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Does Ireland need a constitutional right to health after the COVID-19 pandemic?

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ABSTRACT

There will be many legal legacies of the COVID-19 pandemic. This commentary argues that one of them should be the constitutionalisation of the right to health in Ireland. The overriding objective of saving lives has not always been explicitly linked with fundamental rights protection in government communications or the mainstream media. When the state police power permits the adoption of extraordinary measures to protect the public's health, why would there be a need for a constitutional right to health? This commentary argues that the existence of a constitutional right to health in Ireland would make the process of designing, implementing and explaining the necessity of restrictions in times of public health crisis a more transparent exercise. Moreover, a constitutional right to health would provide a normative and procedural framework for reviewing government decisions that restrict one aspect of the right to health (for example maternity care) to protect another (protection from infectious disease). This commentary links these considerations to the recent proposal to amend the Irish Constitution to include a right to health and addresses the concerns raised about such a process in light of the benefits of a constitutional right to health as well as the social changes wrought by the COVID-19 pandemic. The commentary also evaluates the constitutional text that was proposed and highlights some of the considerations that must be taken into account when drafting a constitutional right to health.

Keywords: right to health; constitution; Ireland; COVID-19; pandemic.

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INTRODUCTION

It is clear in the aftermath of the COVID-19 pandemic that the world's legal preparedness to respond to public health emergencies is inadequate. At the international level, governments have agreed to craft a new global instrument to govern pandemic prevention, preparedness and response.[1] The European Union is strengthening its legislation on serious cross-border health threats.[2] However, state governments must now also consider how they will improve national public health law frameworks, with particular focus on the role that the right to health should play in the governance of future public health emergencies. Very few countries recognise a legal obligation for the government to protect citizens' health – only 14 per cent of national constitutions guarantee the protection of public health, while only 38 per cent guarantee the protection of healthcare.[3] Ireland is one of the majority of countries that do not recognise any right to health in their constitutions. However, in November 2019, just before the start of the COVID-19 pandemic, the Dáil debated the Thirty-ninth Amendment of the Constitution (Right to Health) Bill 2019 (henceforth 'the Bill'),[4] which proposed to insert a right to health into the Irish Constitution. A change of government and the emergence of COVID-19 in quick succession subsequently buried the important national debate that was initiated by the Bill. This commentary returns to that debate and argues that Ireland should seriously consider the constitutionalisation of the right to health, given the key role that right to health analysis could and should have played in the Irish Government's response to COVID-19, particularly in relation to the controversial restrictions placed on healthcare and public health services.

Restrictions adopted to combat COVID-19 were not often publicly accompanied by fundamental rights analysis, both in Ireland and globally, despite the fact that these restrictions had a profound impact upon the enjoyment of a broad range of fundamental rights.[5] While it is possible for governments to derogate from fundamental rights treaties

1 WHO Second Special Session, *The World Together: Establishment of an Intergovernmental Negotiating Body to Strengthen Pandemic Prevention, Preparedness And Response*, SSA2/CONF./1, 27 November 2021.

2 Proposal for a regulation on serious cross-border threats to health, COM (2020) 727.

3 J Heymann et al, 'Constitutional rights to health, public health and medical care: the status of health protections in 191 countries' (2013) 8(6) Global Public Health 639.

4 Dáil Deb 26 November 2019, vol 990, no 1.

5 S Sekalala et al, 'Health and human rights are inextricably linked in the COVID-19 response' (2020) 5 British Medical Journal Global Health e003359.

during a public health emergency,[6] many national constitutions do not provide a similar possibility to derogate from the fundamental rights established within them.[7] The Irish Constitution permits derogation from fundamental rights only in times of war or armed rebellion.[8] Public health measures may limit the enjoyment of a fundamental right only when they are proportionate – when available evidence demonstrates that they are the least restrictive yet still effective means for achieving the public health objective. Upon such analysis some restrictions adopted during the COVID-19 pandemic appear to legitimately restrict the enjoyment of fundamental rights, and some perhaps do not.[9]

Some public health measures involved restricting access to healthcare and public health services such as maternity care, cancer screening and mental health and disability services. Although the available science showed that preventing the social contact that occurs through these services would slow transmission of COVID-19, it was also clear that people's health would suffer in other equally serious ways as a direct consequence of the restrictions.[10] In such situations, a proportionality analysis within a fundamental rights framework should be conducted

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6 For example, art 15 of the European Convention on Human Rights provides that: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.' For a discussion of derogation from fundamental rights during the COVID-19 pandemic, see: A Lebret, 'COVID-19 pandemic and derogation to human rights' (2020) 7(1) Journal of Law and the Biosciences lsaa015.

7 See Venice Commission, 'Observatory on emergency situations'.

8 Art 28.3.3: 'Nothing in this Constitution other than Article 15.5.2 shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law.'

9 See, for example, W van Aardt, 'COVID-19 school closures and the principles of proportionality and balancing' (2021) S3 Journal of Infectious Diseases and Therapy 2; H Gunnarsdóttir et al, 'Applying the proportionality principle to COVID-19 antibody testing' (2020) 7(1) Journal of Law and the Biosciences lsaa058; E Paris, 'Applying the proportionality principle to COVID-19 certificates' (2021) 12(2) European Journal of Risk Regulation 287; G Androutsopoulos, 'The right of religious freedom in light of the coronavirus pandemic: the Greek case' (2021) 10 Laws 14.

10 For example, see the assessment of the Irish Medical Organisation of the impact of COVID-19 restrictions on cancer services in Ireland: 'Oireachtas Health Committee on the impact of the Covid-19 pandemic on cancer services' (2 June 2021). On the impact of restrictions on mental health in Ireland, see Policy Brief: Mental Health and COVID-19 – The Opportunity to Resource, Rebuild and Reform Ireland's Mental Health System (Mental Health Reform June 2021). On the impact of restrictions on partner visiting in maternity hospitals, see 'The experiences of women in the perinatal period during the Covid-19 pandemic' (Psychological Society of Ireland 5 May 2021).

to ensure that these restrictions are imposed in a justifiable manner. The impacted right in these situations is the right to health,[11] which places an obligation upon states to ensure the availability, accessibility, acceptability and quality of all health facilities, goods and services.[12]

However, the Irish Government did not attempt to publicly explain whether restrictions to health services constituted a legitimate limitation on the right to health. This is likely attributable to the absence of a fundamental right to health in Ireland. Although health protection and promotion is a public good to which all humans are entitled,[13] Ireland has not recognised this human right in its Constitution as a fundamental right. This situation is unfortunate first of all because the existence of a fundamental right to health in Ireland would have provided normative legitimation for most aspects of the Government's pandemic response.[14] Moreover, it meant that there was no constitutional pressure placed upon the Government to conduct and publicly share an analysis of whether restrictions to health services specifically placed justifiable limitations on the right to health. Most significantly, it meant that when restrictions to health services were no longer the least restrictive intervention necessary to protect public health, it was impossible to hold the Government accountable for a violation of the right to health.[15] Consequently, decisions concerning the restriction of health services during the emergency phase of the COVID-19 pandemic may have caused illegitimate health harm to citizens, who had no legal possibility of asking a court to provide them with redress.

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11 Art 12 of the International Covenant on Economic, Social and Cultural Rights, which Ireland has ratified, proclaims the right to the 'highest attainable standard of physical and mental health'.

12 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (art 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para 12.

13 For an analysis of why ideas of justice demand the existence of a right to health, see: J P Ruger, *Global Health Justice and Governance* (Oxford University Press 2018). In addition to the ICESCR cited above, the preamble of the Constitution of the World Health Organization (WHO) also proclaims a right to health: 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition'. Art 25 of the Universal Declaration of Human Rights also notes health as essential to an adequate standard of living.

14 For a more detailed analysis of the relationship between the right to health and COVID-19 responses, see L Forman and J Kohler, 'Global health and human rights in the time of COVID-19: response, restrictions, and legitimacy' (2020) 19(5) Journal of Human Rights 547.

15 There is no mechanism in international law to enforce the right to health contained in international treaties, meaning that states must constitutionalise the right to health for it to be justiciable.

The constitutional amendment proposed by the Bill would rectify this inadequacy in Irish law, and the resurrection of a national debate on this topic should be one of the legal legacies of the COVID-19 pandemic. Ireland's fundamental rights framework should, following our pandemic experience, facilitate the justification of restrictions to healthcare and public health services in terms of the right to health, and should permit citizens to claim redress where their right to health has clearly been violated by such restrictions. This commentary will make this argument in three stages. First, an example of how a right to health analysis could clarify whether pandemic restrictions on health services are legally legitimate will be outlined. Second, the objections raised against the Bill will be examined. Finally, the particular conception of the right to health proposed in the Bill will be evaluated.

THE ANALYSIS OF PANDEMIC RESTRICTIONS ON HEALTH SERVICES UNDER THE RIGHT TO HEALTH

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes a right to the 'highest attainable level of physical and mental health'. This was interpreted in General Comment 14 of the United Nations (UN) Economic and Social Council,[16] which provides guidance on how healthcare and public health services can be restricted in order to achieve other public health objectives. For example, maternity hospitals in Ireland severely restricted the visiting privileges of partners of pregnant women, thus curtailing their ability to provide physical and emotional support during the perinatal period. This was sensible at the height of the pandemic. However, hospitals have continued to maintain these visitor restrictions long after the Government insisted that they should be relaxed.[17] Extensive research conducted in several countries on women's experience of pregnancy and childbirth during the pandemic has shown that visitor restrictions generated significant risk to their mental and physical health.[18] These harms raise the question of whether it would have been possible to

16 General Comment 14 (n 12 above).

17 E O'Regan, 'Maternity hospitals continue restrictions despite pressure' (*Independent.ie* 26 January 2022); L Boland, 'Campaigners to raise gaps in partners' access at maternity hospitals in meeting with HSE' (*The Journal* 27 February 2022).

18 J Sanders and R Blaylock, '"Anxious and traumatised": users' experiences of maternity care in the UK during the COVID-19 pandemic' (2021) 102 Midwifery 103069; A Wilson et al, 'Australian women's experiences of receiving maternity care during the COVID-19 pandemic: a cross-sectional national survey' (2021) 49(1) Birth 30–39; S Panda et al, 'Women's views and experiences of maternity care during COVID-19 in Ireland: a qualitative descriptive study' (2021) 103 Midwifery 103092.

strike a more proportionate balance between the protection of public health from infectious disease and the promotion of good maternal health when incidence of COVID-19 was low.[19]

It is clear from General Comment 14 that controlling epidemic disease and ensuring perinatal health are both obligations of comparable priority to the core obligations arising from the right to health,[20] meaning that governments should give equal priority to each. When those obligations conflict though, a proportionality analysis must be conducted to determine whether one can be prioritised above the other.[21] General Comment 14 provides further guidance in this regard. One of the core obligations of the right to health is to 'ensure equitable distribution of all health facilities, goods and services',[22] and a specific legal obligation noted in relation to the right to health of women is 'the removal of all barriers interfering with access to health services'.[23] When this is combined with the suggestions that the right to health is violated by states in the event of a 'failure to take measures to reduce the inequitable distribution of health facilities, goods, and services'[24] and a 'failure to adopt a gender-sensitive approach to health',[25] it is plausible to suggest that limitations to perinatal women's health will be disproportionate where they are unfair or insensitive to the particular needs of perinatal women. The maintenance of highly restrictive visitor policies by maternity hospitals long after recommendations had been made to relax such policies in the wake of decreasing COVID-19 incidence and increasing vaccination levels does not seem to meet these conditions. Such policies appear insensitive to the particular needs of perinatal women given the consistent calls of maternal health groups and even the Government for visitor restrictions to be relaxed, and they appear inequitable given the lifting of most other COVID-19 restrictions throughout society.

Despite this analysis, Irish women cannot rely upon fundamental rights law to seek redress for any harm they suffered as a result of

19 K Shah Arora et al, 'Labor and delivery visitor policies during the COVID-19 pandemic: balancing risks and benefits' (2020) 323(24) Journal of the American Medical Association 2468; J Ecker and H Minkoff, 'Laboring alone? Brief thoughts on ethics and practical answers during the coronavirus disease 2019 pandemic' (2020) 2(3) American Journal of Obstetrics and Gynecology 100141; J Lalor, 'Balancing restrictions and access to maternity care for women and birthing partners during the COVID-19 pandemic: the psychosocial impact of suboptimal care' (2021) 128 BJOG 1720.

20 General Comment 14 (n 12 above), para 44(a) and (c).

21 Ibid para 29.

22 Ibid para 43(e).

23 Ibid para 21.

24 Ibid para 52.

25 Ibid.

potentially illegitimate restrictions. It seems wrong that during a public health emergency Irish citizens can challenge limitations to their right to access a court,[26] but cannot then use that access to ask the court to review a situation such as that analysed above. Moreover, it seems wrong that during a public health emergency Irish courts are able to censor individuals for unlawful actions which place the health of others at risk,[27] yet are unable to declare that the Government should provide redress where decisions for which they are ultimately accountable cause illegitimate health harms.[28]

The existence of a constitutional right to health as proposed by the Bill would rectify this situation in two important ways. Firstly, the inclusion of a right to health in the Constitution would encourage the mainstreaming of right to health analysis into government decision-making,[29] which if practised diligently during a pandemic could increase the likelihood that more nuanced and sensitive decisions will be reached.[30] There is no shortage of support for policymakers in this regard – for example, the Irish Human Rights and Equality Commission published a report containing recommendations for how rights-based analysis could be better integrated into legislative and executive decision-making on pandemic restrictions. These included, for example, involving human rights experts more closely in the decision-making process and publishing more detailed and timely analyses of the human rights implications of pandemic legislation.[31]

Secondly, the inclusion of a right to health in the Constitution would, if suitable enforcement mechanisms are also made available

26 *Heyns v Tifco Ltd & Others* [2021] IEHC 329.

27 *Medical Council v Waters* [2021] IEHC 252.

28 Mr Justice Meenan clarified the non-justiciability of the Constitution's directive principles of social policy in the context of challenges to coronavirus restrictions in *O'Doherty & Another v The Minister for Health & Others* [2020] IEHC 209, para 52: 'I am also satisfied that the applicants are not entitled to rely upon Article 45, which sets out principles of social policy. These principles are not "cognisable by any court under any of the provisions of this Constitution", as stated in the Article.'

29 M Amos, 'Lessons from the COVID-19 pandemic for the UK human rights law framework' (31 July 2020).

30 The norms flowing from the right to health have been relied upon to unify and organise political debate in response to the HIV/AIDS pandemic, such that practical decisions on actions to improve health were taken: D Fidler, 'Fighting the axis of illness: HIV.AIDS, human rights, and US Foreign Policy' (2004) 17 Harvard Human Rights Journal 99.

31 C Casey et al, *Ireland's Emergency Powers during the Covid-19 Pandemic* (Irish Human Rights and Equality Commission 2021) 102.

to facilitate timely access to the courts,[32] make it possible for courts to review government decisions on restrictions to health services and order redress for affected individuals if the restrictions are found to disproportionately breach their right to health.[33] It is clear from experiences in other jurisdictions that a justiciable right to health is a powerful tool for improving access to healthcare and the protection of public health, in particular where governments have failed to respond adequately to ongoing health crises such as the HIV/AIDS pandemic.[34] However, the possibility of courts ordering governments to take certain health policy actions is politically controversial for a number of reasons, which include the potential for resource diversion and the blurring of the separation of powers.[35] In the Irish context, several objections to introducing a constitutional right to health were raised in the Dáil during the debate on the Bill in November 2019 and will be evaluated in the next section of this commentary.

OBJECTIONS TO CONSTITUTIONALISING A RIGHT TO HEALTH

The Bill prompted a number of objections from the Government and did not progress past the second stage, with the Dáil voting to delay further debate until the Department of Health and the Constitutional Convention on Economic and Social Rights had considered it in more detail within the context of the ongoing Sláintecare reforms. A report

32 The importance of court access for improving the utility of the right to health is clear from Colombia's experience with *tutela* actions: A Arrieta-Gómez, 'Realizing the fundamental right to health through litigation' (2018) 20(1) Health and Human Rights 133.

33 The issues raised by right to health litigation are mapped in O Cabrera and A Ayala, 'Advancing the right to health through litigation' in J Zuniga et al (eds), *Advancing the Human Right to Health* (Oxford University Press 2013). An example of the health protections that can be secured through right to health litigation is provided by J Sellin, 'Justiciability of the right to health – access to medicines – the South African and Indian experience' (2009) 2 Erasmus Law Review 445.

34 L Forman, 'Justice and justiciability: advancing solidarity and justice through South African's right to health jurisprudence' (2008) 27 Medicine and Law 661; M Tveiten, 'The right to health secured HIV/AIDS medicine – socio-economic rights in South Africa' (2003) 72 Nordic Journal of International Law 41.

35 Concerns raised by right to health litigation are outlined in Cabrera and Ayala (n 33 above), as well as in C Flood and B Thomas, 'Justiciability of human rights for health' in L Gostin and B Meier (eds), *Foundations of Global Health and Human Rights* (Oxford University Press 2020).

to the Oireachtas Joint Committee on Health was promised, but this never materialised.[36]

Three objections raised by the Government in the debate stand out. The first is that the content of the right to health is unclear, and that the experience of other jurisdictions with a justiciable right to health would not necessarily translate to the Irish context. The second is that inserting only a right to health into the Constitution could weaken the work done to support other socio-economic rights. The third is that constitutionalising a right to health would place the judiciary in control of health policy.

The first objection is astute. The creation of a constitutional right to health has resulted in both positive and negative developments in other jurisdictions, depending upon exactly how the right to health is conceived and interpreted.[37] The experience of a justiciable right to health is unique to each jurisdiction, and experience from other jurisdictions cannot be the sole evidence relied upon to inform the creation of a constitutional right to health in Ireland. More evidence is indeed required on the possible consequences of creating a fundamental right to health in Ireland, before a decision is taken to put a constitutional amendment of this nature forward to the required referendum.

The second and third objections do not reflect the nuanced nature of the right to health and are now outdated in light of our experience of the COVID-19 pandemic. Regarding the second objection, it is true that constitutionalising the right to health may lead to resources being used on health that could have been used to further the protection of other socio-economic rights.[38] The claim that this is unacceptable finds some support in the interpretation given to states' obligations to work towards the progressive realisation of economic and social rights within their maximum available resources.[39] States may choose how to organise their budgets to provide what they believe to be the best possible resource allocation to socio-economic rights protection, but

36 It is noteworthy that the Thirty-seventh Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2018 attracted similar concerns from the Government and, after a vote, was also delayed to allow for further consideration.

37 K Young and J Lemaitre, 'The comparative fortunes of the right to health: two tales of justiciability in Colombia and South Africa' (2013) 26 Harvard Human Rights Journal 179; O L M Ferraz, 'The right to health in the courts of Brazil: worsening health inequities?' (2009) 11(2) Health and Human Rights 33.

38 A Yamin and O Parra-Vera, 'Judicial protection of the right to health in Colombia: from social demands to individual claims to public debates' (2010) 33 Hastings International and Comparative Law Review 431.

39 Art 2 ICESCR; UN CESCR, General Comment 3: The Nature of States Parties' Obligations (art 2, para 1, of the Covenant), 14 December 1990, E/1991/23.

moving funding from one socio-economic right to another (for example from education to health) would be problematic for the progressive realisation of the defunded right.[40]

However, these concerns may be less relevant following the COVID-19 pandemic. Rhetoric on the importance of protecting human health dominated public discourse in Ireland, and the Irish Government committed itself to the position that protecting public health and saving lives was the most important priority for society.[41] If this is true in a public health emergency, it should also be true for existing chronic health crises such as rising rates of childhood obesity. Indeed, the position that health ranks foremost among social priorities finds consistent support in the case law of the European Court of Justice.[42] In light of this, prioritising the funding of actions that will improve healthcare and public health services and thus better safeguard the right to health can no longer be seen as unacceptable – indeed the pandemic has shown us in graphic detail why the opposite might be true.

In relation to the third objection, the experience of other jurisdictions does indicate that the availability of a justiciable right to health leads to significant judicial influence on health policy.[43] However, as the Government itself argued, this experience would not necessarily transfer to Ireland, especially since Irish courts are largely

40 A Blyberg and H Hofbauer, 'The use of maximum available resources' (International Budget Partnership 2014).

41 'As the Roman Statesman Cicero said "the safety of the people shall be our highest law". This is the approach we have taken since the pandemic was declared in March", speech by An Taoiseach Leo Varadkar (Dublin, 5 June 2020); 'But the most important responsibility that we all share is to protect the lives of those we love', speech by An Taoiseach Micheál Martin (Dublin, 30 December 2020); 'All of this, and much more, was necessary because our number one priority had to be the protection of people's lives and public health', speech by An Taoiseach Micheál Martin (Dublin, 31 August 2021).

42 This has been confirmed in relation to, for example, prescription medicine sales (Case C-148/15 *Deutsche Parkinson Vereinigung* ECLI:EU:C:2016:776), dental care (C-339/15 *Vanderborght* ECLI:EU:C:2017:335), optical care (C-108/09 *Ker-Optika* ECLI:EU:C:2010:725), alcohol control (C-170/04 *Rosengren* ECLI:EU:C:2007:313) and chemicals regulation (C-473/98 *Toolex* ECLI:EU:C:2000:379).

43 D Wang, 'Right to health litigation in Brazil: the problem and the institutional responses' (2015) 15 Human Rights Law Review 617;

supportive of government decision-making in health.[44] Moreover, it is misleading to assert, as the Government did, that a constitutional right to health would mean that any executive or legislative decision on health 'could easily be challenged in court'. Despite advances in socio-economic rights jurisprudence, it is still difficult to establish a breach of the right to health unless the claimant can show that the government owes them a clearly defined duty, such as the duty to ensure access to certain medicines or medical care.[45] The vast majority of right to health case law in which judges have ordered governments to provide services has occurred in lower and middle-income countries that have acute problems with basic healthcare priorities such as medicines availability. These problems are not widespread in a rich country with a good healthcare system such as Ireland, and so there is far less need for Irish judges to step in and make orders for basic healthcare provision. Moreover, Irish courts are conservative in their interpretation of socio-economic rights and have sought to respect the separation of powers,[46] contrary to the suggestion made by the Government in the Dáil debate. Even if Irish judges were to become more willing to give liberal interpretations to socio-economic rights, it is still more likely than not that they would adopt a measured approach to adjudicating the right to health.[47] Moreover, it is far more likely that the right to health would be relied upon to challenge more isolated instances of serious failings in the healthcare system, or by specific segments of the population that experience difficulty accessing satisfactory healthcare, rather than to instigate a wholesale diversion of resources or to weaken the authority of the executive and legislature to make health policy.

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44 For example, one of the most significant cases in Irish constitutional law – *Ryan v Attorney General* [1965] IR 294 – in which the courts created the doctrine of unenumerated constitutional rights, concerned the mass fluoridation of drinking water for the protection of dental health. The courts upheld the Government's ability to pursue such a policy. In several other cases concerning health care provision or public health policy, the courts have refused to grant relief to applicants (for example *Teehan v HSE and Another* [2013] IEHC 383) or upheld the legitimacy of the Government's public health powers and actions (for example *Bederev v Ireland* [2016] IESC 34). Moreover, the Irish courts have upheld many of the Government's coronavirus regulations, thereby confirming the broad scope of the public health police power: *Ryanair DAC v An Taoiseach, Ireland, and the Attorney General* [2020] IEHC 461; *The Irish Coursing Club v Minister for Health and Minister for Housing* [2021] IEHC 47).

45 Z Nampewo et al, 'Respecting, protecting and fulfilling the human right to health' (2022) 21 International Journal for Equity in Health 36.

46 T Murray, 'Economic and social rights in Ireland' in D Farrell and N Hardiman (eds), *The Oxford Handbook of Irish Politics* (Oxford University Press 2021).

47 M Lau et al, 'Creating universal health care in Ireland: a legal context' (2021) 125 Health Policy 777.

Once again though, the COVID-19 pandemic has weakened the validity of these concerns. The use of the state police power to protect public health has never been so extensively held in the public spotlight, and the level of public awareness of the ways in which public health law can restrict individual freedoms and entitlements is now arguably at the highest level it has ever been. It was always true that difficult decisions could be taken to promote health. However, now the public are acutely aware that even social priorities once thought to be sacred, such as the ability to access quality healthcare when needed, can be subjugated for the protection of wider population health. This has led to heightened public concern that these essential priorities should be valued and protected even more strongly than they have been to date. The ability for judges to adjudicate disputes over how healthcare and public health services can be restricted should therefore no longer be considered objectionable, given the very visible levels of damage to health that society has had to watch pandemic restrictions inflict.

In summary, there are legitimate questions to be answered in relation to the adoption of a constitutional right to health. However, these must take account of the true nature of the right to health, as well as the 'new normal' created by the coronavirus pandemic. The final section of this commentary will therefore examine in greater detail the conceptualisation of the right to health put forward by the Bill.

THE RIGHT TO HEALTH PROPOSED BY THE BILL

The Bill attempts a compromise between breadth and specificity in the conceptualisation of the right to health. The three substantive provisions would recognise 'the equal right of every citizen to the highest attainable standard of health protection', guarantee 'affordable access to medical products, services, and facilities appropriate to defend the health of the individual', and require the Government to 'give due regard to any health interests which serve the needs of the common good'. There are many ways of drafting a constitutional right to health, and it is possible to frame the right in narrower or broader terms than this formulation proposed by the Bill.

Drafting a constitutional right to health in even broader language[48] better aligns with article 12 ICESCR. General Comment 14 makes clear that the right to the 'highest attainable standard of physical and mental health' includes a right to both individual medical care and a right to wider societal conditions in which it is possible to live a healthy life. However, this breadth can be difficult to translate into concrete

48 For example, the 2009 Constitution of Bolivia states in art 18 that 'All persons have the right to health', without further qualifications.

terms. This – and presumably also the fear of resource diversion – is why many countries which have constitutionalised the right to health have conceptualised it in narrower terms, as a right to healthcare.[49] This would enable individuals to contest the deprivation of medical care, but not the socio-economic decisions made by their government that influence health outcomes. Clearly, this makes the right easier to interpret, but also reduces its potential as a tool to promote greater action on the social determinants of health.

The Bill attempts to balance these considerations, but seems to have done so in a contradictory manner. Although the use of the term 'health protection' was praised in the Dáil debate for its inclusiveness, health protection in fact refers quite specifically to the branch of public health practice that focuses on controlling communicable disease and environmental health threats.[50] Health protection does not cover actions that address the influence of socio-economic factors upon health outcomes – this is the domain of health promotion and health prevention.[51]

Other aspects of the Bill's drafting are also problematic. Firstly, the right to health as set out in the ICESCR is to be realised both progressively and within the state's available resources. However, the Bill splits this requirement over two separate provisions. The drafting implies that health protection is to be achieved progressively but not within the state's available resources, that access to healthcare is to be achieved within available resources but not progressively, and that other public health activities are not subject to either requirement. This might seem a pedantic observation, but the existence of legal obligations can depend upon interpretative questions as specific as this. Second, the term 'medical products' is used in the Bill but does not appear anywhere in General Comment 14, which instead identifies 'essential drugs' and 'health facilities' as core aspects of the right to health.[52] If the intention is to refer to these core aspects of the right to health, then they should be used in place of the term 'medical products', which instead implies a reference to medical devices or technology. If the intention was indeed to refer to the core aspects of the right to health, then the Bill should also have stipulated (in line with General

49 For example, South Africa's 1996 Constitution states in art 27(1) that 'Everyone has the right to have access to: a. health care services, including reproductive health care.'

50 See, for example, A Nicoll and V Murray, 'Health protection – a strategy and a national agency' (2002) 116(3) Public Health 129.

51 H Madi and S Hussain, 'Health protection and promotion' (2002) 14 Eastern Mediterranean Health Journal S15.

52 General Comment 14 (n 12 above) para 43.

Comment 14) that the Government must guarantee access without delay and as a resource priority, rather than simply required that the Government 'endeavour, within its available resources, to guarantee affordable access', which suggests a weaker obligation. Thirdly, the drafting of 'give due regard to any health interests which serve the needs of the common good' is too vague to produce firm legal effects, and raises the extremely difficult question of what the 'common good' is in any particular situation, let alone what level of obligation 'due regard' generates. Since this provision relates to public health issues, it should instead refer to concrete public health concepts such as the social determinants of health.[53] This would allow a court to clearly identify the specific public health duties that are placed on the Government by the provision.

The wording that brings a right to health into the Irish Constitution must be carefully crafted to maximise the impact that the right to health can make to the lives of citizens. A vague or contradictory conceptualisation of the right to health may have the opposite effect of trapping litigants in lengthy legal battles that are resolved too late for any redress to improve their health situation – such an eventuality would be particularly undesirable during a pandemic. To give due credit to the Government, this was another concern that it raised in the Dáil debate.

CONCLUDING REMARKS

One of the lessons that states must learn from the coronavirus pandemic is that legal systems, as well as health systems, must be reformed so that stronger and clearer rules are in place to govern the next public health emergency. Part of this legal reform should involve bringing the right to health into the national legal order, if it is not already recognised. This would generate greater transparency and accountability if restrictions must again be placed on health services in order to protect public health. Having to make policy decisions that damage the health of many in order to protect the health of many more is a difficult and unpopular thing for any government to do, and putting in place an appropriate fundamental rights framework within which to make such decisions seems eminently desirable. Now is an ideal time for Irish lawmakers to return to the important debate initiated by the Bill. The Irish public have never been so engaged with and attuned to health policy issues, so the quality of public debate on the issue of a

53 R Wilkinson and M Marmot (eds), *Social Determinants of Health: The Solid Facts* (WHO 2005); *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health* (WHO 2008).

constitutional right to health will never be better. If political leaders are serious about building a better society in the wake of the COVID-19 pandemic, then a serious national conversation about a constitutional right to health is an excellent place to start.