

FLAC Briefing: A Human Rights Approach to Budgeting

FLAC (Free Legal Advice Centres) is a human rights organisation promoting equal access to justice for all. FLAC recognises that respect for fundamental human rights, as well as their promotion and realisation requires the State to allocate resources towards those objectives. The commitment of the Irish State to protect, advance and realise human rights is evidenced by its ratification of a number of human rights treaties. The decisions that it makes and the way that it makes them in its annual budgeting process is also part of the State duty on foot of its commitments to human rights.

This briefing document contains information on the overarching human rights principles that set a framework for budgetary processes and decisions to ensure a sufficient level of participation, transparency, accountability and protection of a minimum core of human rights. It also sets out practical steps on how to use human rights law as indicators to instruct and assess budgets in a way that is quantifiable and permits reflection on how a State's budget complies with its legal obligations.

Concepts and Principles of the Human Rights Based Approach to Budgeting

In the course of a post-Budget 2014 event in Dublin in October 2013, organised by FLAC and the Equality Budgeting Campaign Dr Liam Thornton of UCD explained why it is necessary to consider human rights in the State budgeting process thus:

The State, freely and without compulsion, undertook international obligations to ensure that rights to an adequate standard of living, housing, healthcare, protection of the social and economic rights of children, women and those from minority backgrounds apply to this State. These legal rights are guided by several principles, including:

- The dignity of all;
- Equality as a social good that needs to be upheld and enforced;
- Non-discrimination in the enjoyment of human rights, unless distinctions can be justified as legitimate and proportionate;
- Very importantly, consultation-that does not mean one vote at the ballot box every few years, but an on-going dialogue between all as regards the political choices and legal human rights obligations that should attach to the budgetary process.

Under international human rights law the State has several tiered duties, to respect, protect, promote and fulfil its international obligations as regards social and economic rights. This includes obligations as regards non-retrogression of social and economic rights, while not absolute, exceptions to this general principle would not, I argue, be applicable in Ireland.

In her report to the United Nations, the then UN Special Rapporteur on Extreme Poverty and Human Rights Magdalena Sepúlveda Carmona put the need for consideration of human rights law in state budgeting thus:

[t]he rights to **participation, accountability, transparency and access to information** are critical human rights principles that also apply to fiscal policies and must be implemented throughout the policy cycle,

from design of budgets and tax codes, allocation of expenditure, through to monitoring and evaluation of impact.¹

Ms. Sepúlveda explained further what is meant by participation, which involves “**effective and meaningful**” civil society involvement as well as the inclusion of those who “will be directly affected by such policies, including people living in poverty”.²

The State also has the responsibility to ensure that all government decisions and policies are **non-discriminatory**, either directly or indirectly. In this way the principle of **equality** is central to human rights law and must be applied in budgeting decisions also.

But what does the Human Rights Based Approach to Budgeting actually mean in practice?

In order to realise human rights, the Government has to **protect, promote** and **fulfil** these rights throughout the budgetary process in all budget-related decisions, legislation, policy and practice. The remainder of this paper will outline the human rights law measures which form the framework to allow the State to comply with international human rights law in its budget work.

⇒ Progressive realisation

Under international human rights law, some rights are immediately applicable to all people at all times. Such a right is the right not to suffer discrimination. For other rights, in particular many of those protected by the International Covenant on Economic, Social and Cultural Rights³ the State is obliged to “progressively realise” the full enjoyment of the rights named in the treaty.⁴ These include rights guaranteeing adequate income, decent working conditions, family life, healthcare, housing, education, cultural life and social security, among others.

In terms of budgeting, ‘progressive realisation’ can take many different forms – direct funding, application of other resources, introducing new programmes, reducing restrictions on certain entitlements/programmes, or changing policy direction to strengthen the rights of marginalised groups. Generally speaking, it occurs when a State takes a positive measure or step that builds on what went before.

Progressive realisation is not the same as putting off the duty. Progressive realisation must take place all of the time. It is not dependent on economic growth but rather requires “the **effective** use of **available** resources”.⁵ The burden of proof is on the State to show that every effort has been made to progress economic, social and cultural rights within the resources it has to hand.

⇒ Protection of the minimum core of rights.

The state has a **core obligation** to ensure at least **minimum essential levels** of economic, social and cultural rights.⁶ These levels safeguard a person’s **right to an adequate standard of living**, which is interrelated with

¹ Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, pg 7. Available online at http://www.justiciafiscal.org/wp-content/uploads/2014/06/A_HRC_26_28_ENG.pdf

² Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, pg 8. & Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, art. 23.

³ Ireland ratified ICESCR in 1989.

⁴ For the full text of the Covenant, see the UN website at <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

⁵ Limburg Principles on the Implementation of the ICESCR, art. 23.

⁶ E/1991/23, annex III, para. 10

the right to health, education, social security, housing and adequate employment to name a few. The test is whether the people in the State can **live in dignity**.

The minimum core obligations will be different for every country and cannot be fixed at a set amount. However, the UN Committee on Economic Social and Cultural Rights has clarified 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.⁷

A minimum core is only the baseline on which the State builds; “put differently, the core content of rights should be seen as a bottom or floor from which states should endeavour to go up”.⁸

While there is no fixed measure internationally, the right to housing has been explained as the right to live somewhere in security, peace and dignity.⁹ There are equally minimum levels of obligations to provide access to basic sanitation, to an adequate supply of water, to essential drugs¹⁰ and for the government to be responsible for monitoring the national housing situation.¹¹ In education, the minimum core encompasses free compulsory primary education and the state provision of educational institutions that have the freedom to conduct scientific research and creative activity.¹² If the State fails to protect a person’s right to live in dignity, then it cannot claim to have safeguarded the minimum core under human rights law.

➔ Assessing the rights

Human rights give us useful tools to help assess whether a right is protected by the State to the extent that it should be. We can ask in relation to any measure taken or omitted to be taken in a State Budget, does this give people a fundamental right **which is adequate, affordable and accessible**.¹³ The State has a duty to use public finances as effectively as possible for the maximum benefit of society.¹⁴

⊙ Adequate

Each human right can be examined in terms of adequacy in budgetary provision. Within international human rights law, the word “adequate” is often used in reference to rights (as in the right to adequate housing or the right to an adequate standard of living) but the word itself can also be used to assess whether the State is compliant with human rights law when making decisions on the budget. The interpretation of “adequate” depends on each State’s own situation. In order to understand what

⁷ Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003).

⁸ A R Chapman and Sage Russell 'Introduction' in *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (eds.) Insentia Antwerp, Oxford, New York (2002), pg 16.

⁹ Committee on Economic, Social and Cultural Rights, 'General Comment No. 4: The Right to Adequate Housing' (13 December 1991) UN Doc E/1992/23 para 7.

¹⁰ Committee on Economic, Social and Cultural Rights, 'General Comment No. 14, The right to the highest attainable standard of health' U.N.Doc.E/C.12/2000/4 (2000) paragraph 43.

¹¹ Committee on Economic Social and Cultural Rights, 'General Comment No. 4, The Right to Adequate Housing' U.N. Doc. E/1992 /23 annex III at 114 (1991) paragraph 13. See also the Committee on Economic, Social and Cultural Rights, 'Consideration of Reports Submitted By States Parties under Article 16 and 17 of the Covenant' U.N.Doc.E/C.12/GBR/CO/5 (2009).

¹² Committee on Economic Social and Cultural Rights *General Comment No. 3, the Nature of States Parties Obligations* U.N. Doc. E/1991/23 Annex III at 86 (1990) paragraph 5.

¹³ There are other questions too that will be asked, relating to quality etc.

¹⁴ Limburg Principles on the Implementation of the ICESCR, art. 23.

“adequate” means in terms of budgetary decisions in Ireland, we need to look at many issues. These include funding, other resources, awareness-raising (has a budget been allocated for information about the existence or extension of a right?), legislative protection (if required for a budgetary measure, this is usually introduced within a few months of the budget), policy (this will flow from any new measures introduced or removed by legislation on a particular right) and practice (if new policy has been introduced on foot of the budget, is the practice of public servants adequate and effective enough to protect the right or ensure it is enjoyed?). On any of these matters, asking the question ‘is it adequate’ will help produce an answer about whether the measure is compliant with human rights.

Let’s look at a practical example: On the adequacy of budgeting for the right to education for children, we should determine the budget allocation for education this year, comparing it with last year’s budget and considering the increase/decrease in the number of children attending school this year. Is the funding expressly for primary/secondary/tertiary education, keeping in mind where the most investment is needed? Is there provision for new buildings or investing in old schools? Is there a budget for hiring staff, is it sufficient in terms of amount and number of places, is there a moratorium on staff, does it affect the teacher/children ratio? Are there new schemes to reach out to minorities who are vulnerable and disadvantaged? For children with a disability, is there provision to make education easily accessible and of a high standard? Was new legislation introduced to ensure protection of all children by the State and how is it being implemented?

If the answer to any or all of these questions is no, then the question has to be asked as to whether the State is actually meeting its legal obligations in terms of adequately protecting, promoting and fulfilling each child’s right to education.

Each decision in the budget process should be interrogated on whether it is adequate enough to protect affected certain rights.

⦿ Affordable

The main question here is, ‘have the decisions within the budget made the human right in question (education, health, housing and so on) more affordable?’ ‘Affordable’ would mean that people with the least income in society - or who are dependent on the State for support - find accessing a right more possible; or that the majority of people can afford to access the right. If the government introduced charges or fees that create a financial obstacle to enjoying a right, then it can be surmised that it is not affordable for all, most, some or marginalised groups.

The enjoyment of human rights cannot be based on direct or indirect discrimination, this is ‘non-derogable’; in other words it cannot be limited or suspended under any circumstances. Tax relief of some form can be interpreted as increasing the affordability of certain human rights, but increased taxes could have the opposite effect, depending on their levels. A lower income threshold to qualify for public services (such as a medical card or eligibility for legal aid) may also impact the affordability of a right or rights. Having exemptions from taxes or charges based on financial hardship is likely to make a necessary service more affordable for poor people but the human rights analysis will also ask how such waivers are enforced by public servants. This means appropriate training, information and guidelines, for

example. All these implications must be considered by the Government in making budgetary decisions to safeguard human rights and ensure the State's compliance with international human rights instruments.

⦿ Accessible

A right is accessible if people are not restricted from realising it and are actively supported to do so; this might involve incentives, tailored schemes or programmes. The more people who have equal access to a human right, the more accessible it is. Budget decisions can make education, housing, health, social security, and legal aid either more or less accessible in terms of finances and restrictions in policy or law. Thus we might expand that definition: **The more people who have access to a public or a publicly funded service that supports a human right, the more accessible that right is.** The State is obliged to make sure that people are aware of their rights to access a service or entitlement; the State's annual budget must accordingly provide for promotion of a service or facility if it is necessary to ensure the accessibility of a right to society as a whole.¹⁵ In conjunction with this, public servants must deliver services in an effective and efficient manner, something which must be considered when the cost and resource implications of implementing budget decisions are being worked out.

➞ Immediate Realisation

Outside of providing the basic minimum core, the State **must also meet some obligations immediately.** The Committee on Economic, Social and Cultural Rights has expanded on what obligations must be implemented straight away by the State. The State has an immediate duty to take steps towards realising economic, social and cultural rights; this is not dependent on resources or the concept of progressive realisation.¹⁶ The right of non-discrimination is one which must be respected, protected and fulfilled immediately by the State; this means equality in terms of wages for work of equal value, equality between genders and non-discrimination of children on the basis of parentage.¹⁷

➞ Maximum Available Resources

Magdalena Sepúlveda has made clear the responsibilities of States to realise human rights in times of recession. She reminds us that even in times of resource constraints, States must use their "maximum available resources" to progressively realise ESCR in an effective manner:

This principle should guide State's decisions and priorities in generating, mobilizing and allocating resources in order to permit the realisation of human rights.

➞ Non-retrogression

A State cannot roll back on progress made on human rights realisation, except in very limited circumstances. Any deliberate action or omission by the State of a retrogressive nature requires careful consideration¹⁸. For

¹⁵ Concluding Observations of the Committee on Economic, Social and Cultural Rights, United Kingdom, U.N. Doc. E/C.12/GBR/CO/5 (2009).

¹⁶ Committee on Economic, Social and Cultural Rights, 'General Comment No. 14, The right to the highest attainable standard of health' U.N.Doc.E/C.12/2000/4 (2000) paragraph 30; Committee on Economic Social and Cultural Rights, 'General Comment No. 3, The Nature of States Parties Obligations' U.N. Doc. E/1991/23 annex III at 86 (1990) paragraph 2.

¹⁷ Committee on Economic Social and Cultural Rights 'General Comment No. 3, the Nature of States Parties Obligations' U.N. Doc. E/1991/23 Annex III at 86 (1990) paragraph 5.

¹⁸ Committee on Economic Social and Cultural Rights, 'General Comment No. 3, The Nature of States Parties Obligations' U.N. Doc. E/1991/23 annex III at 86 (1990) paragraph 9.

instance, in relation to the right to housing, the UN Committee on Economic, Social and Cultural Rights has clarified:

A general decline of living and housing conditions, directly attributable to policy and legislative decisions by State parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.¹⁹

States must explore revenue-raising alternatives before making cuts that would directly or indirectly affect the enjoyment of economic, social and cultural rights, such as cuts in the public sector, public services or social protection. This has very clear implications for budgeting.

⇒ Impact assessments

Impact assessments have been proposed by various UN human rights committees.²⁰ States should “conduct **human rights assessments** of fiscal policy periodically and with broad public **participation**, including **analysis** of the distributional consequences and tax burden borne by different income sectors and disadvantaged groups”.²¹

Ms Sepúlveda has made strong recommendations to States to “institute fully transparent public oversight over the granting and monitoring of tax incentives, and conduct periodic assessments of social benefits and human rights compliance, informed by broad public participation, especially by individuals who will be most affected”.²²

While the Department of Social Protection publishes its own assessment of the impact of the annual State Budget, other government departments either do not do such assessments or, if they do, they do not publish them. Human rights impact assessments, particularly on poverty, gender and equality, have been done in Ireland²³ in the past and are undertaken in

other jurisdictions.²⁴ Such assessments are practical measures that can be adopted by the State to avoid disproportionately affecting some groups more than others in society.

¹⁹ Committee on Economic Social and Cultural Rights, ‘General Comment No. 4, The Right to Adequate Housing’ U.N. Doc. E/1992/23 annex III at 114 (1991) paragraph 11.

²⁰ Committee on Economic, Social and Cultural Rights, General Comment 2, International technical assistance measures (Fourth session, 1990), U.N. Doc. E/1990/23, annex III at 86 (1990) & Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties’ obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991) & Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002) & Committee on Economic, Social and Cultural Rights, General Comment 17, the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), U.N. Doc. E/C.12/GC/17 (2006) & Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009) & Committee on Economic, Social and Cultural Rights, General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a)), U.N. Doc. E/C.12/GC/21 (2009) & General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) pg 21 “Implement rights-based budget monitoring and analysis, as well as child impact assessments on how investments, particularly in the health sector, may serve the best interests of the child”.

²¹ Pg 20, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona see here, http://www.iusticiafiscal.org/wp-content/uploads/2014/06/A_HRC_26_28_ENG.pdf

²² Pg 21, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona see here, http://www.iusticiafiscal.org/wp-content/uploads/2014/06/A_HRC_26_28_ENG.pdf

²³ http://www.eapn.ie/pdfs/23_Poverty%20proofing%20-%20the%20Irish%20experience.pdf

²⁴ <http://www.scotland.gov.uk/Topics/people/Equality/18507/13477>

Conclusion

The human rights approach to budgeting can and should be implemented by governments to ensure a greater level of fairness and respect for human rights, even in a recession. There are a host of different human rights indicators, such as adequacy, affordability etc.

For civil society organisations, these principles of international human rights law – such as consultations (participation), transparency, accountability, minimum core provision and equality & non-discrimination - are practical ‘asks’ to improve current budgetary processes and the situation of their particular constituency.

Civil society organisations can assess the government’s performance in terms of budget proposals by applying human rights language of adequate, affordable, accessible, dignity, non-retrogression, immediate realisation and impact assessments which were expanded on above. This will ultimately result in finding the government either compliant or non-compliant with its international legal obligations within the budgeting system in place.

Resources for Further Reading

- FLAC, *Respecting Rights in a Recession*, July 2011 <http://bit.ly/1vAtJzN>
- FLACsheet, *Realising Rights in a Recession*, September 2011 <http://bit.ly/1ug61s2>
- ‘Budget 2014: Ireland & Human Rights Budgeting’ by Dr Liam Thornton available at <http://bit.ly/1tFB4F>
- ‘Budgeting for Economic and Social Rights: A Human Rights Framework’ by Queens University Belfast available at <http://bit.ly/1wXEPHb>
- ‘Measuring State Compliance with the Obligation to Devote the "Maximum of Available Resources" Realizing Economic, Social and Cultural Rights’ by R Robertson (1994) 16 *Human Rights Quarterly* 693 – 714.
- ‘Overview of Budget Analysis’ – Working Paper for Amnesty Ireland by Prof Rory O’Connell available at <http://bit.ly/1wXFoYk>
- ‘Human Rights and Budget Monitoring - A Tool to Track Human Rights Realization’ by UN OHCHR (re housing in particular) available at <http://bit.ly/1wXFHCH>
- *Moving Towards Human Rights Budgeting: Examples from Around the World*, NESRI, September 2011, see www.nesri.org
- Human Rights Budget Work – from around the world – <http://www.humanrightsbudgetwork.org/>
- Examples from Scotland <http://bit.ly/1wXGMKs>
- Examples from Mexico: <http://bit.ly/1wXGK5r>
- ‘Measuring Human Rights’ by Todd Landman and Edzia Carvalho available at <http://bit.ly/1wXGsLX>
- Report of Magdalena Sepúlveda Carmona, the UN Special Rapporteur on extreme poverty and human rights to the 26th Human Rights Council Session, 22 May 2014, available at <http://bit.ly/1wXGvHF>.