



## Frequently asked questions about economic, social and cultural rights

### 1) What are Economic, Social and Cultural (ESC) rights?

Economic, Social and Cultural (ESC) rights were first given protection in the Universal Declaration of Human Rights in 1948 and later in the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966. Ireland ratified the ICESCR in 1989. At a European level, the European Social Charter to which Ireland is a State Party, also protects a number of these rights.

- **Economic rights** in the ICESCR are the rights to work and to just and favourable conditions of work; the right of everyone to form trade unions, join a trade union of one's own choice; and the right to strike.
- **Social rights** in the ICESCR are the rights to social security; protection and assistance of the family; the right of everyone to an adequate standard of living for them and their family, including food, clothing and housing, the continuous improvement of living conditions and the right to be free from hunger; the right of everyone to the highest attainable standard of physical and mental health; and the right of everyone to education.
- **Cultural rights** in the ICESCR are the rights of everyone to take part in cultural life, to enjoy the benefits of scientific progress, to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Everyone is entitled to ESC rights. The ICESCR states that these rights are **guaranteed to all without discrimination** of any kind such as 'race', colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This list is not exhaustive and discrimination is also forbidden on other grounds, including disability, sexual orientation or gender identity, marital or family status, or socio-economic status.

### 2) What are Ireland's obligations on ESC rights?

The State has a number of different obligations arising from the ICESCR.

- a) Ireland has an **obligation to progressively realise** ESC rights over time. This recognises that States will often not be able to achieve all of the rights in the ICESCR overnight, especially due to limited resources and will need time to do so.
- b) Ireland also has a number of **immediate obligations**. These include:

- the obligation to take concrete and targeted steps, using all of the resources available to it to move as quickly as possible towards the full achievement of these rights;
- the obligation to ensure ESC rights to all without discrimination, for example ensuring non-discrimination in access to health services; and
- the obligation to ensure that a minimum essential level of these rights are provided for everyone, for example essential primary health care and the most basic forms of education.

### **3) Are ESC rights just aspirations rather than enforceable rights?**

It is widely accepted that civil and political rights are enforceable rights. A number of these rights such as the right to liberty, freedom of expression and peaceful assembly are protected in the Irish Constitution. However, some claim that ESC rights are political aims and aspirations rather than enforceable rights. The UN has highlighted that such a distinction between civil and political and ESC rights is not justified and States have agreed that civil and political and ESC rights are of equal importance and should be given the same emphasis.

Regional and domestic courts have adjudicated cases related to ESC rights as a result of which a body of case law has emerged. Decisions of courts in countries around the world covering all ESC rights show that these rights are enforceable. Judicial review of ESC rights can be seen in an increasing number of countries including but not limited to: Germany, Finland, Portugal, Latvia, South Africa, India, Colombia and Mexico.

### **4) Are ESC rights not a matter of public policy and resource allocation that should be left to politics and not the courts?**

ESC rights such as health, housing and social security are, of course, a matter of public policy and often involve decisions around the allocation of resources.

However, there is also a role for the courts to play in ensuring that these rights are protected. Many States have set up procedures that allow for the adjudication of ESC rights before the courts. This has not affected the competency of other public bodies.

Courts in other jurisdictions have been conscious of the separation of powers and have balanced their role with that of the other branches of Government. Where national courts have ordered a programme or policy to be implemented, the orders have recognised that the competence and authority to devise the appropriate response rests with the Government, provided that the policy is in compliance with the ICESCR.

In reviewing compliance, courts have considered whether the State has fulfilled its obligation to ensure the rights at issue rather than whether more favourable measures should have been adopted. The role of the courts is not to take over Government

policy-making when it adjudicates on ESC rights but to remedy violations of rights that may arise as a result of certain policies.

Moreover, while adjudication of ESC rights may result in courts making orders that have implications on budgetary matters, the role of the courts, when it comes to budgets and resource allocation spans beyond ESC rights. For example, when a court enforces civil and political rights such as the right to fair trial or the provision of legal aid this impacts on resource allocation.

#### **5) Are ESC rights too vague to be enforced by courts?**

Some argue that ESC rights are too vaguely worded for judges to decide on whether a violation has occurred.

However, the mechanisms of the UN (UN Committee on Economic, Social and Cultural Rights, UN Special Rapporteurs), as well as national and regional case law, have outlined the nature, content and scope of ESC rights and of States' obligations.

Also, when it comes to civil and political rights judges have already dealt with questions around the scope of sometimes indeterminate concepts such as what constitutes torture, a fair trial or unlawful interference with privacy, thereby filling in gaps that may exist in legislation. There is nothing to prevent judges from doing the same when it comes to ESC rights.

Adjudication of these rights at a national level will also strengthen the understanding and meaning of ESC in the context of that particular country.

National Human Rights Institutions, such as the Irish Human Rights Commission, have also played an important role in deepening the understanding of ESC rights both in the context of their own political and legal system and more broadly.

#### **6) Do ESC rights require an infinite amount of resources, which the Government does not have?**

No. The ICESCR recognises the fact that Governments do not have an infinite amount of resources, by providing that these rights may be achieved progressively over time. Any assessment as to whether the State has discharged its obligations under the ICESCR, will take account of the resource constraints applying within the State.

However, States do have an obligation to use the maximum of their available resources with the goal of achieving ESC rights. States should also not take any retrogressive measures towards that goal. Any retrogressive measures would have to be given the most careful consideration and would need to be fully justified. Even where the State's resources are clearly inadequate, it still has an obligation to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. In particular, vulnerable members of society must be protected.

**7) Do ESC rights oblige the Government to provide goods and services free of charge and prohibit the private provision of goods and services?**

No. There is a misconception that ESC rights require the Government to provide free facilities, goods and services such as healthcare and housing. The State's obligation is to ensure that facilities, goods and services are affordable for all, but this does not necessarily mean free of charge. The Government must ensure that the direct or indirect costs of for example healthcare or housing does not prevent a person from accessing them or compromise their ability to enjoy other human rights.

Human rights law does not preclude the private provision of goods and services or a mix of public and private provision. However, the State is responsible for regulating and monitoring any form of service provision and ensuring that human rights are upheld.

**8) What would be the benefit of enshrining ESC rights in the Constitution?**

- It would provide a useful framework to guide the executive and legislature in drafting laws and in planning and delivering budgets and services relating to ESC rights.
- It would ensure that the protection and fulfilment of these rights are not left to the discretion of individual governments, but are given legal status as national priorities, by which successive administrations are bound.
- It would help to promote greater accountability and transparency, concerning the allocation of resources and particular policy approaches. This is especially important in times of economic crisis.
- It would bring Bunreacht na hÉireann in line with a growing trend among many countries which have recently revised their constitutions and recognise that ESC rights are enforceable.
- It would assist Ireland in implementing the international obligations it undertook when it ratified the ICESCR, specifically by giving domestic legal effect to the rights protected therein.
- It would provide a remedy to people in Ireland if their ESC rights are violated. The right to an effective remedy, in Article 8 of the Universal Declaration of Human Rights, is an essential element of international human rights law. Ireland has an obligation to ensure for everyone the right to a remedy in relation to all the rights it has agreed to be bound by, including ESC rights.