
Introduction

AOIFE NOLAN, RORY O'CONNELL AND COLIN HARVEY

This book addresses one of the most important challenges in contemporary human rights law and practice: the linkage between public finance, particularly budget decisions, and the realisation (or not) of economic and social rights.¹ Much academic work and debate on economic and social rights (ESR) implementation has focused on the role of the courts. However, this work places the spotlight squarely on those organs of government that have the primary responsibility, and the greatest capacity, for giving effect to such rights: namely, the elected branches of government and public administration.

This volume is particularly timely given the impact of the 2007–08 global financial and economic crises. Post-crises budget cutbacks and reallocations have resulted in the domestic realisation of ESR being slowed in many countries and, in some cases, reversed. To achieve expenditure consolidation in the face of severely (and sometimes not-so-severely) constrained resources, developed and developing countries have adopted adjustment policies that are wide-ranging and severe. They include the cutting or capping of the public sector wage bill, the phasing out or removal of subsidies on basic goods and services such as fuel, cuts to social protection programmes, the reform of old-age pensions, and regressive taxation measures such as increased consumption taxes on basic goods.² All such measures are issues of public finance. All of them affect ESR enjoyment, whether directly or indirectly.

I. Foundations

Every human right potentially has implications for budgetary allocations and public finance generally. However, this collection's focus on economic and ESR is of especial significance given the strong linkage between the

¹ The terms 'economic and social rights' and 'socio-economic rights' will be used interchangeably in this collection. The term 'human rights' is used to denote the full spectrum of human rights, including civil, political and cultural rights—not simply economic and social rights.

² See eg, I Ortiz, J Chai and M Cummins, *Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries* (New York, UNICEF, 2011).

realisation of ESR and resource mobilisation and allocation, as well as the fact that the evaluation of budget decisions plays a key role in the assessment of states' compliance with their international ESR obligations. As such, the chapters in the first part of the book focus on fundamental issues regarding the interrelationship between ESR and central aspects of public finance, including macroeconomic policy, domestic and international fiscal policy, and budgetary decisions and processes.

In chapter one, Elson, Balakrishnan and Heintz explore a central umbrella obligation imposed by international ESR law: namely, the requirement under Article 2(1) of the International Covenant on Economic, Social Cultural Rights (ICESCR) that States Parties deploy the maximum of their available resources towards the realisation of ESR.³ The authors outline how the human rights community has recognised the importance of government revenues, as well as public expenditure, to the concept of maximum available resources. Highlighting the different approaches adopted by neoclassical and Keynesian/human development approaches to economic policy, Elson et al demonstrate how the human rights understanding of 'maximum available resources' could be enriched by consideration of the concepts of fiscal and monetary space. The authors then proceed to relate 'maximum available resources' to different components of public finance: public expenditure, taxation, official development assistance (ODA), budget deficits, borrowing and debt and monetary policy and financial regulation. In doing so, they consider how specific understandings of concepts like 'efficiency' and 'effectiveness' will impact on the extent to which public expenditure will advance the realisation of ESR. They also highlight the way in which different perspectives on the desirability of tax revenue mobilisation will colour tax policy and, hence, mobilisation of resources for the achievement of ESR. The authors make clear the problems that may arise with regard to the conceptualisation, direction and employment of ODA in terms of the implementation of human rights, citing issues of recipient state capacity, human rights-compliant development and loan conditionality. The complex interplay between borrowing, debt and resource mobilisation is also explored, as is the role of monetary policy conducted by central banks. The chapter's central message is that governments *do* have alternatives, singly and together, which must be considered before public finance decisions are taken.

Concern with the linkage between international ESR obligations and public finance is also a major concern of Nolan's chapter (chapter two). She addresses conceptual challenges with regard to ESR-based budget analysis work that result from the current condition of the framework as set out in the International

³ Art 2(1) states that 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.

Covenant on Economic, Social Cultural Rights (ICESCR) and interpreted by the Committee on Economic, Social and Cultural Rights (the Committee). In doing so, she focuses in particular on retrogressive measures and the role of private (or non-state) actors and privatisation processes vis-a-vis ESR realisation. The author argues that these are issues highly relevant to the contemporary economic and policy context that have yet to be addressed adequately by the Committee so as to provide guidance to ESR-based budget analysis practitioners (or, indeed, states and ESR advocates more broadly). Nolan criticises the Committee's historic failure to engage convincingly with the concept of retrogressive measures, arguing that this has limited the capacity of anti-poverty and human rights campaigners to argue authoritatively that specific budgetary responses to the global economic crisis are in contravention of states' international legal obligations under ICESCR. Reviewing the Committee's more recent work, however, she suggests that that body may have abandoned the language of 'retrogressive measures', while finally proving willing to apply that concept in practice. With regard to private actors, Nolan argues that, although the Committee has not ignored such actors with regard to the realisation of ESR, it has proven reluctant to move beyond consideration of the need for state regulation of such actors under the auspices of the obligation to protect. She argues that the other key state duty with regard to privatisation is the obligation to fulfil—and that the Committee's failure to acknowledge this and to engage critically with privatisation models and processes is a key gap in its work from a budget perspective. She concludes by emphasising the importance that the Committee should be prepared to play a leadership role in terms of conceptualising and applying a strong and coherent framework of budget-related ESR obligations.

Concentrating on the causes and responses to the economic crisis more broadly, Paul O'Connell (chapter three) argues that the undermining of ESR protection and enjoyment associated with the current age of austerity is not an anomaly, but rather the necessary fate of ESR in the current social and economic order. According to O'Connell, in the context of an economic and social system which invariably privileges small, elite groups within society, commitments to ESR are only ever formal and honoured in the most grudging and limited of ways. In focusing on the impact of austerity on ESR in a number of countries, he argues that the recent push for austerity is motivated not by objective, economic necessity, but is driven by an ideological and political project to further entrench neoliberal capitalism. He critiques the portrayal of austerity as a broad 'pain-sharing' exercise. He highlights how, in practice, it benefits the economic elites who were responsible for causing the crisis, while adversely affecting millions of poor and working people. O'Connell notes that the language of human rights has been absent both from post-economic crisis governmental justifications and proposals and oppositional discourses. Furthermore, he asserts, the so-called 'free market'—a key element of neoliberal policy—operates in way that is inherently inegalitarian, resulting in inequalities and structural denials of ESR. The author emphasises the danger of the view of macroeconomic decisions as 'value neutral'

or 'technocratic' and highlights how existing budgetary processes need to be opened up to broad-based participation and contestation (ie, democratised and politicised). In doing so, he advances the claim that participatory budgeting processes could constitute an important counter to the undemocratic and technocratic tendencies of neoliberal orthodoxy, as well as developing a (potentially ESR-centred) alternative to the limited language of existing processes.

The arguments made in the final contribution to Part I bring together the themes of fiscal policy, ESR obligations, the financial and economic crises and austerity that have already been explored by the first three authors. In chapter four, Saiz focuses on the need (and potential) to combat tax injustice from a human rights perspective. Like Elson et al, he regards taxation as one of the most important policy instruments that states can deploy to generate the resources necessary to realise the full range of human rights. He outlines three central functions of taxation from a human rights perspective: its role in generating the 'maximum available resources' to finance human rights-related expenditure; its potential role in redistributing resources in order to mitigate and redress social inequalities; and its role in cementing the bonds of accountability between state and citizen. He argues for the particular need to bring taxation under the lens of human rights scrutiny given the impact of the crises and the non-fulfilment of many of the Millennium Development Goals (MDGs). He bases his claims firmly on 'real world' examples of the application of human rights to domestic tax policy: (1) the link between inadequate revenue generation and poor human development outcomes in Guatemala; and (2) the human rights impacts of the failure to put in place equitable tax policies in response to the fiscal deficits created by the economic crises in Ireland and Spain. The conclusion of Saiz's chapter outlines current opportunities for linking human rights and the emergent tax justice advocacy movement, arguing in favour of the introduction of a global financial transaction tax and the clamping down on tax havens.

II. Governance

This volume is part of a scholarly and practitioner-driven trend of exploring how human rights, including ESR, might be more effectively integrated in governance, law, policy and practice. The major actors considered in this book are politicians, public servants and civil society, with their role in realising ESR the work's key focus. As such, the book seeks to assist in deepening knowledge on the part of both those who have responsibility for implementing ESR obligations (including elected government, public servants) and those who monitor such implementation (for instance, activists, national human rights institutions, academics). Reflective of this concern, the chapters in Part II consider the challenges that are inherent in integrating human rights analysis with governance, law and policy in a public finance context.

Chapter five sees Rory O’Connell review the history of human rights law and examine the role of the public finance in the early understanding of human rights. He highlights how concerns with revenue and expenditure formed part of early debates about rights, identifying elements common to both historic and current debates with regard to the interrelationship (and, indeed, sometimes hierarchy) between emerging human rights protections and public finance issues. O’Connell discusses the deeply political nature of early debates about human rights; unlike much current discussion of ESR, those debates were not simply limited to a consideration of the respective roles of existing branches of government but were bound up in wider questions about the legitimacy of the political system as a whole. O’Connell emphasises that a key aspect of human rights work in the area of public finances and budgets is its focus on the political rather than the judicial arena. He argues strongly that effective human rights work on public finances is not simply a question of ensuring that politicians speak the language of human rights; rather it also entails attending to the wider political system and shortcomings in democratic processes and structures relating to public finance. The author thus echoes Paul O’Connell’s emphasis on democracy and participation.

In chapter six, Rooney and Harvey provide a critical appraisal of mainstreaming theory in relation to ESR, considering the issue of the ‘transformation’ of government through the absorption of rights-based discourse into state practice, procedures and policies. In keeping with the volume’s focus, they concentrate primarily on the role of the legislative and executive branches of government. They argue, however, that legal culture and institutions cannot be allowed to remain exempt from mainstreaming if such activity is truly to result in the comprehensive promotion of rights within law and policy. Highlighting the procedural elements of mainstreaming, together with its ‘soft law’ nature and the importance that it should be ‘good faith’ in character (as opposed to tokenistic), the authors discuss the prospects of these conditions being met in the contemporary ‘neoliberal’ social and economic circumstances. In doing so, they explore the interrelationship between and the compatibility (or not) of ESR and markets. Focusing on theories of change and power, Rooney and Harvey assert that mainstreaming has the potential to produce some change—even in an environment in which neoliberal economic theory predominates. Ultimately, they argue that mainstreaming provides a vocabulary and mentality for thinking about governance along human rights lines. However, they contend that there are serious risks in relation to ownership and co-option of ESR discourse, and the subsequent interpretation thereof in a governance context, depending on whether such activity is ‘integrationist’ or ‘transformative’ in nature.

III. Group-Specific Work

Having considered the key conceptual issues arising in relation to human rights and public finance, in terms of both standards and governance structures, the collection turns to consider the use of human rights budget work both in shaping

and evaluating budgetary decisions. Part III of the book centres on group-specific budget work, with contributions from Ganguly Thukral and Quinn focusing on children and women, respectively.

Ganguly Thukral (chapter seven) writes about the disaggregation and analysis of budgets from a child-rights perspective. Having described children's particular 'invisibility' in terms of the processes that determine budgets, she outlines the crucial linkages between resources, budgets and the implementation of children's rights as reflected both in the United Nations Convention on the Rights of the Child (CRC) itself, and in the work of the Committee on the Rights of the Child. The author explores the connections between budgets, child citizenship and the inclusion of children in governance, and details the role of budget analysis as a financial performance and political accountability tool in relation to state implementation of children's human rights. In discussing comparative national efforts to track budgetary allocation and expenditure on children's rights, Ganguly Thukral highlights the importance of ensuring that child rights budget work is participatory, and thereby consistent with the CRC and understandings of children as rights-bearing agents in budget processes, rather than simply as passive objects of such. Advocating for child citizenship and participation is thus presented as a key element of child rights budget work. Ganguly Thukral provides numerous examples of child rights-based budget analysis advocacy that have had positive impacts in terms of budgetary allocation and expenditure with regard to child rights; in India, for instance, child rights-based budget analysis work has affected the design and presentation of budgets, resulting in increases in the national budget in certain child-specific sectors. The author concludes that the ultimate (and thus far unachieved) indicator of success of child rights budget work would be the mainstreaming of children's rights as an indicator in all planning initiatives and actions of the government.

Concern with prospective—and not just reactive—integration of human rights into budgetary mechanisms and decisions also emerges in Quinn's contribution (chapter eight), which focuses on working with budget processes to better progress equality outcomes. Quinn demonstrates how gender responsive budgeting (ie, the application of gender mainstreaming in the budgetary process) can be adapted and applied to the broader equality agenda. She advances her arguments in the context of the Northern Ireland budgetary process which takes place against the backdrop of the 'Section 75' statutory duty. This duty requires public authorities to have due regard to the need to promote equality of opportunity between a range of different groups when carrying out their functions.⁴ Having discussed the well-established and extensive body of work on gender responsive budgeting globally, as well as the constituent elements of the methodologies employed in relation to such, Quinn outlines how we can move from a single to a multiple equality ground approach to budgets. In arguing strongly for the legitimacy of

⁴ s 75 Northern Ireland Act 1998.

using the budget to advance equality, she outlines modifications of the concepts, methodologies and tools that have been employed in gender responsive budgeting processes so as to render equality responsive budget work for the purposes of Section 75 possible.

IV. Analysis in Action

Part IV of the book moves from group-focused to thematic human rights-based budget analysis. Building on earlier discussion of global trends in human rights-based budget analysis, as well as the budget-related obligations arising out of ICESCR, chapter nine by Rooney and Dutschke focuses on the implementation of the right to adequate housing in Northern Ireland. Using a framework based on the right to adequate housing under Article 11(1) ICESCR, they evaluate a number of elements of the social housing budget in Northern Ireland. Like many jurisdictions, Northern Ireland has seen a shift from public provision of housing towards great reliance on home-ownership, a growing employment of public/private partnership models for financing housing, and an ever more extensive reliance on the private rented sector to meet housing needs.⁵ Like many countries, Northern Ireland has experienced increases in homelessness and a lack of affordability of housing, and has been negatively affected by the economic crisis in terms of public spending. As such, Rooney and Dutschke's analysis of the extent to which such developments comply with international human rights law ESR obligations like those of 'progressive realisation' and the use of 'maximum available resources' have resonance far beyond the UK.

Harrison and Stephenson (chapter ten) also engage directly with the post-financial and economic crises situation, arguing that the legal standards in equality and human rights legislation can be the basis for examination of the impact of public spending decisions. Having asserted that cuts to public spending will disproportionately affect the most vulnerable in society due to those people's greater reliance on welfare benefits and public services, the authors emphasise the importance of gauging the multifaceted, cumulative impacts of multiple cuts. They present equality and human rights impact assessments (EHRIAs) as a key policy instrument for doing so. Using the example of an EHRIA assessing the impact of cuts on women in Coventry in the UK, Harrison and Stephenson focus in particular on the situation of victims and survivors of violence and abuse. The authors discuss the potential of EHRIAs but also highlight serious problems with the state conducting such processes as superficial, rushed 'tick-box' exercises,

⁵ For more, see eg, R Rolnik, 'Report of the Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-discrimination in this Context: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development' (UN Doc A/HRC/10/7 2009).

resulting in equality and human rights principles having little real impact on decision-making. They therefore outline how current practice should be improved so as to render EHRIAs effective and meaningful policymaking tools. In doing so, they emphasise issues relating to guidance, shared evidence bases and the use of an ESR-specific approach. Harrison and Stephenson caution, however, that a balance must be struck between rigour and usability. Ultimately, they make a strong case that, just as EHRIAs are carried out by a range of national and international state and non-state actors, the responsibility for developing such goes beyond public authorities to encompass academics.

V. Bringing It All Together

While coming at the topic of public finance and human rights from a wide range of perspectives, a number of common themes emerge strongly from this collection. All of these contribute, both individually and in tandem, to a multifaceted understanding of the interrelationship—both real and/or desired—between human rights and public finance.

All the contributors emphasise the importance of the rights framework and argue in favour of it playing a central role in relation to analysis, methodology and advocacy. Similarly, concern with effective operationalisation of ESR is a key element of every chapter. While some authors focus on the employment of human rights analysis in considering public finance decisions from a post facto monitoring perspective (for example, Nolan, Rooney and Dutschke), a key message emerging from most chapters is the need for prospective—as well as retrospective—integration of ESR concepts and analysis into national and supranational law and policymaking (for example, Harvey and Rooney, Harrison and Stephenson, Quinn, and Ganguly Thukral). These contributors are not so much concerned with the questions that judges address (have legal standards been breached?). Rather, they are concerned with incorporating a human rights perspective into the thinking and actions of politicians, public servants, civil society and rights-bearers (how might the transformative and emancipatory potential of human rights law be realised in tangible ways)?

Ultimately, all of the authors are concerned with state accountability for human rights obligations in the area of public finance, whether in relation to specific policy instruments such as tax (for example, Saiz) or policymaking tools (for example, Quinn and Harrison and Stephenson) or with regard to macroeconomic policy more broadly (Elson et al, Paul O'Connell and Rory O'Connell). It is recognised clearly, however, that responsibility for ensuring that ESR are achieved does not lie solely with the state; the role of private actors and privatisation processes (Nolan) and civil society (Saiz, Ganguly Thukral, Quinn and Harrison and Stephenson) with regard to ESR realisation are also subject to scrutiny. Academics are identified as having a key function in relation to the development

and operationalisation of human rights assessment methodologies, as well as in relation to the elaboration and deepening of the conceptual framework (Nolan, Quinn, Harrison and Stephenson). Contributors emphasise the importance that budgetary decision-making processes should be inclusive and participatory (Paul O’Connell, Rory O’Connell, Rooney and Harvey, Ganguly Thukral, Saiz). In this sense, an inclusive approach must specifically include the experiences and concerns of vulnerable or disadvantaged groups (Quinn, Ganguly Thukral), and must provide for genuine and not merely formal, democratic engagement (Paul O’Connell, Rory O’Connell, Rooney and Harvey).

The impact of the economic and financial crises is a central theme of the volume, as is the dominance of neoliberal economic policy, both before, during and after the recent crises. The challenges posed by neoliberalism with regard to ESR realisation—both potential and in fact—are raised by numerous authors (Elson et al, Paul O’Connell, Harvey and Rooney, Rooney and Dutschke), with concern repeatedly being expressed with regard to the inequalities and structural biases in terms of ESR enjoyment that neoliberal economic policies frequently cause.

Bringing together critical voices to highlight global and local perspectives on the state of law, policy and practice, this volume is the first edited collection that directly addresses the question of how public finance decisions can—and should—affect the effective implementation of ESR. It is thus the editors’ hope that the contributions to this book will enrich the global dialogue on human rights by serving as a basis for research and practice, thereby stimulating a wider academic and popular debate on budgets, economic policy and human rights.