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Socio-Economic Rights & Budget Analysis: Some Notes on Available Resources, 'Progressivity' and Non-Retrogression

Human Rights in Ireland welcomes this guest post from Dr John Reynolds. John is a lecturer in law in NUI Maynooth. These are John's notes from the Free Legal Advice Centres (FLAC) seminar FairerBudget, Fairer Society: A human rights analysis of Budget 2015 from Irish civil society held today, 16 October 2014.

We are all too aware of the immediate and cumulative impacts that relentless austerity budgets have had on people in Ireland over the last seven years, with the brunt of that austerity disproportionately meted out on working class communities, low-income families and those most in need of social protection. Structural adjustment during that time has been implemented in keeping with right-wing thinking, coming in the form of a 2:1 ratio of cuts in services to tax increases (themselves often regressive in nature). Levels of poverty and inequality have deepened. Socio-economic protections have been resolutely subordinated by the state's loyalty to financial institutions and the imperatives of transnational capital. There has been no departure from the race to the bottom for foreign investment in which Ireland is engaged, with the diversion of resources to corporate tax reduction measures continuing in various guises.

In the face of such market hegemony, what can international human rights discourse offer when it comes to social justice advocacy and budget analysis?

The distribution of housing, healthcare, education and water is rooted in the underlying struggle for resources between sectors of society, over which ideological lines are drawn and public policy is formulated. *Rights* to housing, healthcare, education or water, therefore, cannot be limited to narrow formalistic conceptions of justiciable legal claims. Implementation of the state's obligations under international human rights treaties pertains as much to the legislative and executive branches as it does to the judiciary. All the more so when it comes to the International Covenant on Economic, Social & Cultural Rights, where constitutional protection for the rights that Ireland has pledged to uphold remains distinctly lacking. Deploying the language of socio-economic rights in this sense is best understood as one tactic within a broader strategy of progressive or radical politics aimed at distributive justice.

In this context, the increased attention devoted to budget analysis and fiscal policy in recent times by human rights organisations, UN Special Rapporteurs and legal scholarship is an important step in opening up the political space to socio-economic rights discourse. This is set against the backdrop of an evolving conversation on the need for a radical transformation from mainstream economics to the assertion of control over the market for social benefit. It is important to be clear from the outset, however, that the field of human rights itself is coming from a low base in this regard. International human rights mechanisms and bodies have traditionally maintained an agnostic approach to the choice of economic model, and as such have been weak in confronting financialisation and the neoliberal economic order. In 1990, at a watershed moment for the global expansion of neoliberalism, the UN Committee on Economic,

Social & Cultural Rights took the opportunity to clarify that ‘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.’

While some inroads have since been made by UN Special Rapporteurs at least acknowledging that the policies of the World Trade Organisation can have negative consequences on social rights, for instance, an overarching ‘trade-related, market-friendly paradigm of human rights’ has implied acquiescence to the prevailing economic orthodoxy and its steady erosion of labour rights standards and public services.

Those structural constraints notwithstanding, there are strands of international human rights law and discourse that can inform a more progressive approach to budgetary policy when it comes to the state’s obligation to devote the ‘maximum of its available resources’ towards the realisation of economic, social and cultural rights. The Committee has stated that ‘the “availability of resources”, although an important qualifier to the obligation to take steps, does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction’, and that ‘even in times of severe resource constraints, States parties must protect the most disadvantaged and marginalized members or groups of society.’ These ‘minimum core’ obligations are supplemented by an ongoing commitment to progressively realising the full range of economic, social and cultural rights for all.

A principle of non-retrogression has been constructed accordingly, under which retrogressive measures imposed in a developed economy should be almost impossible to justify. Aoife Nolan has suggested, however, that the past failures of the Committee on Economic, Social & Cultural Rights in clearly marking out the parameters of retrogressive measures (as well in engaging with issues around privatisation) have limited the capacity of social justice campaigners to contest specific budgetary moves as violations of the Covenant. The Committee’s practice does finally appear to be moving on this more recently though, perhaps prompted by the work of several Special Rapporteurs with mandates over socio-economic rights who have gone furthest in developing the normative framework around tax, fiscal and budgetary policy as it relates to available resources and non-retrogression.

Among the more progressive authorities in this regard have been Magdalena Sepúlveda as Special Rapporteur on Human Rights and Extreme Poverty, and Olivier de Schutter in his capacity as Special Rapporteur on the Right to Food. Before finishing her mandate earlier this year, Sepúlveda built on her previous examination of fiscal contractions and cuts to social protection systems as deliberately retrogressive measures in an investigation that emphasised of the critical role of fiscal policy, and particularly taxation policy, in tackling inequality and vindicating socio-economic rights. She highlighted, among other things, the needs to: increase reliance on direct and personal taxes on income; move away from indirect and regressive taxes on consumption; design taxes so as to that reduce regressive impact and gender inequalities, including in relation to unpaid care work; ensure that public revenue raised from the financial sector is commensurate to the sector’s profitability and the risks it generates; implement a financial transaction tax; and ensure that affected communities and future generations are protected in the exploitation of natural resources, with extractive industries taxed sufficiently. De Schutter made submissions to Sepúlveda as part of this process, in which he reinforced the importance of raising taxes as a means available to states to progressively improve access to

socio-economic rights, and warned of the converse negative impacts in allowing tax avoidance and tax incentives to foreign investors. He pointed out that a 'regressive system of taxation seriously limits the redistributive aspect of [social] programmes', concluding that in such circumstances a state is inherently failing to deploy the maximum of its available resources to the realisation of socio-economic rights. Another notable submission to Sepúlveda from the Independent Expert on the Effects of Foreign Debt on Human Rights emphasised that: *policy-based loans and debt relief from the international financial institutions typically require the borrower countries to implement a range of economic and fiscal reforms including the introduction of a value-added taxes and other regressive taxes, as well as tax holidays for foreign corporations. Although the ostensible aim of these policies is to promote economic growth and restore the debt servicing capacity of borrower countries, research indicates that they, in fact, have a negative impact on the realization of human rights over the longer term and that they have contributed to increasing poverty and marginalization among the poor in debtor countries.*

These findings of the UN special procedures have been supplemented by academic analysis which suggests that counter-cyclical tax policies (to manage the periodic structural crises which are endemic to capitalism) are necessary to uphold the principle of non-retrogression.

The lack of adherence to principles of non-retrogression and tax justice in successive austerity budgets in Ireland since 2008 has been well documented. The Centre for Economic and Social Rights, for instance, highlighted the explicit priority given (in the National Recovery Plan 2011-2014) to 'drastic cuts in social expenditures over progressive tax reforms in a country ranking among the lowest in Europe in terms of overall tax levels.' Budget 2015 appears to stem the tide in terms of those drastic cuts (although the estimates provided by the government suggest that 'real' public spending—factoring in inflation—will continue to decrease through to 2018), but remains problematic from a social justice perspective when it comes to tax policy. Finance Minister Michael Noonan made reference in his Budget 2015 speech to the 'progressivity' of the Irish tax regime. The Department of Finance has repeatedly emphasised, even in the context of previous austerity budgets, that it equates the existence of income tax 'progressivity' with a normative concept of 'fairness'. This focuses on one component of the tax system only, and fails to account for the trend toward taxes and charges that are regressive in character; that is, indirect taxes such as water charges or VAT increases, which are not progressively scaled according to concepts of equality or ability to pay. From a socio-economic rights perspective, such a shift to indirect taxation may not be 'fair' (the continuation of general 'progressivity' in the income tax regime notwithstanding) and may be retrogressive in effect.

In the context of Budget 2015, the net impact of newly introduced regressive water charges and the way in which income tax reductions are scaled means that those at minimum-wage level will benefit least in real and relative terms. Many of those earning between €15,000 and €35,000 will be actually be left in a worse financial situation overall next year. Those earning €70,000, more than double the average wage and falling within in the top 10% of income distribution, will benefit most in relative terms from the budget. The choice to devote available resources to reducing the higher rate of income tax has left social justice campaigners understandably 'outraged', and dilutes the progressivity of the income tax system.

The tax credits and benefit allowances offered as sweeteners to reduce water charges slightly does not alter the fundamentally regressive nature of the water tax, and fails to answer broader

questions about the government's decision to turn water into a commodity. As experience elsewhere has shown, it can be a very quick and slippery slope from commodification to privatisation. This is all the more the case in an international trade and investment climate that seeks to create increased 'market access' to natural resources and public services, as exemplified in Europe's case in the Transatlantic Trade and Investment Partnership currently being negotiated with the United States. In this regard, the likelihood of commodification and privatisation amounting to retrogressive steps in the state's fulfilment of the right to water must be weighed. In resisting these steps, as Paul O'Connell explains, the Right2Water campaign's use of the language of rights to assert that water is 'a public good that should be funded through general taxation, available to all on the basis of need, and protected from the vicissitudes and inequities of the market' is more than a mere appeal to a legal provision; it is 'a rejection of the idea that there is no alternative to the commodification of essential services and resources.' Questions around budget deficits, borrowing and debt have garnered increased attention of late from international human rights mechanisms. A substantial chunk of the Irish state's resources continue to be directed to interest repayments on the national debt, which includes socialised commercial bank debt. The work done under the mandate of the Independent Expert on the Effects of Foreign Debt on Human Rights, in particular in relation to conceptions of illegitimate debt, provides interesting tools with which to analyse the allocation of available resources to accumulated debt in relation to socio-economic rights obligations. Against the sense of a prevailing 'dictatorship of no alternatives', we have seen that it is possible to imagine radical alternatives in this sphere. Argentina recently passed legislation to conduct a public audit of its national debt with a view to assessing whether it is composed of any illegitimate or odious debt. Countries such as Ecuador and Norway have cancelled debt previously on the back of similar investigations. And just last month, the UN General Assembly adopted aresolution on the 'establishment of a multilateral legal framework for sovereign debt restructuring processes', aimed at preventing debt crises and financial speculation from undermining socio-economic rights in developing countries in particular. It was adopted by 124 votes in favour to 11 against. Despite our own harrowing debt crisis experience, Ireland voted in the minority with the global financial centres of Britain, US, Germany and Japan. This is telling of where the current government's loyalties and solidarities lie, and of its attitude to financial creditors and socio-economic rights respectively.

A final point worth noting pertains to the norms of transparency and participation that international human rights standards require of a budgetary process. The Economic Management Council was created in the context of an 'unprecedented national economic emergency' that necessitated 'strong, resolute leadership.' This so-called "super-cabinet" structure was mandated to meet on a weekly basis to oversee key economic, budgetary and banking matters. Operating as 'the equivalent of a war cabinet', it is open to obvious critique as a further concentration of executive power, utterly lacking in democratic accountability and treading on precarious constitutional terrain. It was accepted by establishment commentators, however, as an exceptional, but temporary, necessity. In line with the tradition of the exception becoming the norm, the EMC was quickly championed by Dan O'Brien as 'so good it should be made permanent.' And despite the recent emergence of triumphalist narratives that the emergency has been overcome and the age of austerity is now behind us, there are no signs of the economic 'war cabinet' being dismantled. The other main site of decision-making power when it

comes to the budget, the Department of Finance, formally accepts pre-budget submissions, but has shown little interest in meaningful external consultation. So while Irish civil society has developed a strong sense of engagement around budget policy, the impact of any alternative social vision presented remains marginal. This year, Social Justice Ireland presented analysis in its pre-budget submissions which examined six different options of income tax changes being contemplated by the government. The study concluded that 'the most unfair option would be to decrease the 41% tax rate'. Yet this was the very course taken by the Minister for Finance, and one which he has defended as 'very fair'