of their own are unable to provide for themselves; and no society known to history has been without such people.

To state economic and social rights in the manner proposed above is to avoid two extremes: that of individualism pushed to the point of social breakdown and institutionalised greed, and that of the omniscient state which purports to provide for all human needs to the exclusion or detriment of personal responsibility and initiative. By idolising individual initiative the first extreme fosters alienation and injustice and denies the rightful claims of reciprocal solidarity; by idolising the role of the state the second fosters apathy, inefficiency but above all the atrophy of personal responsibility, without which no healthy society can flourish.

The obligation to fulfil is already stated in the Constitution in regard to the right to education: here the Constitution states a clear duty on the State ("The State *shall provide for* free primary education...") while leaving a more than adequately wide margin of appreciation in regard to the interpretation and implementation of the right. It does not for example prescribe the age up to which free provision must be made, nor does it prescribe the length of the school year or the content of the compulsory element of the curriculum; indeed it does not even provide a definition of education itself. It says nothing as to the resources, either absolute or relative, to be devoted to the discharge of this duty by the State. Such matters are left to the judgement of the legislature and the executive, as it would also in regard to the new rights we propose.

That the Courts have a clear understanding of the limits of their competence in regard to the scope of Executive policy is evidenced by Finlay P. in *The State v. Frawley*:



It is not the function of the Court to recommend to the Executive what is desirable or to fix the priorities of its health and welfare policy. The function of the Court is confined to identifying and, if necessary, enforcing the legal and constitutional duties of the Executive.<sup>26</sup>

We suggest that any objections to the inclusion of new social and economic rights on the grounds that they necessarily open the door to unrealistic or potentially limitless resource demands, would be difficult to sustain in the face of the actual constitutional experience of the right to education over a period of sixty years.

### **VI.3 Margin of Appreciation**

It is clear from General Comment No. 3 of the Economic and Social Committee of the UN that social and economic rights are not to be interpreted as imposing an inflexible straitjacket taking no account of changes of circumstance (which in the event might be in either a favourable or unfavourable direction). For example, a country devastated by war could not be expected by its courts, or indeed by a body such as the ECOSOC, to fulfil its obligations up to peacetime standards. The same would apply in the event of natural disaster, or a prolonged depression. At the same time the fact that a right might be stated in the Constitution in such a way as to give a wide margin of appreciation does not mean that "anything goes" so far as the State's obligation is concerned. Once the right to free primary education had been stated in the 1937 Constitution, neither the community at large, nor presumably the courts, would have regarded an arbitrary State provision of, say, two rather than six or eight years of primary education as an adequate discharge of its constitutional obligation. Once the right is stated, it can be tested in the courts against the criterion of reasonableness. This would provide a boundary protection against arbitrary or unreasonable interpretations, or against a patent failure of compliance with minimum criteria.

### **VI.4 Progressive Implementation**

A change of circumstance might on the other hand be in a favourable direction, such as sustained economic growth, with two consequences: raising of standards and expectations, and a commensurate increase in the State's capacity to meet its obligation to fulfil. This requirement on the State to comply with its obligation to fulfil a right is more difficult to express in terms of justiciability, but examples are not too hard to find. One such is the judgement of the European Court of Human Rights in the *Airey* case which defined an obligation on the State which was ultimately met by establishing and resourcing a scheme of civil legal aid. In housing, the minimum levels of housing standards defined by the State itself are far higher now than in the 1920's. Likewise,

---

<sup>26</sup> [1976] I.R. 365

the interpretation of minimum acceptable standards in health care is continuously evolving. In general, standards in these areas do not change abruptly, but quite gradually, so that the margin of appreciation can be expected to leave sufficient room to the State to make budgetary or other adjustments from year to year as it wishes, without fear of being constrained by the courts or overwhelmed by some particular judgement: It is more likely that if a “new” right is inserted in the Constitution, it will be appealed to by individuals either on grounds already open to them (such as that they are being discriminated against) or that the State or a statutory body is failing in a particular instance to discharge an already defined duty.

## VI.5 Minimum Core Obligations and Resource Constraints

In the same vein, the UN Committee on Economic, Social and Cultural Rights, while noting that any assessment as to whether a State has discharged its minimum core obligation (under the Convention on Economic, Social and Cultural Rights) must also take account of resource constraints applying within the country concerned, has emphasised that, even where the resources available in a State are “demonstrably inadequate” (i.e. to fulfil the State’s obligations under the CESC), the obligation still remains for the State to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.<sup>27</sup> Art. 2 (1) obliges each State party to take the necessary steps “to the maximum of its available resources”.

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>28</sup>

It is reasonable to assume that in the event of a CESC-type right such as housing being included in the Irish Constitution, the courts’ approach to interpreting the obligation would be similar to that adopted by the CESC supervisory body. In other words, the statement and interpretation of a social or economic right, whether in an international instrument such as the CESC, or nationally in the Constitution, takes account of the possibility that resources may be inadequate to ensure complete fulfilment of a right at a given time (i.e. that there are resource constraints). It also ensures that the State continues to remain under obligation to ensure the widest possible enjoyment of the rights under the prevailing circumstances, whatever these might be. It is clear that the international monitoring bodies construe the obligation to ensure the widest possible enjoyment of the right as compatible with the recognition of the reality that resources are limited. This is true not only at UN level but also

---

<sup>27</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No.3*, op. cit., par. 11

<sup>28</sup> *Ibid.*, par. 10

within the Council of Europe. As a former member of the Committee of Experts for the Social Charter and Professor of Public International Law at the University of Nottingham has observed, "the [European Convention on Human Rights] institutions are well used to deciding what can be expected of states in respect of positive obligations (e.g. under Article 8, ECHR)".<sup>29</sup> It should be noted, in the context of the possible resource implications of social and economic rights, as distinct from civil and political rights, that the case law of the European Court recognises that the latter category may also involve positive obligations for the State. The rapporteur of the EU Committee on Civil Liberties and Internal Affairs of the European Parliament, K. de Gucht, has observed with reference *inter alia* to the European Court's case law that "it (the Court) in Strasbourg laid particular emphasis on the fact that although the [European] Convention [on Human Rights] largely postulates civil and political rights, a number of these have extensions in the area of economic and social rights".<sup>30</sup>

The UN Committee has emphasised that

even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors, the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes".<sup>31</sup>

Thus social and economic rights are to be interpreted as imposing reasonable obligations, some of which are resource dependent but some of which are not. It is the latter which would come more into play in times of recession, budget cutting or structural adjustment.

It is, we hope, clear from the foregoing that social and economic rights could not be invoked to block reasonable cost-cutting or reallocation of resources, for such decisions are properly within the margin of appreciation implied in the proposed wording. They should therefore pose no fears to governments and administrators on resource grounds. Where their impact would be felt is in inhibiting unreasonable, arbitrary or discriminatory decisions bearing unduly on certain individuals or categories.

---

<sup>29</sup> David Harris, "The Collective Complaints Protocol to the European Social Charter", paper to Colloquy on The Social Charter of the 21<sup>st</sup> Century, Strasbourg, 14-16 May 1997 Strasbourg, Council of Europe, 1997

<sup>30</sup> Committee on Civil Liberties and Internal Affairs of the European Parliament, *Annual Report 1992*, (doc. NE/RR/220/220877), 27 January 1993

<sup>31</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3*, op. cit., par. 12

## VII. Application of the Seven Criteria to the Rights Proposed

### VII.1 Justiciability

To ensure that the rights can be determined and enforced by the courts it would appear sufficient simply to state them in the Constitution, as is the case already with the right to education.

### VII.2 Development

This has been discussed above under “Progressive implementation” (Section VI.4). The wording proposed for each right allows for and requires progressive implementation, while leaving the necessary flexibility and discretion to the legislature.

### VII.3 Reasonableness and Proportionality

One of the main concerns of the State (elected representatives, government, the civil service) in regard to the enumeration of possible new economic and social rights is likely to be the fear that they would lead to unsustainable resource demands. Such concerns can be met reasonably and in a constitutionally practicable manner by ensuring that the wording is suitably qualified.

The Irish Constitution already does this in a number of places (our emphasis in italics):

Art.40.3.1: The State guarantees in its laws to respect, and, as *far as practicable*, by its laws to defend and vindicate the personal rights of the citizen.

Art.40.3.2: The State shall, in particular, by its laws protect *as best it may* from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Art.40.3.3: The State acknowledges the right to life of the unborn and, with *due regard* to the equal right to life of the mother, guarantees in its laws to respect, and, *as far as practicable*, by its laws to defend and vindicate that right.

Art.41.2.2: The State shall, therefore, *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.

Art.42.3.2: The State shall, however, as guardian of the common good, require *in*

*view of actual conditions* that the children receive a *certain minimum* education, moral, intellectual and social.

Art.42.4: The State shall *provide for* free primary education and shall *endeavour to supplement* and give *reasonable* aid to private and corporate educational initiative, and, *when the public good requires it*, provide *other* educational facilities or institutions *with due regard*, however, for the rights of parents, especially in the matter of religious and moral formation.

Art.42.5: *In exceptional cases*, where the parents for physical or moral reasons fail in their duty towards their children, the State *as guardian of the common good*, by *appropriate means* shall *endeavour* to supply the place of the parents, but always *with due regard* for the natural and imprescriptible rights of the child.

Art.43.2.1: The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article [i.e. on private property] *ought*, in civil society, *to be regulated by the principles of social justice*.

Art.43.2.2: The State, accordingly, *may as occasion requires delimit by law the exercise of* the said [i.e. property] rights *with a view to reconciling their exercise with the exigencies of the common good*.

We draw attention especially to the use of “a *certain minimum*” in Art.42.3.2 and of “*reasonable*” and “*in view of actual conditions*” in Art. 42.4. The wording proposed by the Constitution Review Group itself for an expanded Article on the right to free education also incorporates a number of qualifying phrases already used in the Constitution.<sup>32</sup> By including qualifying wording such as or similar to “reasonable”, “a certain minimum” and “in view of actual conditions”, the Constitution would provide an adequate margin of appreciation for the Oireachtas and the government of the day, as it has already done in regard to the right to free primary education. The reasonableness of measures taken by the State to implement a particular right must be interpreted with reference to the overall level of resources and capacity of the State at a given time. What constitutes reasonable compliance with a right to housing would be interpreted differently in the 1990's, when piped water is the norm, to the 1840's, when piped water was essentially unavailable.

The test of reasonableness leaves open a considerable “margin of appreciation” by the State, but it does close off arbitrary or extreme interpretations by individuals against the State, or by the State against individuals.

---

<sup>32</sup> “Every child has a right to free primary and secondary education. The State shall provide for such education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, where appropriate, provide other educational facilities or institutions ...” *Report of the Constitution Review Group*, op. cit., p.353

#### VII.4 International Consensus

All the rights which we recommend are already fully established and accepted in international human rights sources and are increasingly finding their way into national constitutions. The main sources are indicated further on in the "Comments" on each right proposed.

The most systematic enumerations occur in the international human rights instruments prepared under the auspices of the UN or of regional human rights bodies such as the Council of Europe or the Organisation of American States. Apart from the body of International Labour Office (ILO) conventions, some of which date from the 1920's, the main UN sources are to be found in the Convention on Economic, Social and Cultural Rights (1966), the Convention on the Rights of the Child (1989), the Declaration on the Right to Development and the Convention on the Elimination of Discrimination against Women (1979). The ILO conventions such as no. 115 (Right to Healthy Workplace) often spell out in much more detail than the CESCRC the content of particular social or economic rights.

The single most important international source is probably the Convention on Economic, Social and Cultural Rights (1966). Major sources of elaboration on the rights in the CESCRC are the "General Comments" of the Committee on Economic, Social and Cultural Rights.

At regional level the main instruments are the European Social Charter (1961), which was intended to complement the European Convention on Human Rights, and the Revised European Social Charter (1996). It is of particular significance in the context of our submission that the member states of the Council of Europe felt the need to progressively replace the 1961 Charter by updating it in the form of the Revised European Social Charter, adopted in 1996. The Revised Charter, (not to be confused with the Social Chapter of the Treaty on European Union - the Maastricht Treaty - applicable only within the EU and much more restricted in scope) states a number of important new rights, reflecting the recognition by the Council of Europe member states (including Ireland) of the need to "update and adapt the substantive contents of the Charter in order to take account in particular of the fundamental social changes which have occurred since the text [i.e. of the 1961 Charter] was adopted".<sup>33</sup>

While the European Union has stated some rights in the Treaty on European Union the progressive development of the EU has led to the realisation that it is weak in the provision of rights. The European Parliament has drafted a proposed Bill of Rights which includes social and economic rights. The Parliament has also passed resolution

---

<sup>33</sup> Council of Europe, *Revised European Social Charter* (1996), Preamble

B4-0581/96 specifically on the right to housing. The Comité des Sages, mandated by the European Commission, proposed the inclusion of social and economic rights in the Treaty of European Union for consideration at the EU summit meeting of June 1997. Although this proposal was not incorporated in the final text of the Amsterdam Treaty, the European Commission has committed itself to carry forward the debate on fundamental rights, building on the report of the Comité des Sages.<sup>34</sup>

As might be expected, due to the comparative infrequency of constitutional review, the longer established national constitutions tend to enumerate only the classical civil and political rights. Social and economic rights are less likely to be found, if at all, in older constitutions, and more likely to be stated in newer ones, for example those drawn up after the UN Convention on Social, Economic and Cultural Rights. A notable recent example is the South African Constitution, the social and economic rights in which were the subject of extensive prior discussion and consultation. Many of the constitutions of the countries of Central and East Europe and the new states which emerged after the dissolution of the former USSR, such as the Ukraine, also include social and economic rights. However, some EU member states' constitutions also have elements of the rights which we propose, such as the right to housing.

#### **VII.5 Duty of the Individual**

The wording of rights in Bunreacht na hÉireann is surprisingly weak in stating duties and responsibilities of the individual corresponding to the rights enumerated. This is possibly because at the time the Constitution was adopted (1937) it was taken for granted that every right carries a reciprocal duty. However, even if this was the case then, the subsequent development of human rights has often tended to leave unsaid, and therefore unregarded, the truth that there are no rights without responsibilities. It is desirable that the contemporary enumeration of rights in the Constitution be explicitly balanced by reference to the reciprocal responsibilities and duties which go with them, especially given the nature of social and economic rights. The wording we propose, while in no way diminishing the State's obligations, is intended to emphasise that the primary responsibility for respecting and securing the rights in question rests on the individual. The State's role is to supplement, not to supplant, the efforts and responsibilities of individuals, families and groups to supply their needs and maintain their physical and social integrity through their own initiative in the first place.

---

<sup>34</sup> European Commission, *Social Action Programme, 1998-2000*, Luxembourg, Office for Official Publications of the European Union, 1998, p.17.

## **VII.6 Existing Practice**

The Review Group, as we have already noted, expressed concern about the possible diminution of the proper role of the Oireachtas by judicial activism in the area of unenumerated rights. The weakness of this argument has been pointed out earlier. Most obviously, proposals to include new rights in the Constitution require initially the approval of the government of the day and then must receive the ultimate democratic authorisation of approval by the whole people in a referendum. If the Constitution remains unamended through failure or refusal to develop its rights content as appropriate, this leaves the people with undeveloped and out of date constitutional protection for their rights, especially as under the dualist system of Irish law the rights to which the State subscribes through ratifying international human rights instruments require specific domestic legislation before they become *directly* available to the citizen.

The Review Group would seem to have contradicted itself by on the one hand cautioning against possible encroachment by the courts on the sphere of the legislature (through the courts' judicial activism), while on the other preferring to leave certain implied rights unenumerated, even though such lack of clarification must actively invite rather than inhibit judicial activism. Inaction on this front leaves the courts with the task of taking up the constitutional slack, which inevitably increases as time goes by. The preferable and more democratic alternative is to follow the path of judicious development of the rights content of the Constitution through referenda, combined with the ordinary and ongoing development by the Oireachtas of the legal framework appropriate to the subject matter of each right. In reality statute law has already specified many if not most of the elements of the rights we propose for inclusion.

## **VII.7 Rights already Implied in the Constitution**

See our comments under this heading above and in the following sections.



## VIII. The Right to Adequate Housing

### VIII.1 Introduction

The realisation of the right to adequate housing, which embraces the badly housed as well as the unhoused, is intimately connected to the enjoyment of other rights, including the right to privacy, to freedom of movement, to respect for the home, to family life, to freedom from discrimination, to security of the person, to health, to education, to equality before the law, to work and to a decent and safe environment. That said, shelter begins as a response to a basic necessity of physical life: in the harsh winter of 1992/3, four homeless people died on the streets of Dublin.<sup>35</sup>

Shelter is one of the most basic human needs, not simply in itself but also because increasingly in today's world it determines access to other necessities: "Not only are the roofless deprived of the means to improve their lot – an address holds the key to employment, credit, goods, support and services".<sup>36</sup>

Without housing, or in the absence of decent housing, families and individuals are unable to live a dignified life.<sup>37</sup> Worse still, a lack of housing can even accustom people and families to subliminal conditions of existence.<sup>38</sup> The inherent dignity of the human person, from which the right to housing derives, requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that it be ensured to all persons irrespective of income or access to economic resources.<sup>39</sup> The right to housing is of particular importance to low-income or non-earning groups.

Housing can be considered under two main aspects: as the means of providing essential shelter and accommodation to human beings and households, and as an avenue for investment and the creation of wealth. The right to housing arises from the first aspect. This is not to say that the second is unimportant, since it clearly is, not least in regard to rights to property and inheritance. It is rather that the right to housing derives from the necessity of shelter and adequate accommodation for human

---

<sup>35</sup> Brian Harvey, Preface, in Mary Daly, *Abandoned: Profile of Europe's Homeless People: The Second Report of the European Observatory on Homelessness, 1993*, Brussels, FEANTSA, 1993

<sup>36</sup> UK Environment Select Committee *Report into Housing Need*, quoted in *Housing Plus*, Newsletter of the Catholic Housing Aid Society Education Network, Issue 10, Summer 1996

<sup>37</sup> Pontifical Commission for Justice and Peace, *The Church and the Housing Problem. Document on the Occasion of the International Year of the Homeless*, Vatican City, Vatican Polyglot Press, 1987, III. 2

<sup>38</sup> *Ibid.*, III.3

<sup>39</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No.4, The Right to Adequate Housing*, Geneva, United Nations, 1991, Doc. E/1991/23, par. 7

life and flourishing. Because housing is a basic social good it cannot therefore be simply considered as a market commodity.<sup>40</sup>

The fact that “basic shelter for the entire population is universally regarded as a human right” was one of the two main grounds on which the National Economic and Social Council accepted in 1988 that there was “significant justification” for the State to intervene in the housing system (the other being a convergence of economic arguments such as market failure, merit goods and redistribution criteria).<sup>41</sup>

## VIII.2 The Right to Housing in International Human Rights Instruments.

In 1996 Ireland and the other member states of the United Nations participating in the Habitat II Conference reaffirmed their commitment to the “full and progressive realisation of the right to adequate housing, as provided for in international instruments”. They recognised the obligation on Governments to enable people to “obtain shelter and to protect and improve dwellings and neighbourhoods”. They committed themselves to the goal of improving living and working conditions on an “equitable and sustainable basis, so that everyone will have adequate shelter that is healthy, safe, secure, accessible and affordable and that includes basic services, facilities and amenities, and will enjoy freedom from discrimination in housing and legal security of tenure”. The right to adequate housing to be implemented “in a manner fully consistent with human rights standards.”<sup>42</sup>

Ireland has already begun to report to the UN on its compliance with the right to adequate housing, as part of its general reporting obligations under the UN Covenant on Economic Social and Cultural Rights. In the first Irish report under the CESCR, submitted in 1996, 32 pages were devoted to the right to adequate housing. In addition to a general overview of the right to adequate housing, the report dealt with the water and sanitary services programme, the number of persons in different types of housing tenure, legislation relevant to land use, land distribution, land allocation and land zoning, legislation concerning the rights of tenants, legislation concerning building codes, regulations and standards, and “changes in national policies, laws and practices negatively affecting the right to adequate housing during the reporting period.”<sup>43</sup>

---

<sup>40</sup> Pontifical Commission for Justice and Peace, *The Church and the Housing Problem*, op. cit., III. 3

<sup>41</sup> “Council’s Comments on a Review of Housing Policy” in John Blackwell, *A Review of Housing Policy*, National Economic and Social Council, Report No.87, Dublin, 1988, p.6

<sup>42</sup> *Report of the United Nations Conference on Human Settlements (Habitat II)*, Istanbul, 3-14 June 1996; A/CONF.165/14, 7 August 1996, par. 39

<sup>43</sup> International Covenant on Economic, Social and Cultural Rights – First National Report of Ireland (1996), op. cit., pp.122-54

The main international sources for the right to adequate housing<sup>44</sup> are the following:

**Universal Declaration of Human Rights:** Art. 25.1 “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including the right to...housing...”.

**UN Convention on Economic, Social and Cultural Rights:** Art. 11.1 “The States Parties...recognise the right of everyone to an adequate standard of living for himself and his family, including food, clothing and *housing*, and to the continuous improvement of *living standards*” (emphasis added).

**International Convention on the Elimination of All Forms of Racial Discrimination:** Art. 5 (e) “...States Parties...guarantee the right of everyone...to equality before the law, notably in the enjoyment of the following rights...(e) Economic, Social and Cultural Rights, in particular...iii) the right to housing.”

**Convention relating to the Status of Refugees:** Art. 21 “As regards housing, ...Parties, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances.”

**Convention on the Rights of the Child:** Art. 27.1 “States Parties recognise the right of every child to a standard of living adequate to the child’s physical, mental, spiritual, moral and social development... 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”

**European Convention on Human Rights:** Article 8(1): “Everyone has the right to respect for his private and family life, his home and his correspondence”.

**Protocol No. 4 of the European Convention on Human Rights:** 2(1) “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

**The European Social Charter (1961):** Art. 16 “With a view to ensuring the necessary

---

<sup>44</sup> For a comprehensive listing, including ratifications, see “Existing Legal Sources of Housing Rights Under International Law” in *Human Rights Activities Related to Housing Within the United Nations*, HS/C/15/INF.7, United Nations, Geneva [1994], Annex II.

conditions for the full development of the family, which is the fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means."

Art. 19(4): "With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting States undertake...(4) to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect to the following matters...(c) accommodation."

**Additional Protocol to the European Social Charter (1988):** Art. 4 "With a view to ensuring the effective exercise of the right of elderly persons to social protection, the States Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular...to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: provision of housing suited to their needs and their states of health or of adequate support for adapting their housing....[and] to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution."

**Council of Europe Revised European Social Charter (1996):** The Revised European Social Charter, agreed by all member states of the Council of Europe including Ireland, and opened for signature and ratification in 1996, contains several completely new Articles in comparison to the 1961 Social Charter, in particular: Art. 23 "The right of elderly persons to social protection"; Art. 30 "The right to protection against poverty and social exclusion"; and Art. 31: "The right to housing".

Art. 23 "The right of elderly persons to social protection: ...the Parties undertake to adopt or encourage...appropriate measures...designed ...- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of a provision of housing suited to their needs and their state of health or of adequate support for adapting their housing..."

Art. 30 "The right to protection against poverty and social exclusion ...the Parties undertake a) to take measures...to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, ...housing..."

Art. 31: "The right to housing: With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- to promote access to housing of an adequate standard
- to prevent and reduce homelessness with a view to its gradual elimination
- to make the price of housing accessible to those without adequate resources."

**European Convention on the Legal Status of Migrant Workers (1977):** Art. 13  
"1. Each Contracting Party shall accord to migrant workers, with regard to access to housing and rents, treatment not less favourable than that accorded to its own nationals, insofar as this matter is covered by domestic laws and regulations. 2. Each Contracting Party shall ensure that the competent national authorities carry out inspections in appropriate cases in collaboration with the respective consular authorities, acting within their competence, to ensure that standards of fitness of accommodation are kept up for migrant workers as for its own nationals. 3. Each Contracting Party undertakes to protect migrant workers against exploitation in respect of rents, in accordance with its laws and regulations on the matter. 4. Each Contracting Party shall ensure, by the means available to the competent national authorities, that the housing of the migrant worker shall be suitable.

**Holy See, Charter of the Rights of the Family (1983):** Art. 11: "The family has the right to decent housing, fitting for family life and commensurate to the needs of its members, in a physical environment that provides the basic services for the life of the family and the community."

**International Labour Office: ILO Recommendation No. 115' (1961)** on workers' housing is one of the most comprehensive international texts on housing and spells out the objectives of national policy and the respective responsibilities of public authorities and employers in providing workers' housing, *inter alia* by making available loans at moderate interest rates. It also elaborates housing standards, including: space per person or family in terms of floor area; cubic volume and size and number of rooms; the supply of safe water; adequate sewage and garbage disposal; appropriate protection against excessive temperatures; and a minimum degree of privacy. In addition to Recommendation No. 115, **ILO Convention No. 117 Concerning Social Policy (Basic Aims and Standards)** of 1962 also refers to housing rights issues.<sup>45</sup>

**Vancouver Declaration on Human Settlement (1976)**, adopted by Habitat (United Nations Conference on Human Settlements 1976: Section III (8): "Adequate shelter and services are a basic human right which places an obligation on governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided programmes of self-help and community action. Governments should endeavour to remove all impediments hindering attainment of

---

<sup>45</sup> United Nations, *Human Rights Activities Related to Housing Within the United Nations*, doc. HS/C/15/INF.7; Geneva, United Nations, Annex 1, par. 2 [1994]

these goals. Of special importance is the elimination of social and racial segregation, inter alia, through the creation of better-balanced communities, which blend different social groups, occupations, housing and amenities.

Chapter II (A.3): “The ideologies of States are reflected in their human settlement policies. These being powerful instruments for change, they must not be used to dispossess people from their homes or land or to entrench privilege and exploitation. The human settlement policies must be in conformity with the declaration of principles and the Universal Declaration of Human Rights.”

**UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1993/36, “The Right to Adequate Housing”** (adopted 26 August 1993): “3. Strongly encourages all governments to pursue effective policies and legislation aimed at creating conditions towards ensuring the full realisation of the right to adequate housing of the entire population concentrating on those currently homeless or inadequately housed, and to take into account the particularly negative impact on housing and living conditions that may result from the adoption of economic adjustment and other policies based exclusively upon the dictates of the free-market.”

**United Nations General Assembly resolution 42/146 “The Realisation of the Right to Adequate Housing”** (adopted 7 December 1987), states in part: “The General Assembly reiterates the need to take, at the national and international levels, measures to promote the right of all persons to an adequate standard of living for themselves and their families, including adequate housing, and calls upon all States and international organisations concerned to pay special attention to the realisation of the right to adequate housing in carrying out measures to develop national shelter strategies and settlement improvement programmes within the framework of the Global Strategy for Shelter to the Year 2000.”

**The Global Strategy for Shelter to the Year 2000**, adopted by the UN General Assembly (Res. 43/181, 20 December 1988), Point 13: “The right to adequate housing is universally recognised by the community of nations... All nations without exception have some form of obligation in the shelter sector, as exemplified by their creation of ministries or housing agencies, by their allocation of funds to the housing sector and by their policies, programmes and projects. All citizens of all States, poor as they may be, have a right to expect their Governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage or destroy them.”

**European Union: Community Charter of Fundamental Human Rights (1989):** Art. 29 “All disabled persons, whatever be the origin and nature of their disablement, must be entitled to additional concrete measures aiming at improving their social and professional integration. These measures must concern, in particular, according to the

capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing.”

**European Parliament Resolution on Shelter for the Homeless in the European Community** (resolution No. C 190/39 of 16 June 1987.) Paragraphs 4-8:

“4. [The Parliament] calls for clear priority to be given to legal rules concerning the implementation of the right to adequate housing and aid for rehabilitation and consequently for national legal provisions on vagrancy, where they exist, and particularly those on begging and sleeping rough to be adapted to the resulting requirements.”

5. Asks that associations and any tenant should be offered the possibility of being assisted in legal proceedings by a natural or legal person of their choice.

6. Considers it vital that the rights of the homeless to be housed in decent and appropriate housing suited to their needs be recognised, which implies putting an end to all discrimination, whether legal or moral.

7. Considers that the punitive classification of homeless persons seeking housing as 'intentionally homeless' or 'not rehouseable', for example, contravenes the basic right of the homeless to be housed.

8. Asks that the right to a home should be guaranteed by legislation, that Member States should recognise it as a fundamental right and that no person or family should be evicted without being rehoused”.

A **European Parliament Resolution of 14 May 1996**<sup>46</sup> urged the EU to incorporate the right to housing into the EU treaty and to support international recognition of this right at the Habitat II Conference (Istanbul, June 1996). It considered that non-implementation of the right to housing “is a breach of the principles and democratic values on which European society is based, as stated in the European Convention on the Protection of Human Rights and Fundamental freedoms, according to Article F (2) of the Treaty on European Union”.<sup>47</sup>

**European Parliament Resolution on the Social Aspects of Housing**<sup>48</sup>, approved 29 May 1997. This resolution, proposed by Irish M.E.P. Brian Crowley, asks that the “fundamental right to decent and affordable housing for all be given operational reality by concrete policies and measures carried out at the appropriate administrative and institutional level” (par.2). The Parliament believes that housing “must be seen as an area of general interest, underpinning all other fundamental social rights, to be

---

<sup>46</sup> European Parliament Session Documents, 14 May 1996, PE 199.168

<sup>47</sup> *ibid.*, Preamble, par. E

<sup>48</sup> European Parliament, *Resolution on the Social Aspects of Housing*, 29 May 1997 (A4-0088/97)

taken into consideration at all levels of decision-making in the [European] Union” (par.6). In calling for the development of a housing policy at European level it states that such a policy "should not be problematic since all Member States have recognised the right to adequate housing for all as a principle by ratifying the 1966 United Nations Covenant on Economic, Social and Cultural Rights” (recital M).

It is noteworthy that when the member states of the Council of Europe several years ago began to revise and update the 1961 Social Charter, a process from which emerged the Revised European Social Charter (1996), they explicitly included a new right to housing (see above). It is to be expected that in due course Ireland will ratify the Revised Social Charter.

### VIII.3. The Right to Housing at National Level

Throughout the world over fifty Constitutions refer in one way or another to a right to housing and/or shelter.<sup>49</sup> Six member states of the European Union – Belgium, Finland, Portugal, Spain, Sweden and the Netherlands - have included the right to adequate housing in their constitutions.<sup>50</sup> The view that the right to housing is an implicit right has been repeatedly supported by the Italian Constitutional Court, which in a number of judgements has referred to housing as a “fundamental social right”.<sup>51</sup> In the EU as a whole, anti-poverty legislation which guarantees income transfers and housing benefits, and housing legislation which deals with access to publicly funded housing and housing assistance, contribute to the establishment of the right to housing in all member States.<sup>52</sup>

The constitutional clauses enumerating the right to housing in EU countries are of recent origin – 1976 (Portugal), 1978 (Spain), 1982 (Netherlands), 1994 (Belgium) and 1995 (Finland).<sup>53</sup> The Portuguese wording is as follows: “Everyone shall have the right for himself and his family to a dwelling of adequate size satisfying standards of hygiene and comfort and preserving personal and family privacy” (Art. 65.1).<sup>54</sup>

---

<sup>49</sup> Rajindar Sachar, “Constitutional Sources of Human Rights”, in *The Right to Adequate Housing: Second Progress Report submitted by Mr. Rajindar Sachar, Special Rapporteur, to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, of the UN Commission on Human Rights*, Geneva, 21 June 1994, E/CN.4/Sub.2/1994/20, Annex 1

<sup>50</sup> Dragana Avramov, *The Invisible Hand of the Housing Market: A Study of the Effects of Changes in the Housing Market on Homelessness in the European Union*, Brussels, FEANTSA, 1996, p.62

<sup>51</sup> A. Tosi and C. Ranci, *Homelessness in Italy*, Brussels, FEANTSA, 1994, quoted in Dragana Avramov, *Homelessness in the European Union: Social and Legal Context of Housing Exclusion in the 1990's*, Brussels, FEANTSA, 1995, p.21

<sup>52</sup> *Ibid.*, p.30

<sup>53</sup> Dragana Avramov, *Homelessness in the European Union*, op. cit., p.21.

<sup>54</sup> Rajindar Sachar, *The Right to Adequate Housing*, op. cit., Annex I, “Constitutional Sources of Human Rights”



However, “[i]n view of scarce legislative and financial commitment and the lack of implementing mechanisms, the maximum scope of the constitutional right to housing in Portugal and Spain is that of a statement of intent. Housing is not a right which citizens may claim on the basis of the constitutional clause. By contrast, in the Netherlands and Belgium the right to housing is implemented through a series of supporting legal provisions and social policy measures, many of which are older than the incorporation of the right to housing in the constitution”.<sup>55</sup>

In 1995 the constitution of Finland was amended to provide the right to a home. This amendment imposes an obligation on the State to further the right of all people to a home and to support people in finding a home. However, as the right has not yet been tested in the courts it is not clear exactly what the State must provide, or where the limitations to its obligations might be set.

Four EU states, including Ireland, have legislation implementing the right to housing for certain categories or in certain respects. In the UK the Housing Act guarantees a legally enforceable claim to housing to certain homeless groups.<sup>56</sup> French law “asserts clearly and in a detailed manner the right to housing for all citizens and entitlements of people unable to access housing”.<sup>57</sup> The relevant Belgian law, passed a year before the right to housing was enumerated in that country’s Constitution, addresses some social rights of homeless people and defines obligations to provide for them.<sup>58</sup> The Irish Housing Act of 1988 obliges local authorities to assess the housing needs of vulnerable groups, to establish priorities for accommodation and to assign a proportion of dwellings to housing persons who cannot manage with their own resources. The housing authorities are empowered to determine whether a claimant is homeless, and a homeless person has no right to recourse to a court to assert his or her right to housing.

#### **VIII.4 Constitutional Pointers to a Right to Housing**

While the Irish Constitution enshrines a right to private property, it recognises that the exercise of the rights to private property mentioned in Art.43.1.1 and 43.1.2 “ought, in civil society, to be regulated by the principles of social justice” (Art.43.2.1), and further, that the State accordingly “may, as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good” (43.2.2). The common good must include the requirement to ensure that the basic needs of human existence, including shelter and housing, are adequately met.

---

<sup>55</sup> Dragana Avramov, *Homelessness in the European Union*, op. cit., p.23

<sup>56</sup> Dragana Avramov, *The Invisible Hand of the Housing Market*, op. cit., p.62

<sup>57</sup> Dragana Avramov, *Homelessness in the European Union*, op. cit., p.26

<sup>58</sup> *Ibid.*, p.26

As far back as 1963 in *Ryan vs. Attorney General* it was held by the High Court and endorsed by the Supreme Court that “the personal rights which may be invoked to invalidate legislation are not confined to those specified in Art. 40 of the Constitution but include all those rights which result from the Christian and democratic nature of the state”. In the High Court Justice Kenny had cited the recently published encyclical of John XXIII, *Pacem in Terris*, in support of this proposition, and he specifically referred to the right to bodily integrity in this context. Paragraph 11 of the encyclical states in part that everyone has “the right to life, to bodily integrity, and to the means which are necessary and suitable to the proper development of life. These means are primarily food, clothing, shelter, rest, medical care and finally the necessary social services”. On this basis, presumably, the Art. 40 guarantee is not confined to the rights specified in Art. 40 but extends to other personal rights which follow from the Christian and democratic nature of the State. It should consequently equally protect other rights necessary to the proper development of life, including the right to shelter.

It was with this judgement apparently in mind that the *Report* of the Constitution Review Group asserted, with reference to rights to food, clothing and shelter, that should someone fall below a minimum level of subsistence, despite the social welfare system, the Constitution “appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity” (p.236). As already pointed out, this can only mean that the constitutional rights to life and to bodily integrity imply or include, ultimately, rights to such necessities as food and shelter. Given the development of Irish society in the sixty years since the Constitution was established, and the enormous development in international human rights thinking and practice, the time is more than ripe to make the right to housing and shelter explicit and endow it unambiguously with constitutional standing.

“Because housing is such a basic human need”, as a former Minister for the Environment has noted, “the consumers of housing services, whether they are owners or tenants, need an appropriate regime of protection”.<sup>59</sup> If, however, those who already command access to housing, namely owners and tenants, are thus acknowledged to require an “appropriate regime of protection”, precisely because housing is such a basic need, then the prior need to provide such a regime for those who are not yet housed at all, or housed inadequately, must be acknowledged in logic, justice and humanity. Such a regime is most likely to be sustained when it is anchored in the Constitution.

There is too somewhat of an irony when we realise that the Constitution offers additional protection to the citizen who already possesses a dwelling: “The dwelling of

---

<sup>59</sup> Brendan Howlin, Minister for the Environment, “Introductory Message”, in *Social Housing – The Way Ahead*, Dublin, Department of the Environment, May 1995

every citizen is inviolable and shall not be forcibly entered into save in accordance with law” (Art. 40.5). Needless to say, those without a dwelling in the first place cannot avail of this protection.

Grounds for deriving an explicit constitutional right to housing can arguably be discerned in elements of the existing rights specified in the Fundamental Rights section of the Constitution, such as Art. 41.2.1: “In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved”; Art. 41.2.2 “The State shall, therefore, 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”; Art. 42.1.2: “Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State”; and Art. 42.5: “In exceptional cases, ...the State, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child” which could include a right to shelter and housing.

Although the Directive Principles of Social Policy, set out in Art. 45 of the Constitution, are non-cognisable by the courts, they nonetheless enunciate principles expressly stated to be intended for the general guidance of the Oireachtas. As such, they commit the State to “strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life” (Art. 45.1); more specifically, they lay down that the State “shall, in particular, direct its policy towards securing: -

- (i) That the citizens ...may through their occupations find the means of making reasonable provision for their domestic needs.
- (ii) That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.
- (iii) That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment” (Art. 45.2).

### **VIII.5 Remedy and Accountability**

The argument for stating a right to housing in the Constitution is justified not because in Ireland there is necessarily widespread homelessness, or because large numbers of people are living in grossly substandard conditions. It is because homelessness and chronically ill-housed groups demonstrably persist in all developed as well as developing societies.

While conferring constitutional recognition to the right to housing will not in itself

solve the problem of homelessness (any more than recognising a constitutional right to education will suffice to ensure that everyone is adequately educated), such recognition would *inter alia* provide a sound basis for measures of remedy and accountability.

A meaningful and comprehensive right to housing will not exist to the extent that rights are unenforceable, that responsibilities are not clearly identified, that target groups are not clearly identified, that implementation is not consistently monitored, that insufficient resources are allocated, that legal instruments and policy measures are not objectively evaluated.<sup>60</sup> A constitutionally enshrined right to housing would substantially conduce to good practice and comprehensive implementation.

The question as to whether the legal concept of justiciability or the provision of effective domestic legal remedies are applicable to socio-economic rights including the right to housing has been answered affirmatively by the UN Committee on Economic, Social and Cultural Rights.<sup>61</sup> Areas where such provisions would apply to housing and shelter include:

- Legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions;
- Legal procedures seeking compensation following an illegal eviction;
- Complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance and racial or other forms of discrimination;
- Allegations of any form of discrimination in the allocation and availability of access to housing;
- Complaints against landlords concerning unhealthy or inadequate housing conditions;
- Class action suits in situations involving significantly increased levels of homelessness.

A substantive right to housing is of particular importance to low-income or non-earning groups for whom lack of accommodation is a central part of their situation. The majority of those coming to a church-related food centre in Dublin, for example, are also homeless.<sup>62</sup>

In Ireland the local authority assessment of housing needs of March 1996 identified housing needs for 27,400 households under ten categories.<sup>63</sup> While the assessment identifies only 2,500 individuals as in the "homeless" category, non-governmental sources insist that the number is in reality far higher, perhaps as high as 5,000. As an

---

<sup>60</sup> cf. Dragana Avramov, *Homelessness in the European Union*, op. cit., p.63

<sup>61</sup> UN Centre For Human Rights, *The Human Right to Adequate Housing*, Fact Sheet No.21, Geneva, 1993, p.23

<sup>62</sup> Franciscan Social Justice Initiative, *Submission to the Finance and General Purposes Committee of Dáil Éireann on the Housing (Miscellaneous Provisions) Bill, 1996*, Dublin, 1997, p.1

<sup>63</sup> Department of the Environment, *Housing Statistics Bulletin*, September 1996, pp.42 ff

example, whereas the assessment found no homeless in the town of Tullamore, a survey carried out between December 1996 and January 1997 by a local group found between 25 and 40 persons sleeping rough in the town.<sup>64</sup> A Focus Point study on the occupancy of Dublin hostels in 1991, restricted to emergency hostel beds, found that 6-7,000 people a year used the hostels for homeless people in Dublin.<sup>65</sup>

The categories of household need identified in the 1996 assessment include, in addition to the homeless, those living in unfit or materially unsuitable accommodation (4,799 persons), those in overcrowded accommodation (5,912), those involuntarily sharing accommodation (3,120), young persons leaving the care of institutions or without family accommodation (66), those in need of accommodation for medical/compassionate reasons (1,762), elderly persons (2,140), disabled/handicapped (241), and those unable to afford existing accommodation (7,659).<sup>66</sup> Consideration of these categories makes it obvious that they are precisely the ones which market forces are most likely to ignore or marginalise.

### **VIII.6 Protection against Market Deficiencies and Changes in the Political Climate**

Where the right to housing is not constitutionally protected, increasing prosperity can go cheek-by-jowl with increasing homelessness or housing inadequacy. Categories particularly likely to be affected include abused women, ex-prisoners, young people, migrants, low-income groups, those with personal problems such as alcoholism or drug addiction, and elderly people.

Increased housing inadequacy can result from market forces reflecting social and economic factors over which vulnerable groups have no control. It can also result from changes in the political climate. An example is the US where federal spending for subsidised housing dropped substantially during the Reagan years and the ensuing shortage continued into the 1990s. A 1989 survey of twenty-six cities by the US National Coalition for the Homeless found the lack of affordable housing cited repeatedly by service providers as the main cause of homelessness in their areas. A 1990 study by the Economic Policy Institute concluded that as many as one-third of all Americans were shelter-poor, that is, obliged to spend so much on housing that they were unable to pay for other necessities - all during a period when GNP grew steadily.

In Ireland, social housing is defined as the housing needs of households whose

---

<sup>64</sup> Conall MacRiocard, "Where Have All the Homeless Gone?", *Simon Community Newsletter*, no. 232, March 1997, p.3

<sup>65</sup> *Ibid.*, p.4

<sup>66</sup> Department of the Environment, *Housing Statistics Bulletin*, op. cit., Appendix 2

resources are insufficient to provide them with access to suitable and adequate housing. According to the Department of the Environment, social housing needs increased between 1987 and 1993. And it judged in 1996 that “*notwithstanding the positive economic outlook*, social and demographic factors suggest a continuing strong demand for social housing in the future”<sup>67</sup> (emphasis added).

Homelessness will at any one time be the result of many different causes: a rise in unemployment, marital breakdown, shortage of moderately-priced private rented accommodation, policy changes emphasising a move from institutional care to living in the community, a growth in the imprisonment rate, addiction problems, changes in emigration rates, and so on.<sup>68</sup> Homelessness is not simply the result of a lack of shelter, but part of a complex of other social problems – educational deprivation, low pay, the experience of institutional care, involuntary emigration, personality disorders and many others.<sup>69</sup> Solutions to homelessness will therefore call for integrated responses from the various responsible authorities (local authorities, health boards, social service agencies and others), working together<sup>70</sup>. It is in this perspective that the right to housing should rather be seen “in the light of the combination of duties of care resting on governments”.<sup>71</sup>

### VIII.7 Adequacy as Part of the Right to Housing

The UN Committee on Economic, Social and Cultural Rights states that the right to housing should be seen as the right to a place to live in security, peace and dignity.<sup>72</sup> The Committee emphasises that this right is not just to housing but to *adequate* housing. It identifies the following as constituting part of the definition of adequacy: legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

This interpretation accords closely with the Christian view of housing, which envisages a secure habitation giving individuals and households the possibility of putting down roots and building relationships as members of a family and of the wider community.

Without a decent home it is impossible for people to manage their own lives or to

---

<sup>67</sup> *Urban Settlement and Housing in Ireland*, op. cit., par. 201.

<sup>68</sup> See National Economic and Social Council, *A Review of Housing Policy*, op. cit., pp.284-5.

<sup>69</sup> cf. *Homelessness and Bunreacht na hEireann*, Submission by the Simon Community to the Constitution Review Group, Dublin, July 1995, p.3. See also “Factors Precipitating Homelessness”, in Mary Daly, *Abandoned: Profile of Europe's Homeless People: the second report of the European Observatory on Homelessness, 1993*; Brussels: FEANTSA, 1993, pp.5-8

<sup>70</sup> National Economic and Social Council, *A Review of Housing Policy*, op. cit., pp.285-6

<sup>71</sup> Netherlands Advisory Committee on Human Rights and Foreign Policy, *Advisory Letter on Habitat II* (English version); The Hague: 11 March 1996

<sup>72</sup> United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The Right to Adequate Housing*, op. cit., par. 7

contribute to society. Without a decent home it is doubly impossible to maintain a stable family life which meets the material and emotional needs of its members, and children in particular.<sup>73</sup>

Not just shelter of any sort, therefore, but decent housing, is a basic human right.<sup>74</sup>

That this is not a politically unrealisable wish-list is evidenced by the fact that the requirements stated by the Committee on Economic, Social and Cultural Rights are as it happens largely accepted also within Ireland at official level. The overall aim of Irish housing policy, including that relating to social and rented housing, is defined as "to enable every household to have available an affordable dwelling of good quality, suited to its needs, in a good environment, and, as far as possible, at the tenure of its choice".<sup>75</sup> Social housing is defined as "the housing needs of households whose resources are insufficient to provide them with access to suitable and adequate housing".<sup>76</sup> With specific regard to the needs of the homeless, i.e. the unhoused, as distinct from the badly housed, one of the seven stated objectives of Irish national housing policy is to enable "a prompt and *adequate* response to the accommodation needs of the homeless"<sup>77</sup> (emphasis added).

### VIII.8 Comments on the Wording Proposed

The wording proposed embodies the same structure as that of the other rights advocated, in that it provides for the three aspects of respect, protection and promotion.

### VIII.9 Individual Responsibility

The right to housing which we have proposed above is worded in such a way as to emphasise that it is individuals, not the State, who have the primary responsibility for housing themselves and their dependants, whether through ownership or rental. The presumption is that most people will be able, and expected, to secure housing largely or wholly through their own resources and efforts. In fact the principle that primary responsibility for the provision of housing rests with the individual has been central to official Irish policy for a long time.<sup>78</sup>

---

<sup>73</sup> Catholic Housing Aid Society, Church Action on Poverty, Churches National Housing Coalition, *Housing Bill Briefing for the House of Lords*, London: May 1996, p. 4.

<sup>74</sup> US Catholic Conference Administrative Board, statement on "Political Responsibility: Choices for the '80's", 21 March, 1984, in *Origins*, April 12, 1984, Vol. 13, no. 44, p. 735

<sup>75</sup> Department of the Environment, *Social Housing*, op. cit., p. 4.

<sup>76</sup> *Ibid.*, p.5

<sup>77</sup> Department of the Environment, *Urban Settlement and Housing in Ireland*, in *Ireland*, op. cit., par.197

<sup>78</sup> See Department of Local Government, *Current Trends and Policies in the Field of Housing*,

### VIII.10 Duty to Respect:

The wording enunciates a responsibility of the State for protecting the right to housing. The scale, direction and mix of housing-related legislation, financing, policies and programmes deemed necessary to protect the right at any given time would be primarily a matter for the legislature and administration. Such a margin of appreciation is internationally recognised: the UN Committee on Economic, Social and Cultural Rights has said that measures designed to satisfy a State Party's obligations in respect of the right to adequate housing (under the Convention on Economic, Social and Cultural Rights) may reflect whatever mix of public and private sector measures are considered appropriate.<sup>79</sup> As noted above, the Irish State already acknowledges a major responsibility to meet the housing needs of its citizens.

### VIII.11 Duty to Protect

Although the provision of housing is primarily the responsibility of the individual, at any one time there will be some, whether individuals or families, who through no fault of their own are unable to provide adequately for themselves. Perhaps most in this category will lack the necessary resources. Households and individuals unable to house themselves from their own resources depend largely on local authorities to provide them with accommodation, either directly or by arranging with an approved voluntary body to provide accommodation, by providing assistance, including financial assistance, by renting accommodation or lodgings, or contributing to the cost of accommodation or renting.<sup>80</sup> Local authorities financially assist voluntary bodies towards the cost of operating accommodation/hostels for homeless persons. 90% of expenditure "reasonably incurred" by local authorities in this way is reimbursed by the Department of the Environment and amounted to £2.35m in 1995. This has been complemented in recent years by official encouragement of the voluntary housing sector to meet social housing needs. Accommodation for the homeless amounts to one third of all accommodation provided under the Voluntary Housing Capital Assistance Scheme. In the period 1988-1995 about 1,600 units of accommodation were provided for homeless people under the scheme.<sup>81</sup>

---

*Building and Planning: Ireland 1975*, mimeographed, p. 4, quoted in National Economic and Social Council, *Report on Housing Subsidies*, op. cit., p. 7, fn.3; a recent re-affirmation is in Department of the Environment, *Background Information on Ireland and Irish Housing Policy*, Dublin, 1994, p.2

<sup>79</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4*, op. cit., par. 14

<sup>80</sup> Department of the Environment, *Urban Settlement and Housing in Ireland: Report by Ireland to the UN Conference on Human Settlements, Istanbul, June, 1996: (1<sup>st</sup> Draft)*, Dublin, March, 1996, par. 217

<sup>81</sup> *Ibid.*, par. 218



As noted, local authorities made an official assessment of the number of homeless in March 1996, yielding an estimate of 2,667 on 31 March 1996. At the same time it is officially acknowledged that the estimate made by voluntary agencies working on behalf of the homeless arrived at a much higher figure of 5,000, based on flows of homeless persons through voluntary agencies in 1993<sup>82</sup>. There appear to be similar significant differences in practically every European country between the estimates of homelessness made by official and by voluntary agency sources respectively, the official ones being generally much lower. In any event, as the 1988 NESC report noted, estimates of homelessness pick up only part of the problem, since "there is a continual flow of people into homelessness at different stages of the life cycle".<sup>83</sup> A response to the needs of this group must go beyond the provision of bricks and mortar<sup>84</sup>. Solutions to homelessness call for a coherent response through housing authorities, health boards and social service personnel working together. In this context it is "unfortunate", in the words of the NESC report, that the 1988 Housing Act does not contain a clear duty on local authorities to house homeless people.<sup>85</sup>

To the number of homeless must be added the number of those inadequately housed. The UN estimates that world-wide the latter exceed the former by a ratio of 10:1.<sup>86</sup>

While the definition of a specific constitutional right to housing entails enunciation of duties and responsibilities on the State, this is generally compatible with the continuation of the existing policy of large-scale reliance on the market to provide housing. However, although the extremely high incidence of home ownership in Ireland and the relatively low incidence of homelessness may give the impression that it is sufficient to leave matters largely to market forces, it is important to emphasise that the market itself operates and has always operated within a long-standing and complex structure of State regulation and encouragement, the scale and scope of which may not be fully appreciated by most people. One significant aspect of this is that some two-thirds of all dwellings provided by local authorities over the years have been bought by tenants under successive tenant purchase schemes.<sup>87</sup>

Local authority house purchase schemes are nonetheless only the tip of the iceberg of State involvement.

A comprehensive picture must include such items as public authority provision of essential services including water, sanitation, and roads, public regulation of the financial institutions (banks, building societies and insurance companies) without

---

<sup>82</sup> Ibid., par. 219

<sup>83</sup> National Economic and Social Council, *A Review of Housing Policy*, op. cit., p. 285

<sup>84</sup> Ibid., p. 285

<sup>85</sup> Ibid., p. 285

<sup>86</sup> UN Committee on Economic, Social and Cultural Rights; *General Comment No.4*, op. cit., par. 4

<sup>87</sup> Department of the Environment, *Urban Settlement and Planning in Ireland*, op. cit., par. 205

which most people could not become home owners, direct funding of local authority housing, elaboration and enforcement of building standards and inspection, planning and environmental laws, regulations and controls, grants to first-time buyers, urban renewal schemes (such as the Temple Bar quarter and Docklands areas in Dublin), tax incentives to encourage building and resettlement in certain areas, public transport, strategic land use and transportation planning (DITS, Dublin and LUTS, Cork),<sup>88</sup> waste removal and recycling, rent regulation, local authority house purchase and house improvement schemes, shared ownership schemes (between the local authority and occupiers), income tax allowances for tenants of private rented accommodation, legally binding standards of accommodation, including sanitary facilities, for tenants in the private rented sector, remedial works schemes, grants for home improvement works (by 1995, over £200m had been provided cumulatively by the State under a home improvement grants scheme which operated from 1985 to 1987, involving the improvement of over 100,000 dwellings),<sup>89</sup> home improvement loans to low-income households, local authority grant schemes to facilitate adaptation of houses for disabled persons, a scheme, administered by local authorities, which can provide an essential repairs grant of up to 100 per cent of the cost of necessary repairs to prolong the useful life of houses in poor repair in rural areas,<sup>90</sup> and so on.

The above listing helps to reveal not only the extent of direct State financial assistance to the housing market, but even more so the elaborate Governmental structure of essential legal, fiscal, policy and programmatic support, control and regulation which underpins it.

The listing makes it clear that the State explicitly recognises that there is a range of housing and shelter needs of specific groups which the market cannot or will not meet. It is apparent that successive governments have accepted for decades that substantial and continuing State involvement is essential if the housing needs of the community are to be adequately met in constantly changing circumstances. It is increasingly appropriate and desirable that the State's responsibilities and power of initiative in regard to meeting the need for housing, especially of vulnerable categories, be put on a clear and firm constitutional basis.

### **VIII.12 Duty to Promote and Fulfil**

The wording suggested for the right to housing provides for progressive implementation. It recognises that the right is to be interpreted qualitatively as well as quantitatively since it may be violated not only if there are no places or not enough in

---

<sup>88</sup> Ibid., pars. 117 ff.

<sup>89</sup> Ibid., par. 212.

<sup>90</sup> Ibid., par. 212. For a factually dated but thematically comprehensive overview of the scale of housing subsidies, see National Economic and Social Council, *Report on Housing Studies*, Report no.23; Dublin: October 1976.

which to live but also if those available are unsuitable or substandard. The categories used in the 1993 and 1996 local authority assessments of housing needs demonstrate that the authorities already accept the relevance and importance of qualitative criteria such as overcrowding, involuntary sharing, unfit or materially unsuitable accommodation.

In practice the State can point to a record of sustained progressive implementation in regard to meeting the housing needs of the community. The number of households with piped water inside had risen from under 40% in 1946 to 99.9% by 1981; of households with sanitary facilities inside from 23% to 85%; of dwellings with fixed bath from 15% to 82%; the number of persons in households with more than two persons per room had fallen from 17.6% to 3%, and the average number of persons per room had fallen from 1.01 to 0.74, in the same period.<sup>91</sup> According to the official definition (i.e. two or more persons per room), overcrowding, which is a key indicator of housing conditions, fell significantly in the decade from 1971 to 1981 from 14% of persons in overcrowded households in 1971 to 4.8% in 1981; the proportion of households overcrowded had fallen over the same period from 7.5% to 2.9%.

In terms of progressive implementation it may be noted that the level of owner occupation in Ireland at 80% is the highest in the EU. A major contributory factor to this is the policy, pursued since the 1930's, of selling local authority housing to tenants, often at heavily discounted prices.<sup>92</sup> Nonetheless a serious question remains as to the extent to which ownership is in any real sense an option for the remaining 20% of the population. The policy of promoting home ownership at the expense of other options has been criticised from several quarters. It is argued that this policy acts to the detriment of social housing provision, including local authority, co-operative, voluntary and non-profit, which has been relegated to second best and has become associated with social marginalisation.<sup>93</sup>

The author of the 1988 NESC report "A Review of Housing Policy" concluded that "for the bulk of households, their quality of housing services have improved since the early 1970's".<sup>94</sup> His assessment was based on the considerable net addition to the housing stock, the decline in the number of older dwellings, the increased proportion of dwellings with basic amenities, the increased average size of dwellings, the diminution of overcrowding among households and the improved quality of local authority dwellings.<sup>95</sup> The NESC consultant suggested that Ireland's housing provision was favourable by international standards: among countries of roughly

---

<sup>91</sup> National Economic and Social Council, *A Review of Housing Policy*, op. cit., p.10

<sup>92</sup> *Background Information on Ireland and Irish Housing Policy*, op. cit., p. 2

<sup>93</sup> See Dick Shannon, "Comment", *Simon Community Newsletter*, March 1996, p. 2, and Fahy and Watson, *An Analysis of Social Housing Need*, Dublin, Economic and Social Research Institute, 1995

<sup>94</sup> *A Review of Housing Policy*, op. cit., p. 112

<sup>95</sup> *Ibid.*, p. 13

similar GNP per capita, Ireland "has close to the best overall standard of housing".<sup>96</sup>

These summary statistics and qualitative indicators are evidence that, although a right to housing is not enumerated in the Constitution, Ireland is already substantially implementing it, in very much the same way as it substantially implements the right to education, which is so enumerated. Housing and education both involve the allocation of substantial resources by the State. Both are regulated by a substantial framework of legislation; both require an elaborate set of administrative structures; both are the object of extensive programme activity; both are more or less equally open-ended in terms of resource requirements.

Despite the fact that the right to education has been constitutionally enshrined for sixty years there is no proof or evidence that this in itself has conducted to a higher level of expenditure on education than would otherwise have been the case. With the experience of education as a guide, there is little to suggest that enshrining the right to housing in the Constitution would thereby subject governments to undue resource pressures on constitutional grounds. Yet its inclusion would have value in signalling a firm commitment on the part of Irish society to work to eradicate conditions of poverty and social exclusion.

---

<sup>96</sup> Ibid., p. 13

## IX. The Right to Health

We have explicitly proposed a right to health (psychological as well as physical) *per se*, rather than a narrower right to health care. This reflects the reality that health care is only one of a wide range of elements necessary to health. Preventative health care and shelter are as important to the health and quality of life of the population as is the clinical response to disease. This has been acknowledged by the World Conference on Human Settlements (Habitat II), for example, in which Ireland participated.<sup>97</sup> Adequate nutrition, proper housing, adequate income, good lifestyles, education, a healthy environment and other factors are essential to the establishment and maintenance of good health. Water, air and soil pollution increasingly threaten health.

Even at government level, whereas health care is seen as primarily the responsibility of one government department (Health), health status in the broad sense is affected by a wide spectrum of concerns falling within the mandates of many other departments and by a broad sweep of legislation, programmes and policies. A random list would include health and medical services to prisoners, housing and sanitation regulations, pollution and environmental questions, violence against women, health education syllabi, road safety, animal quarantine and disease such as BSE-related issues, pesticide control, public finances (a notable example being reliance on revenue from tobacco sales taxes and other substances injurious to health), data protection in the medical and health areas, pharmaceutical research and production, anti-discrimination laws, local authority obligations in regard to housing particular categories of persons, scientific and social research, and many other issues.

Monitoring of technology for its health implications will become increasingly complex and challenging as major advances in such areas as biotechnology and biomedical engineering have legal, social and moral consequences which cannot easily be predicted. "It has become more important than ever to ensure that ethical safeguards are put in place to guarantee the safety and rights of both individuals and communities in health-related areas".<sup>98</sup>

### IX.1 Arguments for Constitutional Recognition

Constitutional recognition of the right to health would give added protection to the poor and the vulnerable. The availability of constitutional redress would provide a

---

<sup>97</sup> *Report of the United Nations Conference on Human Settlement (Habitat II)*: (Istanbul), 3-14 June 1996), United Nations Conference on Human Settlements (Habitat II), A/Conf.165/14, 7 August 1996, par. 128

<sup>98</sup> World Health Organisation, *Health in Development: Prospects for the 21<sup>st</sup> Century: Report of the First Meeting of the Task Force on Health in Development*, Geneva, World Health Organisation, 1994, pp.14 -15

significant corrective and safeguard against individual or systemic failures in the equitable allocation of the resources necessary to maintain and protect health, or arising from other factors in the public arena outside the control of the individual but within the control of the State.

It would offer protection against the danger that an overly narrow focus on development would actually worsen rather than improve the health status of the most vulnerable groups in the population, such as the elderly, the unemployed, children, and women. The WHO has pointed out that inappropriate economic development may worsen the community's health status, for example through environmental degradation. "Health status cannot be exchanged for economic gain".<sup>99</sup>

It would provide a grounding for the protection of the dignity of the individual, family and household in face of unfolding developments in the scientific and technological fields, including bio-medicine, and the associated and growing commercial pressure to patent genetic material and thus remove it from the public domain.

It would also help to inhibit age-related discrimination, which is likely to make itself more felt as the population grows older. With longer life and higher capacity for survival the disease burden shifts to the last quintile of the life span.<sup>100</sup>

It would affirm the principle that discriminatory measures or situations affecting people's health are violations of their dignity and equality in rights.

It would compel the health impact of environmental factors to be taken into account in a rights context, in view of their growing contribution to the burden of disease and disability (as indicated for instance in the reports of the WHO Commission on Health and Environment<sup>101</sup>).

In the Catholic tradition, the right to adequate health care is clearly acknowledged as flowing from the sanctity of human life and the dignity that belongs to all persons who are made in the image of God. "This implies that access to health care, which is necessary and suitable for the proper development and maintenance of life, must be provided for all people, regardless of economic, social or legal status. Special attention should be given to meeting the basic health needs of the poor. With increasingly limited resources in the economy, it is the basic rights of the poor that are frequently threatened first".<sup>102</sup>

---

<sup>99</sup> World Health Organisation, *Ninth General Programme of Work Covering the Period 1996-2000*, Geneva, World Health Organisation, 1994, par. 69

<sup>100</sup> *ibid.*, p.19

<sup>101</sup> *ibid.*, p.21

<sup>102</sup> US Catholic Conference, Pastoral Letter on *Health and Health Care*, November, 1981, in *Origins*, December 3, 1981, Vol. 11, No. 25, p.402

## IX.2 Constitutional Pointers to the Right to Health

As with the other rights proposed, it is possible to discern in the existing rights sections of the Constitution elements from which an explicit right to health might be derived: "The State shall, in particular, by its laws...and, in the case of injustice done, vindicate the life...of every citizen (Art.40.3.2); "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right" (Art. 40.3.3); "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child" (Art. 42.5). Under the Directive Principles of Social Policy the State "shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life" (Art. 45.1); "The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged" (Art. 45.4.1); "The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children, shall not be abused..." (Art. 45.4.2).

Of particular note is the fact that "among the implied, unspecified or unenumerated rights that have been recognised by the Irish Courts are the following... (2) The right not to have one's health endangered (The State (C) v. Frawley (1976) I.R. 365)...".<sup>103</sup>

In his judgement in this case Judge Finlay stated: "I see no reason why the principle [i.e. the right of bodily integrity as an unspecified constitutional right, laid down in *Ryan's Case*] should not operate to prevent an act or omission of the Executive which, without justification, would expose the health of a person to risk or danger".<sup>104</sup>

---

<sup>103</sup> *International Covenant on Economic, Social and Cultural Rights - First Report of Ireland*, Dublin, Stationery Office, 1996, par. 84

<sup>104</sup> [1976] I.R. 365

### IX.3 Scope of the Right to Health

In speaking of a right to health we repeat that we are not speaking of any utopian right to perfect health for all. That would be absurd.

The right to life is not a right to power over life; it is rather the right to live with human dignity.<sup>105</sup> Such a fundamental understanding equally regulates the interpretation of the right to health. The duty to respect, protect and promote health does not stretch to the provision of disproportionate means or remedies. And in the calculation of what is disproportionate, the question of expense, that is of the resources available and their relative cost, must be among the factors to be considered,<sup>106</sup> as it would be in regard to the State's constitutional duty to provide for education, to take a cognate example.

In *The State v. Frawley Finlay P.*, while recognising that the right not to have one's health endangered is an unenumerated constitutional right, nonetheless stated that he could not hold that an obligation on the State to provide for prisoners the best medical treatment in all the circumstances could be construed as including a duty to build, equip and staff a very specialised unit which a health board director of psychiatry had recommended and which might be appropriate for the prosecutor and four or five other persons only.

In any event, the right to health has implications even when the possibility of a cure is not likely, or can be ruled out, since "every person has a primary right to what is necessary for the care of health and therefore to suitable medical assistance"<sup>107</sup>. Subject to the qualification in the preceding paragraph, patients have consequently a right to any treatment from which they can draw salutary benefit<sup>108</sup>.

Health care is an essential safeguard of human life and dignity and there is an obligation on society to ensure that a person be able to realise this right, which includes the right of access, insofar as it is possible, to those goods and services which

---

<sup>105</sup> Pontifical Council for Pastoral Assistance to Health Care Workers, *Charter for Health Care Workers*, Vatican City, 1995, n. 46

<sup>106</sup> "To verify and establish whether there is due proportion in a particular case, 'the means should be well evaluated by comparing the type of therapy, the degree of difficulty and risk involved, *the necessary expenses*, and the possibility of application, with the result that can be expected, taking into account the conditions of patients and their physical and moral powers' ", Pontifical Council for Pastoral Assistance to Health Care Workers, *Charter For Health Care Workers*, Vatican City 1995, n. 64. The embedded quotation is from the *Declaration on Euthanasia*, Congregation for the Doctrine of the Faith, Vatican City, 5 May 1980, AAS 72 (1980), pp. 549-550 (emphasis added).

<sup>107</sup> John Paul II, *Address to the World Congress of Catholic Doctors*, 3 October 1992, in *Insegnamenti* V/3 [1992] 673, n. 3, quoted in *Charter for Health Care Workers*, op. cit.

<sup>108</sup> *Ibid.*, n. 63.



will allow a person to maintain or regain health.<sup>109</sup>

While a right to health would not lead to judicial determination of, for example, what particular health benefits should be legislated for, or the resources to be allocated to them, constitutional questions could arise along the way. For example, the US Supreme Court held in 1970 (*Goldberg v. Kelly*) that welfare recipients were constitutionally entitled to a hearing before their benefits could be terminated, and that, although the Government was not required to provide such benefits, once provided they could not be arbitrarily withdrawn.<sup>110</sup> In Ireland a statutory procedural right exists to be heard before social welfare benefits are withdrawn.

#### IX.4 International Sources for the Right to Health

The right to health is recognised internationally. In certain circumstances it takes precedence over the rights of freedom of expression, peaceful assembly or association, as in the **International Covenant on Civil and Political Rights (1966)** (which permits these rights to be restricted in conformity with the law in the interests of public health, (among other considerations), if necessary in a democratic society (Arts. 19, 21 and 22).

The **European Social Charter (1961)** specifies a right to the protection of health (Art. 11), the right of anyone without adequate resources to social and medical assistance (Art. 13) and the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement (Art.15).

Under the provisions of the Charter each State which has ratified it, including Ireland, must submit reports for examination at regular intervals (every two years from June 1997). Under Article 11, States' reports are scrutinised under the headings of removal of causes of ill health, advisory and educational facilities, and prevention of diseases.<sup>111</sup> Under the terms of Art.11.1 ("the right to protection of health") Ireland already has an obligation to report at regular intervals to the Council of Europe on how it is discharging its responsibility to "take appropriate measures designed *inter alia* to remove as far as possible the causes of ill-health".

---

<sup>109</sup> Joseph Cardinal Bernardin, "The Consistent Ethic of Life and Health Care Reform", in *Origins*, Vol. 24, No. 4, 9 June 1994

<sup>110</sup> *Goldberg v. Kelly*, 397 US 254, 25 L. Ed 2d 287, 90 S. Ct. 1011, 1970, cited in Virginia Leary, "The Right to Complain: The Right to Health", in *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 25-28 January 1995 in Utrecht*; Utrecht: Netherlands Institute of Human Rights, SIM Special No. 18; 1995, p.98

<sup>111</sup> See for example pp. 341-51 of *European Social Charter: Conclusions XIII-3* of the Committee of Independent Experts, Strasbourg, Council of Europe, 1996

Reporting. States are asked to indicate how public health services are organised, including such matters as the number of diagnostic and preventive clinics and the annual attendance at them, details of the extent of regular health examinations for the population in general or parts of it, the number of general hospitals and public and private establishments for specialised treatment, numbers of medical personnel and pharmacies, special measures to protect the health of mothers and babies, children and the aged, and the nature and scope of general preventative measures in the public health field, including prevention of air and water pollution, noise abatement and food control, minimum housing standards, health education, and the conditions on which the various health services are available to the whole population.<sup>112</sup>

An authoritative international understanding of the obligations of a State party under Art. 11 of the Social Charter was given in the first *Conclusions* of the Committee of Independent Experts of the European Social Charter, and has been developed in subsequent *Conclusions*. Significantly, even though the concept of health protection itself has changed over the years, Contracting Parties have been found by and large to comply with the provisions of the Article.<sup>113</sup>

While retaining the wording of Arts.11 and 13 of the 1961 Charter, the **Revised European Social Charter (1996)**, expands and strengthens various rights relevant to health, such as the right to participate in determination and improvement of working conditions and the working environment (Art. 22), the right of elderly persons to social protection (Art. 23) and the right to protection against poverty and social exclusion (Art. 29).

The **UN Covenant on Economic, Cultural and Social Rights (1966)** states the right to healthy working conditions (Art. 7.b), and, more comprehensively, the right of everyone to the enjoyment of the highest possible attainable standard of physical and mental health (Art.12.1). The steps to be taken by States Parties to the Covenant to achieve the full realisation of this right "shall include those necessary for" provision for reduction of the stillbirth-rate and of infant mortality and of the healthy development of the child (12.2.a), improvement of all aspects of environmental and industrial hygiene (12.2.b), the prevention, treatment and control of epidemic, endemic, occupational and other diseases (12.2.c) and the creation of conditions which would assure to all medical care and medical attention in the event of sickness (12.2.d).

The **UN Convention on the Rights of the Child (1989)** recognises the "right of the child to the enjoyment of the highest attainable standard of health and to facilities for

---

<sup>112</sup> Council of Europe, *Form for the Reports Submitted in Pursuance of Article 21 of the European Social Charter, as adopted by the Council of Ministers in December 1981*, Soc. (81) 3, Strasbourg: Council of Europe, 1981, pp.45-6

<sup>113</sup> Lenia Samuel, *Fundamental Social Rights: Case law of the European Social Charter*, Strasbourg, Council of Europe Publishing, 1997, pp. 283-96

the treatment of illness and rehabilitation of health” (Art. 24). States Parties shall “pursue full implementation of this right and in particular shall take appropriate measures” (Art. 24.2.a).

The **UN Convention on the Elimination of All Forms of Discrimination Against Women (1979)** requires States Parties to take all appropriate measures to eliminate discrimination against women in the field of health care “in order to ensure, on the basis of equality between men and women, access to health care services...” (Art. 12.1).

The **American Declaration of the Rights and Duties of Man (1948)**: states that “everyone has the right to preservation of his health through sanitary and social measures relating to ...medical care, to the extent permitted by public and community resources” (Art. XI).

The **Additional Protocol to the American Convention On Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, 1988)**, states that “everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being” (Art.10.1). States Parties to the Protocol “agree to recognise health as a public good” (Art. 10.2).

The new Council of Europe **Convention on Human Rights and Biomedicine** was opened for ratification in April 1997. Under it “[p]arties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality” (Art. 3).<sup>114</sup>

The European Union's **Treaty of Amsterdam** (2 October 1997) includes a new Article 129 which states that

a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

The Community shall complement the Member States' action in reducing drugs-related health damage, including information and prevention (Art. 129.1).

---

<sup>114</sup> Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, opened for signature 4 April 1997

The **Preamble to the World Health Organisation's Constitution (1946)** defines health holistically and comprehensively as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The Constitution states that the enjoyment of the highest possible standard of health is one of the fundamental rights of every human being. As part of the obligations of membership Member States including Ireland accept the duty to protect and ensure enjoyment of this right for all.

The WHO's **Programme on Primary Health Care and Health for All by the Year 2000**, and its **Alma Ata Declaration (12 September 1978)** outline the requirements of national approaches for reaching the "highest attainable standard of health".

The potential scope of the right to health in existing international law is highlighted by the request of the World Health Organisation in 1993 to the International Court of Justice in The Hague for an advisory opinion on whether the use of nuclear weapons by a State in time of war or other armed conflict would be a breach of its obligations under international law, including the WHO Constitution. The Court is the judicial organ of the United Nations. The Irish Government was one of over 40 countries which made written submissions to the Court in relation to the WHO request. In its submission Ireland noted that while its own approach to promote and support efforts to bring about the ultimate abolition of nuclear weapons had been political in character, it did not see the WHO approach, "which situates the issue within the framework of obligations accepted by States under international law, as in any way incompatible with [the Irish Government's] own efforts in the political field to secure the abolition of such weapons".<sup>115</sup> (The Court's Advisory Opinion of 8 July 1996 declared the use or threat of nuclear weapons to be generally contrary to international humanitarian law.)

As with the right to housing, Ireland has already begun to report to the United Nations on its compliance with the right to "the enjoyment of the highest attainable standard of physical and mental health", as part of its general reporting obligations under the UN Covenant on Economic, Social and Cultural Rights. The first Irish report under the CESCR, submitted in 1996 devoted fifteen pages to the right to health (Art. 12 of the Covenant). The report describes "measures taken to assure to all, medical service and medical attention in the event of sickness", gives information on the physical and mental health of the population, including infant mortality rates, national immunisation programmes and life expectancy, percentage of GNP spent on health, outlines national health policy, and groups whose health situation is worse than the national majority; it outlines the measures taken to reduce still-births and infant mortality and to provide for the healthy development of the child, to prevent and control epidemic, occupational and other diseases (including the provision of clean

---

<sup>115</sup> "Statement by Ireland to the International Court of Justice", Dublin, Department of Foreign Affairs, 9 June 1994

water), measures to ensure that the rising costs of health care for the elderly do not lead to infringements of these people's right to health, measures to maximise community participation in the planning, organisation, operation and control of primary health care, measures to provide health education, measures to improve environmental and industrial hygiene, and the role of international assistance in the realisation of the rights in Article 12.<sup>116</sup>

## IX.5 The Right to Health at National Level

At national level, a number of countries have incorporated a right to health care in their Constitutions, with a minority expressing this as a right to health or even incorporating the exact terms of the WHO definition in the constitutional text.<sup>117</sup> Thirteen countries are named by WHO in a listing of "Recent Constitutions and Constitutional Provisions Establishing a Right to Health Care" covering the period 1980-1996, the most recent being South Africa.<sup>118</sup>

## IX.6 Equity and Health

The right to and provision of health care arises from the recognition that there is a social obligation which political society through governmental activity should co-ordinate and fund and which is generated by the needs of those who are ill and unable to provide for themselves. Just as with other social and economic rights, the analysis which leads to this conclusion, however, does not appear to have definite implications as to the precise ways in which this right is to be honoured or as to the extent of the entitlement.<sup>119</sup> These matters would normally be the responsibility of the legislature and government.

The simple provision of health services does not in itself guarantee that those who most need them can have adequate access to them, or that they suffice in themselves to address all significant determinants of the individual's and household's health.

---

<sup>116</sup> *International Covenant on Economic, Social and Cultural Rights – First National Report of Ireland* (1996), op. cit. pp.155-70

<sup>117</sup> Sev S. Fluss, "International Public Health Law: An Overview", in *Oxford Textbook of Public Health* (3rd Ed.), Vol. 1, The Scope of Public Health, ed. Detels, Holland, McEwen, Omenn, New York, Oxford University Press, 1997, p.379

<sup>118</sup> Communication from the WHO Office for Health Legislation to the Irish Commission for Justice and Peace, 14 August 1997. The countries are Algeria (1989), Belarus (1994), Brazil (1988), Cambodia (1993), Chile (1985), Croatia (1990), Former Yugoslav Republic of Macedonia (1992), Guatemala (1985), Ethiopia (1987), Madagascar (1992), Nicaragua (1986), South Africa (1996), and Vietnam (1980)

<sup>119</sup> Joseph Boyle, "Catholic Social Justice and Health Care Entitlement Packages", in *Christian Bio-ethics*, 1996, Vol. 2, No.3, p.287

Social justice and the political and economic structures of society are important health determinants. The major causes of preventable illness, disability and premature death relate as much to discrimination, inequity and injustice as they do to viruses and parasites.<sup>120</sup> Writing in 1994 an Irish consultant noted that although MMR vaccine (measles, mumps and rubella) was provided free through general practitioners for all persons aged 18 months to six years, and the doctor's fee covered, the vaccination uptake was 80% in higher socio-economic areas of Dublin but "abysmally low" (20%) in socially disadvantaged areas. He concluded that this "presumably reflects the poor funding and organisation of primary health care in Ireland".<sup>121</sup>

There is evidence to show that high income and higher allocation of resources to the health sector do not automatically make for better health status, as the World Health Organisation has pointed out.<sup>122</sup> "Greater wealth – whether for countries, communities or individuals – is not a sufficient guarantee of improving health status because of the random nature of choices about how the resources will be allocated"<sup>123</sup> (emphasis added). International comparisons show that there is no direct correlation between the health status of a population and its gross national product, and that countries of roughly similar wealth can vary significantly in their health statistics, reflecting differing priorities and policies. Life expectancy at birth in Sri Lanka is higher than in Tunisia (72 vs. 68 years) although Sri Lanka's income per head is only about three-fifths of the latter's.<sup>124</sup> An American commentator notes that "although the United States has the most advanced medical technology, the largest ratio of doctors to population in the world, and the highest hospital bills, the country fares worse than other developed countries on many health indicators".<sup>125</sup> The infant mortality rate in Washington DC is higher than in Costa Rica or Chile.<sup>126</sup> The US "ranks (from best to worst) 19<sup>th</sup> in infant mortality, 28<sup>th</sup> in the rate of infants born at low birth rates, 15<sup>th</sup> in the rate of maternal mortality, and 9<sup>th</sup> in life expectancy, worse in some cases than Hong Kong, Singapore, Jordan or Costa Rica".<sup>127</sup>

---

<sup>120</sup> Dr. Jonathan Mann, contribution to discussion on the right to health, 9<sup>th</sup> Session of the UN Committee on Economic, Social and Cultural Rights, 6 December 1993, UN Doc. E/1994/23, E/C.12/1993/19, par. 293

<sup>121</sup> Dr. Gerard Sheehan, "Complacency over measles has dangerous consequences", *Irish Times*, 25 August 1994

<sup>122</sup> World Health Organisation, *Ninth General Programme of Work Covering the Period 1996-2000*, Geneva, World Health Organisation, 1994, par. 29

<sup>123</sup> *Ibid.*, par. 69

<sup>124</sup> World Bank, *World Bank Atlas 1995*, Washington DC, World Bank, 1994, pp. 9,19: Life expectancy figures for 1992; GNP per capita at purchasing power parity figures for 1993

<sup>125</sup> Audrey R. Chapman, *Exploring a Human Rights Approach To Health Care Reform*, Washington DC, American Association for the Advancement of Science, 1993, p.5

<sup>126</sup> Virginia Leary, "Discussion on the Right to Health", in *The Right to Complain About Economic, Social and Cultural Rights*, ed. Coomans and Van Hoof, op. cit., p.109

<sup>127</sup> Audrey Chapman, *Employing a Human Rights Approach to Health Care Reform*, op. cit., p.5, derived from American Public Health Association, *America's Public Health Report Card: A State-by-State Report on the Health of the Public*, Washington D.C., American Public Health

It is increasingly appreciated that gender equity is particularly important for the health of women. As the Department of Health has pointed out,

[m]any women on low incomes and who are also socially disadvantaged face multiple challenges to their health. The struggle to survive, run a house and rear a family on a low income can undermine their physical and mental health. Limited education, low self-esteem and lack of information about health are barriers to these women's access to services. Some women live in communities in which violence and crime are endemic. Distance from services is a major handicap for women in rural areas. Because of their economic dependence such women have little control over important aspects of their lives which touch on their health and little choice in many aspects of their lives. Choosing a healthier lifestyle is often not an option for these women".<sup>128</sup>

### **IX.7 Health a Right, not a Commodity**

The form of words proposed emphasises that health is a right, not a commodity. This fundamental distinction is crucial to the provision of health care. In an era of privatisation there will be a tendency to reduce health to health care, and, concomitantly, to rely overly on the market to provide health care with the attendant risk that health becomes commodified. While market forces and market principles have a legitimate place in the provision of health care and other determinants of good health status, health and health care have unique characteristics which distinguish them from commodities. Aside from this, even if health and health care could be regarded solely as commodities, it is simply not the case that the free market is the most equitable method of distributing them.

Left to itself, the market has no mechanism which ensures equity, either in access to health care or in acting upon the determinants of health that ensure equity in health outcomes.<sup>129</sup>

Three economic rationales, put forward by the World Bank as justifying the role of government in health care, at the same time provide ethical and moral justifications which strengthen the case for a constitutional right to health.

- Some actions that promote health are, in the Bank's words, "pure public goods or create large positive externalities, whereas private markets would not produce them at all or would produce too little";

---

Association, 1992

<sup>128</sup> Department of Health, *A Plan For Women's Health, 1997-1999*, Dublin, Department of Health, 1997, p.55

<sup>129</sup> Godfrey Gunatilleke and Aleya El Bindari Hammad (eds.), *Health, The Courage To Care: A Critical Analysis of the Future of International Health by the Task Force on Health and Development*, Geneva, World Health Organisation, 1997, WHO/HDP/97.3, p.12

- Market failures in health care and health insurance mean that government intervention can raise welfare by improving how those markets function. The poor cannot always afford health care that would improve their productivity and well being. Publicly financed investment in the health of the poor can reduce poverty or alleviate its consequences.<sup>130</sup>

To this could be added the pragmatic consideration that failure to deal with the root causes of public health problems contributes to increases in the cost of health care: "Low birth weight infants require expensive neonatal care, and even with that care, often sustain life-long neurological disabilities".<sup>131</sup> Similarly, policy ambivalence about tobacco consumption places a substantial economic burden on the health care system. Examples could be multiplied.

The overriding need to ensure equity in access to health care may be more difficult to achieve in the context of the market orientation of private health systems: "Market driven health care systems do not respond to everyone's need, and therefore may not guarantee compliance with the ethical principles that inspire the provision of public goods, including the principles of comprehensiveness, universality, affordability, and accessibility".<sup>132</sup>

The concepts of *public goods* and *externalities* in conventional economic analysis, noted above, provide further justification for government involvement in the health field, rather than reliance solely on market mechanisms.

*Public goods* are those from which the individual can benefit while having to pay only a part of the real cost or without having to pay for them at all. This characteristic means however that such goods have the major drawback, so far as the narrow logic of the market is concerned, that the cost of producing them cannot be profitably recouped from the beneficiaries. The economic incentive to produce them is thereby reduced or becomes non-existent. A notable example of a public good in the health field is the elimination of smallpox from the world in the 1980's. No private individual or commercial organisation could justify the cost of the international eradication campaign, yet the benefits to all states and their populations following eradication have far exceeded the once-off cost of the campaign. Another example is the beneficial impact on dental health of the Irish population following the introduction of fluoridation of public water supplies in the 1960's.

---

<sup>130</sup> World Bank, *World Development Report 1993: Investing in Health*, New York, Oxford University Press, 1993, pp.52-3

<sup>131</sup> Chapman, *Exploring a Human Rights Approach to Health Care Reform*, op. cit., p.19

<sup>132</sup> World Health Organisation, *Health in Development: Prospects for the 21<sup>st</sup> Century: Report of the First Meeting of the Task Force on Health in Development*, op. cit., p.45



Public good arguments are particularly cogent as rationales for government-sponsored initiatives aimed at prevention. For example, one part of the private sector has an obvious interest in promoting the consumption of tobacco while other parts benefit from the enormous health care investment made necessary by the worldwide tobacco pandemic. From a common good perspective this is an Alice in Wonderland situation, since the diminution and eventual elimination of harmful tobacco consumption would clearly lead to a far greater improvement in community health status, and to major cost savings, than the unfettered application of market logic, in which more sickness very often means effectively more profit.

*Externalities* characterise cases in which a private market “might function but would produce too much or too little...if the externality is not taken into account, treatment will be priced too high in private markets and too little treatment will be given...subsidies for treatment are therefore justified”.<sup>133</sup> An example of a positive externality is where the act of curing an individual of a contagious disease also prevents it from being transmitted to others. An externality may also be negative, as for instance when excessive or inappropriate use of antibiotics leads to increased microbial resistance to the drug, thereby reducing its value to others and increasing their risks.<sup>134</sup> The direct and indirect costs of treating cocaine-affected infants in the US during the first month of their life were estimated to be \$500 million in 1993.<sup>135</sup>

Inadequacies of the free market aside, a more fundamental consideration is that neither health in general nor healthcare in particular can be treated as commodities. The right to health is grounded in the nature both of the human person, and of health as an essential human good, not as a commodity.

There is broad agreement between secular and religious traditions on the holistic nature of health, and therefore of health care, arising from the nature of the human person who is the subject of health. Health care must never lose sight of “the profound unity of human beings, in the obvious interaction of all their corporal functions, but also in the unity of their corporal, affective, intellectual, and spiritual dimensions, nor can one isolate the technical problem posed by the treatment of a particular illness from the care that should be given to the persons of patients in all their dimensions”.<sup>136</sup> And in the words of one commentator, the WHO definition of health “has discerned the intimate connection between the good of the body and of the self (and not only of the individual self but the social community of selves)”.<sup>137</sup>

---

<sup>133</sup> World Bank, *World Development Report 1993*, op. cit., p.55

<sup>134</sup> Ibid., p.55

<sup>135</sup> World Health Organisation, *Health in Development: Prospects for the 21<sup>st</sup> Century: Report of the First Meeting of the Task Force on Health in Development*, op. cit., p.6

<sup>136</sup> John Paul II, *Address to the Participants at the 35th General Assembly of the World Medical Association*, October. 29, 1983, in *Insegnamenti*, VI/2, 920, n. 5

<sup>137</sup> S. Fluss, “International Public Health Law: An Overview”, in *Oxford Textbook of Public Health* (3rd ed.), Vol. 1, The Scope of Public Health, ed. Detels, Holland, McEwen,

The specific quality of health as a human good springs from the fact that [t]he goods and services essential to protect health and cure disease are essential to individuals in a way that most other goods are not, since positive health is an indispensable precondition for the enjoyment of other goods and services. Without the conditions that enable a person to function in normal health, the enjoyment of other states of living are impaired or become impossible.... Consequently positive health and the goods and services needed for it are not tradeable as are other commodities. This attribute of non-substitutability of health and related factors makes health a unique good for human beings.<sup>138</sup>

Other factors distinguishing health care from the provision of a commodity include the reality that the “profound vulnerability” of the patient requires a level of trustworthiness that is not required of a purveyor of commodities; medical personnel must “even be trusted not to meet the patient’s desires”<sup>139</sup> on occasion. Likewise, the relationship between doctor and patient is itself part of the healing; this relationship is special; it is part of what the patient needs and part of what makes him or her well.<sup>140</sup>

The fact that the knowledge available to and used by health care professionals in treating patients is non-proprietary is another feature setting medicine apart from commodities.

When I was a medical student I did not ask the patients with whom I practised taking histories, doing physical examinations, and performing procedures to forego any compensation and allow me to learn from them, so that I could then take possession of a body of knowledge that I would later sell back to them and their loved ones at the highest price the market would bear. Rather, I asked them to volunteer so that they could help me to learn to help those who, like themselves, were in need of health care. Likewise, patients who volunteer for research are asked to help their fellow human beings. It would be the height of hypocrisy to turn around and to say that the researcher personally owned all the information that came from their acts of altruism. The human being who volunteered her remains for me to be able to learn anatomy did not understand her act as a gift to the for-profit medical industrial complex.<sup>141</sup>

The time and resources which must be devoted to treating illness are rarely matters of choice for those in need of treatment. They will be determined by the specific ailment,

---

Omenn, op. cit., p.377.

<sup>138</sup> Gunatilleke and Hammad (eds.), *Health, The Courage To Care: A Critical Analysis of the Future of International Health by the Task Force on Health and Development*, World Health Organisation, op. cit., pp. 11-12

<sup>139</sup> Daniel Sulmasy OFM, “Do the Bishops Have It Right on Health Care Reform?”, in *Christian Bioethics*, 1996, Vol.2, No. 3, p.314

<sup>140</sup> Ibid., p.313

<sup>141</sup> Ibid., p.313.

its severity, the treatment options, and specialised skills available to them in a particular time and place; "Nor can [*those in need of treatment*] effectively defer satisfaction of their needs to a future time without some cost to their health; the most extreme cost being that of death. Health care is unique in this."<sup>142</sup>

The person in need of health care must depend on the health professional's expertise for the diagnosis and the service and evaluation of the outcome. The results of treatment must be confirmed with tests and expert examination. This inequality renders the patient greatly dependent on the health care provider, resulting in an acute asymmetry between patient and provider.<sup>143</sup>

## IX.8 Comments on the Wording Proposed for a Constitutional Right to Health

**Right to emergency medical assistance:** The right to emergency medical assistance is expressly included in the proposed wording to emphasise its universality regardless of the status or resources of an individual. Need should be the only criterion here.

**Responsibility of the individual:** The wording we propose emphasises the primary responsibility of each person to preserve and protect his or her health and bodily and functional integrity. The reason why a competent adult has the final say about health care is because each person has the fundamental responsibility for it.<sup>144</sup> Developments such as the increasing complexity of health care systems, progress in medical and health science and technology, the fact that medical practice has become more hazardous and in many cases more impersonal and dehumanised have all placed new emphasis on the importance of recognising the individual's right to self-determination.<sup>145</sup>

Such a right carries reciprocal responsibilities. As the **Declaration on the Promotion of Patients' Rights in Europe** points out, patients (in the broad sense of users of health care services, whether healthy or sick) "have responsibilities both to themselves for their own self-care and to health care providers, and health care providers enjoy the same protection of their human rights as all other people".<sup>146</sup> Furthermore, since many of the major causes of health problems, such as tobacco and drug abuse, abuse

---

<sup>142</sup> Gunatilleke and Hammad (eds.), *Health, The Courage To Care: A Critical Analysis of the Future of International Health by the Task Force on Health and Development*, op. cit., p.12

<sup>143</sup> Ibid., p.12.

<sup>144</sup> Joseph Boyle, "Catholic Social Justice and Health Care Entitlement Packages", in *Christian Bio-ethics*, op. cit., p.287

<sup>145</sup> See Section on "Principles of the Rights of Patients in Europe: A Common Framework, 1. Background" in *Declaration on the Promotion of Patients' Rights in Europe*, WHO European Consultation on the Rights of Patients, Amsterdam 28-30 March 1994.

<sup>146</sup> Ibid., "Background: Purpose of the Document"

of toxic substances, dietary habits, unsafe sexual practices, exaggerated risk taking and violent behaviour, are related to individual behaviour,<sup>147</sup> it is proper that individuals be required to accept responsibility for such behaviour in the context of assigning and assessing rights and responsibilities in regard to health.<sup>148</sup> "There is a moral responsibility on the part of all to do what they can to preserve and enhance their own health".<sup>149</sup> A "large and growing number" of deaths are due to chronic non-communicable diseases largely related to diet and lifestyle.<sup>150</sup> Even here, however, the complementary role of the state cannot be ignored, since families and individuals also need knowledge and skills to take proper responsibility. While reforms in personal habits are very important they are only a first step. People's health problems are not simply self-inflicted, but are often caused by factors over which they have no control.<sup>151</sup>

**Duty to respect:** As with the content of the other rights for which we have suggested wording, the responsibility of the State is therefore to be understood as complementary to that of the individual, household and family. In the same way as the right to housing or adequate nutrition, the State's responsibility is in the first place that of ensuring that the individual's and family's right to health is respected and protected. Even at a pragmatic level, "households can buy health care with their own money and, when well informed, may do this better than governments can do it for them".<sup>152</sup>

**Duty to promote and fulfil:** This element of the wording proposed for the right to health should lead to an increasing emphasis on identifying and remedying inequities in health status and access to health services; to an enhanced focus on primary health care, on health promotion and prevention policies, to the identification and reduction of inequalities and discrimination in health between different groups, and to a heightened awareness of human rights considerations in public policy discussions. It could also be expected to lead to a more explicit monitoring of a broad range of public policies in the light of health criteria, with particular reference to the socio-economic determinants of health.

---

<sup>147</sup> World Health Organisation, *Ninth General Programme of Work Covering the Period 1996-2000*, op. cit., par. 85

<sup>148</sup> See Audrey R. Chapman, *Working Paper prepared for the Day of general discussion on the right to health, (6 December 1993)*, Geneva, United Nations, Committee on Economic, Social and Cultural Rights of the UN Economic and Social Council, E/C.12/1993/WP.24, 26 November 1993, Part I, point 10

<sup>149</sup> California Association of Catholic Hospitals, "Report on the Health Care of the Poor" (1984), in *Origins*, 29 March 1984, Vol.13, No. 42, p.697

<sup>150</sup> Chapman, *The Right to Health: Conceptualising a Minimum Core Content*, op. cit., par. 21

<sup>151</sup> US Bishops' Conference, *Pastoral Letter on Health and Health Care*, op. cit., p.398

<sup>152</sup> World Bank, *World Development Report 1993: Investing in Health*, op. cit., p.5

## X. The Right to Adequate Nutrition

### X.1 Introduction

The right to adequate nutrition, essentially the right to satisfy one's hunger and thirst, is situated squarely within the Catholic tradition, which views basic human rights as a kind of baseline, a set of material conditions which are essential for human dignity. As Cardinal O'Connor told the US Senate Committee on Agriculture in 1984, "this concept of rights implies a social obligation and, ultimately, an obligation on the part of government. When, through the normal workings of the economy and the social system, the basic material needs of some citizens are not met, the government has the responsibility to intervene. It has the duty to see that no one goes without adequate food for daily sustenance".<sup>153</sup> The right to food is an essential condition for the right to life.<sup>154</sup>

Philip Alston, a leading international human rights authority, has argued that although the rights approach to food and nutrition has not been a priority concern of governments, it is important because it underlines the ethical and moral dimensions of issues too often portrayed as merely technical; it puts other rights which often receive greater priority back into perspective; and it brings the accountability of governments and international organisations whose policies and programmes impact upon the right to food into clearer emphasis.<sup>155</sup>

It might well be believed that in Ireland, a country with one of the highest per capita intakes of calories in the world, hardly anyone goes hungry, or that hunger is either a transient accident or the result of wilful neglect, and that the current wave of unprecedented economic growth makes the inclusion of such a right superfluous. Experience both in Ireland and in other countries of equal or much greater wealth, such as the US, shows however that the right to food is often not secured to individuals and sectors of the population, even though the majority might never go hungry. A commentary published eleven years after Cardinal O'Connor's submission underlines the continuing relevance of the right to adequate nutrition even in one of the richest countries in the world.

Between 1985 and 1990 the number of people in the United States lacking

---

<sup>153</sup> Cardinal John O'Connor, "Food-Stamp Block Grants Opposed": Statement to the US Senate Committee on Agriculture, 21 March 1984, in *Origins*, 26 April 1984, Vol.13, No. 46, pp.761-2

<sup>154</sup> Cardinal Angelo Sodano, Vatican Secretary of State, address to the Food and Agriculture Organisation, Rome, 7 November, 1997

<sup>155</sup> Philip Alston, "International Law and the Right to Food", in *The Right to Food*, (P. Alston and K. Tomasevski, eds; Boston, Martinus Nijhoff Publishers, 1984, p.61

enough to eat at least once each month increased from 20 to 30 million (13 per cent of the population), including 12 million children. Cuts in welfare spending and wage decline reduced food security. In 1993 private feeding agencies served 26 million clients. By 1994, 28 million people were receiving food stamps (vouchers redeemable at food markets) through the Federal Government Stamp Programme); 87 per cent of the recipients are women, children or elderly people. Although the programme is an "entitlement", funded to enrol all qualified people, fewer than 67 per cent of those eligible participate because of poor outreach...Since 1994 Congress has debated restructuring and reducing anti-poverty spending...there would no longer be national nutritional standards....<sup>156</sup>

The purpose of citing these statistics is to show that even in one of the wealthiest societies in the world today undernutrition can and does co-exist with prosperity and economic development. In Ireland, despite a comprehensive social welfare system and a booming economy, it is still the case that "we have communities in our cities where families are dependent on hampers being handed out after Mass on a Sunday".<sup>157</sup> The Dublin Diocesan agency CROSSCARE operates four food centres providing about 400 mid-day meals a day. This is the "main and often the only nutritious meal" for those who come. The agency also provides funds for two other food distribution centres in Dublin. Apart from meals directly provided in this way it operates a food bank which acts as a clearing-house for food donations. In 1996 the throughput of food received from businesses and EU intervention stocks exceeded 477 tons<sup>158</sup>. In the year ending March 1997 the St. Vincent de Paul Society allocated £1.93m. directly for food, and a substantial proportion of the £3.56m. which it gave in the form of cash to families and individuals would also have gone on food. It would not be unreasonable to assume that between a quarter and a third of the Society's total expenditure of £13m. in that year was directly or indirectly related to food purchases.<sup>159</sup>

The 1994 *Living In Ireland Survey* revealed that in 3.8% of households the household manager had a day without a substantial meal in the two weeks preceding the survey (down from 4.5% in 1987), 5% of households did not have a meal with meat, fish or chicken every second day and 8% did not have a roast or its equivalent once a week, because they could not afford it.<sup>160</sup> Comparisons of living standards of an "average

---

<sup>156</sup> DEEP (Development Education Exchange Papers), Office for External Relations, *Waiting Without: How the International Community Can Promote Food Security*, Rome, Food and Agriculture Organisation, September 1995, p.9

<sup>157</sup> Sr. Stanislaus Kennedy "UN Year For Eradicating Poverty", in *Doctrine and Life*, Vol. 46, November 1996, p.521

<sup>158</sup> CROSSCARE *Annual Report 1996*; Dublin: CROSSCARE, 1997, pp. 17-18.

<sup>159</sup> Society of St. Vincent de Paul, *Annual Report 1997*; Dublin: Society of St. Vincent de Paul, 1997, p. 6.

<sup>160</sup> T. Callan, B. Nolan, B. Whelan, C. Whelan, J. Williams, *Poverty in the 1990's: Evidence from*

family” and a “welfare family” found that the former “have better quality food, larger portions and greater variety. Fruit consumption, for instance is a regular item for most ‘average’ families whereas fresh fruit and vegetables are severely limited for the welfare family. The welfare family relies heavily on cheap filler foods like potatoes and white bread to stretch its spending which is 25 per cent less than that of the average family. The mother of the welfare family makes do with smaller portions and compromises her nutritional status”.<sup>161</sup>

There is no automatic or direct correlation between the abolition of undernutrition and the abolition of poverty, which is why we believe the right in question should be stated separately from the right to an adequate standard of living. In the words of the Deputy Director of the FAO, “there is a significant number of countries North and South which have overcome chronic undernutrition without overcoming poverty. We don’t need to overcome chronic poverty first. We need to identify those policies and actions which have been able to reduce undernutrition”.<sup>162</sup>

## X.2 The Right to Adequate Nutrition in International Sources

According to one source, there are over 100 legal instruments touching on the right to food at the international and national levels.<sup>163</sup> The fundamental importance of food as an essential component of the right to an adequate standard of living has been unambiguously stated in the **Universal Declaration of Human Rights (1948)** (n. 25), the **UN Covenant on Economic, Social and Cultural Rights (1966)** (Art. 11.2), by which States Parties including Ireland recognise the “fundamental right of everyone to be free from hunger”, the **Universal Declaration on the Eradication of Hunger and Malnutrition** of 1974 (n. 1), and the **World Declaration on Nutrition (1992)**.

Most recently, in the **Declaration on World Food Security** of the 1996 Rome World Food Summit, the Heads of State and Government reaffirmed the “right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger” (first par.).

---

*the 1994 Living in Ireland Survey*; Dublin: Oaktree Press, 1996, p. 104.

<sup>161</sup> Murphy-Lawless, J.; *The Adequacy of Income and Family Expenditure*; Dublin: Combat Poverty Agency, 1996, cited in *Sharing in Progress: National Anti-Poverty Strategy*; Dublin: Stationery Office, 1997, Appendix 2, p. 55

<sup>162</sup> Quoted in DEEP (Development Education Exchange Papers), Office for External Relations, *Waiting Without: How the International Community Can Promote Food Security*, op. cit., inside cover.

<sup>163</sup> Robert Robertson, “The Right to Food - Canada’s Broken Covenant”: in *Canadian Human Rights Yearbook/Annuaire Canadien des Droits de la Personne, 1989-90*, Toronto, Carswell, 1990, p.187

Commitment Seven of the **1996 World Food Summit Plan of Action** commits governments and States to “clarify the content of the right to adequate food and the fundamental right of everyone to be free from hunger” and to give particular attention to “implementation and full and progressive realisation of this right as a means of achieving food security for all” (Objective 7.4).

Ireland (together with France, Italy, Portugal and 28 other states) formally reaffirmed its support for the Commitment Seven wording a few months later by co-sponsoring a **Resolution on the Right to Food**, which was adopted by the 53<sup>rd</sup> session of the UN Commission on Human Rights. The resolution reaffirms

the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger so as to be able fully to develop and maintain their physical and mental capacities.<sup>164</sup>

Among its reporting obligations under various international human rights instruments Ireland has already had to report on how it is discharging its obligations in regard to the right to food. The first Irish report under the UN Convention on Economic, Social and Cultural Rights devotes twelve pages to “the right to adequate food”. Topics covered include the extent to which the right has been realised, food consumption trends over time, nutritional surveillance, nutrition amongst disadvantaged or vulnerable groups, changes in national policies, laws and practices affecting access to adequate food, measures undertaken to guarantee access to adequate food for vulnerable or disadvantaged groups, measures taken to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, measures taken to disseminate knowledge of the principles of nutrition, agrarian reform undertaken “to ensure that the agrarian system is efficiently utilised in order to promote food security at household level”, and, finally, measures taken to ensure an equitable distribution of world food supplies, in terms of both production and trade.<sup>165</sup>

### **X.3 Comments on the Wording Proposed**

The suggested wording is intended to make clear that the right in question is first and foremost a right to feed oneself, rather than an open-ended, unqualified “right to be

---

<sup>164</sup> United Nations Commission on Human Rights, *Resolution on The Right to Food*; United Nations Commission on Human Rights, Fifty-third session, Agenda Item 5, 2 April 1997, E/CN.4/1997/L.21/Rev.1

<sup>165</sup> *International Covenant on Economic, Social and Cultural Rights: First National Report of Ireland*, Dublin: Stationery Office, 1996, pp.119-31, (pars. 545-596 614)



fed".<sup>166</sup> The statement of the right directly implies the corresponding duty to provide for one's needs in this regard through one's own efforts and initiative in the first place. Only when these efforts fail or fall short would the State be obliged to make a more targeted response, which could be the direct provision of food, but is much more likely to be through indirect means, such as the provision of resources to enable the recipient to provide himself or herself with adequate nutrition.

In modern society the right to food has to be realised not only at the level of the individual but at that of the household and the wider community. It has therefore an inescapably social and communal aspect. In the US context at least, it was the judgement of Cardinal O'Connor that hunger is "essentially a national problem, caused in large part by national economic policies. As a national problem, therefore, it requires a national solution".<sup>167</sup> The headings in the first Irish report under the UN Covenant on Economic, Social and Cultural rights (noted above), clearly reflect the many ways in which action at national level is necessary to guarantee the right to food.<sup>168</sup>

Realisation of the right to food would include an adequate and equitable distribution, a balanced and healthy diet, stability in food supply, and sufficiency of food supply for the individual, family, and community as a whole. At household level it includes the adequacy of food, both qualitatively and quantitatively, in terms of nutritional balance, absence of toxic substances, and cultural acceptability of food; access to food in a manner which does not destroy one's human dignity; and sustainability both of food supplies and access to them over time.<sup>169</sup> It also includes the need to ensure equal access for all members of the family, women and men, adults and children.

Whether at the level of the individual, the family or the wider community the centrality of the concept of food security, a growing consideration in international development policies, should be emphasised. Food security is defined jointly by the World Bank and the World Food Programme as "access by all people at all times to enough food for an active and healthy life entailing adequate food supplies through domestic production or imports and ensuring that people who suffer from under-nutrition can acquire food by producing it themselves or buying it".<sup>170</sup> This definition is significant

---

<sup>166</sup> See Rolf Kunnemann, "Comments", in *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, held from 25-28 January 1995*, op. cit., p.128

<sup>167</sup> Cardinal John O'Connor, "Food-Stamp Block Grants Opposed", op. cit., p. 761

<sup>168</sup> *International Covenant on Economic, Social and Cultural Rights: First National Report of Ireland*, op. cit., pars. 549-588

<sup>169</sup> See the 1983 study on "*The Right to Adequate Food as a Human Right*" by Asbjörn Eide, Special Rapporteur, UN Human Rights Commission.

<sup>170</sup> World Food Programme and World Bank, *Food Aid in Africa: An Agenda for the 1990's*, Rome, World Food Programme, 1991, p.14

in defining a concept of *sufficiency* in access to food, viz. “enough food for an active and healthy life”. Such a concept is similar to that of *adequacy* which we noted above in the context of the right to housing.

The right to nutrition is also highly relevant in an environmental context, for it depends above all on the development of a sustainable agriculture, nationally and globally. Ireland, together with the vast majority of the world’s states and the EU, is committed under the terms of the World Food Summit Plan of Action to “pursue participatory and sustainable food, agriculture, fisheries, forestry and rural development policies and practices...which are essential to adequate and reliable food supplies at the household, national, regional and global levels...”.<sup>171</sup>

#### X.4 Right to Water as a Component of Right to Nutrition

Although the right to water is not mentioned as frequently as the right to food, perhaps because its centrality to human existence is so obvious, clean, accessible and affordable water is even more important than food as a necessity for life. “Freshwater is the essential resource for the creation and existence of virtually all life forms on earth. As well as being essential to the creation and existence of life, water is also a key component of the social and economic system that we have created for ourselves”.<sup>172</sup> Growing international concerns about water make it clear that no country, even one as well endowed by nature as Ireland, can take it for granted that water will remain forever plentiful, unpolluted and inexpensive. EU countries including our own have acknowledged a major interest in “the rational use of water, its protection, its utilisation and the development of available resources while respecting the natural equilibria and the rights of future generations” (emphasis added).<sup>173</sup>

The quality and availability of water supplies is increasingly a factor in economic growth, locally and nationally. It can come under threat from the growing and unplanned concentration of population and industry in large urban areas, the increase of toxic compounds and other pollutants caused by industrialisation and development of intensive farming, greater use of energy, and deterioration of ground and surface water resources. In addition there is a growing risk of needlessly inefficient and wasteful use of water for all purposes. In this context, unregulated use of water and water pollution have increasing negative externalities (which, as noted above, also arise in the context of the right to health).

---

<sup>171</sup> Commitment Three of the 1996 World Food Summit, *Plan of Action*

<sup>172</sup> “Foreword”, *International Conference on Water and the Environment: Development issues for the 21<sup>st</sup> Century: Keynote Papers*, 26-31 January 1992, Dublin, Ireland; Geneva: ICWE Secretariat, c/o World Meteorological Organisation, [n.d]

<sup>173</sup> Euro-Mediterranean Conference on Local Water Management, Marseille, 25-26 November 1996, *Euro-Mediterranean Declaration on Local Water Management*, EURO-MED 14/96, Annex 1, p.7

Control and management of water resources are now accorded growing importance. Among the questions arising are the allocation and reallocation of water supplies, integration of water quantity and quality control, management of water resources and the definition of priorities for water use. There is globally a trend to move from treating water as a virtually free resource with nearly unrestricted control, to treating it as a vital necessity which has to be paid for and is not available at will. Without prejudice to the cogency or otherwise of arguments for pricing water as a means of controlling waste and promoting conservation, priority must at the same time go to safeguarding the right to adequate potable water and to water for other basic human needs such as sanitation.

It is not necessarily the case that using water for the maximum benefit of society as a whole means treating it as a cost-free and inexhaustible natural resource. The principles of water law being developed in South Africa, for instance, favour conservation campaigns and instruments such as water tariffs to make water available to the users who need it, and to make sure that water is used efficiently and effectively. They end the assumption that rights to use water can be held in perpetuity and that underground water is private property. The principles make environmental protection a formal element of water law: the government, as the custodian of the nation's water resources, will have a duty to promote the public trust represented by the environment which all citizens share.<sup>174</sup> A recent World Bank study on *Water Markets in the Americas* notes that the judicial system has helped maintain fairness and equity within the market and protected third-party beneficiaries.<sup>175</sup>

Clean and plentiful water is essential to public and individual health. In a recent Irish case involving Fingal County Council the court refused to cut off the water supply to a house under the Family Home Protection Act as the wife and family of the homeowner also resided at the address in question.<sup>176</sup> It is under the heading of public health that the European Social Charter, to which Ireland is a contracting party, asks States reporting under the Charter to include information on measures taken to prevent water pollution.<sup>177</sup> In its first national report under the UN Covenant on Economic, Social and Cultural Rights Ireland has reported on national water and sanitary services, noting that the progressive extension of piped water supplies and related facilities across the country has been a "major factor" in the improvement of

---

<sup>174</sup> South African Department of Water Affairs and Forestry, "Water law: a quiet revolution" (Press Release), Capetown/Pretoria, Department of Water Affairs and Forestry, 20 November 1996

<sup>175</sup> "Water Markets in the Americas", in *World Bank News*, January 8, 1998, p.5

<sup>176</sup> Reported in *South Dublin Life and Leisure*, 26 August 1997, Vol.4, No. 16, p.1

<sup>177</sup> Council of Europe, *Form for the Reports Submitted in Pursuance of Article 21 of the European Social Charter, as adopted by the Council of Ministers in December 1981*: op. cit., p. 46, Section D.a.ii

the quality of peoples' lives.<sup>178</sup>

The close connection between water, nutrition and food is recognised in the World Food Summit Plan of Action. Among the objectives accepted by the participating states including Ireland is to "promote access to clean water and sanitation for all people, especially in poor communities and rural areas" (Par. 22, objective 2.4). Clean and adequate water supplies and the sanitary services for which water is essential are also of course central to the enjoyment of the right to health.

At an even deeper level the intimate relationship between clean water and the integrity of aquatic and terrestrial ecological systems in general should be borne in mind, since this is one of the foundations of human life on the planet as a whole.<sup>179</sup>

---

<sup>178</sup> *International Covenant on Economic, Social and Cultural Rights: First National Report of Ireland*, op. cit., par. 614

<sup>179</sup> James R. Karr, "Protecting Ecological Integrity: An Urgent Societal Goal", in *Yale Journal of International Law*, Winter 1993, Vol.18, No.1, pp. 297-306

# XI. The Right to an Adequate Standard of Living

## XI.1 Introduction

One of the most enduring human costs of poverty is the way in which it denies people in practice the enjoyment of many rights essential to human flourishing.

A person's or a family's security rests on certain foundations: employment, health, housing, education. When these foundations are sound, people are able to meet their responsibilities to their work, their families and their communities, and they are able to enjoy their basic rights as citizens. When these foundations are undermined, there is insecurity and the results can be more or less severe or permanent. This insecurity is what constitutes poverty, and it can in some instances lead to extreme poverty, which affects several areas of life at the same time and becomes persistent. Poverty in turn compromises a person's or family's chances of regaining their independence and their lost rights and responsibilities.<sup>180</sup> (emphasis added).

At stake here therefore is the possibility of being able to invoke the Constitution as an important means, even if insufficient on its own, of asserting the rights and dignity of many people in the face of market forces which, if left uncorrected and unconstrained by the demands of human dignity, are unlikely or unable to share the goods of society equitably and according to the basic needs of all its members: "There are many human needs which find no place on the market. It is a strict duty of justice and truth not to allow fundamental human needs to remain unsatisfied, and not to allow those burdened by such needs to perish".<sup>181</sup>

Poverty can and does co-exist with increasing wealth. It has for instance deepened in recent years in Australia, Belgium, Finland, Germany, the Netherlands and Norway.<sup>182</sup> In the US the share of people living below the poverty line grew from 16% in 1974 to 19% in 1994. In the same country one in four children under the age of 18 and one in five elderly people live in poverty, the worst record among OECD countries.<sup>183</sup> Although Americans' personal income increased by \$740 billion between 1977 and

---

<sup>180</sup> Sr. Stanislaus Kennedy, op. cit., p.523

<sup>181</sup> John Paul II, Encyclical *Centesimus Annus*, (1991), n. 34

<sup>182</sup> See UN Development Programme, *Human Development Report 1997*, New York, United Nations, June 1997

<sup>183</sup> James Speth, Administrator of the United Nations Development Programme (UNDP), "Even in the Land of Plenty", in *Choices*, a publication of the UNDP, July 1997, Vol.6, No. 3, p.10

1989, almost two-thirds of this went to the wealthiest one per cent, only 660,000 families, whereas 40% of all families were worse off in real terms at the end of the 80's than at the beginning of the decade. In the United Kingdom in the heyday of "champagne capitalism" under Margaret Thatcher's government the bottom 10% of the population suffered a 14% drop in its real income during the 1980's while average household income increased by 36%.<sup>184</sup>

To propose the right to an adequate standard of living is to accept the necessity of poverty reduction:

"Poverty prevents homeless families from choosing their place of residence. Illiterates have no way of becoming familiar with political programmes. Without minimum security, no one can take advantage of associations: the long-term unemployed rarely retain trade union membership; very poor parents see their children fail at school but do not dare to join parents' committees; mothers in debt do not take their problems to consumer organisations".<sup>185</sup>

The constitutional vindication of the right to an adequate standard of living is dictated by more than the fulfilment of a moral obligation. What is also at stake, if citizens lose the feeling of security, protection and solidarity, is "the acceptance and legitimacy of all levels of public authority", as has been recognised at EU level.<sup>186</sup>

In the European Union social protection expenditure in the broad sense now accounts for 28 per cent of the European Union's GDP, varying nationally from 16 to 35 per cent, as the European Commission has pointed out. It comments

[Social protection] plays a fundamental role in income redistribution and social cohesion, political stability and economic progress. The more working life becomes flexible, the more citizens will demand security from their social protection systems. Good social protection and successful business are therefore mutually supporting.

This view on social protection is underpinned by detailed international

---

<sup>184</sup> Sr. Stanislaus Kennedy, "A UN Year For Eradicating Poverty", in *Doctrine and Life*, Vol. 46, November 1996, p.521

<sup>185</sup> Council of Europe Directorate of Human Rights, *Towards Justice Accessible to All: Legal Aid Machinery And Certain Local Initiatives As Seen By Families Affected By Severe Poverty*, Strasbourg, Council of Europe, doc. H (92) 2, 1992, par.124

<sup>186</sup> Pdraig Flynn, European Commissioner for Social Affairs, Industrial Relations and Employment, "Social policy, the Union and its citizens: completing the circle": Speech to the Austrian People's Party Conference on Social Security in Austria and Europe, Vienna, 10-11 April 1996

comparison, suggesting that, when account is taken of private as well as public spending, total household expenditure on social protection, health care and pensions are at relatively similar levels across a range of developed, industrialised countries. Moreover, Member States with a strong safety net often perform better in terms of GDP per capita or external balance than Member States with a weaker safety net. On the other hand, only countries with a sound economy are able to maintain a high level of social protection. For this reason, the completion and reinforcement of the European internal market will become increasingly important.

It is important to realise that the reason for a reform of social protection systems is not competition from third countries. Free trade and globalisation should not be seen as a threat to the European social model.

The reasons for a reformation are internal. The real threat against the European social model would be our inability to cope with the existing problems. First of all, there is an urgent need to consolidate public finances in most Member States in order to avoid growing deficits and heavy debt services in the future, crowding out expenditure on social protection. *This is not in contradiction with a high degree of social protection nor does it dismantle the principle of solidarity. On the contrary, it strengthens solidarity between different generations, since it reduces the burden of future generations* (emphasis added).

Secondly, the system needs to be reformed in order to promote economic and social integration. One key function of social protection systems is to provide the categories of people who cannot work with some income security. However, this has simultaneously tended to deter from economic integration. Social protection systems have been both a success, in terms of alleviating poverty, and a failure, in terms of promoting full integration within society.<sup>187</sup>

The above quotation illustrates clearly the centrality of social protection in the social model now shared by virtually every EU State, including Ireland. The importance attached to it by citizens is reflected in the proportion of national resources devoted to it, and the constantly expanding network of legislation surrounding it. To enshrine the right to an adequate standard of living in the Constitution would be to give formal recognition to a reality which already exists, and acknowledge a basic moral obligation corresponding to a primary human need.

---

<sup>187</sup> European Commission, *Modernising and Improving Social Protection in the European Union*, Brussels, 12 March 1997; Com (97) 102 final: Section 1, 1.2, "The challenge: The need to modernise and improve European social protection system"

## XI.2 International Sources for the Right to an Adequate Living Standard

Elements of the right to an adequate living standard have been formulated in many international texts. The most important global source is to be found in Art. 11 of the **UN Covenant on Economic, Social and Cultural Rights (1966)**: “The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”.

As with the right to housing, Ireland has already begun to report to the United Nations on its compliance with the right to an adequate standard of living as part of its general reporting obligations under the UN Covenant on Economic, Social and Cultural Rights. Most of the reporting under Article 11 is devoted to the right to food and the right to housing, apart from one general section on the overall right. However it must be borne in mind that the Covenant also has a separate Article (9) on the right of everybody to social security, including social insurance, to which the report of Ireland also devotes 19 pages.

The **European Social Charter (1961)** and the **Revised European Social Charter (1996)** state the right to protection against poverty and social exclusion (RESC, Art. 30), the right to social security (Art. 12 of the ESC and the RESC), the right to benefit from social welfare services (Art. 14 of the ESC and RESC), the right to social and medical assistance (Art. 13 of the ESC and RESC), and the right of the family to social, legal and economic protection (Art. 16 of the ESC and the RESC).

The Parliamentary Assembly of the Council of Europe, in its 1996 **Resolution** on the proposal for a second summit of heads of state of the Council, called for a number of items to be included in the draft declaration for consideration by heads of state, including the implementation of new initiatives to promote a model for European society, among them encouragement of ratification of the 1961 and 1996 Social Charters, and the implementation of social rights, including “the guaranteeing of social welfare systems [and] the struggle against poverty and exclusion”.<sup>188</sup>

At European Union level the maintenance of a high level of employment and social protection is one of the Community’s fundamental objectives and is explicitly included in the tasks listed in Article 2 of the **Treaty on European Union (1992)**. In the judgement of the European Commission, “social protection represents a fundamental component and a distinguishing feature of the European model of society”.<sup>189</sup>

---

<sup>188</sup> Parliamentary Assembly of the Council of Europe, *Recommendation 1303 (1996) on the proposal for a second summit of heads of state and of government of the Council of Europe*, Strasbourg, 24 September 1996, p.2

<sup>189</sup> European Commission, *Modernising and Improving Social Protection in the European Union: Communication from the Commission*, op. cit., Section 1, “A European debate about the



The **Community Charter of the Fundamental Social Rights of Workers (1989)** “incorporates a foundation of social rights which are guaranteed and implemented, in some cases at the level of the Member States or at Community level depending on the level of competence”.<sup>190</sup> The **European Union’s Social Charter** is based on earlier texts such as the Council of Europe’s Social Charter (1961) and various **Conventions of the International Labour Office (ILO)**.<sup>191</sup> It includes the right of every worker in the EU to have, according to the arrangements applying in each country, a “right to adequate social protection” and to enjoy an “adequate level of social security benefits”, regardless of his or her status and whatever the size of the undertaking in which he or she is employed (n.10); the right to satisfactory health conditions in the working environment (n.19); also according to the arrangements applying in each member state, every EU worker must be able at the time of retirement to enjoy resources affording him or her a decent standard of living (n.24); any person who has reached retirement age but who is not entitled to a pension or who does not have other means of subsistence must be entitled to sufficient resources and to medical and social assistance specifically suited to his or her needs (n.25).

The EU's **Treaty of Amsterdam** (2 October 1997) includes a new recital in which the member states confirm “their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers”.<sup>192</sup> A new Article 117 states that the Community and the Member States “having in mind fundamental social rights such as those set out in the [1961] European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers”, shall have as their objectives “proper social protection, “the development of human resources with a view to lasting high employment and the combating of exclusion”.<sup>193</sup> Under the new Article 118 the Council may adopt measures to encourage co-operation between Member States through various initiatives in order to combat social exclusion.

---

future of social protection”.

<sup>190</sup> Jacques Delors, President of the European Commission, “Introduction” to *Community Charter of the Fundamental Social Rights of Workers*; Luxembourg, Commission of the European Communities, 1990, p.3

<sup>191</sup> *Ibid.*, pp.3, 10

<sup>192</sup> *Treaty of Amsterdam*, Part One: Substantive Amendments, Article 1, Luxembourg, Office for Official Publications of the European Communities, 1997, p.7

<sup>193</sup> *Treaty of Amsterdam*, *op. cit.*, p.35

### XI.3 Justiciability

We are not talking of an aspirational right which remains largely unrealised in law and in policy. A large body of legislation covering many if not all the elements listed already exists in Ireland. The greater part of social policy directed to help the poor is legitimated by legislation such as the various Social Welfare Acts, Housing Acts and Health Acts, so that the courts already play an authoritative role in the interpretation and enforcement of such policy.<sup>194</sup> The extent and complexity of this corpus of legislation, under which expenditure accounting for roughly half of the total annual national budget expenditure is disbursed, is an additional reason to give a clear constitutional footing for the relevant legislation and the programmes issuing from it. Budgeted social welfare expenditure for 1997 was more than twice the provision for education.

Of particular interest in the context of enshrining the right to an adequate standard of living in the Irish Constitution is a judgement of the Swiss Federal Court of 27 October 1995 which defines the right to “conditions minimales d’existence” (roughly, a basic minimum level of subsistence) as an unwritten constitutional right based on or derived from fundamental human rights (“*droits de l’homme*”).<sup>195</sup> The judgement noted that although the Federal Constitution did not explicitly recognise a right to existence, there were nevertheless unwritten rights of the same order as the constitution which could be derived from it. There were elements which, although not expressly enumerated in the 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 is, said the Court, “absolutely necessary for human existence and development”, and at the same time an indispensable element of a political society based on democracy and the rule of law. It followed that “to this extent securing one’s existence fulfils the pre-conditions to be guaranteed as an unwritten right having the same status as the Constitution”. Linked to this, the Court said, were other points of constitutional jurisprudence, including the constitutional principle of human dignity which guarantees to every person what he or she is entitled to expect from the community

---

<sup>194</sup> Free Legal Advice Centres/Coolock Community Law Centre, *Civil Legal Aid Bill 1995: A Case Study in the Need for a National Anti-Poverty Strategy*: Submission to the Interdepartmental Committee on a National Anti-Poverty Strategy; Dublin: Free Legal Aid Centres/Coolock Community Law Centre, September 1995, p.3

<sup>195</sup> BGE (Bundesgerichtentscheid)\_ 121\_I\_367: *Arrêt du Tribunal Fédéral Suisse: jugement de la 2ième cour de droit public* of 27 October 1995.

simply as a human being, the right to life as the core value of human existence which would not be guaranteed if the minimum preconditions for survival were not assured, and equality of status “to which belongs the function of guaranteeing minimal material justice”.

#### **XI.4 European Union Perspectives**

In its document on “Modernising and Improving Social Protection in the European Union” the European Commission has explicitly proposed social protection measures, including particularly “the safety nets designed to guarantee a minimum level of resources to all inhabitants” as “essential tools in an active policy to fight exclusion”. Its observations are worth quoting at some length.

The modern design of European social protection systems was conceived just after World War II. They were intended to provide workers with a replacement income during periods of work interruption, either temporary (sickness or unemployment) or definitive (permanent work incapacity or retirement). As such, they were quite effective in alleviating poverty. However, social protection is now confronted with a new phenomenon: exclusion.

Exclusion goes beyond poverty. It is the accumulation and the combination of several types of deprivation: lack of education, deteriorating health conditions, homelessness, loss of family support, non-participation in the regular life of society, lack of job opportunities. Each type of deprivation increases the other types. The result is a vicious circle; leading from long-term unemployment to the break of family ties, and possibly eventually to marginality and delinquency.

Social protection alone cannot be a remedy for every situation of exclusion. However, social protection has a role to play not only in providing excluded people with an income enabling them to live in keeping with human dignity, but also in helping to reintegrate them into society. Both unemployment compensation schemes and social assistance mechanisms, *and particularly the safety nets designed to guarantee a minimum level of resources to all inhabitants*, should become essential tools in an active policy to fight exclusion (emphasis added).<sup>196</sup>

As the Commission notes elsewhere in the same document, following publication at

---

<sup>196</sup> European Commission, *Modernising and Improving Social Protection in the European Union*, Communication from the Commission, 10 March 1997, Brussels, European Commission, 1997, Com (97) 102 final; Section 2.2.5, “Social protection to promote inclusion”

the end of 1995 of its “Framework for a European Debate on the Future of Social Protection”, an extensive consultation during 1996 involving governments, the social partners and NGOs confirmed that

the European social model is valued and should be consolidated. This model is based both on common values and the understanding that social policy and economic performance are not contradictory but mutually reinforcing. *Highly developed social protection systems are a major component of this social model* (emphasis added).<sup>197</sup>

In 1995 the European Commission appointed the Comité des Sages (the “Committee of the Wise”), to examine what might become of the Community Charter on the Social Rights of Workers. The Comité recommended that the frame of reference used by the European Court of Justice to determine the general principles of Community law should be extended, a) to the Social Charter and b) to the main international agreements signed by the Member States. If this were done, the Social Charter would be incorporated indirectly into the European Treaties, and the international agreements on fundamental rights, including for instance the UN Covenant on Economic, Social and Cultural Rights, could thus be used to vet all legal acts by the Union.<sup>198</sup> They would form part of the Community law domain under the new version of Article F of the Treaty of European Union proposed by the Comité.<sup>199</sup> Even without such an amendment of Article F, the European Court of Justice in the *Nold* judgement of 1974 has already stated its inability to “uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of (the Member) States” or with “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”.<sup>200</sup>

The Comité des Sages recommended that one principle should be laid down immediately at European Union level, specifically in the Treaty to be negotiated at the Intergovernmental Conference of June 1997 (which eventually emerged as the Amsterdam Treaty), namely that “each Member State must set in place a minimum

---

<sup>197</sup> European Commission, *Modernising and Improving Social Protection in the European Union*, op. cit., 1.1 “The contributions to the debate”

<sup>198</sup> European Commission, *For a Europe of Civic And Social Rights: Report by the Comité des Sages*, Luxembourg, Office for Official Publications of the European Communities, 1996, Part III.2

<sup>199</sup> *Ibid.*, Part III.3.B

<sup>200</sup> Quoted in Christian Duparc, *The European Community and Human Rights*, Commission of the European Communities: Luxembourg, Office for Official Publications of the European Communities, 1992, p. 13.

income for persons who, despite their efforts, are unable to find paid employment and have no other source of income". The actual amount would depend on the particular stage of development reached in each State and the eligibility conditions such as actively searching for work would be a responsibility of each Member State<sup>201</sup>. Regrettably the Amsterdam Treaty does not enshrine such a principle. However, as noted earlier, the European Commission has stated that it intends to carry forward the debate on fundamental rights, building on the report of the Comité des Sages, in the context of its Social Action Programme for the period 1998-2000.

### **XI.5 Comments on the Proposed Wording**

A multiplicity of elements, all of them important, have to be taken into account in formulating wording for this right. We felt it preferable to use a comprehensive phrase, which is also part of international human rights law, being stated in the UN Covenant on Economic, Social and Cultural Rights as the "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" (Art. 11.1).

The wording proposed states that the provision of an adequate standard of living for one's self and one's dependants is a duty of the individual in the first place. It then proceeds to set down a general obligation of the State, firstly to respect the individual's right, and secondly to protect each person's right against encroachments or violations from other sources, and to provide, within reason, against unforeseen or unpreventable circumstances, which could be economic, health, familial, or indeed a combination of these and other factors - in other words, whenever a human being is deprived of the basic means of subsistence through no fault of his or her own.<sup>202</sup> The legislature and administration would continue to be responsible for determining the modalities of such protection, having regard to prevailing resources, standards and conditions, which of course will change over time and in the light of circumstances.

The third element of the State's obligation contained in the proposed wording is that of promoting and fulfilling the right, i.e. (in the words of the UN Covenant on Economic, Social and Cultural Rights) of working to achieve its "full and progressive" realisation. This would remain a continuing necessity due to the growth and development of the community's economic and social potential, the changing nature of the concept of adequacy which would reflect advances in the technological, social, medical and other fields, demographic changes such as increased ageing of the

---

<sup>201</sup> *Report of the Comité des Sages*, op. cit., Part III.3.B.

<sup>202</sup> John XXIII, Encyclical *Pacem in Terris*, n.11

population, educational provision and many other factors.

In general, the right to social security might be considered as fulfilling at least partially to the right to an adequate standard of living such as the UN Covenant on Economic, Social and Cultural Rights states it. In Ireland as in many other countries the social welfare system has grown continuously in scope and depth for many years now and is likely to be seen as the core element of the State's direct response to poverty and need. Indirectly of course the most important response of the state is through enabling and safeguarding the capacity of individuals to provide for themselves through their own efforts and initiative, for example by pursuing full employment policies.

Other social policy objectives are also relevant to social security. The Commission on Social Welfare (1986) identified five such - attainment of full employment, achievement of housing objectives, education, health, and taxation. Of these, housing and health are of immediate relevance to the rights we are discussing, and the importance of full employment to adequate living standards hardly needs emphasising. It is not possible here to discuss in any depth the breadth and complexity of the interrelationships between rights in the social welfare field and those in other areas - suffice it to note that they are many: "Improved incomes for social welfare recipients may *improve their nutrition and health*, increase their *ability to educate* their children, or *help them to pay for good quality housing*".<sup>203</sup> (emphasis added).

The Report of the Commission on Social Welfare pointed out that in Ireland the term "social welfare" had become associated mainly with income maintenance schemes, including the supplementary welfare allowance. It summarised the financial objectives of social security under three headings: the *abolition of destitution and poverty*, which remains a central aim, the *redistribution of income, different to the distribution generated solely by market forces*, and *income replacement*, in which to some extent the rewards of skill and customary standards of living of recipients are recognised.

The term "social security" is used internationally to describe systems which provide either income maintenance only or a combination of both income maintenance and health services. The International Labour office has defined "social security" as i) "the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from" seven eventualities (sickness, maternity, employment injury, unemployment, invalidity, old age and death); ii) the provision of medical care; iii) the provision of subsidies for families with children.

The main difference in the components of social security is that between "social

---

<sup>203</sup> Report of Commission for Social Welfare, Dublin, Stationery Office, 1986, p.122

insurance”, in which payments are related to previous contributions by the beneficiary, and “social assistance”, which is independent of prior contributions and is related to need. The concept of social insurance is understood as “an expression of social solidarity and citizenship in which the risks, costs and benefits should be shared as widely as possible”.<sup>204</sup> The Social Welfare Allowance is intended to provide an ultimate safety net for those who for one reason or another are not entitled to other social security benefits.

The underlying principle ought to be that social welfare payments should be set at a level that ensures a “minimally adequate standard of living relative to incomes and living standards in society generally”.<sup>205</sup> The Commission for Social Welfare itself proposed such a minimally adequate level income for one person in 1986, and this has been updated subsequently.

The Department of Social Welfare commissioned a study, published in 1996, reviewing the Commission’s minimum adequate income.<sup>206</sup> The study noted that while the Commission envisaged that the adequacy standard would move up over time in line with general living standards in the community, there was “wide scope for debate” about the most appropriate reference point. Refusal to grant constitutional status to the right to an adequate standard of living, on the grounds of such disagreement, would be warranted only if it could be assumed that by enumerating such a right the courts would *ipso facto* also be endowed with the associated competence to determine how this should be implemented in practice. Such an assumption would be mistaken. It would remain always primarily the function of the legislature and the executive, not the courts, to determine such matters as criteria for entitlement, the relationship between insurance and assistance payments, indexation of payments, the role of additional allowances and non-cash benefits, and so on.

In this context another element of the judgement of the Swiss Federal Court referred to above is of particular interest. In addition to finding that there was an unwritten constitutional right to a basic minimum, the Court posed, and answered, a further question, viz. whether such a right was justiciable in constitutional law. It observed that while constitutionally based negative claims do not pose any problems, positive claims “presuppose that they are sufficiently normatively defined and that the judge has at his disposition the necessary procedures and means to concretise and implement [such claims]”. The judge also has to have cognisance of the functional boundaries of

---

<sup>204</sup> *Report of Commission on Social Welfare*, op. cit., p.251

<sup>205</sup> *Ibid.*, p.189

<sup>206</sup> Tim Callan, Brian Nolan, and Christopher T. Whelan, *A Review of the Commission on Social Welfare’s Minimum Adequate Income*, Dublin, The Economic and Social Research Institute, 1996

his competence. In view of the restraints of state resources, the Court observed, the judge does not have the competence to set priorities for the allocation of resources. As a consequence, direct constitutional imperatives which could be implemented by the judge could therefore only ever be a minimum level of state acknowledgement and performance.

In the light of the various points considered, the Court concluded that “the basic right of securing the conditions of existence fulfils these conditions of justiciability. As such it is directed towards the minimum necessary under constitutional law i.e. help in emergency cases”. And, (in the Swiss context), “the associated State expenditures are recognised by reason of the social assistance laws in the cantons. They need no other financial-political basic decision. *What constitutes the inalienable pre-condition of dignified human existence is clearly recognisable and susceptible to investigation in legal proceedings*” (emphasis added). The Court added however that there was no question of a guaranteed minimum income, since the Constitution “only requires what is unconditionally necessary for a dignified human existence and which can prevent an undignified beggar’s existence”. It was in the first instance the affair of the responsible community (presumably, in this judgement, referring to the canton in question) to define according to its basic legislative framework the type and extent of the necessary level of performance in the particular case. This, said the Court, should take both money and goods into consideration. Only when the outcome of the legislative framework failed to meet the minimum claim required under the rights stated in the Constitution was it to be set aside, the Court stated.

The conclusion of the Federal Court in this instance, namely, a) that the basic minimum of dignified human existence is susceptible to investigation in legal proceedings, but also, b) that in view of the restraints of State resources the judge does not have the competence to set priorities for the allocation of resources, strikes a careful balance between ensuring that there is a constitutionally significant content to the right while at the same time recognising clear boundaries to the courts’ competence in defining its scope and in determining how it is to be implemented in particular circumstances. To round off this section it can be argued in support that the judgement of Finlay P. in *Frawley*, referred to earlier in connection with the right to health, had already made the same type of careful distinction in an Irish constitutional context.



## XII. Conclusion

The Preamble to the Irish Constitution speaks of "we, the people...seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, [and] true social order attained...". It is the concept of human dignity and freedom which gives rise to the articulation of rights. Rights are moral claims before they are legal entitlements. By giving them constitutional expression a society makes a solemn statement that the rights so enumerated are recognised as of commanding importance in the moral as well as the political and legal structures of that society. Because of this special status it is generally agreed that constitutional recognition of rights should be accorded sparingly and only after careful deliberation. This puts an onus on those advocating the enumeration of new rights to make a detailed and responsible case.

The enumeration of rights in the body of the Constitution is a considered attempt to specify important aspects of what is necessary to assure the dignity and freedom of the individual and of groups especially the family. Since human dignity eludes final definition, no such enumeration can ever be regarded as a completed project. It is our contention that fundamental social and economic rights, of which we have identified four in particular, should now be explicitly recognised in the Irish Constitution. We have endeavoured in this document to make out a reasoned case for such recognition precisely on grounds of the common good, the freedom and dignity of the individual and the attainment of social order.

Rights are indivisible because the human person is indivisible. They arise from the recognition of the inalienable dignity of the person, which ultimately has to be respected as a whole. During the Cold War it was perhaps inevitable that the spectre of totalitarianism should elicit a corresponding reaction in favour of those rights which recognise and protect freedoms in the civil and political sphere. Now, however, the end of the Cold War has removed previous justifications and motivations to favour one type of right over another. The proposition that human rights are indivisible has secured recognition by the international community everywhere. As we have shown from a wide variety of sources, the judgement of experience and of reflection is that giving constitutional protection only or primarily to one class of rights is not adequate to protect human dignity, at least insofar as it is possible to give such protection through the medium of the Constitution. A more balanced constitutional statement of rights is now needed.

What is evident from many parts of this document is the extent of agreement and consistency at international level in the formulation of social and economic rights. Our country, like many others, has willingly become party to international treaties which specify social and economic rights. The next step facing us is to bring these into the national arena. For Ireland the appropriate place is the Constitution.

The *Report of the Review Group on the Constitution* has summarised the arguments against constitutional enumeration of such rights, that is, the arguments against making such rights justiciable or judiciable. The present document is evidence of the degree to which the Irish Commission for Justice and Peace found the Report's treatment unsatisfactory. Provoked to make a systematic response to and rebuttal of the Review Group's arguments, the Commission for Justice and Peace became increasingly convinced of the strength and cogency of the case for enumeration.

The case rests on the convergence of several lines of argument - constitutional, political, moral, economic and social. There is the reality that the Irish constitutional experience of the right to education belies the fears of the Review Group. There are hints and pointers in the wording of the existing Constitution and positive elements in the doctrine of unenumerated constitutional rights. There are the major internal inconsistencies in the Report's discussion of the issue. There is the international consensus.

From another aspect, the case for enumerating core socio-economic rights in the Constitution is buttressed by the widespread concern about the harsher side of economic growth in Ireland and the social divisions and inequalities which accompany it.

The market place is at best indifferent to the requirements of human dignity. It must perforce equate value with price. It justifies its prominence in economic life by its ability to produce wealth, not by any innate capacity to respect and promote human dignity. For this we look to other sources - politics, morality, religious beliefs, the State. It is in such a perspective, and starting from the premise that one of the tasks of the State is that of overseeing and directing the exercise of human rights in the economic sector<sup>207</sup>, that the importance of giving constitutional expression to the right to "the means necessary and suitable to the proper development of life" becomes apparent. Market forces can and do aggravate injustice and inequalities as well as provide the means to reduce them. There is no inherent economic mechanism in the market to ensure that they will do the latter. Against a background of unparalleled economic growth in Ireland the case for constitutional affirmation and protection of human dignity in the face of economic and social forces becomes more compelling and at the same time its achievement more feasible.

The market is a good servant but a bad master. To make sure that it does indeed serve human dignity rather than work against it, adequate restraints and controls are needed. One of these, we have argued, is the development of explicit constitutional protections for human rights in the economic and social arena.

---

<sup>207</sup>John Paul II, Encyclical *Centesimus Annus* (1991), n.48

The Constitution is a fundamental source of values in our society. The time is now ripe to bring it into line with the basic moral insight that the requirements of human dignity include ensuring to everyone, regardless of their economic status or social condition, the “means necessary and suitable for the proper development of life”.<sup>208</sup> To do so would be a noble political achievement, the satisfaction of a profound moral imperative and a significant contribution to the common good of all.

**End**

---

<sup>208</sup>John XXIII, Encyclical *Pacem in Terris* (1963), n.11

## **Other materials on human rights published by the ICJP**

Human Rights Note 1: *The UN Covenant on Civil and Political Rights: A Guide to Making an Independent Submission* (plus text of the Covenant, the Optional Protocol and the Irish reservations to the Covenant), April 1991, pp. 33.

Human Rights Note 2: *Civil Legal Aid: A Policy Document*, Sept. 1992, pp.10.

Human Rights Note 3: *Migrants and Asylum Seekers in the European Community: Towards a Community Policy on Respect for Human Rights* - An ecumenical declaration by a joint working group of the Conference of European Justice and Peace Commissions and the Churches' Commission for Migrants in Europe, October 1992, pp. 7.

Human Rights Note 4: *Human Rights, Justice, Equality and Peace: A Submission on the Green Paper on Education, with Extracts from International Human Rights Documents*, April 1993, pp. 50.

Human Rights Note 5: *A New Safeguard for People Deprived of Their Liberty: the European Convention for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment: An Information Note*, June 1993, pp. 18.

Human Rights Note 6: *Human Rights in Prison* [Comments on the Draft Rules Contained in "The Management of Offenders: A Five Year Plan"], Department of Justice, June 1994], November 1994, pp. 63.

*Mandatory Reporting of Child Abuse: Safeguards and Rights* [Submission to the Minister of State at the Department of Health in Response to the Discussion Document "Putting Children First"], June 1996, pp.22

"*Yes, You Do Count*" (with the Irish Council of Churches): A Teaching Programme on Human Rights for Secondary Schools, 1996, pp. 234

*The Proposed New Prisons Board* [Submission to the Expert Group on the Establishment of an Independent Prisons Board], January 1997, pp. 8

*Children and the Juvenile Justice System: the Children Bill 1996* [Submission to the Select Committee on Legislation and Security], March 1997, pp. 19

*Refugees and Asylum Seekers: A Challenge to Solidarity* (with Trocaire): December 1997, pp. 21

Human Rights Note 7: *The Theological Basis of Human Rights*, Bishop Donal Murray, March 1998, pp. 26

**Available from ICJP, 169 Booterstown Ave., Blackrock, Co. Dublin, tel 2885021, fax. 2834161, e-mail: [icjp@tinet.ie](mailto:icjp@tinet.ie)**



