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# The 'Necessity' of Austerity and its Relationship with the UN Convention on the Rights of Persons with Disabilities: A Case Study of Ireland and the United Kingdom

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## ABSTRACT

Following the Global Financial Crisis of 2008, contractions in the global economy were often utilised as a justification for deep cuts in State spending, including welfare state programmes. This article will problematise the 'necessity' of austerity measures and how this conflicts with the intentions of the Convention on the Rights of Persons with Disabilities (CRPD), which requires State intervention to ensure the right to a minimum standard of living (Article 28 CRPD) for such persons. By comparing the arguably voluntary and ideologically-driven austerity programme undertaken in the United Kingdom with the externally imposed 'Bailout Package' in Ireland, it will address whether the Convention may, in limited circumstances, allow for programmes such as these to be deemed compatible with the CRPD among developed States.

**KEYWORDS:** human rights; disability; austerity; the United Nations Convention on the Rights of Persons with Disabilities; social rights.

## 1. INTRODUCTION

The UN Convention on the Rights of Persons with Disabilities (hereafter the CRPD), and its Optional Protocol (which is a separate instrument requiring separate signature and ratification), were adopted by the UN General Assembly of the United Nations in 2006. The CRPD was the first human rights treaty of the twenty-first century.<sup>1</sup> It became one of the fastest ratified instruments in UN history.<sup>2</sup> Unlike the individualised conception of disability which dominated during the early twentieth century and focused on the existence of impairment and the supposed loss to the individual,<sup>3</sup> the drafting of the CRPD was heavily influenced by the social or social-contextual model of disability.<sup>4</sup> Social model theorists view disability as the result of socio-economic, societal and environmental barriers that inevitably limit or prevent the participation of persons with disabilities within society.

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<sup>1</sup> United Nations, Convention on the Rights of Persons with Disabilities 2006, GA Res 61/106 and UN General Assembly, Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006, GA Res 61/106, Annex II.

<sup>2</sup> Gooding, *A New Era for Mental Health Law and Policy: Supported Decision-Making and the UN Convention on the Rights of Persons with Disabilities* (2017) 1.

<sup>3</sup> Drum, 'Models and approaches to disability' in Drum, Krahn, Bersani, *Disability and Public Health* (2009); Oliver, *Social Work with Disabled People* (1983); Oliver, 'The social model of disability: thirty years on' (2013) 28(7) *Disability & Society* at 1024-26.

<sup>4</sup> Hacking, *The Social Construction of What?* (1999) at 6-7.

This is often interpreted as including, but not limited to, the built environment and societal attitudes.<sup>5</sup> In this way, the structural issues which hinder the full participation of persons with disabilities within society must be addressed by States Parties, and the CRPD is infused with a strongly interventionist tone.

What complicates this widespread support for the CRPD among States Parties, is the steady erosion of the welfare state, which governs ‘all publicly provided and subsidised services, statutory, occupational and fiscal,’<sup>6</sup> and can broadly be considered ‘a state which through its state structure, social policy, and institutions allows its inhabitants a *level of decommmodification*; they can opt-out of work for a period of time and there still exists a safety net in the form of public social support.’<sup>7</sup> Or, as Esping-Andersen argued, it reduces the importance of the labour market ‘as the chief determinant of peoples’ life chances.’<sup>8</sup> This does not mean that the overall trend has been a reduction in State welfare budget *strictu sensu*. For example, there has often been an upward trend in the amount allocated towards old-age pensions as a percentage of overall welfare budgets,<sup>9</sup> as well as in spending on disability-related payments.<sup>10</sup> Many States have, however - at least in a general sense - shifted to a form of welfare provision which is less focused on the reduction of insurable risks, and is more conditional on prescribed behaviours, fitting within an increasingly prescribed category,<sup>11</sup> or which are not directly provided for by the State.<sup>12</sup> In this way, the erosion of the welfare state is more evident in a shift within the *relationship* between the State and its constituents than it is within per capita spending. From the perspective of the CRPD in particular, this poses some concern due to its emphasis on State-level action. Austerity programmes are often the quickest, and the most brutal, in the way in which they bring about these changes within the welfare state. For the purposes of this article, austerity will be taken as a situation within which State revenues are exceeded by its continued spending. Austerity programmes may be instigated for a variety of reasons, but this contribution argues that

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<sup>5</sup> Kayess and French, ‘Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8(1) *Human Rights Law Review* 1 at 6. See also Oliver, *Understanding Disability: From Theory to Practice* (1996).

<sup>6</sup> Alcock and Glennerster (eds), *Welfare and wellbeing: Richard Titmuss’ Contribution to Social Policy* (2001) at 118; Girvetz, ‘Welfare State’ in. Sills (ed.) *International Encyclopedia of the Social Sciences*, Vol 16, (1968) at 512.

<sup>7</sup> Ingvarsson, ‘Migrants and the Welfare State: An Examination of Variation in Migrants Access to Social Benefits’, (2014), at 2, available at: [www.ibei.org/migrants-and-the-welfare-state-an-examination-of-variation-in-migrants-access-to-social-benefits\\_37765.pdf](http://www.ibei.org/migrants-and-the-welfare-state-an-examination-of-variation-in-migrants-access-to-social-benefits_37765.pdf) [last accessed 26 November 2020].

<sup>8</sup> Esping-Andersen, *Politics against Markets: The Social Democratic Road to Power* (1985) at 245.

<sup>9</sup> Office of Budget Responsibility, ‘Welfare Spending: State Pension’, available at: [obr.uk/forecasts-in-depth/tax-by-tax-spend-by-spend/welfare-spending-state-pension/#:~:text=State%20pension%20spending%20is%20set,0.1%20per%20cent%20of%20GDP.&text=Thereafter%2C%20the%20share%20increases%20by,points%20between%202020%20and%202023](http://obr.uk/forecasts-in-depth/tax-by-tax-spend-by-spend/welfare-spending-state-pension/#:~:text=State%20pension%20spending%20is%20set,0.1%20per%20cent%20of%20GDP.&text=Thereafter%2C%20the%20share%20increases%20by,points%20between%202020%20and%202023) [last accessed 26 November 2020].

<sup>10</sup> Department of Public Expenditure and Reform, ‘Disability Allowance Expenditure Drivers’, (2017), available at: [assets.gov.ie/7268/48351e0c87ef4600a615494e152f1ba8.pdf](http://assets.gov.ie/7268/48351e0c87ef4600a615494e152f1ba8.pdf) [last accessed 26 November 2020].

<sup>11</sup> Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (2018); O’Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017).

<sup>12</sup> Dardot and Laval, *The New Way of the World: On Neoliberal Society* (2014).

the primary motivating justification in recent decades has been that of ‘necessity’ and a lack of alternative public policy choices which States can implement in lieu of cuts to fiscal spending. This lack of choice also positions cuts to public expenditure as the most viable option for reducing the overall deficit. However, in instigating large scale cuts to the welfare budget, States likely bring themselves into conflict with the CRPD and its intentions, creating questions regarding whether, and to what extent, austerity measures and disability rights provisions, are capable of being reconciled with one another. This is particularly important given that the UN Flagship Report on Disability and Development Report highlighting that persons with disabilities suffer ‘disproportionate levels of poverty... lack of access to education, health services, employment... [and] under-representation in decision-making and political participation,’<sup>13</sup> underlining the symbiotic relationship between economic, social, civil and political rights and potential impact of further alterations to the structure of the welfare state.

This article seeks to develop the current state of the art by contrasting the impact of austerity measures undertaken by the United Kingdom and Irish governments and explore whether the justifications for and nature of the cuts made by each can be reconciled with the positive obligations to intervene through State resources created within the Convention. Both States took divergent, but not entirely dissimilar, paths in this respect. The UK voluntarily undertook its austerity programme to address its fiscal deficit, and appeared to target disability in a disproportionate manner. Ireland was externally bound by a ‘Bailout Package’ negotiated in order to stabilise the Irish economy between November of 2010 and December of 2013, and had certain targets that it had to reach in terms of cuts to the welfare budget. Both governments argued that these cuts and reforms were ‘necessary’, and it is for this reason that the article uses the liminal space between the ‘necessity’ of austerity on the one hand and the positive obligation to intervene within the CRPD on the other, as the primary research question.<sup>14</sup> This is not to say that one programme is less ideological than the other, but rather that the external imposition of austerity programmes allows the blame for such changes to be placed upon the forces necessitating such changes are those who are truly responsible. Similarly, both the UK and Ireland vary primarily in terms of the overtness of their own governing ideologies, and not in approaches themselves. One of the largest and most novel contributions of this article, therefore, is that it compares two *similar* European states who tend to differ by a small number of degrees within this same liminal space rather than comparing two entirely dissimilar contexts.

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<sup>13</sup> United Nations Department of Economic and Social Affairs, UN Flagship Report on Disability and Development 2018: Realization of the Sustainable Development Goals by, for and with Persons with Disabilities, (2018), at 24, available at: [www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/12/UN-Flagship-Report-Disability.pdf](http://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2018/12/UN-Flagship-Report-Disability.pdf) [last accessed 26 November 2020].

<sup>14</sup> The Convention only came into force in Ireland on 19 April 2018, whereas the UK ratified the Convention and its Optional Protocol in 2009.

What this article ultimately finds, is that the Convention does provide some latitude towards States Parties where funds are simply unavailable, and that this would include austerity in certain instances. However, the ‘necessity’ of austerity measures is not an automatic defence, and requires a degree of externality and temporality: namely, whether the State in question truly had a choice in the matter, or if necessity is a smokescreen for ideology; and if the cuts are in some way made permanent or outlast a period of imposed or negotiated austerity. On both accounts, the United Kingdom, clearly fails this test, and this is reflected in the recent findings of the CRPD Committee. Contrastingly, in the Republic of Ireland (hereinafter Ireland), despite the diminution in standards for persons with disabilities which would otherwise amount to a violation of their rights, the austerity programme imposed there would appear permissible on the grounds of externality and within the period of the ‘Bailout Package’. The Irish State's failure to rectify these cuts within a reasonable period after this, however, would arguably amount to a violation since that time and until such time as they are reversed. Thus, for developed states who are party to the CRPD, the space provided for austerity is quite narrow in reality.

In order to achieve these aims, the article shall be structured as follows. Firstly, following on from this introduction, it will briefly outline whether necessity can be used as a justification for austerity measures, before proceeding to examine the new human rights model of disability within the CRPD and how the right to an adequate standard of living and social protection is now enshrined under Article 28. This will be followed by an examination of the cuts made to disability payments within the UK and its compliance with the Convention. A fifth section will expand upon whether and to what extent the measures adopted in Ireland could be said to comply with the Article 28 of the CRPD on the right to an adequate standard of living and social protection, as well as how it differs from the UK. It will then close by offering some brief concluding remarks, tying these various strands together as well as reflecting upon how this may or may not change in a post COVID-19 world.

## **2. NECESSITY AS A JUSTIFICATION FOR AUSTERITY MEASURES**

Necessity, as discussed within the introduction, argues that where States operate at a deficit, they should simply seek to reduce these in line with the spending which they can meet as an ongoing concern, and in this way reach a new equilibrium. Some scholars such as Pierson, and supported by Schafer and Streeck, have suggested that we have now entered an age within which States are continually limited in their ability to either reassign funds from pre-existing projects to those which have arisen since these were first introduced or to deal with the increased pressures created as the welfare

state has matured.<sup>15</sup> For example, the length of time for which pension recipients now receive these payments are much longer than they may have originally been envisaged, and the number of recipients now far exceeds what the welfare system can support without reforms. Pressure has subsequently mounted to reduce welfare spending which might have become ‘immovable’ and potentially threatens the fiscal viability of the State.<sup>16</sup> Yet, this must also be viewed in the context of the historical move towards the dismantlement of the post-WWII consensus and the erosion of the welfare state in an overarching sense. For a variety of reasons, political actors have argued that the welfare state is no longer fit for purpose, and often along ideological lines.<sup>17</sup> This justification must therefore be viewed as another way to attack or undermine a long-term project which they fundamentally disagree with, albeit on the basis that it is not only rational, but needed.

Another argument in favour of the necessity justification is the increasingly globalised system of capitalism that currently operates, and the pressure which international markets and actors are capable of exerting in order to ensure that States will attempt to cut public budgets rather than operate at a loss and try to leave a recessionary period by utilising social and capital investment.<sup>18</sup> This justification centres on heightened tax competition between States at the international level, and that increasing tax rates may, in fact, worsen the financial situation as market actors no longer see investment in that same State as advantageous. This ‘race towards the bottom’ has meant that States are left with less choice, and must cut spending rather than engaging with other policy tools.<sup>19</sup> Although the pressures of international tax competition have not gone unchallenged,<sup>20</sup> it is another example of how States will feel an external pressure to ‘cut the cloth’ rather than increasing their tax revenues to compensate for any shortfall in public finances.

It is important to remember that States or international market actors will often use the existence of a deficit to justify the imposition of austerity measures even when they are shown to worsen the situation nationally, to ‘double down’ on these programmes of fiscal adjustment. This can be

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<sup>15</sup> Pierson, ‘Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies’ in Pierson (ed.), *The New Politics of the Welfare State* (2001); Schafer and Streeck, ‘Introduction: Politics in the Age of Austerity’ in Schafer and Streeck (eds), *Politics in the Age of Austerity* (2013).

<sup>16</sup> Pierson, ‘Irresistible Forces, Immovable Objects: Post-Industrial Welfare States Confront Permanent Austerity’ (1998) 5 *Journal of European Public Policy* at 539.

<sup>17</sup> Michaels, *The Trouble with Diversity: How We Learned to Love Identity and Ignore Inequality* (2006); Bockman, *Markets in the Name of Socialism: The Left-Wing Origins of Neoliberalism* (2011).

<sup>18</sup> Dahl, *Pluralist Democracy in the United States* (1969).

<sup>19</sup> Sinn, ‘US Tax Reform 1981 and 1986: Impact on International Capital Markets and Capital Flows’ (1988) 41 *National Tax Journal* at 327; Steinmo, ‘The End of Redistribution? International Pressures and Domestic Tax Policy Choices’ (1994) 88 *Challenge* at 9.

<sup>20</sup> Plumper, Treoger and Winner, ‘Why is There No Race to the Bottom in Capital Taxation?’ (2009) 53 *International Studies Quarterly* at 761; Garretsen and Peters, ‘Capital Mobility, Agglomeration and Corporate Tax Rates: Is the Race to the Bottom for Real?’ (2007) 53(2) *CESifo Economic Studies* at 263.

viewed as ideological insofar as it demonstrates a dogmatic adherence to the idea of austerity even where it proves unsuccessful. This is perhaps best exemplified in recent years by Krugman's comment on the Eurozone Financial Crisis that, 'rather than admit that they've been wrong, European leaders seem determined to drive their economy — and their society — off a cliff.'<sup>21</sup> Elsewhere, Breuer has also argued against the notion that austerity can ever be expansionary.<sup>22</sup>

For much of the latter half of the 20th Century, it was also openly acknowledged that capital and social spending - in lieu of reducing these - was perhaps the most appropriate means of navigating out of a recessionary period. Scholars such as Krugman have noted that States inherently possess the ability to run deficits of this kind to the benefit of society, and that to treat a governmental budget as equivalent to that of a household, which is limited in terms of the mechanisms available to it, is wholly inappropriate.<sup>23</sup> States can, for example, utilise monetary policy to issue more currency to increase their spending power, as well as assume longer-term debts which can be repaid over far longer periods than in a household. However, because of the internal and external forces which pressure governments to cut spending rather than continue to operate at a deficit, as well as the impetus to maintain or reduce taxation to maintain competitiveness, this has fallen out of favour, and austerity has become 'necessary' even when it will potentially worsen the economic climate within that State. This is compounded by a shift since the 1970s within economic scholarship that increasing long-term debt is generally detrimental.<sup>24</sup> Cumulatively, this has led to a situation within which the discretion of the State to choose courses of action other than austerity are severely limited.<sup>25</sup>

However, these external pressures to utilise austerity measures and the limitations placed upon States where they are required to enter into bailout programmes in order to fix fiscal liquidity crises have not wholly restricted the choices available to them. National governments may, for example, take the opportunity to implement welfare reforms which would have likely proven to be deeply unpopular under different circumstances and which align with their own political ideology. In this way, it becomes a matter of looking at *where* and *how* the reforms are introduced and the extent to which evidence was ignored in *designing* and *applying* these reforms. Necessity can simply prove

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<sup>21</sup> Krugman, 'Europe's Economic Suicide' *The New York Times*, (2012), available at: [www.ny-times.com/2012/04/16/opinion/krugman-europes-economic-suicide.html](http://www.ny-times.com/2012/04/16/opinion/krugman-europes-economic-suicide.html) [last accessed 26 November 2020].

<sup>22</sup> Breuer, 'Expansionary Austerity and Reverse Causality: A Critique of the Conventional Approach', Working Paper No: 98 (Institute for New Economic Thinking, 2019).

<sup>23</sup> Krugman, 'The Austerity Agenda' *The New York Times*, (2012) available at: [www.nytimes.com/2012/06/01/opinion/krugman-the-austerity-agenda.html](http://www.nytimes.com/2012/06/01/opinion/krugman-the-austerity-agenda.html) [last accessed 26 November 2020].

<sup>24</sup> Rose and Peters, *Can Governments Go Bankrupt?* (1978); Rose, 'Inheritance Before Choice in Public Policy' (1990) *2 Journal of Theoretical Politics* at 263; Rose and Davies, *Inheritance in Public Policy: Change Without Choice in Britain* (1994).

<sup>25</sup> Pierson, supra n 16; Streeck and Mertens, *An Index of Fiscal Democracy*, MPfG Working Paper 10/3 (Max Planck Institute for the Study of Societies, 2010).

to be a smokescreen for a national political agenda. This is particularly true for developed countries with greater levels of access to the globalised economy, when compared to developing economies that will have less capital with which to combat these arguments of necessity. Similarly, where an external body such as the International Monetary Fund (IMF) mandates austerity measures as a precondition for State's accepting fiscal support during a national liquidity crisis, this can also not be viewed as apolitical. As Clift has argued, the recent ideological shift within the IMF to acknowledge the weaknesses of austerity programmes underlines that it has often historically upheld an ideological propensity for hawkish behaviour in this respect.<sup>26</sup>

## **2. A NEW CONCEPTUALISATION OF DISABILITY: THE HUMAN RIGHTS MODEL**

As discussed in the introduction to this article, the CRPD denoted a clear break with the previously utilised medicalised model of disability, and signalled a shift towards one which views disability as being the consequence of barriers within society itself. The Preamble of the CRPD highlights this,<sup>27</sup> by recognising that it is the 'attitudinal and environmental barriers that hinders full and effective participation'<sup>28</sup> which are the most significant issues at play with regards to the construction of disability as a concept. Although the drafters did not include an exhaustive definition of disability within the text, Article 2 does outline some important guidance vis a vis what constitutes disability for the purpose of Convention. In this vein, it identifies a person with a disability as having:

long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>29</sup>

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<sup>26</sup> Clift, *The IMF and the Politics of Austerity in the Wake of the Global Financial Crisis* (2018).

<sup>27</sup> de Paor and O'Mahony, 'The Need to Protect Employees with Genetic Predisposition to Mental Illness? The UN Convention on the Rights of Persons with Disabilities and the Case for Regulation' (2016) 45(4) *Industrial Law Journal* 525 at 549.

<sup>28</sup> CRPD, Preamble para (e). See also para (k), which recognises that persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.

<sup>29</sup> CRPD, Article 2.



This definition, and the text of the Convention as a whole, is broadly considered to represent the social or social-contextual model of disability, which again views disability as being caused by societal barriers.<sup>30</sup> More recently however, there has been a shift away from this social model of disability, with some scholars highlighting that it does not fully encapsulate the nuance within this open-ended definition of disability.<sup>31</sup> Consequently, it can be argued that the CRPD instead promotes a new human rights-based model of disability,<sup>32</sup> which builds upon the earlier works of social model theorists, and encompasses values which acknowledge the human dignity of persons with disabilities.<sup>33</sup> The importance of recognising one's inherent right to dignity stems from the work of Degener and Quinn, who have argued that:

The human rights model focuses on the inherent dignity of the human being and subsequently, but only if necessary, on the person's medical characteristics. It places the individual centre stage in all decisions affecting him/her and, most importantly, locates the main 'problem' outside the person and in society.<sup>34</sup>

Indeed, one of the main criticisms of the social model is that it ignores the effects of one's medical characteristics (including pain), and how it affects sense of identity.<sup>35</sup> In later works, Degener argues that the recognition of human diversity (as enshrined in Article 3 of the CRPD) includes the recognition of impairment as an element of one's own personal identity.<sup>36</sup> Thus, impairment can be seen as a 'valuable contribution to human rights theory in that it clarifies that impairment is not to be regarded as a deficit or as a factor that can be detrimental to human dignity.'<sup>37</sup> This reasoning makes sense within the context of welfare programmes, as specific assistance payments may be required to enable people with disabilities to their enjoy an adequate standard of living under Article 28. It is therefore necessary for States Parties to adopt a human-rights approach across social and economic

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<sup>30</sup> de Paor and O'Mahony, *supra* n 27 at 549; This is best reflected in the Preamble of the CRPD, which recognises the 'attitudinal and environmental barriers that hinders full and effective participation.'

<sup>31</sup> Retief and Letsosa, 'Models of disability: A Brief Overview', (2018) 74(1) *HTS Teologiese Studies/ Theological Studies*, available at: <doi.org/10.4102/hts.v74i1.4738> [last accessed 15 June 2020]; Degener, 'A New Human Rights Model of Disability' in Della Fina, Cera and Palmisano (eds), *The United Nations Convention on the Rights of Persons With Disabilities: A Commentary* (2017) at 41-60; Oliver, *The Politics of Disablement* (1990).

<sup>32</sup> CRPD Committee, General Comment No 6: On equality and non-discrimination (2018), at para 11.

<sup>33</sup> Degener, 'Disability in the Human Rights Context' (2016) 5(3) *Laws* at 35.

<sup>34</sup> Degener and Quinn, 'A Survey of International, Comparative and Regional Disability Law Reform', in Breslin and Yee (eds), *Disability Rights Law and Policy* (2002) at 13; Although, as noted by Degener subsequently, they did not distinguish between a human rights model and a social model at this stage.

<sup>35</sup> See, for example, Morris, *Pride against Prejudice* (1991) at 10.

<sup>36</sup> CRPD, Article 3. Article 3(4) places further emphasis on 'respect for difference and acceptance of persons with disabilities.'

<sup>37</sup> *Ibid.* at 43.

law and policy-making, which considers the experience of an individual's overall identity in line with the human rights model, alongside the external barriers which obstruct their equal participation and inclusion within society.

It is now widely regarded that the CRPD simply reaffirms human rights as opposed to creating new ones.<sup>38</sup> However, the restatement of existing provisions in a new disability-specific manner offers a new lens through which we can challenge discriminatory laws and practices. It also allows for an intersectional analysis of disability issues, meaning that structural inequalities like gender or race and their interactions with disability have become more nuanced and more common within the UN institutional framework. Similarly, the kinds of intervention that the CRPD necessitates - such as reasonable accommodation and accessibility - cement that rights will generally require positive intervention and the spending of State monies.<sup>39</sup> This emphasis on intersectionality, on positive duties and the individualised or nuanced experienced of disability, is important in the context of austerity, which involves the reduction in State spending, the cutting of core welfare state programmes, and the abrogation of State duties towards its citizens in many respects. This has alternatively been referred to as the concept of 'inclusive equality' which the CRPD Committee considers as including:

(a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.<sup>40</sup>

The CRPD and the new human rights model of disability, therefore represent a (qualified) buttress against the notion of austerity and its necessity by emphasising that persons with disabilities must be able to enjoy a certain level of protection, and that it is incumbent upon States Parties to provide this based upon the reconceptualisation of disability as a social construct. It is limited insofar as, this article argues throughout, the CRPD does not remove the potential for regression within economic and social rights, but rather reduces the number circumstances within which austerity would appear to be permissible. The Convention is, of course, also ultimately subject to progressive realization. As Article 4(2) CRPD outlines:

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<sup>38</sup> Kayess and French, *supra* n 5 at 20.

<sup>39</sup> See, for example, Article 14 on the right to liberty and 24 on the right to education.

<sup>40</sup> CRPD Committee, *supra* n 32.

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

This is in line with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (CESCR) which equally stresses the relative resources of the State in question.<sup>41</sup> Whilst this could be considered a relativist approach and in danger of diluting the intentions and spirit of the CRPD, it is in part a reflection of the divide between developed and developing States Parties - those with more resources and durable structures can ensure higher standards within their own jurisdiction and provide a template for others to follow. It is important to note that while the Committee on Economic, Social and Cultural Rights have recognised that, for some States parties, there may be limits on the available resources available which in turn impact the full realisation of the right to social security under Article 9 CESCR; however, this is not an absolute derogation of the States duties and there are immediate obligations which are still mandatory. These include an obligation to ensure that existing guarantees are exercised without any discrimination and ensuring the equal rights of men and women alike.<sup>42</sup> It is further noted that the realisation of the right to social security is inherently linked to the right and respect for human dignity, and therefore States parties must ensure that the right is given priority in law. The Committee obliges States to take positive actions towards compliance with Article 9, which include the development of a national strategy for the full implementation of the right to social security alongside the allocation of sufficient fiscal (and other resources where necessary).<sup>43</sup> Thus, while international law recognises the divide between developed and developing States (and the available resources therein), this does not amount to a full derogation of a States responsibilities under international human rights laws.

The Committee on the Rights of Persons with Disabilities has also previously indicated that States should not allow economic or financial instabilities to prevent the full enjoyment of the rights

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<sup>41</sup> CESCR, General Comment No 19: On the Right to Social Security (art. 9), 4 February 2008, at para 40.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid. at para 41.

of persons with disabilities.<sup>44</sup> This is particularly true of more developed States of whom the CRPD Committee has arguably been most critical,<sup>45</sup> and is also reflected in the language of the UN Special Rapporteur on Extreme Poverty and Human Rights.<sup>46</sup> All of these constitute the minimum essential levels of a nationally defined social protection floor, and are said to be ‘crucial to securing an adequate standard of living for persons with disabilities.’<sup>47</sup>

The Committee has commented that the duty of progressive realization includes a presumption against retrogressive measures in the spheres of economic, social and cultural rights.<sup>48</sup> States parties are required to demonstrate that they paid full consideration of all alternative options to retrogressive measures and that they can justify these with regard to the totality of rights outlined in the CRPD, and in light of the maximum available resources available to the State in question.<sup>49</sup> States must ultimately show that there was a reasonable justification, that there was genuine participation of the affected groups in examining the proposal and any alternatives, they were neither directly nor indirectly discriminatory in nature, an independent review took place at the national level, and finally, that the measures will not deprive individuals of their right to a minimum level of social security.<sup>50</sup> Indeed, as previously noted by the Office of the High Commissioner for Human Rights (OHCHR) in 2013, all policy responses in the wake of economic crises must be developed and implemented in line with international human rights laws, particularly because austerity measures which target social welfare programmes have the potential to ‘undercut human rights norms and threaten the most vulnerable members of society.’<sup>51</sup>

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<sup>44</sup> CRPD Committee, Committee on the Rights of Persons with Disabilities: Looking forward, 27 February 2009, A/66/55, Annex IX, at para 6.

<sup>45</sup> See for example, CRPD Committee, Concluding observations on the initial report of Austria, adopted by the Committee at its tenth session, CRPD/C/AUT/CO/1, 2–13 September 2013, where the lack of planning for emergency situations generally is critiqued versus CRPD Committee, Concluding observations on the initial report of Algeria CRPD/C/DZA/CO/1 where the recommendations are narrower and more specific with regards to asylum seekers with disabilities.

<sup>46</sup> Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights London, 16 November 2018, available at: <[www.ohchr.org/Documents/Issues/Poverty/EOM\\_GB\\_16Nov2018.pdf](http://www.ohchr.org/Documents/Issues/Poverty/EOM_GB_16Nov2018.pdf)> [last accessed 15 June 2020].

<sup>47</sup> Ibid.

<sup>48</sup> CRPD Committee, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention Report of the Committee, CRPD/C/15/R.2/Rev.1, 6 October 2016, at para 46. More generally on retrogression see Warwick, ‘Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights’ (2019) *Human Rights Law Review* 467.

<sup>49</sup> Ibid.

<sup>50</sup> Committee on Economic, Social and Cultural Rights, general comment No 3: On the nature of States parties’ obligations (1990); Letter of the Chairperson of the Committee on Economic, Social, and Cultural Rights to the States parties to the Covenant on Economic, Social and Cultural Rights, 16 May 2012.

<sup>51</sup> OHCHR, Report on austerity measures and economic and social rights (2013) 9, available at: <[www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf)> [last accessed 26 November 2020].

With this in mind, the following subsections will focus on how the CRPD relates more directly to austerity, by examining Article 28 on the right to an adequate standard of living, before chronicling its enforcement in more detail.

### 3.1 THE RIGHT TO AN ADEQUATE STANDARD OF LIVING

Among the rights contained in the CRPD, Article 28 is perhaps the most relevant for the purpose of this discussion, as it provides a right of adequate standard of living and social protection:

States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.<sup>52</sup>

The need for such a provision to be expressly provided for within the body of the Convention is clear, as statistically, people with disabilities are more likely to have lower income levels on average than those without disabilities,<sup>53</sup> and as such, are more likely to live in poverty-related conditions.<sup>54</sup> An argument could be made that, when read literally, Article 28 contains both a general right to an adequate standard of living *and* to experience this free from discrimination. Thus far, such a reading has yet to be entertained by the CRPD Committee. It is somewhat doubtful that the Committee would interpret Article 28 as imposing a generalised duty, as this may penalise States for any cuts in fiscal spending which would appear to affect persons with disabilities and do not contain a disproportionate and discriminatory element. An interpretation such as this would not be politically advantageous, as it may exceed what many State Parties believed the effect of Article 28 to be and would be far more financially burdensome.

In order to ensure the realisation of Article 28, and the enjoyment of rights more broadly, States Parties are now required to assist in the form of disability-related expenses, adequate training, financial assistance and respite care,<sup>55</sup> alongside public housing programmes where necessary.<sup>56</sup> The inclusion of disability-related costs is significant, and offers a clear example of how the CRPD is

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<sup>52</sup> CRPD, Article 28(1).

<sup>53</sup> The Organisation for Economic Co-operation and Development, *Sickness, Disability and Work: Breaking the Barriers* (OECD 2010) 54.

<sup>54</sup> Schur, Kruse and Blanck, *People with Disabilities: Sidelined or Mainstreamed?* (2013) 29.

<sup>55</sup> CRPD, Article 28(2)(c).

<sup>56</sup> CRPD, Article 28(2)(d).

designed to create meaningful improvements in the lives of persons with disabilities, unlike other Conventions which have previously been ineffective for the advancement of disability rights and can therefore be seen as creating ‘paper victories.’<sup>57</sup> This is one example of the ‘paradigm shift’ brought about by the CRPD,<sup>58</sup> but it is also significant due to the binding nature of the treaty. Whereas previous international laws were introduced to ensure respect for the rights of persons with disabilities, such as the Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1994, they did not have the force of a legally binding treaty, a status which is now enjoyed by the CRPD throughout its States Parties. Thus, while the right to income maintenance and social security were previously outlined in Rule 8 of these Standard Rules,<sup>59</sup> this did not enjoy the same weight as Article 28 of the CRPD. This is of course limited by the nature of the CRPD and the fact the obligations contained within it are subject to progressive realisation.

Throughout human rights laws more generally, access to food, clothing and housing conditions is outlined in Article 25.1 of the Universal Declaration of Human Rights, which also provides that everyone has the right to a standard of living, and the right to security in the event of sickness or disability.<sup>60</sup> Similarly, Article 9 of the International Covenant on Economic, Social and Cultural Rights provides that ‘States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.’<sup>61</sup> The comparatively vague wording of this provision was referenced by the EU during the third session of the negotiation of the CRPD (at which time Ireland held the presidency of the Council), in which they noted this was justifiable to take into account the differences between States Parties to the Convention.<sup>62</sup> Such differences are also relevant in the context of austerity measures, as various factors can impact upon the standard of living during times of economic hardship, including the overall cost of living and increased unemployment levels; the effects of which may be felt harder in countries with already poor levels of infrastructure.

Throughout the drafting of the CRPD, there was further debate regarding the terms ‘social security’ and ‘an adequate standard of living,’<sup>63</sup> with some delegations arguing that these are two

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<sup>57</sup> Perlin, ‘Through the Wild Cathedral Evening’: Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities’ (2008) 13 *Texas Journal on Civil Liberties & Civil Rights* 413 at 418-19.

<sup>58</sup> Lang et al., ‘Implementing the United Nations Convention on the rights of persons with disabilities: principles, implications, practice and limitations’ (2011) 5 *European Journal of Disability Research* at 206.

<sup>59</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities 1994, Rule 8.

<sup>60</sup> Universal Declaration of Human Rights, Article 25(1).

<sup>61</sup> International Covenant on Economic, Social and Cultural Rights, Article 9.

<sup>62</sup> UN Convention on the Rights of People with Disabilities, Third session of the Ad Hoc Committee - Daily Summary Of Discussions Related To Article 23 Social Security and Adequate Standard of Living, 2 June 2004.

<sup>63</sup> See the Report of the Chairman during the Sixth Session of negotiations, in which he references the disagreement regarding the use of the term social security, available at: [www.un.org/esa/socdev/enable/rights/ahcstata28ssrepchair.htm](http://www.un.org/esa/socdev/enable/rights/ahcstata28ssrepchair.htm) [last accessed 26 November 2020].

separate rights.<sup>64</sup> The eventually finalised text of Article 28 excludes reference to social security, unlike previous international law texts,<sup>65</sup> and now refers to the right to social protection,<sup>66</sup> as proposed by the EU delegation.<sup>67</sup> The right to social protection is considered to be a broader term which encapsulates the different assistance programmes provided by States,<sup>68</sup> and alongside the right to an adequate standard of living, must now be interpreted in light of the overall tenor and spirit of the CRPD, which is to ensure that people with disabilities are treated equally and are respected as being rights-holders. In this way, Article 28 is an express recognition of the duties on behalf of States Parties to ensure that persons with disabilities are not discriminated against in terms of standard of living and are financially supported and assisted so that they can fully participate (live, work, socialise etc.) in the community.<sup>69</sup>

The final text of Article 28 further requires that special care and attention must be paid to women and girls with disabilities, as well as older persons with disabilities, who may require further social protection support and poverty reduction services.<sup>70</sup> This is in line with Article 6, which recognises the multiple forms of discrimination which women experience. Indeed, it is now well-established that women are overrepresented within the world's poorest populations, and according to the CRPD Committee, this is a direct consequence of discriminatory practices.<sup>71</sup> Another important factor is the degree to which women with disabilities have been subject to discrimination within the family unit and are more likely to be assigned caregiving roles and to be tasked with 'informal' or household-related work than their male counterparts.<sup>72</sup> This limits the time available to seek employment outside of the home and consequently, women are more likely to be reliant on social welfare payments as their sole source of income in these circumstances. Where women have chosen to engage in informal work within the home, this decision should also be recognised and respected in line with their right to exercise capacity in all personal decision-making under Article 12 of the CRPD. Indeed, it is this interconnectivity between the rights contained in the Convention that is most important to

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<sup>64</sup> Schulze, *Understanding the UN Convention on The Rights of Persons with Disabilities* (2009) at 105.

<sup>65</sup> See Article 22 UDHR; Article 9 CESC (as above); Article 11 of The Convention on the Elimination of all Forms of Discrimination Against Women; Article 26 of The UN Convention on the Rights of the Child; and Article 27 of The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>66</sup> This is similar to the Copenhagen Declaration on Social Development, which includes a commitment to: 'Develop and implement policies to ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child-rearing, widowhood, disability and old age.'

<sup>67</sup> United Nations Enable, Seventh Session: Comments, proposals and amendments submitted electronically, available at: [www.un.org/esa/socdev/enable/rights/ahcstata28sevscomments.htm](http://www.un.org/esa/socdev/enable/rights/ahcstata28sevscomments.htm) [last accessed 26 November 2020].

<sup>68</sup> Report of the Chairman, *supra* n 63.

<sup>69</sup> Morris, 'Independent living and community care: A disempowering framework' (2004) 19 *Disability and Society* at 427–42.

<sup>70</sup> CRPD, Article 28(2)(b).

<sup>71</sup> CRPD Committee, General comment No 3: On women and girls with disabilities, 2 September 2016, at para 59.

<sup>72</sup> *Ibid.* at para 18.

note, as when read together, the rights contained therein will help to shape domestic disability law and policy in States Parties in a far more significant and multi-faced manner than if they were read in isolation. In this regard, it is argued that the right to an adequate standard of living and social protection must be read in line with other relevant provisions of the CRPD including, but not limited to, Article 6 (women and girls with disabilities) and Article 27 (work and employment).

This issue was also recently raised by the Committee on the Elimination of Discrimination Against Women (herein after the CEDAW Committee) in a decision against Moldova.<sup>73</sup> In this instance, the author was the mother of a child with a disability. It was later discovered that the period she spent caring for her child was not considered one which contributed towards her pension. The author then argued that this was discrimination by association. In finding against the Moldovan State, the CEDAW Committee underlined the gendered nature of care duties within society, and how without adequate safeguards, this will disproportionately affect women and led to vulnerability and insecurity.<sup>74</sup> That the CEDAW Committee also underlines this ‘feminisation of poverty’ is a further confirmation of the need for Article 28 CRPD to address this same concern.

### 3.2 ENFORCING ARTICLE 28

In considering the meaning of Article 28, the CRPD Committee’s recent report concerning the UK is of note, as the impact of austerity measures on persons with disabilities is addressed. Although the report and recommendations of the Committee will be referenced more specifically below, it is important to note that in their concluding observations, the Committee expressed concern regarding the ‘impact of austerity measures and anti-poverty initiatives introduced as a consequence of the financial crisis in 2008/09, which resulted in severe economic constraints among persons with disabilities and their families [...] including increased reliance on food banks.’<sup>75</sup> The Committee further commented on the negative impact on the standard of living as a result of reductions in social support, unemployment allowance, and insufficient compensation for disability-related costs, among others.<sup>76</sup> This is particularly important as, according to figures issued by the UK Office for National Statistics, persons

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<sup>73</sup> Committee on the Elimination of Discrimination against Women, Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning communication No. 104/2016 CEDAW/C/74/D/104/2016.

<sup>74</sup> Ibid. at para 7.15.

<sup>75</sup> CRPD Committee, Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, 3 October 2017, CRPD/C/GBR/CO/1, at para 58(a).

<sup>76</sup> Ibid. at para 58(b).



with disabilities are 28.6% less likely to be in employment than persons without disabilities,<sup>77</sup> with the equivalent Irish figures demonstrating a similar trend.<sup>78</sup> Access to employment for people with disabilities has been a chronic problem, with further issues relating to job progression, unequal pay, lack of permanent job opportunities, forced early retirement, segregation within the workplace, and underemployment (i.e. performing a role for which one is overqualified).<sup>79</sup> A lack of access to employment, coupled with the associated costs of accessibility requirements and the broader systemic barriers across society, led to greater reliance on welfare programmes among people with disabilities. In light of these findings and concerns, the Committee made a number of recommendations in its Concluding Observations on the United Kingdom, including the introduction of social protection reforms to secure the income levels of persons with disabilities (taking into account their disability-related costs), conduct a cumulative impact assessment of the social protection system in collaboration with organisations of persons with disabilities, and to ensure that eligibility criteria and assessments for social welfare benefits are in line with the human rights model of disability.<sup>80</sup>

As discussed, the right contained within Article 28 is never absolute and is subject to progressive realization. Although the CRPD Committee has dealt with only a small number of complaints concerned with austerity measures, *D.R. v Australia*<sup>81</sup> is instructive on the limitations of the Article and its scope, and the manner in which austerity or a lack of funding may be used by States to justify inactions. In this instance, the complainant was a 52-year-old who had been diagnosed with a mental and intellectual disability and was in receipt of a disability support pension.<sup>82</sup> In 1998, he was admitted to a Brain Injury Centre to undergo a rehabilitation programme for a period of two years, following which he was advised that accommodations and disability-based supports were needed within the community before he could be released.<sup>83</sup> In the absence of such supports, the complainant continued to reside within the Centre, where he remained up until the date of his communication to the CRPD Committee. In the interim period, an application was made for social housing and disability support services, following which he was deemed eligible for social housing but on

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<sup>77</sup> Office for National Statistics, 'Disability and Employment, UK: 2019' available at [https://www.ons.gov.uk/people-populationandcommunity/healthandsocialcare/disability/bulletins/disabilityandemploymentuk/2019#:~:text=Labour%20Force%20Survey%20\(LFS\)%20data,%25%20for%20non%2Ddisabled%20people](https://www.ons.gov.uk/people-populationandcommunity/healthandsocialcare/disability/bulletins/disabilityandemploymentuk/2019#:~:text=Labour%20Force%20Survey%20(LFS)%20data,%25%20for%20non%2Ddisabled%20people) [last accessed 26 November 2020].

<sup>78</sup> McMahon, 'People on disability allowance will be allowed earn €427 a week and keep medical card' *The Irish Times*, 30 November 2018, available at: [www.irishtimes.com/news/social-affairs/people-on-disability-allowance-will-be-allowed-earn-427-a-week-and-keep-medical-card-1.3715203](http://www.irishtimes.com/news/social-affairs/people-on-disability-allowance-will-be-allowed-earn-427-a-week-and-keep-medical-card-1.3715203) [last accessed 26 November 2020].

<sup>79</sup> See Barnes and Mercer, 'Disability, work, and welfare: challenging the social exclusion of disabled people' (2005) 19(3) *Work, Employment and Society* 527 at 533-4.

<sup>80</sup> *Ibid.* at para 59 (a)-(e).

<sup>81</sup> CRPD/C/17/D/14/2013.

<sup>82</sup> *Ibid.* at para 2.1.

<sup>83</sup> *Ibid.* at para 2.2.

the condition that he was first provided with disability supports. The application for such supports was said to be successful, however, the relevant authorities were not in a position to provide such services due to a lack of funding. Furthermore, due to his living arrangements, the complainant did not have access to his pension and had no powers to manage his financial affairs as this was subject to compulsory administration by the Public Trustee of Queensland. In addressing the CRPD Committee, the complainant argued that the denial of his access to public housing and disability supports violated his right to an adequate standard of living pursuant to Article 28 of the Convention.<sup>84</sup>

While the Committee went on to find this complaint inadmissible, this case is interesting due to the arguments made on behalf of both parties, and particularly the counterarguments made on behalf of the State Party in regard to fulfilling their duties. In addressing the issues relating to Article 28, it was submitted on behalf of the State Party that this Article must be interpreted in light of the particular circumstances arising from an individual's disability.<sup>85</sup> This must be done in view of Article 4(2) which affords a duty on States Parties 'to take measures to the maximum of its available resources' in an effort to realise the economic, social and cultural rights of persons with disabilities.<sup>86</sup>

The availability of services and specialised supports for persons with disabilities is dependent on a wide range of factors, and arguably, the text of the CRPD itself is designed so that it can apply across the board in terms of developed, developing and underdeveloped countries. As such, each of the individual provisions must be read in light of the maximum of the economic resources available within each State,<sup>87</sup> and understandably, this may differ depending on what services are already available and what needs to be prioritised. This would mean that there is space for States to justify the effects of austerity, particularly where these are firstly outside of their control. Necessity is, consequently, a means of limiting from the full scope of Article 28, so long as there are issues stemming from the directly imputable obligations of the State - i.e. the degree to which they may be directly attributable to the relevant authority simply renegeing in their obligations - and temporality - i.e. if the cuts are only undertaken for a short period of time in which the State addresses its deficit before later being corrected. In this way, the CRPD and austerity as a policy tool can be reconciled, albeit in rather limited circumstances.

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<sup>84</sup> Ibid. at para 3.7.

<sup>85</sup> Ibid. at para 4.30.

<sup>86</sup> Ibid.

<sup>87</sup> United Nations General Assembly, Report of the Special Rapporteur on the rights of persons with disabilities, 7 August 2015, A/70/297, at 25.

It also highlights a key shortcoming in international legal instruments like the Convention - although establishing that there shall be a floor below which states should not fall in respect of a minimum standard of living, this is not defined and, it allows States Parties to justify why they are not necessarily meeting this same objective by providing them with financial defences. This is arguably a dispensation which should protect developing countries, for whom the CRPD may prove too demanding, and fail to accommodate the reality within those States. However, these financial justifications will also be available to highly industrialised States, who may be able to exploit these ambiguities to undermine the Convention and what should be a stronger obligation as well as their more developed welfare systems and large financial resources.

### 3. AUSTERITY IN THE UNITED KINGDOM: UNNECESSARY HARDSHIP

A clear example of where the argument of necessity is rebutted, and which led to a rather scathing Concluding Observations of the CRPD Committee, is that of the United Kingdom. Changes to the welfare system there under the Conservative party and Liberal Democrat coalition government and the more recent Conservative and Democratic Unionist Party (DUP) supply arrangement have been dictated not solely by necessity, but by the Conservative party political agenda which, at the very least, have gone unchallenged by both of its recent governmental partners.<sup>88</sup> David Cameron, the Conservative party leader and eventual Prime Minister, openly promised that upon entering government his party would rebalance the public budget and by deepening the cuts that had already been made by the Labour Party following the onset of the Global Financial Crisis of 2008-2009.<sup>89</sup> In a landmark speech, he argued that ‘the age of irresponsibility is giving way to the age of austerity.’<sup>90</sup> In order to help achieve this, the welfare budget was to be cut by £18 billion per annum between 2010 and 2014-2015.<sup>91</sup> In its initial report on compliance with the CRPD, the UK government argued that it was committed to implementing a ‘radical welfare reform programme to tackle entrenched poverty and end intergenerational worklessness through welfare reform and employment programmes,’<sup>92</sup>

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<sup>88</sup> Ellison, ‘The coalition government, public spending and social policy’ in Bochel and Powell, *The coalition government and social policy: restructuring the welfare state* (2016).

<sup>89</sup> Firzli and Bazi, ‘Infrastructure Investments in an Age of Austerity: The Pension and Sovereign Funds Perspective’ (2011) 41 *Revue Analyse Financière* at 37.

<sup>90</sup> Cameron, ‘The Age of Austerity’, available at: [conservative-speeches.sayit.mysociety.org/speech/601367](http://conservative-speeches.sayit.mysociety.org/speech/601367) [last accessed 26 November 2020].

<sup>91</sup> Scope and Demos, ‘The Hardest Hit of the Hardest Hit’, 26 March 2013, available at: [blog.scope.org.uk/2013/03/26/the-hardest-hit-of-the-hardest-hit/](http://blog.scope.org.uk/2013/03/26/the-hardest-hit-of-the-hardest-hit/) [last accessed 26 November 2020].

<sup>92</sup> CRPD Committee, Consideration of reports submitted by States parties under article 35 of the Convention Initial reports of States parties due in 2011 United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/1, at para 308.

which tries to contextualise this austerity programme as being for the benefit of persons with disabilities. However, it immediately qualifies this by stating that this programme will 'deliver a system that is simpler, fairer, and in which work always pays.'<sup>93</sup> The final emphasis on working one's way out of poverty is perhaps the most instructive, as it points towards a system which de-emphasises the role of the State should play in eliminating social barriers through direct cash transfers and other redistributive programmes, and instead underlines the active, and somewhat central role that persons with disabilities must play in this respect.

Some scholars such as Sands - as well as the Social Security Advisory Committee (SSAC) - have argued that cuts had in reality been made without any consideration of the impact of the cuts made to the welfare budget and how they would impact upon different communities and marginalised groups.<sup>94</sup> Moreover, this omission was indicative of a political platform - to ignore evidence or failure to engage with it in any meaningful way is a political decision. This is particularly true where the executive was made aware of the likely impact of its cuts or changes to welfare payments and chose to implement them regardless.<sup>95</sup> Similarly, much like Cameron's speech ushering in the new 'age of austerity' in the UK, reforms were often ushered in with a clearly ideological tone to them: alterations to jobseeker's payments were made to end the 'something for nothing culture' within the British society;<sup>96</sup> and, that the government would 'root out the benefits cheats who pretend to be ill for money.'<sup>97</sup> Ryan argues that this presented a very different narrative to the necessity of these measures: 'it was not a global economic crash that had caused a recession but the so called bloated welfare bill covering the needs of supposedly disabled people.'<sup>98</sup> Although austerity measures could potentially be justified based upon the existing economic literature due to 'immovable' programmes like those designed to assist persons with disabilities, the shift in burden away from the most obvious cause - an international recession - towards a vulnerable minority and the manner in which it is framed is again indicative of ideology, not of necessity. Rather, this was a convenient vehicle through which to 'hollow out welfare,' public services and local council budgets,'<sup>99</sup> and acted as much 'a moral case as an economic one: as so-called hardworking 'strivers' watched their wages shrink, 'scrounging'

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<sup>93</sup> Ibid.

<sup>94</sup> Sands, *The impact of austerity on women* (2012); SSAC Annual Report 2015-16, available at: [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/545870/ssac-annual-report-2015-2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/545870/ssac-annual-report-2015-2016.pdf) [last accessed 26 November 2020].

<sup>95</sup> SSAC Annual Report 2017-18, available at: [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/730615/ssac-annual-report-2017-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/730615/ssac-annual-report-2017-2018.pdf) [last accessed 26 November 2020].

<sup>96</sup> Mason, 'Benefit reforms will end 'something-for-nothing culture', says Duncan Smith', *The Guardian*, (2013).

<sup>97</sup> Brown, 'Iain Duncan Smith: We'll Root Out the Benefits Cheats Who Pretend to be Ill for Money' (2014) *the Express*.

<sup>98</sup> Ryan, *Crippled: Austerity and the Demonization of Disabled People* (2019), at 19 (ebook version).

<sup>99</sup> Ibid. at 18.

disabled people were said to be milking the system.’<sup>100</sup> Although the CRPD Committee did not engage with the ideological basis on which the UK reforms were implemented, they did find clear issues with regards to the lack of evidence for the alterations made, calling for a review of the impact of these cuts and alterations. The UK government was also told, in two separate instances, that this review needed to be conducted with the assistance of disability organisations.<sup>101</sup>

What this ultimately means, is that all such changes to the welfare system based upon the executive’s austerity agenda must be viewed critically, and assessed on the basis of whether or not these were ‘deliberately intended to... promote social and economic hardship precisely to point up a perceived moral distinction between those receiving benefit and those who, because they were in work, were deemed to be more deserving’<sup>102</sup> - and the extent to which persons with disabilities became a convenient target for these reforms. As the CRPD Committee notes in its initial Inquiry, the UK government foresaw the impact of the changes it was making to access to disability supports, and was intentionally making these alterations with the intention of limiting access.<sup>103</sup> This aligns with a previous observation made by the OHCHR, in which it was stated that ‘austerity is now being applied for ‘pre-emptive reasons’ i.e. fiscal deficits are being reduced to avert negative reactions from financial markets.’<sup>104</sup> Such an approach is counterproductive, as Nolan explains, as the growing evidence suggests that austerity measures do not in fact promote economic growth.<sup>105</sup>

Substantive changes to the payments included the abolition of the Disability Living Allowance and its replacement with the Personal Independence Allowance (PIP), which mandated that all recipients be retested at regular intervals.<sup>106</sup> Even prior to the launch of the PIP, the government was aware that this would likely led to upwards of half a million persons with disabilities and chronic illnesses being in receipt of payments.<sup>107</sup> Combined with cuts to welfare generally as well as those targeted at disability, recipients were deemed to be up to 19 times more affected than persons without

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<sup>100</sup> Ibid. at 37.

<sup>101</sup> CRPD Committee, supra n 75 at paras 59-59(b).

<sup>102</sup> Ellison, ‘Public policy in practice’ in G Craig (ed.), *Handbook on global social justice* (2018) at 280-1.

<sup>103</sup> CRPD Committee, Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention, CRPD/C/15/4, at paras 110-112.

<sup>104</sup> OHCHR, Report on austerity measures and economic and social rights (2013), available at: [www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf) [last accessed 26 November 2020].

<sup>105</sup> Nolan, ‘Not Fit For Purpose? Human Rights in Times of Financial and Economic Crisis’ (2015) 4 *European Human Rights Law Review* at 362.

<sup>106</sup> Ryan, supra n 98 at 51.

<sup>107</sup> Walters, ‘I Will Go After the Bogus Disabled - Some of Them DO Get Better’, 30 April 2013, *Daily Mail*.

disabilities depending on the severity of their condition.<sup>108</sup> By 2018, the Equality and Human Rights Commission argued that this was getting worse, and this continued erosion of the rights of persons with disabilities was an 'alarming backwards step.'<sup>109</sup> Families in which a person identifies as having a disability have also been more deeply affected, with figures from 2017 showing that 30% lived in poverty whilst those without were closer to 19%.<sup>110</sup> Based upon this assessment, and the widespread availability of data of this kind, it is quite clear why the CRPD Committee reached the conclusions it did with regard to Article 28 - persons with disabilities in the UK were subject to such severe cuts that simply being related to them made it more likely for a family to enter into poverty. The Committee went so far as to request the outright repeal of the PIP due to its lack of compliance with the Convention.<sup>111</sup> Similarly, although it did not suggest specific financial targets for payments for applicants, the Committee also underlined that payments must amount to 'full compensation of disability-related costs.'<sup>112</sup>

This issue was also compounded by the manner in which the PIP was administered. With the requirement that all former recipients of the Disability Living Allowance be reassessed, and that this be periodically conducted after successfully being in receipt of the PIP, the potential for individuals to be deemed fit for work was high if these assessments were not carried out by an appropriate individual. However, it was found that one of the private bodies conducting these assessments on behalf of the State included basic errors in their documentation, that there has been a widespread difficulty in recruiting and training appropriate staff, and that in some instances, the number of sub-standard reports has exceeded 50% of the total number carried out by a contracting body.<sup>113</sup> This can be attributed due to the nature of these assessments, which are framed as means of achieving 'value for money',<sup>114</sup> are rarely conducted by medical specialist, and can constitute 'tick-box' exercises.<sup>115</sup> Not only is this capable of being administratively arbitrary and unsuitable for dealing with the individualised nature of disability implicit within the CRPD, it will, as previous sections have made clear, lead to a violation of Article 28 CRPD where the refusal leads to a person with a disability being incapable of enjoying a dignified standard of living. It is therefore unsurprising that as well as calling for the repeal of the PIP, the CRPD Committee also recommended that eligibility criteria be redrawn,

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<sup>108</sup> Duffy, 'A Fair Society? How the Cuts Target Disable People' (2013).

<sup>109</sup> Bloom, 'Tory Welfare Cuts Have Hammered the Disabled Declares Britain's Human Rights Watchdog' (2018) *Daily Mirror*.

<sup>110</sup> Barnard, 'UK Poverty 2017: A comprehensive analysis of poverty trends and figures' (2017) at 4.

<sup>111</sup> CRPD Committee, supra n 75 at para 59(c).

<sup>112</sup> Ibid. at para 59(a).

<sup>113</sup> National Audit Office, 'Contracted-out Health and Disability Assessments' (2016), available at: [www.nao.org.uk/wp-content/uploads/2016/01/Contracted-out-health-and-disability-assessments.pdf](http://www.nao.org.uk/wp-content/uploads/2016/01/Contracted-out-health-and-disability-assessments.pdf) [last accessed 26 November 2020].

<sup>114</sup> Ibid. at 6.

<sup>115</sup> Ryan, supra n 98 at 51, 53.

that a substantive review of the impact of this increased conditionality be conducted and, perhaps most importantly, that all legal and administrative requirements for disability benefits be addressed to ensure that individuals conducting any assessments are adequately trained and qualified to do so.<sup>116</sup> A point worthy of note, is that these recommendations regarding administrative fairness were not framed directly as an access to justice issue. Rather, they were applied under Article 27 CRPD and the right to work. Although this specific provision falls outside of the scope of this article, it is important to underline that framing this as within the material scope of such a substantive right - and its direct impact on access to employment and other material supports - highlights how interlinked all rights with the CRPD are.

These points are not only reflected within the Concluding Observations of the CRPD Committee, but also within the findings of the United Nations Special Rapporteur on extreme poverty and human rights, who noted that the poverty inflicted as a result of austerity measures was a ‘political choice,’<sup>117</sup> with ‘the compassion and mutual concern that has long been part of the British tradition has been outsourced.’<sup>118</sup> Similarly, the CESCR Committee, in their 2016 Concluding Observations in relation to the United Kingdom, criticised the disproportionate adverse impact of the austerity measures introduced in 2010, calling upon it to ‘use the maximum of its available resources with a view to progressively achieving the full realization of economic, social and cultural rights,’<sup>119</sup> and highlighting the need to consider the impact on people with disabilities.

From this perspective, it is difficult to argue that these reforms were necessary. The effect of the policies introduced by the UK government ultimately created unnecessary harm and undue hardship for people with disabilities. The European Committee on Social Rights in particular noted that payments such as the Employment Support Allowance were manifestly inadequate.<sup>120</sup> This must, however, be contrasted with the position of the UK Supreme Court, who upheld these reforms as broadly consistent with the European Convention on Human Rights, save for in certain instances such

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<sup>116</sup> CRPD Committee, *supra* n 75 at paras 57-59.

<sup>117</sup> *Ibid.* at 22.

<sup>118</sup> *Ibid.* at 23.

<sup>119</sup> Committee on Economic, Social and Cultural Rights, Concluding observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, 14 July 2016, E/C.12/GBR/CO/6, at paras 18-19.

<sup>120</sup> See also the Reports of the European Committee of Social Rights in relation to the United Kingdom: European Committee of Social Rights, Conclusions XXI-2 - United Kingdom - Article 12-1, 8 December 2017; Conclusions XX-2 - United Kingdom - Article 12-1, 6 December 2013.



as domestic violence.<sup>121</sup> Such measures were ultimately politically justified by arguably casting persons with disabilities as being a drain on the system who elected not to enter employment. It is also clear from the findings of the CRPD Committee that at no time could these be deemed to fall within the ‘progressive realisation’ exception for austerity programmes, based upon the very direct nature of the Committee’s critiques and proposals for reform to bring the UK welfare state in line with the Convention’s obligations.

#### 4. THE ‘BAILOUT PACKAGE’ AND AUSTERITY: CHANGES TO THE IRISH WELFARE SYSTEM

Ireland represents an interesting comparison in many ways to the UK example. On the one hand, the Irish welfare state has proven difficult to categorise, as it had historically often elected to mimic measures adopted in the UK without an overt ideological rationale for doing so.<sup>122</sup> This often meant that in principle, both States have proven to be quite similar, albeit often divergent in terms of the content and suitability.<sup>123</sup> While the UK would adopt clear programmes of reform,<sup>124</sup> Ireland eschewed such concerns. On the other, the Irish State has ensured that it maintains a model of ‘[l]ow taxes [and] the reliance on non-state actors to deliver ESR-related goods and services.’<sup>125</sup> The primary distinction consequently, is that Ireland has often sought to underplay the ideological basis for its model of welfare provision, whilst the UK has tended to politicise its own. Both however, ultimately represent strong examples of limited neoliberal welfare states, with Ireland consistently remaining less developed than that of the UK even prior to its gradual nadir. This also bears out in the way in which the Irish state implemented its own austerity measures against persons with disabilities, as it tried to depoliticise these by attributing them to external requirements imposed upon them.

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<sup>121</sup> See *SG and others v Secretary of State for Work and Pensions* [2015] UKSC 16; and *Carmichael and Rourke v Secretary of State for Work and Pensions* [2016] UKSC 58.

See also, *J.D. and A v. the United Kingdom* (Applications nos. 32949/17 and 34614/17) [24/10/2019], where the Strasbourg Court affirmed this.

<sup>122</sup> McCashin, *Social Security in Ireland* (2004) at 25; and Cook, ‘Britain’s Legacy to the Irish Social Security System’ in Drudy (ed.), *Ireland and Britain since 1922* (1996).

<sup>123</sup> Cousins, *The Irish Social Welfare System: Law and Social Policy* (1995) at 14-15; McCashin, *Social Security in Ireland* (2004) at 38.

<sup>124</sup> Daly & Yeates, ‘Common origins, different paths: adaptation and change in social security in Britain and Ireland’ (2003) 31(1) *Policy & Politics* 85.

<sup>125</sup> Nolan, ‘Welfare Rights in Crisis in the Eurozone: Ireland’ in Kilpatrick and De Witte, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges* (2014).



Following the Global Financial Crisis of 2008, the Irish State accepted a ‘bailout’ package of approximately €85 billion from the ‘Troika’ - which includes the IMF, European Commission and the European Central Bank (ECB) - requiring that substantial adjustments be made in all areas of public spending. Many of these adjustments were targeted at the DEASP’s annual budget, and emphasised cuts to certain payments and categories of payments, which totalled almost €750 million.<sup>126</sup> The argument that the Irish State could make in this instance, is that it had little power in relation to whether or not the State could make cuts as it was directed to do so by external forces, reinforcing the idea that this was in fact ‘necessary’ and could consequently fall within the remit of the CRPD Committee’s findings in *D.R. v Australia*.

What complicates this narrative, is that research conducted by Hick demonstrates that the Commission and ECB were generally ‘agnostic to [specific] cuts, as long as [Ireland] make the macro,’<sup>127</sup> and that the State and well as the Minister for Employment Affairs and Social Protection took this as an opportunity to ‘cut the cloth’<sup>128</sup> and ‘make the system less passive.’<sup>129</sup> Consequently, while the Irish executive maintained that any changes were non-ideological and practical in nature, and thus fell within the bounds of what was required of it, it had discretion in respect of *where* and *how* to make cuts to the welfare budget - even if it had overall targets that it was required to meet.

Some of the most substantive changes brought about as a result of this programme of reforms made to the Irish welfare system, included cuts to all working age payments, which included the One Parent Family Payment (OPFP), maternity benefit, and in 2012, to the disability allowance (DA) and Carer’s Allowance.<sup>130</sup> Changes to disability payments like these, included an increase in the qualifying age for the disability allowance from 16 to 18, as well as a reduced rate of €100 per week for 18-21 years and €144 per week for persons aged 22-24. Those over 25 or in receipt of payments prior to this change were unaffected, and it was argued that this brought it in line with changes made to jobseeker payments for those under 25,<sup>131</sup> but to apply a general rule regardless of circumstance, and to discriminate against young persons with disabilities was troubling. The Domiciliary Care Allowance was extended to persons aged 16-18 to compensate for this loss of the DA but would still amount

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<sup>126</sup> European Commission, ‘Ireland’s economic crisis: how did it happen and what is being done about it?’, available at: <[ec.europa.eu/ireland/economy/irelands\\_economic\\_crisis/index\\_en.htm](http://ec.europa.eu/ireland/economy/irelands_economic_crisis/index_en.htm)> [last accessed 15 June 2020].

<sup>127</sup> Hick, ‘Enter the Troika: The Politics of Social Security during Ireland’s Bailout’ (2017) *Journal of Social Policy* 1 at 9.

<sup>128</sup> *Ibid.* at 7.

<sup>129</sup> *Ibid.* at 6.

<sup>130</sup> See [www.budget.gov.ie/Budgets/2010/Summary.aspx#SocialWelfare](http://www.budget.gov.ie/Budgets/2010/Summary.aspx#SocialWelfare) and [www.budget.gov.ie/Budgets/2011/2011.aspx](http://www.budget.gov.ie/Budgets/2011/2011.aspx) [last accessed 26 November 2020].

<sup>131</sup> See [www.citizensinformation.ie/en/money\\_and\\_tax/budgets/budget\\_2012.html](http://www.citizensinformation.ie/en/money_and_tax/budgets/budget_2012.html) [last accessed 26 November 2020].

in a net loss for such persons. These reforms were strongly rebuked by the Disability Federation of Ireland (DFI) when they were proposed, who argued that reductions of 47% or more in the rate of payments for the DA<sup>132</sup> would, among other factors, likely ‘further exacerbate the day to day difficulties experienced by people with disabilities and the threat of falling into consistent poverty.’<sup>133</sup> Similarly, the Rent Supplement (RS) and reimbursement for medical expenses through the ‘drug payment scheme’ often used by persons with chronic conditions and disabilities were also affected.

In a broader sense, some of the most acutely affected by the overall cuts were persons under the age of 25, single parents and low-income multi-parent families.<sup>134</sup> Those who fell within the lowest 10% of economic earnings within Irish society were considered to have felt an 18.4% cut to their real income, whilst the highest 10% of wage earners experienced an 11.4% loss of earnings or earning potential.<sup>135</sup> Women, especially those with intersectional identities, were considered to be one of the most egregiously effected minority groups in any analysis of these cuts.<sup>136</sup> Material deprivation within Irish society generally was recorded in 2010 at 23%, with 8% of society deemed to be suffering from severe material deprivation,<sup>137</sup> and the reforms introduced certainly deepened this problem, but there was no particular emphasis placed on people with disabilities.

This approach is different from that of the UK. Rather than targeting persons with disabilities for specific cuts and engaging in discourse which treats disability as a potential source of abuse within the welfare system, Ireland appears - on a surface level analysis - to have applied cuts somewhat evenly across all segments of society. There, of course, remains clear questions of the hardship that these cuts produced. In their 2015 Concluding Observations on Ireland’s compliance with the CESCR, the Committee expressed a number of concerns pertaining to the impact of the austerity measures taken in the wake of the 2008 crash.<sup>138</sup> Among these concerns, the Committee criticised:

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<sup>132</sup> Disability Federation of Ireland, Newsletter: Budget 2012 Special, available at: [www.disability-federation.ie/download/legacy/NEWSLETTER%20%20BUDGET%20SPECIAL%20December%202011.pdf](http://www.disability-federation.ie/download/legacy/NEWSLETTER%20%20BUDGET%20SPECIAL%20December%202011.pdf) [last accessed 26 November 2020].

<sup>133</sup> Disability Federation of Ireland, Budget 2012 Analysis, (2012), see [www.disability-federation.ie/about/publications/newsletter-budget-2012-special/full-text/](http://www.disability-federation.ie/about/publications/newsletter-budget-2012-special/full-text/) [last accessed 26 November 2020].

<sup>134</sup> Hick, ‘From Celtic Tiger to Crisis: Progress, Problems and Prospects for Social Security in Ireland’ in *Social Policy and Administration*, (2014); and see [www.oneparent.ie/CSO-Statistics-On-Lone-Parent-Families-2011.pdf](http://www.oneparent.ie/CSO-Statistics-On-Lone-Parent-Families-2011.pdf) [last accessed 26 November 2020].

<sup>135</sup> Callan et al., ‘Crisis, Response and Distributional Impact: The Case of Ireland’, ESRI Working Paper, n.456/2013, 9.

<sup>136</sup> Murphy, Gendering the Narrative of the Irish Crisis, in *Irish Political Studies*, n.30:2/2015; Barry & Conroy, *Ireland in Crisis 2008-2012: Women, austerity and inequality*, National Women’s Council of Ireland (NWC) and Think Tank on Social Change (TASC) (2012).

<sup>137</sup> Irish Central Statistics Office, Survey on Income and Living Conditions (SILC): Preliminary Results 2010, (2011), available at: <[www.cso.ie](http://www.cso.ie)> [last accessed 26 November 2020].

<sup>138</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of Ireland*, 8 July 2015, E/C.12/IRL/CO/3, at para 11.

- i. 'The disproportionate focus on instituting cuts to public expenditure in areas such as housing, social security, health and education, without altering its tax regime;
- ii. The adoption of austerity measures (both during and after the crisis) without conducting proper assessments as to their impact on economic, social and cultural rights;
- iii. The adverse impact of austerity measures on the entire population, especially those who were already disadvantaged or marginalized;
- iv. Finally, the failure to conduct a review (in a comprehensive and human rights manner) to assess the impact of the State's exit from the bailout programme.'<sup>139</sup>

The Committee noted that there are particular austerity policies which States parties to the CESCR must adhere to in the context of economic and financial crises: namely, any measures taken must be temporary (covering only the period of the crisis itself) and they must also be necessary and proportionate.<sup>140</sup> Moreover, any such cuts must not result in discrimination or increased inequalities for its citizens.<sup>141</sup>

When viewed through the lens of the CRPD, there is an argument that States Parties should be required to refrain from making blanket cuts across the population, as this could amount to a disproportionate burden on people with disabilities, who already experience disability-specific expenses which may be necessary to enable them to participate fully within society. In this way, one can posit that a 10% cut to disability related payments, would have a far greater impact than the same cut to non-disability related welfare payments. In their 2015 General Comment, the Committee acknowledged the impact of Ireland's austerity measures on people with disabilities and noted that the 'accessibility of persons with disabilities has been significantly restricted owing to cuts in social benefits', and as such, it recommended that the State should cancel its cuts to specialised benefit programmes.<sup>142</sup>

It is true that the changes to the welfare system also produced an unequal effect on those who were already marginalised, and that the State should have been cognisant of this fact, but the overall requirements of the Bailout Package necessitated that certain targets for reductions within the welfare budget be made, and Ireland appears to have made these in a relatively evenly distributed manner based upon the terms of the agreement with the IMF and EU despite this important proviso.

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid. at 3.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid. at 4.

Thus, it may be argued that, along with having its hands tied by the terms of the Package, the Irish executive could be said to be in line with the necessity argument, and thus in line with the CRPD - so long as these cuts would eventually be reversed following the Irish State's exit from the recapitalisation programme. However, despite Ireland's exit in 2014, no increases were made in any Disability, Illness or Carer Schemes until 2017, when a nominal increase of €5 was proposed.<sup>143</sup> These were followed by marginal increases in 2018, which the Disability Federation of Ireland deemed incapable of addressing the problem of disability-related poverty in Ireland and appear to attribute this to previous changes to the system and a historic lack of appropriate funding within the sector.<sup>144</sup> By 2019, the DFI argued that the promise to 'disability proof' future budgets was welcome, but the changes suggested were unlikely to solve these legacy issues.<sup>145</sup> What this points to, is that in respect of Article 28, Ireland may have been within a permissible space for the purpose of compliance with the CRPD, especially in light of the lack of information or guidance so far from the CRPD Committee in terms of the limits of austerity and the 'acceptable' level of impact on such measures for people with disabilities. However, the subsequent failure to reverse or alleviate these regressive measures in the intervening years arguably brings the Irish State into conflict with the CRPD.

The State no longer has the justification of the Bailout Package and its terms, and for that reason cannot argue that it is temporally or externally justified in continuing to violate Article 28 to the extent that it currently does by maintaining - with some minor improvements - austerity budget spending outside of the required period of austerity. It could therefore be argued that the government's commitment to 'advancing equality, reducing poverty and strengthening economic and social rights'<sup>146</sup> through the allocation of State monies during the budgeting process has thus far proven to be more rhetorical than substantive in tenor. This is particularly noteworthy as Ireland was due to report to the CRPD Committee on 20 April 2020, but as of 26 November 2020, there is no evidence of this having been lodged with the Committee. When a State Party report is submitted to the Committee, it will be reviewed to examine Ireland's level of compliance with the rights contained therein. The importance of this review procedure must not be understated in terms of Ireland's commitment to

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<sup>143</sup> Department of Public Expenditure and Reform, 'Spending Review 2017 Disability and Special Education Related Expenditure', (2017) at 8, available at: [www.budget.gov.ie/Budgets/2018/Documents/5.Disability%20and%20Special%20Education%20Related%20Expenditure%20-%20Part%20of%20the%20Spending%20Review%202017.pdf](http://www.budget.gov.ie/Budgets/2018/Documents/5.Disability%20and%20Special%20Education%20Related%20Expenditure%20-%20Part%20of%20the%20Spending%20Review%202017.pdf) [last accessed 26 November 2020].

<sup>144</sup> Disability Federation of Ireland, 'Budget Press Release from the Disability Federation of Ireland', (2017), available at: [www.disability-federation.ie/news/press-releases/2017/10/10/budget-press-release-from-the-disability-federatio/](http://www.disability-federation.ie/news/press-releases/2017/10/10/budget-press-release-from-the-disability-federatio/) [last accessed 26 November 2020].

<sup>145</sup> Disability Federation of Ireland, 'Budget 2019 Press Release - DFI welcomes disability proofing of future budgets', (2018), available at: [www.disability-federation.ie/news/press-releases/2018/10/09/budget-2019-press-release-dfi-welcomes-disability/](http://www.disability-federation.ie/news/press-releases/2018/10/09/budget-2019-press-release-dfi-welcomes-disability/) [last accessed 26 November 2020].

<sup>146</sup> Ministerial Question 45, Equality Proofing of Budgets, Dáil Éireann Debate, Tuesday - 5 March 2019.

their obligations under the Convention, and as such, it is expected that disability-related benefits will feature within the initial report and will likely face scrutiny by the Committee in their subsequent report.

## 5.1 ACCESS TO JUSTICE

A 2014 report interviewing staff within the DEASP, which would reflect Ireland's exit from the Bailout programme, found that the economic climate and political pressure to implement a more restrictive approach towards the processing of welfare applications. Staff argued that this has led to a poorer standard of client care, with 'fewer qualifying payments, and lower payments'.<sup>147</sup> From the perspective of disability payments in Ireland, it should be noted that in 2012 over half of all applications for the Disability Allowance were refused at first instance by a Deciding Officer,<sup>148</sup> reflecting this hardening attitude towards payments and the release of further monies. In addition to the often-substantial cut in entitlements, this kind of approach will ensure that people with disabilities bear an unnecessary cost for such reforms.

This has proven to a chronic issue for the Irish welfare system, and pre-dates the 2011 Bailout Package: a 2008 review conducted on behalf of the DEASP logged many significant issues with the way in which its officers who deal directly with the public conduct themselves. For example, staff did not engage meaningfully with those presenting themselves to the DEASP and the training for these members of staff was often inadequate. This lack of training would in turn lead to difficulties in interpreting circulars, internal communications and other rules within the DEASP and could lead to incorrect determinations being made.<sup>149</sup> Combined, this generalised pressure to refuse payments as well as inadequately trained Deciding Officers would not only easily account for these high rates of refusals for Disability Allowance but also the high rate of success upon appeal: of the 4,310 appeals dealt with in 2012, 2,114 and 95 were partially allowed, meaning that just over 51% of appeals for this individual payment were successful.<sup>150</sup> For example, In *CP v Chief Appeals Officer, Social Welfare Appeals Office & the Minister for Social Protection*,<sup>151</sup> an Appeals Officer (AO) had made a

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<sup>147</sup> Axiom Consulting, 'One DSP Organisational Development Initiative: Driving Strategy and Transformation Through Strategy', Department of Social Protection, 21 August 2014, at 9.

<sup>148</sup> Irish Examiner, 'Over Half of Disability Allowances Not Granted', 23 January 2013, available at: [www.irishexaminer.com/ireland/over-half-of-disability-allowances-not-granted-220845.html](http://www.irishexaminer.com/ireland/over-half-of-disability-allowances-not-granted-220845.html) [last accessed 26 November 2020].

<sup>149</sup> Thornton, 'Strategic Review of the Customer Facing Services', Department of Social Protection, (2008), 12 and annexes 2.

<sup>150</sup> Irish Examiner, supra n 146.

<sup>151</sup> [2013] IEHC 512.

negative determination in refusing a domiciliary care allowance for the maintenance of a child living with autism. The child's parents sought further evidence to satisfy the test necessary to receive the payment, but the SWAO refused to hear the case. Hogan J. later made an order quashing the decision of the AO, directing the Chief Appeals Officer to revise the decision.

Going forward, accessibility training will now be a requirement for all stakeholders working in the disability sector, as per the obligations imposed on Ireland as a State Party to the CRPD.<sup>152</sup> The need for positive awareness raising, education and training is outlined in Article 8 which provides that States must promote awareness-training programmes regarding people with disabilities and their inherent rights.<sup>153</sup> This is arguably most pertinent in times of austerity, when access to social welfare assistance is most crucial. Thus, it is imperative that social welfare officers have the requisite level of training to facilitate the individualised supports and needs of people with disabilities, particularly in cases where the overall process of accessing payments is complicated. Training staff who act as gatekeepers to the welfare system, can create an equilibrium between the need to make cuts to the overall State budget, while also protecting the rights of persons accessing the system and ensuring their right to access to justice is upheld under Article 13 CRPD.

Much like the potential for cuts to be rationalised based on the basis of Article 28 CRPD, these issues regarding the administration of the welfare system may be justified where there they are not wholly disproportionate, are the result of an externality and are temporary in nature. For the latter, this would again require that they do not exceed the duration of the Bailout programme by a significant period of time. This does not, however, appear to be the case. For example, a number of court cases and Ombudsman appeals from 2014 onwards reflect these same issues. Similar outcomes to that in *CP* were also reached in *MD v Minister for Social Protection*,<sup>154</sup> and *B v Minister for Social Protection*.<sup>155</sup> In each instance, it would appear that the AO acting in these cases utilised the narrowest reading of the provisions available to them, and this was potentially due to internal or governmental political pressure to ensure that individual payments are reduced or refused in greater numbers. Many other cases brought to the Office of the Ombudsman have supported these cases brought before the Courts,<sup>156</sup> and illustrate how restrictive the Department and the Appeals Office have become in their

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<sup>152</sup> CRPD, Article 9(2)(c): 'States Parties shall also take appropriate measures: (c) To provide training for stakeholders on accessibility issues facing persons with disabilities.'

<sup>153</sup> CRPD, Article 8(1)(d).

<sup>154</sup> [2015] IEHC 206.

<sup>155</sup> 2014 (unreported).

<sup>156</sup> Ombudsman Casebook Issue 1 Autumn 2014 Carer's Allowance C22/13/1537; Ombudsman Casebook Issue 2 Winter 2014/15. Ombudsman Casebook Issue 1 Autumn 2014 Carer's Allowance C22/14/0447; Ombudsman's Casebook Issue

interpretation of the applicable laws. These cases do, however, take place within two years of Ireland's exit from the programme, and due to the length of time that often elapses between a decision being reached by a Deciding Officer, these could reflect decisions made during or immediately after the austerity programme was completed, and may still fall within a space permissible under the Convention. However, figures acquired by the DFI demonstrate that in 2018, almost 70% of appeals were successful based on an increased rate of refusals at first instance<sup>157</sup> - a significant escalation from the 2012 statistics cited above. This would arguably confirm that this remains a chronic legacy issue and a clear violation of the CRPD from an administrative justice perspective and Article 28 where this deprives applicants of their right to a minimum standard of living.

Ultimately, what this points to, is that Ireland's current lack of compliance with the Convention approximately 5 years after its exit from the austerity programme, from the perspective of both Article 28 and administrative justice, mean that it is currently acting in violation of the rights contained therein and this is likely to be criticised in the upcoming reporting process. This underlines that even where persons with disabilities are not targeted in the same overt manner as occurred in the UK, the space provided within the CRPD for 'necessary' austerity measures is always finite. Thus, while it could be said that Ireland was once acting lawfully and within the permissible liminal space in which austerity measures could be said to comply with the CRPD, the change of economic and financial circumstances thereafter (and the exit from the recapitalisation programme), coupled with the failure to reverse the once-necessary austerity measures, mean that Ireland is now in violation of Article 28.

## CONCLUSION

In this 'age of austerity,' there has often been a series of continued pressures being placed on States to reform their fiscal budgets to ensure that they are operating, if not a balanced budget, a fiscal surplus to ensure the viability and competitiveness of their economy. This gives rise to arguments regarding the 'necessity' of austerity. In particular, where States are required to take financial bailout

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3 Spring 2015 Disability Allowance C22/14/1705; and Ombudsman's Casebook Issue 3 Spring 2015 disability Allowance C22/14/1694.

<sup>157</sup> Baker, 'Disability allowance refusals rise, but 70% of appeals granted', Irish Examiner, 29 January 2019, available at: [www.irishexaminer.com/breakingnews/ireland/disability-allowance-refusals-rise-but-70-of-appeals-granted-900721.html](http://www.irishexaminer.com/breakingnews/ireland/disability-allowance-refusals-rise-but-70-of-appeals-granted-900721.html) [last accessed 26 November 2020].

agreements in order to address fiscal shortfalls in times of recession, reforms to welfare state programmes may actually be mandated, leaving them with very little choice as to how this will be carried out or how deep these cuts will be in practice.

The more recent COVID-19 pandemic certainly raises questions regarding the degree to which this austerity agenda may have ended, with many States signalling a strong shift towards greater welfare state provision in order to halt the spread of the virus and protect public health. Ireland, for example, implemented a robust package in order to do so, moving sharply away from its pre-COVID policies.<sup>158</sup> Although this was far from perfect,<sup>159</sup> it did so in a short period of time and showed how quickly it could mobilise State resources when called upon. However, it also quickly cut its timeframe for relaxing public health restrictions, as well as highlighting the exceptional nature of these interventions. Perhaps most importantly, the increased spending on COVID-related measures combined with the inevitable economic contractions that will be experienced globally among States will provide a convenient opportunity to justify the necessity of austerity programmes once the virus has been contained.

Returning to the central question of this analysis, this raises significant difficulties with regards to compliance with the CRPD, which has recast disability as a social issue, and one which States Parties must address through positive actions and redistributive programmes. Where a State must, by necessity, engage in austerity measures, it would be quite easy for them to fall afoul of the obligations contained within the Convention. The only safety valve contained within the Convention which could potentially reconcile these two issues is the principle of progressive realisation - States Parties are not required to ensure that the obligations contained within it are met all at once, and this can be context specific. Thus, as this article has argued, where austerity is of a short duration and arguably outside of the full control of the implementing State, this may be permissible.

However, this potential exception at no point allows for ideologically led austerity programmes, like that of the United Kingdom and the Republic of Ireland. Both have consistently operated limited neoliberal welfare states, with Ireland historically being less developed and more reliant on charitable organisations etc. to assume some of the obligation towards welfare provision. The UK is simply more overt in signalling its rationales and proactive in adopting substantive changes, whilst Ireland has generally avoided politicisation, and could be considered more passive. This does not

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<sup>158</sup> O'Sullivan, 'Against Ideology? Examining Social Rights in Ireland During Times of Crisis' (2020) 2020/2 *BioLaw Journal - Rivista di BioDiritto* at 715-21.

<sup>159</sup> Fletcher, 'Selective responses to justice under Covid-19 in Ireland', (2020), available at: <[statecrime.org/covid19ireland/](http://statecrime.org/covid19ireland/)> [last accessed 26 November 2020].



mean that Ireland is less ideological, merely that it has often attempted to act as if a lack of explicit tenets underpinning the operation of the system is less ideological. For example, its acceptance of the terms of the bailout package were, in some respects, merely a vehicle for making alterations that it wanted to do for some time.

The reforms to the welfare state in the UK were so retrograde and detrimental to the lives of people with disabilities, often without any clear rationale for them other than to ‘cut the cloth’ and ensure that the welfare state will be more limited in the future, that the CRPD Committee requested significant revisions to be made. It even, in one instance, effectively called for the repeal of one such reform, and made clear that the system in the UK was substandard and did not comply with human rights norms. The response of the Department for Work and Pensions in 2019, seems to sidestep many of the criticisms included in the Concluding Observations of the CRPD Committee. For example, despite the Committee calling for the abolition of the PIP, the response focuses on making the payment easier to understand and less severe in application.<sup>160</sup> These same criticisms were reiterated by the Special Rapporteur on Extreme Poverty and Human Rights, who underlined that these were purely political decisions, as well as the degree to which such a wealthy country could effectively fail its most vulnerable citizens. It is interesting to note, that when the UK government response, they described the Special Rapporteur’s report as including “inflammatory language and [an] overtly political tone” as well as “strongly refut[ing] the claim that the design and delivery of welfare reforms.... are deliberately punitive.”<sup>161</sup> That the UK government seems content to cast the conclusions of the Rapporteur as being politically-motivated and not based on clear evidence remains troubling.

The Irish austerity programme, instigated following the externally negotiated bailout package, would appear more complicated on the surface. Due to the fact that it mandated certain targets be met, this could be said to satisfy the question of agency. Similarly, the reforms, despite generally having a severe impact on the rights of persons with disabilities, was also broadly applied, and there was no direct targeting of disability programmes like that of the UK. On the question of temporality, Ireland also exists in a more liminal space. Following its exit from the bailout programme in 2014, the Irish government has outwardly engaged with the notion that it will try to ‘disability-proof’ or

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<sup>160</sup> Department for Work and Pensions, ‘The UK's 2019 response to select concluding observations of the UN Committee on the Rights of Persons with Disabilities’ available at: <https://www.gov.uk/government/publications/disabled-peoples-rights-the-uks-2019-report-on-select-recommendations-of-the-un-periodic-review/the-uks-2019-response-to-select-concluding-observations-of-the-un-committee-on-the-rights-of-persons-with-disabilities> [last accessed 26 November 2020].

<sup>161</sup> Report of the Special Rapporteur on extreme poverty and human rights on his visit to United Kingdom of Great Britain and Northern Ireland: Comments by the State A/HRC/41/39/Add.3, para 2.

‘equality-proof’ all of its future budgets.<sup>162</sup> In doing so, it notes its commitment to addressing the legacy of its own austerity. However, the changes it has made to the disability budget in practice have thus far been minimal at best, and most of the issues stemming from its austerity programme are now persistent or chronic problems which are not actively improving. In this way, it would appear that the CRPD Committee would have ample ground to critique the Irish State and its compliance with the Convention text and its ensuing obligations.

Thus, what can be learned from this comparative analysis of the UK and Ireland, is that there is space within which more developed States Parties to the CRPD can justify austerity on the basis of necessity and a regression from previous attempts to progressively realise the obligations within the Convention. It is simply that this space is limited, and continuously subject to scrutiny. Part of this can be also be discerned from the tone of the Committee’s findings on the United Kingdom. The necessity of austerity is not directly discussed, although this may be attributed to the fact that the UK itself does not make this argument and there is no need to counter it *strictu sensu*. This would appear to differ from developing States Parties, where the emphasis is more general and concerned with the development of welfare state structures which are durable and are not reliant on civil society or other forces which are less reliable. This is in large part attributable to the concept of progressive realisation being tied to the available fiscal resources in that same State, and the likelihood that their relative political capital will not ensure that they may exit a financial rescue package with the same ease as more developed States like Ireland.

Ultimately, this means that despite the surface level distinctions that can be made between Ireland and the United Kingdom, both must strive to uphold the spirit of the CRPD based on their relative positions, and austerity measures may only be justifiable where they are temporary, and are in some way beyond their own control. This may become even more important in a post-COVID world, where austerity could be more feasibly justified by developed State Parties such as the UK, due to the likely economic contractions that will be experienced and the increased social spending required to aid public health measures to halt the spread of the virus. Both of these are potentially valid bases for developed State Parties to argue that decreased public spending might be necessary to help rebalance their fiscal budgets. However, the ability of these State Parties to impose austerity on persons with disabilities in a manner which is potentially Convention-compliant is likely to be of little comfort due to the effects the ensuing cuts would have upon them. As such, it is even more important that this

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<sup>162</sup> Power, ‘Additional €150m for disability services in budget’ *The Irish Times*, 9 October 2018, available at: <https://www.irishtimes.com/news/social-affairs/additional-150m-for-disability-services-in-budget-1.3657699> [last accessed 26 November 2020].

potential exclusionary zone is scrutinised to ensure that the level of protection afforded by Article 28 remains robust.