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CHAPTER 13

INTRODUCTION: THE ECHR, SOCIO-ECONOMIC DISADVANTAGE & ACCESS TO JUSTICE

LIAM THORNTON AND JUDY WALSH

“There are outsiders, always”
Eavan Boland, *Outside History* (1990)

[13.01] This Part addresses the dual, interrelated themes of socio-economic rights and access to justice. Both themes raise questions about the capacity of human rights law to effect positive social change in practice. The indivisibility and interdependence of all human rights is a core feature of the contemporary human rights regime, yet the inadequacy of mechanisms for redressing socio-economic rights violations in particular continues to feature in debates about the potential of transnational and domestic legal systems to combat social exclusion. The four chapters in this section, which are introduced below, tease out how well the Convention and the ECHR Act serve the interests of people living in poverty and other vulnerable populations. Significantly, they interrogate substantive and procedural aspects of European human rights law from the vantage point of such groups. As the UN Special Rapporteur on extreme poverty and human rights observes ‘access to justice’ does not simply correlate with the ability to invoke one’s rights, it also encompasses the substance of those rights:

[M]any laws are inherently biased against persons living in poverty, do not recognize or prioritize the abuses they regularly suffer, or have a disproportionately harsh impact on them…

For example, in many legal systems, economic, social and cultural rights are not sufficiently protected, and discrimination on the grounds of socioeconomic situation is not recognized. Similarly, issues such as abuses in the informal employment sector or the exploitation of tenants by landlords, all of which disproportionately affect persons living in poverty, are often not legislated against in an effective manner. Meanwhile, actions which are undertaken by persons living in poverty out of necessity, such as sleeping in public spaces or street vending, are criminalized. Hence, reforms aimed at improving access to justice by the poor must not neglect the need to modify or repeal certain laws or strengthen others.¹

With respect to legal rights generally, empirical and socio-legal research has consistently exposed and explored the gap between the law in the books and the law in action. In other words, formal recognition of rights is often not secured in practice. People affected by poverty and other vulnerable groups such as migrants are limited in their capacity to assert the rights guaranteed by the Convention. Multiple practical barriers such as the costs involved, as well as inadequate access to information and advice, militate against the invocation of one’s rights. Procedural barriers also impede access to justice. Within the Irish legal system the promise of equal access to justice for migrants is often illusory as Becker and Keegan’s chapter suggests. Legislative exemptions purport to either insulate elements of the Irish immigration system from the reach of human rights law or to severely curtail the ability to invoke one’s legal rights. Several of the chapters in this Part consider whether the European Convention and the ECHR Act 2003 assist in redressing such barriers.

Two of the Convention’s provisions are particularly significant in this context: Article 13, which addresses the provision of remedies at national level for violations of Convention rights and Article 6, which confers a range of procedural rights in both proceedings concerning criminal charges and in the “determination” of “civil rights and obligations”. Both provisions can enhance the procedural obligations inherent in several of the substantive Convention rights, and so can be usefully pleaded in conjunction with violations of, for instance, the right to life (Article 2) and the prohibition on torture, inhumane and degrading treatment (Article 3). As noted in this collection, several of the Strasbourg Court’s significant adverse findings against Ireland pertain to Article 6 violations, in areas such as civil legal aid and excessive delays in criminal proceedings. In O’Keeffe v Ireland the Court reiterated that Article 13 requires a mechanism to be available for establishing any liability of state officials or bodies for acts or omissions in breach of the Convention and that compensation for the

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5 In addition to those discussed below by Becker and Keegan, one could point to various exceptions and exemptions under the Equal Status Acts 2000-2012, the Ombudsman Act 1980-2012 and the Ombudsman for Children Act 2002.
7 Egan & Forde, “From Judgment to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court” in Egan, Thornton & Walsh, The ECHR and Ireland: 60 Years and Beyond (Bloomsbury Professional, 2014), 2.05-2.07.
9 Application No 35810/09, O’Keeffe v Ireland, 28 January 2013.
non-pecuniary damage should also be part of the range of available remedies. Since the applicant was entitled under the Convention to a remedy establishing state liability, the remedies available under Irish tort law were regarded as ineffective.

[13.04] The International Bill of Human Rights (which comprises the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) recognises the vast array of civil, political, socio-economic, and cultural rights that individuals possess. These rights inhere in all individuals “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

While political rights are for the most part expressly limited to citizens, socio-economic rights, including the right to social security, the right to work and to fair conditions of work, the right to an adequate standard of living, including food, water, clothing and shelter and medical care and the right to elementary education, inhere in “everyone”. Yet the ECHR is primarily a civil and political rights instrument. The text does provide for limited protection of some socio-economic rights, primarily in the form of the rights to education and to peaceful enjoyment of one’s possessions under the terms of the First Protocol to the Convention. Other provisions explicitly guarantee elements of the right to work: Article 11, for instance, includes the right to form and to join trade unions under the overarching right to freedom of peaceful assembly and to freedom of association with others. Nonetheless within the Council of Europe system socio-economic rights are fully articulated in an instrument, the European Social Charter, with relatively weak accountability mechanisms. More robust remedies are available under the ECHR and public interest litigants have sought expansive interpretations of its classic civil and political rights guarantees.

[13.05] The first two chapters in this section consider whether and to what extent Convention-based litigation has cut through the traditional distinctions between socio-economic and civil-political rights. The Strasbourg Court has acknowledged that potential for decades, stating in Airey that “the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field.

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10 Art. 2 UDHR, art. 2(1) ICCPR and art. 2(2) ICESCR.
11 Art. 21 UDHR, Art. 25 ICCPR.
12 Arts. 23-27 UDHR and Arts. 7, 8, 9, 11, 12, 13 & 15 ICESCR. The exception which exists for developing countries restricting economic rights to citizens need not be discussed in the context of these chapters.
covered by the Convention.”14 In subsequent decades litigants have tried to rely on various ECHR provisions, primarily Articles 3, 6, 8 and 14, to seek access to services such as health treatment, education and housing with limited success. While the Strasbourg Court is disinclined to impose extensive financial obligations on the Contracting States, in acute and limited circumstances the Convention can give rise to a right to a minimum level of social provision.15

[13.06] This Part begins with a chapter by Liam Thornton exploring the ambit and reach of socio-economic rights under Article 2 (right to life), Article 3 (prohibition of torture, inhuman and degrading treatment) and Article 8 (right to private and family life) of the ECHR. He argues that the ECHR can be a rather reluctant socio-economic rights charter. The last two decades have witnessed a shift from the outright dismissal of socio-economic rights as outside the ratione materiae of the ECHR. Yet, as is clear from Thornton’s chapter, such protection does not equate to the same level of protection as applies under international human rights treaty law or the European Social Charter.16 While accepting that the reticence of the European Court of Human Rights in this field is legitimate, Thornton nevertheless argues that certain duties may be imposed on States in upholding socio-economic rights. While this is usually limited by the insistence, to date, to anchor such a finding on a State’s violation of their own domestic legal obligations, there may be a possibility to expand socio-economic rights protections under the ECHR. However, as Thornton recognises, it very much remains to be seen how the Strasbourg Court will deal with such claims over the coming years.

[13.07] Gerry Whyte’s chapter complements Thornton’s account of Strasbourg jurisprudence by analysing how the Convention has been invoked in domestic proceedings seeking to enforce socio-economic rights against the State. Whyte examines several structural features of the ECHR Act that militate against its use as an instrument for advancing public interest litigation in Ireland, focusing in particular on the inadequacy of its remedial provisions. Since public interest cases in the field of socio-economic rights are often concerned with the provision of an on-going service, monetary compensation is ill-equipped to remedy the human rights violations experienced by individual litigants. Moreover, declarations of incompatibility are unavailable in respect of ‘pure’ omissions to secure socio-economic rights

14 Airey v Ireland (1979) 2 EHRR 305, 26.
15 For an analysis of minimum levels of social provision in the direct provision system, see further Smyth, “Children, Direct Provision and the European Convention on Human Rights” in Egan, Thornton & Walsh, The ECHR and Ireland: 60 Years and Beyond (Bloomsbury Professional, 2014).
16 Council of Europe, European Social Charter, 3 May 1996.
because that remedy must be tied to an impugned statutory provison or rule of law. Whyte’s line of argument is grounded in a comprehensive review of the public housing judgments in which the ECHR Act has been invoked. While he identifies some potential for further litigation in the fields of civil legal aid and social welfare, Whyte concludes that the 2003 Act’s capacity to tackle social exclusion is limited.

[13.08] The remaining two chapters in this section focus on discrete facets of the overarching access to justice theme. Hilinka Becker and Edward Keegan take a cross-cutting look at migrants’ capacity to activate human rights protections, while Deirdre Duffy examines in detail the right of access to a lawyer in police custody.

[13.09] Becker and Keegan analyse the extent to which systems and processes charged with determining rights in the immigration arena comply with Ireland’s obligations under the Convention and Article 47 of the EU Charter of Fundamental Rights. At administrative level access to justice is severely compromised by delays and inconsistencies in decision-making, they argue. Access to the court system is also beset by excessive delays and by multiple procedural obstacles. Canvassing Strasbourg jurisprudence under Articles 13 and 6 of the Convention in particular, Becker and Keegan identify several elements of the remedial processes availed of by migrants that do not adhere to Convention standards. For instance, they question the adequacy of judicial review, the traditional method of challenging immigration related administrative decisions, as an effective remedy for the purposes of Article 13. Although Convention-based arguments have acquired little purchase before the Superior Courts in Ireland to date, the authors maintain that further avenues of challenge remain open to litigants. As Kingston also notes in this collection, for matters falling within the scope of EU law, the right to an effective remedy under Article 47 of the EU Charter should prove especially significant in future case law.\textsuperscript{17} Becker and Keegan conclude that the establishment of an independent appeals mechanism to deal with immigration related decisions is necessary to ensure access to fair procedures and effective remedies.

[13.10] Deirdre Duffy’s chapter centres on the ramifications of the \textit{Salduz} judgment of the Strasbourg Court for Irish criminal justice law and practice.\textsuperscript{18} The case established the right of access to a lawyer while in police custody with consequent effects on the admissibility of

\textsuperscript{18} \textit{Salduz v Turkey} (2008) 49 EHRR 421.
evidence obtained without the benefit of legal assistance. It generated wide-ranging reforms in several countries. In this jurisdiction, as Duffy explains, Salduz was ‘brought home’ via a 2014 decision of the Supreme Court, some six years after the Strasbourg litigation. The Irish Court’s findings did not rest on a breach of the ECHR Act 2013, instead Salduz was deployed in tandem with U.S. jurisprudence to develop the due process guarantee set out under Article 38.1 of the Constitution. As Hogan observes in this collection, the case is perhaps the primary instance of how “the shadow of established ECHR jurisprudence has prompted the courts to re-evaluate existing constitutional guarantees”. Drawing on Supreme Court dicta, Duffy explores in some detail the steps which must yet be taken by the Irish government to secure compliance with Convention standards.

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