



**An Bille um an Seachtú Leasú is Tríocha ar an
mBunreacht (Cearta Geilleagracha, Comhdhaonnacha
agus Cultúir), 2018**

**Thirty-Seventh Amendment of The Constitution
(Economic, Social and Cultural Rights) Bill 2018**

Meabhrán Mínitheach
Explanatory Memorandum



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AN MBUNREACTH (CEARTA GEILLEAGRACHA,
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(ECONOMIC, SOCIAL AND CULTURAL RIGHTS) BILL 2018**

EXPLANATORY MEMORANDUM

Purpose of the Bill

The purpose of the Bill is to amend Article 45 of Buncreacht na Eireann by adding to the end of that Article a provision, contained in the Schedule, that the State shall progressively realise, subject to its maximum available resources and without discrimination, the rights contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and that this duty be cognisable by the courts.

Background

At both international and regional levels Ireland has agreed to be bound by a number of treaties protecting economic, social and cultural rights (ESC rights) also known as socio-economic rights.

Despite these protections, any ratification of a treaty (other than an EU treaty) is not directly enforceable before the courts in Ireland as Ireland is a dualist state. These limitations are set out in Article 29.5.6° of Buncreacht na Eireann which states that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas. Therefore only indirect protections of ESC rights currently exist in Ireland creating certain limitations and overall uncertainty with regards to the extent of protections afforded to these provisions.

International Context

The International Covenant on Economic, Social and Cultural Rights (ICESCR), a United Nations human rights treaty signed by a total of 71 countries is the most relevant treaty concerning ESC rights. Ireland ratified the treaty in 1989 thereby agreeing to be legally bound by its provisions.

Notwithstanding Ireland's ratification, economic, social and cultural rights (as defined in the ICESCR) are only partly recognised in Buncreacht na Eireann and are further limited under Article 45 which explicitly states that principles of social policy set out in that Article are intended for the general guidance of the Oireachtas only and shall not be cognisable by the Courts.

In order for greater protection of ESC rights to be realised in Ireland the Houses of the Oireachtas must pass specific legislation for any relevant treaty to become enforceable. This Bill seeks to achieve such recognition by inserting the relevant provision referring to economic, social and cultural rights into the Buncreacht na Eireann as defined by the ICESCR.

The provisions defined within the ICESCR include the following but are not limited to:

Economic Rights: the right to earn a living and to just and favourable conditions at work; the right of everyone to form a trade union, join a trade union of her/his choice and the right to strike.

Social Rights: the right to social security; right to an adequate standard of living, including food, clothing and housing, continuous improvement of living conditions and the right to be free from hunger; the right to the highest attainable standard of physical and mental health; the right to education.

Cultural Rights: the right to take part in cultural life, to enjoy the benefits of scientific progress, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he/she is the author.

The oversight mechanism for the ratification of ICESCR, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) monitors the implementation of the ICESCR by its states parties. The CESCR publishes its interpretation of the provisions of the ICESCR, known as 'General Comments'. In General Comment 9 the CESCR stated that it strongly encourages the formal adoption or incorporation of the ICESCR into national law by states parties.

The CESCR also considered Ireland's periodic reports on the implementation of the ICESCR in 1999 and 2002. In each of its concluding observations on Ireland's reports, the CESCR noted 'with regret that, despite its previous recommendations in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation and that the state party could not provide information on case law in which the Covenant and its rights were invoked before the courts'.

A number of other UN treaty bodies have also highlighted Ireland's failure to incorporate the provisions of treaties of relevance for ESC rights into national law. In 2011, a number of UN Member States made several recommendations on the domestic protection of ESC rights during Ireland's examination under the Universal Periodic Review (UPR) mechanism of the UN Human Rights Council. While Ireland has signed the Optional Protocol to the ICESCR shortly after its examination under the UPR, ratification of the Optional Protocol remains outstanding.

Regional Context

At a regional level, the European Social Charter adopted in 1961 and revised in 1996 guarantees ESC rights such as the right to health, housing, employment, legal and social protection including against poverty and social exclusion, free movement of persons and non-discrimination.

The European Committee of Social Rights is mandated to oversee states parties' compliance with the provision of the Charter adopting conclusions on national reports submitted by those Parties on an annual basis. Ireland ratified the Collective Complaints Protocol to the Charter meaning organisations from the State can lodge complaints with the Committee alleging violations of the rights within the Charter.

Crucially, in 2017 the European Committee of Social Rights (ECSR) found Ireland in violation of human rights in relation to the stated failure to take sufficient and timely measures to ensure the right to housing is of an adequate standard for families living in Local Authority housing. A class action by tenants of 20 local authority estates in Dublin, Cork and

Limerick, submitted their case via the International Federation for Human Rights (FIDH).

The protection of ESC rights continues to grow around the world. For example, the right to healthcare is included in 133 constitutions while the right to join trade unions is included in 152 constitutions. 136 Constitutions recognise the right to work and/or the State duty to provide work. Furthermore, the right to housing is included in 81 constitutions and the right to culture is incorporated in 141 constitutions.

Decisions by courts in countries around the world covering ESC rights demonstrate that these rights are legally enforceable with an increasing number of judicial reviews being carried out in more and more countries. Complaints procedures are being developed all the time at international and regional level with a substantial number of States incorporating ESC rights at constitutional level.

The international and regional context is reflective of the fact that international law mandates that ESC rights should be viewed as legal rights enforceable in domestic law. This referendum Bill will seek to bring Ireland's recognition of ESC rights in line with international and regional norms.

Progressive Realisation

A key tenet of the ICESCR is the notion of progressive realisation as defined in Article 2 (1) and reflects the fact that it may not be possible to achieve the full enjoyment of ESC rights in a short period of time and particularly when resources are limited.

Progressive realisation is seen as 'a necessary flexible device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of ESC rights [CESCR General Comment No. 3]'.

Most importantly progressive realisation ensures that the State establishes clear obligations on states parties in achieving full realisation of the rights as contained in the ICESCR. In the case of an economic downturn or recession, progressive realisation may be impeded and some adjustments are inevitably made with regards to the implementation of some of these rights, however any proposed policy change in reaction to an economic crisis must be justified and take into account the necessary protections required for vulnerable and disadvantaged populations in particular.

Determining the amount of available resources is not exclusively financial, it may encompass the available human resources and natural resources within the state including information and technology which can be useful in the achievement of ESC rights as contained in the ICESCR.

Constitutional Convention

In February 2014 85% of the members of the Constitutional Convention voted in favour of amending the Constitution to strengthen the protection of ESC rights. A majority favoured a Constitutional provision explicitly stating that "the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts". The Convention also voted on whether specific additional rights should be enumerated in the Constitution. The Convention voted for, *inter alia*, that all the rights contained in the ICESCR be enumerated within the Constitution. This Bill is intended to give effect to that determination.

ESC rights are becoming increasingly necessary in the Irish context particularly after a decade-long recession in which a housing crisis has emerged. As Ireland experiences unprecedented numbers of families in emergency accommodation questions are being raised as to how the

provision of housing can be adequately and consistently provided for in an economy that frequents cycles of boom and busts, while not remaining at the mercy of ideological preferences as determined by the Government of the day.

Greater protections of ESC Rights in our Constitution would provide the necessary anchor for rights like housing, health and education to be provided for on the basis of need at all times even amid economic or political turbulence.

When it comes to budgetary measures the Government would have to justify reasons for allocations of resources not intended for the administration of economic, social and cultural rights. If a justification was not favourable an individual could defend their right in the courts, thereby holding the Government to account for its decision-making.

Together with the ‘progressive realisation’ tenet this Referendum bill would ensure that the economic, social and cultural rights of individuals are balanced against the available resources of the State regardless of the Government’s ideological persuasion or the state of the economy at the time.

Provisions of the Bill

Section 1 amends the introductory text of Article 45 of the Constitution by inserting a new paragraph, the text of which is set out in the Schedule to the Bill.

Section 2 is a standard provision relating to the citation of the Bill and the amendment.

The schedule sets out the proposed amendment.

Thomas Pringle TD,
Meán Fómhair, 2018.