Using Law and Litigation in the Public Interest

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Do we really need Public Interest Law and Litigation in a state which is now one of the wealthiest in the world?

Three weeks ago John Lonergan, Governor of the country's largest prison, wrote in the Irish Times that, despite our new found prosperity, "there are thousands of our people, young and old, living in dire poverty and totally alienated from mainstream society … The more wealth we generate, the more widespread inequality becomes".

He should know. Many of the casualties of our unequal society end up in his prison. Others are found in grim and inadequate mental hospitals, neglected geriatric homes, desolate, drug-ridden housing estates, road-side halting sites, or fighting for proper education or treatment for their children with disabilities. Others such as gay couples or transsexuals suffer discrimination and social exclusion through ignorance and prejudice and laws inherited from two centuries ago.

This should not be. We have a Constitution with an inbuilt Bill of Rights, including unenumerated rights that the Supreme Court in an earlier and more active phase read into that Constitution. In addition Ireland has now signed up to most of the major European and UN human rights conventions that protect a wide variety of rights, both civil and political, and economic, social and cultural. These rights should be tools to enable the poor and marginalised to get better accommodation, better education, better health and social welfare, and to find remedies when they are unfairly treated by the powers that be.

But how can vulnerable and disadvantaged people access these rights? First of all they need to know about them. Then they need organisations and structures and usually professional legal assistance to vindicate those rights or to change the law when it does not adequately protect them. And, of course, they rarely have the money to pay for the research and legal fees that may be needed in order to go to court.

That is where Public Interest Law and Litigation comes in, together with structures to deliver it.

Mel Cousins in his paper rightly says that litigation and legal education designed to protect the rights of vulnerable people should be funded by the civil legal aid scheme, and indeed this has happened to a limited degree in the UK. However, FLAC has recently published a study of the civil legal aid system in this jurisdiction, entitled "Access to Justice: A Right or a Privilege?", showing that it is seriously underfunded, operates an impossibly low means test threshold, confines itself almost exclusively to family law cases and is legally barred from taking test cases.

We will be campaigning to change that, but even if we succeeded overnight, the legal aid law centres would probably still have to devote the vast bulk of their time to individual

case work, vitally important and necessary for the particular clients involved, but not intended to change the law or widen the spectrum of rights available to the socially excluded. And it is arguable that a wholly Government-funded body like the Legal Aid Board would always be subject to subtle, or not so subtle, pressures if it took too many cases that significantly challenged Government policies or were likely to cost the Government a lot of money.

We also have, of course, the Equality Authority, which does take test cases very effectively and engages in public legal education but its remit is limited to discrimination issues. So there is a need to develop independent structures to take a wide range of public interest cases on a strategic basis and to carry on campaigns of community legal education and lobbying for legal reform. Mel Cousins has also rightly pointed out that litigation should be only one part of any strategy to assert the rights of the disadvantaged, but it is frequently a crucial part and, as Mel has also noted, even unsuccessful cases can play an important role by highlighting injustices and sparking demands for change.

It is, of course, important to say at this stage that public interest litigation is not new in Ireland. Solicitors and barristers here have been taking cases that affect the public interest, and particularly the interests of disadvantaged and marginalised communities or vulnerable minorities, for many years. And a lot of the time they have taken such cases on a *pro bono* basis or at least on the basis that if they got awarded costs at the end of the day it would be an unexpected bonus.

Such cases go back to ***Ryan v. The Attorney General*** in 1965, ***McGee v. The Attorney General*** in 1973, and ***Airey v. Ireland*** shortly afterwards, and include many cases on Travellers rights and disability rights in the intervening period. Some of the lawyers who took the more recent cases at little if any gain to themselves are here today and we should pay tribute to them. And, since I have only very recently taken up my present position with FLAC, I can also say without embarrassment that FLAC itself has taken a significant number of groundbreaking cases over the years as well as being involved in public legal education and lobbying for legal reform.

But every lawyer in private practice who has taken public interest cases for clients without means, knows the feeling of having to spend hours at the end of a busy day, at night, at weekends, during vacations, working on those cases because the rest of the time has to be spent earning a living and being seen to pull one's weight in the firm. And most of us have had plenty of cases where there was a point that we would have liked to pursue, an anomaly or injustice we would have liked to challenge but we simply could not do it because of the pressure to get on with the case – and dozens of others – and to get the best possible outcome for the particular client, not necessarily for the class of people who might be affected by the point at issue.

The type of public interest litigation taken so far has usually been piecemeal, unplanned, even haphazard. It has depended on cases that raise important issues coming in the door, and on the clients wanting to litigate those issues, not just to settle, quite understandably, for the best deal that is on offer for ***them***. The results of such cases can be haphazard as

well. Even if the issues are thoroughly ventilated in the case, there may be no change in the law or policy unless work has also been done to raise public awareness and create a demand for change.

An example is the ***Norris*** case on gay rights. Even after a comprehensive victory in the European Court of Human Rights in 1988, it took another five years of awareness raising, campaigning, and lobbying to secure the repeal of the Victorian legislation banning gay sex between consenting adults.

There is also a mismatch between the justice system and those who are victims of unfair policies, prejudice or official neglect. Poor people are often afraid to go to solicitors or, if they do, the firms they go to are usually small and may not have the expertise and resources to take on major test cases. Larger firms might be willing to take such cases or support them but usually they have no contact with the people concerned. Barristers are at another remove again, and court rules and procedures are not exactly welcoming to indigent litigants.

And we might as well face the fact as well that the public image of the legal profession has been badly tarnished in recent years and for many it is not the first place they would think of going to seek help in vindicating their rights.

So we are talking about access to the law for the vulnerable and the voiceless and about a strategic approach to litigation that targets specific injustices or abuses and seeks out cases through which to challenge them. And there is also, of course, the need for legal education and awareness raising, both in deprived communities and for the public at large, so as to create a climate of opinion that will support change.

There is a range of models for meeting this challenge, using for example: specifically legal NGOs like FLAC that will concentrate on test case litigation and public legal education; community law centres like Northside and Ballymun in Dublin, which have worked for years in deprived communities, under very difficult circumstances and constantly short of money, striving to raise awareness of legal rights and entitlements and taking cases arising out of those communities; NGOs serving particular disadvantaged groups like Travellers, asylum-seekers, or people with disabilities, and who have decided to pursue a legal strategy as well; and law firms, big and small, and barristers, who are willing to engage in or support public interest litigation.

None of these models is exclusive and none of them can satisfy the full range of unmet legal need. All of them have a potential part to play. And there is also a need to change court rules and procedure to allow and facilitate the taking of test cases and class actions, to give *locus standi* to NGOs acting on behalf of vulnerable groups, and to develop protective or pre-emptive costs orders and other procedures to reduce the threat of financial ruin for those who take on public interest challenges.

In that context it is encouraging to see that the courts and the Law Reform Commission have recently taken some steps towards making court procedures more accessible by

allowing the Irish Penal Reform Trust to represent particularly vulnerable prisoners and by making proposals to facilitate class actions on behalf of groups of people affected by the same policy or practice. However, we are still quite a way behind even our nearest neighbour in the UK in making the courts more receptive to public interest litigation.

One major step forward that has been taken is the partial incorporation of the European Convention on Human Rights into Irish law. The European Convention on Human Rights Act, 2003 has provided a potentially very powerful instrument for vindicating the rights of the vulnerable in our society. And the whole range of other international human rights treaties and conventions that we have signed up to create new tools for defining and enforcing rights, both by making submissions to the international bodies that monitor Ireland's compliance with its obligations, and by taking cases to international fora. But to seize this opportunity requires the development of expertise about these international instruments and money to fund research and litigation as, with the exception of the European Court of Human Rights, there is no legal aid for using any of these international mechanisms. And the legal aid for the European Court would just about pay for a train fare to Strasbourg.

The need is there for a major expansion in public interest law and litigation and in our increasingly wealthy society the resources should be there as well. Mel Cousins' paper looks at some ways of meeting this need and we have also had the opportunity today to share and learn from the experiences of lawyers working in other countries which are well ahead of us in devising structures to deliver public interest law to deprived and excluded communities. Hopefully we can appropriate elements of best practice from all of them.

Funding is a major issue, especially for the legal NGOs, but one message that has come across clearly from several different models of organising public interest law is the importance of tapping into the resources of the legal profession to support this work. We in FLAC must of course acknowledge the generous contribution made to our budget annually by both solicitors and barristers. But law firms have the capacity and, I hope, the willingness to contribute more, whether by taking on cases themselves, seconding personnel to work with legal NGOs, or funding particular cases or campaigns of public interest legal education.

And this does not have to be an entirely disinterested exercise. Experience elsewhere has shown that involvement in public interest law is good for law firms. It gives their staff valuable experience and stretches their capabilities, it is in a good cause, and it is good for the company's image in an era when lawyers are not the most popular and highly regarded professionals around. So one of the lessons we can take away from today's conference is that we need to devise structures, whether based on the Australian model or otherwise, to try to involve law firms in the delivery of public interest law.

That will not solve the financial problems of the NGOs who must also play a leading role in the delivery of public interest law, but there are a number of possible funding sources that could help to put them on a more secure footing. The legal professional bodies could

make a direct contribution in addition to the contributions already made by individual members. If the ban on the Legal Aid Board taking or funding test cases was removed, it could contract out work to the NGOs as the legal aid bodies do in Britain. And, hopefully, other bodies interested in promoting social change will see the value of strategic litigation and public legal education and commit some funding to it.

This conference has been intended as a beginning, the start of a serious discussion on public interest law and litigation in Ireland. It has packed in a lot of information in one day and there will not be time to assimilate it all or to tease out the implications of the various models in the limited time available for discussion today, much less take decisions about future strategy. But the take-up for the conference indicates a widespread recognition that public interest law and litigation can make an important contribution to accessing justice and ending social exclusion in Ireland today.

We do not want this to be just a theoretical discussion and we are anxious to maintain the momentum the conference has generated. Noeline Blackwell, the Director General of FLAC, will outline some suggestions for following up on today's conference in her closing remarks.

In conclusion, I have focused in this paper largely on the continuing deprivation, inequality and social exclusion in our increasingly wealthy society and on the role of public interest law in helping to end that deprivation and exclusion. But lest that seem too negative an approach, we should also stress that the combination of fundamental rights provisions in the Constitution, the incorporation of the European Convention on Human Rights into our domestic law, and the international conventions we have signed up to, provide the basis for building a society firmly founded upon human rights and where all public policy decisions should be proofed beforehand for compliance with our human rights commitments.

For the first time too our economic prosperity leaves Government with no excuse for failure to comply with those commitments. And we as lawyers have a golden opportunity to contribute to the building of that inclusive, rights-based society.