

AGAINST IDEOLOGY? EXAMINING SOCIAL RIGHTS IN IRELAND DURING TIMES OF CRISIS

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1. Introduction

The onset of the COVID-19 pandemic has raised significant questions from not only a public health dimension in attempting to stem the spread of the virus, but also from a social rights perspective, and attempting to deal with the social and economic realities of the fallout from the same. With this in mind, this brief contribution seeks to examine the specific response by the executive in the Republic of Ireland from March 2020 onwards, and tease out how it has sought to ameliorate a crisis such as this through redistributive social policies, and the reinforcement and development of social rights. In particular, it underlines how certain social rights-based policies during this time differ from the ideological policies and institutional attitudes prior to this time. In doing so, it aims to underline the degree to which the Irish executive has, on the one hand, signalled a clear break from previous long-standing policies, and on the other, how it might fail to address other long standing issues. It will be structured as follows. Following this brief introduction, Section Two will examine the general response to the COVID-19 pandemic through the creation of one new targeted payment and the opening up of others. A third section will then highlight the specific issues related to asylum seekers, the material reception conditions within which they are housed and access to the so-called COVID-19 emergency payment. It will end with some brief concluding remarks.

2. Emergency Social Welfare Measures in Context

Much like the Republic's weak culture of enforceable social rights, the right to social security and assistance payments and the institutional structures that give rise to it have been subject to

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few significant revisions since obtaining independence. The right itself does not stem from the either the directive principles of public policy contained within the Constitution,¹ nor a duty to protect and promote the family,² nor a right to property.³ Instead, it is a right that is provided for solely through primary legislation,⁴ and this legislation should be interpreted narrowly.

As previously argued elsewhere,⁵ this absence of a culture of socio-economic rights led to a significant restriction in terms of access to social welfare payments generally following the Global Financial Crisis, and the subsequent Bailout Package entered into by Ireland with the European Central Bank, European Commission and International Monetary Fund. Although it is outside of the scope of this analysis to look at these changes in detail, it suffices to say that core payments like the Jobseeker's Benefit and Allowance, Rent Allowance, and Child Benefit were some of the most deeply affected, and that this led to a higher level of material deprivation being experienced by many already marginalised groups - such as women, single parents, and the working poor. After the Republic's successful exit from the Bailout Programme, these changes remained in place in almost all instances. This was arguably driven by the executives own ideological leanings, which could no longer be attributed to the terms of the Bailout Package.⁶ For example, the current interim Taoiseach (Prime Minister) Leo Varadkar made the issue of social welfare fraud a central tenet of his candidacy for the office in 2017⁷ - a campaign that proved to be unsuccessful from a purely utilitarian perspective,⁸ and one which the Department of Social Protection quickly expressed regret over.⁹

It therefore presented as being somewhat unusual when, in light of the COVID-19 pandemic and increasing measures to slow the spread of the virus, Varadkar's interim government announced a significant opening up of the social welfare system, which by the 3rd of April were

¹ Article 45, Bunreacht na hÉireann.

² *MhicMathúna v Ireland* [1995] IR 484.

³ *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 IR 64.

⁴ *Meagher v Minister for Social Protection* [2015] IESC 4 (2015).

⁵ D. FERRI & C.E. O'SULLIVAN, *The Impact of the Economic Crisis on the Irish Legal System: Between Austerity and Constitutional Rhetoric*, *Federalismi* 26 (30 December 2016).

⁶ R. HICK, *Enter the Troika: The Politics of Social Security during Ireland's Bailout*, *Journal of Social Policy* (1)47 (2017) 1 - argued that the choices made during the Bailout Package were ideologically driven in many areas, with the terms imposed effectively offering an external party to attribute these cuts to.

⁷ See <http://leovaradkar.ie/2017/04/welfare-cheats-cheat-us-all/> (last visited 07/04/2020).

⁸ C. GALLAGHER, *Social welfare fraud detection falls despite Varadkar campaign* (16/10/2017) *The Irish Times* available at <https://www.irishtimes.com/news/politics/social-welfare-fraud-detection-falls-despite-varadkar-campaign-1.3256899> (last visited 07/04/2020).

⁹ RTE, *Official admits 'welfare cheats' campaign was a mistake* (07/12/2017) *RTE News* available at <https://www.rte.ie/news/politics/2017/1207/925784-welfare-cheats/> (last visited 08/04/2020).

estimated to have cost €8 billion.¹⁰ Many of these were provided for through specific emergency legislation,¹¹ but some were changes in practice which had a fundamental effect on the ability of individuals to engage with the Department of Social Protection, and access payments in a quick and efficient manner. For example, applications could now be made online for payments, where previously the view of even staff within the Department had been that there was a reticence to spend money, that the priorities of the department were often unclear and that the system is not designed to be responsive.¹²

The COVID-19 emergency payment, has also consistently been in an amount exceeding ordinary Jobseekers payments, despite its intention being almost identical to that of a Jobseeker's payment albeit time-limited: Jobseeker's Benefit payment facilitates labour market integration over an undefined period of time, transitioning to a more conditional payment as time progresses (Jobseeker's Allowance); whereas the COVID-19 payment deals exclusively who have lost their employment as a result of the pandemic. The first is a maximum of €203 per week, whereas the latter, as of the 24th of March, is €305 per week. The level of conditionality attached to the COVID payment is negligible, with the intention of ensuring that the widest number of affected persons are capable of applying for and receiving it without undue restrictions.¹³ Similarly, Illness Benefit increased to €350 per week for a maximum of two weeks, with the original 6 day waiting time removed. Whilst this may not seem significant, prior to COVID-19, this payment, and many others had previously been disproportionately affected by cuts in government spending. Although prior to the pandemic the executive had engaged in a process of 'disability proofing' budgets, the Disability Federation of Ireland had considered this to be inadequate and would be unlikely to lead to any significant changes¹⁴ - and the Illness Benefit would likely come within the scope of this criticism. These measures do not only extend to protecting workers who have been made redundant or find themselves without work during

¹⁰ RTE, Economic cost of Covid-19 could top €16 billion - Donohoe (03/04/2020) *RTE News* available at <https://www.rte.ie/news/business/2020/0402/1128100-exchequer-figures/> (last visited 08/08/2020).

¹¹ Emergency Measures in the Public Interest (Covid-19) Act 2020.

¹² See Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy' (21/08/2014), and Grant Thornton, 'Strategic Review of the Customer Facing Services' (Department of Social Protection, 2008).

¹³ See <https://assets.gov.ie/71304/268133c542ec42fc9c533b9f583ecfea.pdf> (last visited 08/04/2020).

¹⁴ Disability Federation of Ireland, Budget 2019 Press Release - DFI welcomes disability proofing of future budgets, available at <https://www.disability-federation.ie/news/press-releases/2018/10/09/budget-2019-press-release-dfi-welcomes-disability/> (last visited 08/04/2020).

the pandemic: a wage subsidy scheme was created in order to facilitate the retention of staff,¹⁵ and reduce the perceived need for redundancies or temporary layoffs.

Another hugely significant step taken by the government, is to ensure that the COVID-19 payment is available to almost every category of person within the State, regardless of their immigration status. The Migrant and Refugee Rights Centre notes that individuals on student visas, third-country workers with permission to work in the State on a full-time contractual basis, and even undocumented migrants are able to access it, and that for undocumented migrants, a firewall will operate between the Department of Social Protection and immigration officials to ensure their equal access to the payment without fear of reprisal.¹⁶ This is perhaps most notable, because one of the few consistent programmes of reform within the social welfare system prior to the Bailout Package was due to fears stemming from migration.¹⁷ Similarly, the often criticised immigration system has been effectively paused, and all migrants in the country who need to renew or register their immigration permission, as well as those who were on short-stay visas but have effectively been unable to leave Ireland, have had their permission to remain in the State renewed automatically for a period of two months to facilitate social distancing as well as to grant legal certainty to such persons.¹⁸

This is not to say that the general approach towards addressing the COVID-19 pandemic through social welfare measure has been without critique - the protections granted to tenants in particular to protect them from eviction have done little to assuage the burden that will be faced by many who lose their primary income but will still be expected to pay rent.¹⁹ However, for an executive which is historically disinclined to engage with social rights, the response adopted is a relatively clear break with party ideology, and the institutional biases of the State.

3. Asylum Seekers: Direct Provision, Social Distancing and Material Needs

Another issue that has come to light since the onset of the COVID-19 pandemic, is the well-being and safety of asylum seekers awaiting a determination of their claim. Currently, the

¹⁵ See <https://revenue.ie/en/corporate/communications/covid19/temporary-covid-19-wage-subsidy-scheme.aspx> (last visited 09/04/2020).

¹⁶ See <https://nascireland.org/know-your-rights/covid-19-social-welfare-updates> (last visited 08/04/2020).

¹⁷ C.E. O'SULLIVAN, *Europeanisation and the Irish Habitual Residence Condition*, *Journal of Social Security Law* 26(2) (2019) 79, 85.

¹⁸ See <https://www.thejournal.ie/immigration-permissions-5053375-Mar2020/> (last visited 09/04/2020).

¹⁹ See https://onestopshop.rtb.ie/images/uploads/general/COVID_Update_Guidance_Document_final.pdf (last visited 08/08/2020).

regime places such persons in a system referred to as Direct Provision, whereby their housing and material needs are provided for directly through suppliers determined by the Department of Justice. Although not expressly a social rights-based issue, the material needs, employment prospects, and more importantly health, of asylum seekers appear to be of lesser concern to the Irish executive at present than other categories of persons.

The legal basis for Direct Provision was established in the Department of Social Protection Ministerial Circulars 04/00 of 10 April 2000²⁰ and 05/00 of 15 May 2000,²¹ the latter of which has now been repealed. These circulars created an administrative basis for providing asylum seekers with room and board, which would be managed by the Reception and Integration Agency (RIA)²² within the Department of Justice and Equality. Asylum seekers are not free to choose where they live and are granted accommodation across the country based on the decision-making of the RIA.²³ A weekly allowance was initially paid to adults of €19.10 a week. A Working Group Report recommended that this be increased to €38.74 per adult per week,²⁴ and this was later implemented in 2019.²⁵ Parents initially received €9.60 per week per dependent child, before being increased in 2016 to €15.60.²⁶ The Working Group Report suggested that children receive a weekly allowance of €29.80,²⁷ and this was also eventually implemented in 2019. The intention of this system was to wholly eject asylum seekers from the primary welfare system, and to reduce the incentive for lodging claims in Ireland - in line with similar changes made for immigrants generally to the social welfare code. More recently, a right to work (both through direct employment and self-employed activities)²⁸ has been recognised and implemented for asylum seekers who remain within the Direct Provision system for a more

²⁰ DSCFA, SWA Circular 04/00 on Direct Provision to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (10 April 2000).

²¹ DSCFA, SWA Circular 05/00 on Direct Provision to Chief Executive Officers, Programme Managers, SWA Appeals Officers, Superintendent CWOs and CWO (15 May 2000).

²² See <http://www.ria.gov.ie/> [last visited 07/4/2020].

²³ DSFA, Circular 04/00 (10 April 2000), para. 1. See also, DSFA, Circular 05/00 (15 May 2000), para. 1.

²⁴ Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers, available at <http://www.justice.ie/en/JELR/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf/Files/Report%20to%20Government%20on%20Improvements%20to%20the%20Protection%20Process,%20including%20Direct%20Provision%20and%20Supports%20to%20Asylum%20Seekers.pdf> [last visited 07/04/2020], 5.27.

²⁵ Although this was rounded up to €38.80.

²⁶ Department of Social Protection, 'Government announces increase to the Direct Provision Allowance for Children' (Press Release) (05/01/2016).

²⁷ Working Group Report, 5.27.

²⁸ See <http://www.inis.gov.ie/en/INIS/form-LMA7.pdf/Files/form-LMA7.pdf> (last visited 07/04/2020).

durable length of time,²⁹ as will be discussed below in direct relation to the COVID-19 response.

Criticisms of Direct Provision have been a constant feature since its introduction. For example, it has been argued that accommodation centres are not designed for long-term residence.³⁰ This means that their standard of living - or lack thereof - has a substantial and lasting impact on those housed within it. It was also highlighted that among many rights, the right to an adequate standard of living is a core human right and are an extension of those within the 1951 Convention on the subject of Refugees.³¹ This is not helped by what are considered to be «systemic delays [which] continue to undermine the fundamental rights and freedoms of persons seeking asylum or other forms of protection in the State, particularly those asylum seekers in Direct Provision centres».³²

The overriding concern is that the conditions within these centres remain wholly inadequate, and are potentially detrimental to the health - both mental and physical - of the asylum seekers housed within Direct Provision, and are likely become more acute over time.³³ This is large part due to the centralised nature of services within the centres, and lack of personal space being provided to asylum seekers.³⁴ Although highlighted from the perspective of children, it has been noted that rooms are often shared by entire families, and in close proximity with others to whom they are not related.³⁵ As contracts with service providers do not necessitate any kind of intercultural training amongst staff or mandate true minimum standards for service provision, this problem arguably persists to this day.³⁶ This is not helped by the more recent ‘housing

²⁹ See *N.H.V v Minister for Justice and Equality and ors* [2017] IESC 35. The Department of Justice subsequently opted-in to Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29.6.2013, pp. 96–116 in order to regulate the right to work more clearly. There has been no significant change to the modality of welfare provision beyond this, with Direct Provision as a system remaining largely intact.

³⁰ Independent Expert on the Question of Human Rights and Extreme Poverty, Report of the Independent Expert on the Question of Human Rights and Extreme Poverty following: Mission to Ireland,(2011), Para 90.

³¹ *Ibid*, Para 91.

³² Irish Human Rights Commission Submission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights (2014), 62, main areas of concern, available at <http://www.ihrec.ie/publications/list/ihrec-designate-report-onicccpr-june-2014/> (last visited 07/04/2020).

³³ UN Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the 3rd and 4th periodic reports of Ireland, April 2011, CERD/C/IRL/CO/3-4, Para 20.

³⁴ Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Ireland (fourth monitoring cycle): Adopted on 5 December 2012, 19 February 2013, CRI(2013)1, Para 115.

³⁵ G SHANNON, Seventh Report of the Special Rapporteur for Children (2014), 56.

³⁶ Council of Europe: European Commission Against Racism and Intolerance (ECRI), ECRI Report on Ireland (fourth monitoring cycle): Adopted on 5 December 2012, 19 February 2013, CRI(2013)1, Para 115.

crisis' which has meant that asylum seekers are often housed in emergency accommodation, which are even by comparable standards not designed for long-term occupation.

In view of the current pandemic, many civil society organisations have underlined the need to urgently alter the system of Direct Provision to facilitate social distancing and to address the healthcare and welfare needs of people within the system. As the Migrant and Refugee Rights Centre highlighted, rooms continue to be shared in some centres by up to six people, and these include people who could be considered 'immuno-compromised'.³⁷ A more recent letter circulated by Dr. Liam Thornton of University College Dublin (UCD)³⁸ amongst legal scholars, practitioners, medical experts and other civil society organisations was co-signed by approximately 900 of the same by the 1st of April,³⁹ suggesting a strong consensus on this issue. The Department of Justice, by that time, had announced the addition of 650 further beds in other sites with the intention that this would facilitate self-isolation where necessary as well as social distancing in a broader sense.⁴⁰ The actual implementation of this, however, remains unclear - as of the 5th of April, asylum seekers were continuing to highlight that their concerns about the systemic issues of overcrowding and lack of resources within Direct Provision generally which will continue to increase their risk of infection.⁴¹ In this regard, the level of response from the Irish State would appear to be inadequate, and constrained by institutional attitudes and perceptions of the system.

From a social welfare perspective, there are significant questions regarding the ability of asylum seekers who have found outside employment to access the COVID-19 emergency payment on an equal basis with not only Irish citizens, but also all other categories of migrants. When, in 2018, the Irish State enacted a limited right to work amongst asylum seekers via the Recast Reception Conditions Directive,⁴² the initial level of interest was quite high, with some 10% of

³⁷ The Irish Times View, 'Irish Times view on coronavirus in direct provision: a sharp wake-up call' (24/03/2020) *The Irish Times* available at <https://www.irishtimes.com/opinion/editorial/irish-times-view-on-coronavirus-in-direct-provision-a-sharp-wake-up-call-1.4211154> (last visited 08/04/2020).

³⁸ <https://people.ucd.ie/liam.thornton> (last visited 08/04/2020).

³⁹ <https://docs.google.com/document/d/1ErM23muJ7nWuaMhFZ51yy8VzSSmKBdfwdeyfvHLhvk/edit> (last visited 08/04/2020).

⁴⁰ S. POLLACK, Coronavirus: More than 650 beds secured for asylum seekers in direct provision, (31/03/2020) *The Irish Times* available at <https://www.irishtimes.com/news/social-affairs/coronavirus-more-than-650-beds-secured-for-asylum-seekers-in-direct-provision-1.4217128> (last visited 08/04/2020).

⁴¹ C. O'SULLIVAN, Asylum seekers fear increased risk of infection due to overcrowding, (05/04/2020) *RTE News* available at <https://www.rte.ie/news/2020/0405/1128671-direct-provision-coronavirus/> (last visited 08/04/2020).

⁴² See Directive 2013/33/EU.

residents within Direct Provision being granted a right to work within 6 weeks.⁴³ Based on statistics from 2019, it is estimated that approximately 15% of the population within Direct Provision was likely in employment prior to the COVID-19 outbreak in Ireland.⁴⁴ However, despite the almost universal application of the COVID-19 payment, asylum seekers living in Direct Provision are not considered to be entitled to it, even where they would appear to meet the qualifying criteria. The justification for this appears to be that residents within Direct Provision are already in receipt of the daily allowance as well as the services directly provided to them. Where they are in employment and reside outside of Direct Provision, the payment will then be available to them.⁴⁵

The degree to which this is intentional or merely a technical oversight remains to be seen, but it does raise further concerns over access to basic amenities - with the low level of provision at many, if not most, centres, the additional income received from outside employment would help many residents to do so using their own personal resources. With these income streams cut off for an indeterminate period of time, this can be viewed as another concerning development from both a health and well-being perspective for what is an already marginalised and at risk population.

4. Concluding Remarks

The rapid changes made to the social welfare system in light of the COVID-19 pandemic are certainly laudable. Within a short period of time, the Irish executive signalled its commitment to facilitating measures which would help flatten the curve and slow down the spread of the virus through the reinforcement of existing social rights that had for some time, been continually diminished. However, the Taoiseach has already signalled that these measures are only an emergency measure,⁴⁶ and are unlikely to represent an overall shift within the modality of welfare provision that exists within Ireland, with social rights likely returning to their pre-pandemic levels once this crisis has ended. In this way, the overall ideologies of the executive

⁴³ S. BARDON, More than 500 asylum seekers have been granted work permits, (09/08/2018) *The Irish Times* available at <https://www.irishtimes.com/news/social-affairs/more-than-500-asylum-seekers-have-been-granted-work-permits-1.3590215> (last visited 08/04/2020).

⁴⁴ C. THOMAS, 'Considerable challenges': Direct Provision residents facing employment barriers despite right-to-work' (14/03/2019) *The Journal* available at <https://www.thejournal.ie/considerable-challenges-direct-provision-residents-facing-employment-barriers-despite-right-to-work-4535651-Mar2019/> (last visited 07/04/2020).

⁴⁵ R. O'HANRAHAN, Direct Provision jobless unable to claim Pandemic Unemployment Payment available at <https://www.joe.ie/politics/direct-provision-covid19-pandemic-695184> (last visited 07/04/2020).

⁴⁶ <https://www.thejournal.ie/leo-varadkar-welfare-5065257-Apr2020/> (last visited 08/04/2020).

will remain intact in the long-term. Similarly, the response to asylum seekers living in Direct Provision falls short of that provided to the general population, and may represent a continuation of governmental attitudes to this marginalised community who, by virtue of their more institutionalised setting, continue to be ‘othered’ and put at greater risk than the general population. Due however to the ongoing nature of this crisis, it remains to be seen how social rights will be dealt with if the pandemic does not resolve itself within a more discreet period of time, or how these issues might be addressed in the more immediate future.