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Public Interest Litigation as a Tool for Vulnerable Groups: Lessons from India

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Introduction

There is little doubt that the growth of standards of international human rights law and their wide ratification by countries across the globe are indicators of the overwhelming success of human rights law.[1] A process that began as an attempt to frame universal standards for the treatment of human beings has matured to become a cornerstone of international law, with an impact on regional and domestic law.[2] In fact the human rights agenda has arguably had the biggest impact on law itself in the last fifty years, as legal standards have evolved to guarantee the inherent dignity, worth and respect for the individual.

Yet, the positive developments obscure several underlying problems that continue to hinder the creation of a system that is effective in the guarantee of human rights. This note is concerned with the potential remedies that human rights law has to offer, especially in the realm of the protection of particularly vulnerable groups.[3] In this context it also addresses the lack of standards for economic, social and cultural rights. In doing so it hopes to challenge the conceptual and ideological belief that economic, social and cultural rights are non-justiciable: a belief that is often informed by no more than a lack of activity on the front of these rights, and political unwillingness to engage the burden that these rights represent.

An argument to be asserted at the outset is that for a society to aspire to genuine substantive equality it is vital that the rights of the most vulnerable are addressed, and in this context this paper posits that public interest litigation is an ideal vehicle for seeking such remedies. It draws on research undertaken in the context of the development of law in India, with a view to exploding the myth of the non-justiciability of economic, social and cultural rights and emphasising the role of the courts in the context of this battle for the rights of the vulnerable.

It can be argued that the bifurcation of the human rights agenda into civil and political on the one hand and economic, social and cultural on the other, was a significant western bias inherited by international human rights law. This bias traces to *laissez faire* governance and a notion of civil liberties that envisioned a minimal role for the state. This was imbibed into the

[1] For general reading on the growth of international human rights law see Steiner H., & Alston P., *International Human Rights in Context: Law, Politics, Morals* [end edition] (Oxford: Oxford University Press, 2000); also see Ishay M., *The History of Human Rights from Ancient Times to the Globalization Era* (California: California University Press, 2004).
[2] See e.g. Rowe P., *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge University Press, 2006).
[3] For a general reading on remedies in human rights law see Shelton D., *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2000)

foundations of international human rights law by power struggles between east and west that led to the creation of two separate covenants in 1966: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The development of the two separate streams of human rights law have followed different paths since then, with an overwhelming emphasis on the former while the latter were considered aspirational standards, and received significantly less attention from human rights lawyers. This paper challenges the view prominent in legal circles in Ireland, that 'rights' are mainly civil and political, suggesting that this is a remnant of the *laissez faire* politics inherited through colonialism. Instead, it exhorts the need for looking beyond traditional sources of legal models to countries such as India and South Africa for finding workable mechanisms to address questions *vis-à-vis* the exclusion of segments of population from accessing the rights table.

Drawing on jurisprudence of the Indian Supreme Court towards fulfilling the stated aims, this paper seeks to portray:

- ★ Public Interest Litigation as a Remedy;
- ★ Public Interest Litigation in Practice;
- ★ Possible lessons that could be imbibed in the Irish context.

It remains fundamentally important to stress the nature of the task facing vulnerable groups the world over. Mired in conditions of extreme poverty, several southern states in building human rights regimes, have emphasised the need for these regimes to take due cognisance of economic, social and cultural rights. Aside from the morality that demands adequate attention be paid to the plight of all sections of the population in a bid to improve their inherent dignity and worth, a failure to attend to socio-economic rights negates any sophisticated regime of civil and political rights that may develop: since this remains inaccessible to many. According to the United Nations Development Programme, we live in a world where:

> … a fifth of the developing world's population goes hungry every night, a quarter lacks access to even a basic necessary like safe drinking water, and a third lives in a state of abject poverty – at such a margin of human existence that words simply fail to describe it, the importance of renewed attention and commitment to the full realization of economic, social and cultural rights is self-evident….

The report stresses that:

> …over one billion people live in circumstances of extreme poverty, homelessness, hunger and malnutrition, unemployment, illiteracy and chronic ill-health. More than 1.5 billion people lack access to clean drinking water and sanitation, some 500 million children don't have access to even primary education; and more than one billion adults cannot read and write. This massive scale of marginalization, in spite of continued global economic growth and development, raises questions, not only of development, but also of basic human rights.[4]

I. The Essentials of Public Interest Litigation as a Remedy: An Indian Extrapolation

[4] Fact Sheet No.16 (Rev.1) The Committee on Economic, Social and Cultural Rights

The cornerstone of remedies as provided for in the Indian Constitution is expressed in the language of article 32,[5] which provides a right for citizens to move the Supreme Court for any violations of their fundamental rights.[6] This has resulted in direct petitions to the apex court, and has developed a strong sense of public interest litigation.[7] The relaxation of the rules of locus standi and the fact that there is no limitation on the relief the Courts can provide, has facilitated remedies and procedures.[8] The activism of the Courts[9] has also played a significant role in emphasising this remedy further.[10] The essentials of public interest litigation in India were summarized by Justice Bhagwati (since then a member of the UN Human Rights Committee) in S. P. Gupta:

> There must be a legal wrong caused to a person or to a determinate class of person, on whom burden is imposed in violation of law or without legal authority;
> The wrong must arise from violation of any constitutional or legal right;
> The wronged person (or determinate groups of persons) must be unable to approach the court for relief, by reason of –
>
> - poverty;
> - helplessness; or
> - social or economic disability of socially or economically disadvantageous position.
>
> If the above conditions are satisfactory, then any member of the public can seek judicial redress for the above wrong.
> But the court should be anxious to ensure that the person initiating the proceedings is acting bona fide to get redress for a public grievance and not to pursue any personal gain from malicious motives.

[5] As expressed in *Daryao v State of UP* AIR 1961 SC 1457, 1461 - fundamental rights are not only in place to protect individual rights, but are also based on public policy, and it was the privilege and duty of the Court to uphold those rights. The Court had already identified itself as the protector and guarantor of fundamental rights in *Romesh Thappar v State of Madras* AIR 1950 SC 124.

[6] One of the most famous public interest cases in India also shows the limit of using law from a 'minority' perspective. In *Narmada Bachao Andolan v Union of India*, the displacement of population for the construction of the dam was challenged. The Court held that the displacement did not violate fundamental rights; instead it analysed whether rehabilitation at newer locations made them better off, and satisfied itself that the new facilities were better than those enjoyed in the tribal hamlets, ruling that gradual assimilation into mainstream society would lead to betterment and progress see AIR 2000 SC 3751.

[7] For more on the scope of public interest litigation as enunciated by the Courts themselves see *S. P. Gupta v Union of India*, AIR 1982 SC 149, 194.

[8] Especially *D. C. Wadhwa v State of Bihar*, AIR 1987 SC 579, para 38 and *Fertilizer Corporation v Union of India*, AIR 1981 SC 344.

[9] Commenting on the occasion of 50th Anniversary of the Indian Supreme Court, Dr Adarsh Sein Anand, CJ stated: …[The Court] has, intervened to protect democracy and the rule of law… guided by the Latin *boni judicis est ampliare jurisdictionem* (law must keep pace with society to retain its relevance)… to create a civil society in which respect for human dignity is the corner-stone of it's functioning, the Supreme Court has zealously protected the human rights of individuals… In expanding the ambit of the right to life and personal liberty, the Court has evolved compensatory jurisprudence, implemented international conventions and treaties, and issued directions for environmental justice. It has given directions, and also prescribed guidelines for the enforcement and achievement of human rights of various groups such as children, women, disabled, scheduled castes, scheduled tribes, bonded labourers, minorities, and socially and economically backward classes', foreword in V Kusum (n 9 above) vi.

[10] SP Sathe *Judicial Activism and the Indian Supreme Court* (2002).

> If the case is otherwise appropriate for public interest litigation then the court can act even on letters addressed to it.[11]

Public interest litigation in India[12] emerged in response to a need to make judicial processes more accessible to disadvantaged sections of society, and to ensure adequate judicial protection of human rights.[13] Unlike in other settings[14] in India such litigation has been more concerned with conflict rather than dispute resolution, with courts playing a political role in securing constitutionally guaranteed human rights entitlements to the masses that call upon it to play such a role.[15]

Leading constitutional commentator Sathe summarizes the nature of public interest litigation in India as being particularly useful in the following contexts:[16]

a) in genuine collective rather than individual disputes;[17]
b) where victims belong to vulnerable sections of society;[18]
c) where judicial law-making is necessary to prevent exploitation;[19]
d) where judicial intervention is necessary to safeguard democratic institutions; and
e) where administrative decisions related to development jeopardize peoples' right to natural resources.[20]

A swathe of cases have come before the courts, dominated by cases concerning minorities, Dalits (the former 'untouchables' of the Indian caste system) working or living in vulnerable conditions, besides women and children facing multiple forms of discrimination[21]. Dalits and Tribal peoples in particular, as arguably the most vulnerable and diverse groups in Indian society, have gained significant rights by moving the Supreme Court, less as an ethnic identity-based grouping, more as an occupational grouping such as that of labourers in the unorganized sector of the economy or of bonded labourers. [22]

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[11] *S. P. Gupta v President of India* AIR 1982 SC 149: (1981) Supp. SCC 87.
[12] Baxi prefers the term 'Social Action Litigation', which he suggests better describes the cases under this heading; 'Taking Suffering Seriously: Social Action in the Supreme Court of India' in S Dhavan and S Khurshid (ed) *Judges and the Judicial Power* (1985) 289; also see Ahuja (1997) (n 164 above) xxxvi
[13] ibid xxxv.
[14] For a comparative albeit limited examination of measures of affirmative action see A Peters *Women, Quotas and Constitutions: A Comparative Study of Affirmative Action for Women under American, German, European Community and International Law* (1999).
[15] SP Sathe 'Introduction' in S Ahuja (1997) (n 164 above) xli-xlii.
[16] ibid xlii.
[17] eg Bonded labourers, under-trial prisoners, prison inmates etc. For *obiter dicta* on this issue see Bhagwati J in *P. U. D. R. and ors v Union of India*, AIR 1982 SC 1473 at 1476-7.
[18] eg Unorganized labour, women, children etc. As expressed by Justice Iyengar in *Bar Council of Maharashtra v M.V. Dabholkar*, AIR 1975 SC 2092 at 2104.
[19] *Laxmikant Pandey v India¸ AIR* 1987 SC 232 (inter-country adoption); *Vishaljit v India*, AIR 1990 SC 1412; (1990) 3 SCC 318 (education for children of prostitutes).
[20] *R. L. and E. Kendra v UP*, AIR 1985 SC 632.
[21] eg *Brij Bala v State of HP and ors* (1984) 2 SLR 408 (concerning discrimination in seeking training for job reserved for men).
[22] Another vulnerable group that consists mainly Dalits are slum dwellers in urban spaces. Ahuja (1997) (n 164 above) discusses cases brought by several different groups in their favour, 335-408. The most remarkable case on this score is *Olga Tellis and ors v Bombay Municipal Corporation and ors*, AIR 1986 SC 180.

II. Public Interest Litigation in Practice: Some Insights

Sangeeta Ahuja's two volumes studying public interest litigation in India are worthy of detailed study for the range of cases that have been addressed through this mechanism. In this section a few examples have been chosen to illustrate the manner in which the Courts have dealt with issues and to highlight their outcome.

In *Hira Lal and anr v Zilla Parishad, Kanpur and ors*,[23] a petition on behalf of Scheduled Castes employed in the fraying of carcasses, resulted in a socio-legal investigation into the industry and finally suggestions from the Court to the state government towards an improvement of the socio-economic plight of the workers in the industry. Similarly in *Sanjit Roy v State of Rajasthan*[24] exceptions to minimum wage (affecting mainly SC/ST workers) designed by the Rajasthan Famine Relief Work Employees (Exemption from Labour Laws) Act 1964 were repealed.

According to studies, 86.6 per cent of bonded labourers come from among the Dalit and Tribal population. [25] Several cases concerning bonded labour have come before the Supreme Court under the Bonded Labour System (Abolition) Act, 1976.[26] While a remedy for bonded labour was provided in the Act, it was not until social action groups challenged its occurrence that the legislation began to take effect. Journalists and public service organisations, rather than the labourers (most of whom were unaware their situation was in violation of law) moved the Court to repeal this 'structurally entrenched problem'.27 Several cases on the issue have come before the courts, raising the possibility of dismantling this age-old phenomenon. [28]

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[23] 1982 (1) SCALE 123 [545].

[24] AIR 1983 SC 328, the action taken by the Social Work and Research Centre, in Rajasthan (an organisation working for the upliftment of SC/ST) complained against the Public Works Department's violation of the provisions of the Minimum Wages Act, 1948.

[25] Scheduled Castes account for 61.5 percent while Scheduled Tribes account for 25.1 per cent of the total bonded labourers. See Ahuja (1997) (n 164 above) 300.

[26] s2(g) defines bonded labour as being in existence when the following conditions are satisfied: (i) in consideration of an advance obtained by him or by any of his lineal descendants (whether or not such advance is evidenced by any document) and in consideration of the interest, if any, due on such advance or (ii) in pursuance of any customary social obligation, or (iii) in pursuance of an obligation devolving on him by succession, or (iv) for any economic consideration received by him or by any of his lineal ascendants or descendants, or (v) by reason of his birth in any particular caste of community, he would – (1) render, by himself, or through any member of his family, or any person dependent on him, labour or service to the creditor, for a specified period or for an unspecified period, either through wages or for nominal wages, or; (2) forfeit the freedom of employment or other means of livelihood for a specified period or for an unspecified period, or; (3) forfeit the right to move freely throughout the territory of India, or (4) forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or any person dependent upon him.

[27] Ahuja (1997) (n 164 above) 300.

[28] *Bandhua Mukti Morcha v State of Tamil Nadu*, 1986 (Supp) SCC 541; *Bandhua Mukti Morcha v Union of India and ors (*Haryana Mines I), AIR 1984 SC 802/(1984) 4 SCC 161, 1991 (1) SCALE 79 [295], AIR 1992 SC 38; *Bandhua Mukti Morcha, through Chairman, Swami Agnivesh v State of Haryana and ors* (Haryana Mines II), 1983 (1) SCALE 121 [543]; *Vivek Pandit v State of Maharashtra* WP No. 1503 of 1984; *Vivek Pandit v State of Makarashtra* WP No. 1504 of 1984; *Chattisgarh Krishak Mazdoor Sangh v State of MP and others* WP No. 13300 of 1983; *Upendra and ors v State of MP and anr* WP (Civil/Cri) No 1071 of 1986 among others.

Cases concerning women's rights have also been raised, especially in the context of violence against women and discrimination against women from minority religious communities.[29] The Court has also addressed aspects of 'cultural' law when dealing with the violation of women's rights. For instance in *Madhu Kishwar and ors v State of Bihar and ors*[30] sections 7, 8, and 76 of the Chhota Nagpur Tenancy Act, 1908 preventing women from the Ho and Oraon tribes from acquiring, holding or transferring property came under judicial scrutiny.[31] When the government argued that this was a requirement of their own customary tribal law, the Court stressed that the Tribals, as citizens of India were '…entitled to benefit of the guarantees of the Constitution' and that their exclusion from inheritance would not be appropriate'.

The issue of religion is ever-present in the Courts dockets, with several categories of cases concerning religious rights, including challenges to the Muslim Women (Protection of Rights on Divorce) Act, 1986,[32] and a challenge to the validity of the Muslim Personal Laws (Application) Act of 1937.[33] To avoid rule-making from the bench on such sensitive issues the court concluded that writ petitions were not maintainable to challenge legislation on personal law, especially where policy matters are involved[34] thus preventing the misuse of the remedy such as in the attempt engage public interest litigation to ban the Qur'an as not being in public interest.[35]

It has been suggested that moving beyond a system of personal laws, currently in existence as separate religious minority regimes, to a uniform system, could be beneficial to the achievement of rights to all sections of society. The drafters of the Constitution indicated their own wish for such a system, in the words of Article 44, in the Directive Principles.[36] The question was

[29] Rape of twenty five women by the army in Tripura, *All India Democratic Women's Association and anr v State of Tripura and ors* WP (c) No 385 of 1988, WP (Crl) No 366 of 1988.
[30] 1991 (2) SCALE 148 [794].
[31] The sheer length of the first case did not yield direct result. However, a second challenge considered simultaneously, filed by women of the Oraon tribe resulted in the Court ordering the State of Bihar to undertake a study with regards to the petition. The government responded that the practice of exemption of women from inheritance was the result of a long established practice among the Scheduled Tribes of the region and thus such as action would cause 'great agitation and unrest in the area among the Scheduled Tribe people who have a custom-based living.
[32] *Susheela Gopalan and ors v Union of India* WP No 1055 of 1986.
[33] *Shehnaaz Sheikh and ors v Union of India* where it was argued that the act was discriminatory, that practices such as polygamy, *purdah* and *talaaq*, and the rules governing maintenance and inheritance are no more 'Islamic' than the ban on drinking, entertainment and the giving and taking of loans with interest, which Muslims freely violate.
[34] *Ahmedabad Women Action Groups v Union of India* (1997) 3 SCC 573. Baxi (n 12 above) summarizes several other attempts that have likewise been dismissed without consideration of merits including writs seeking: to declare Muslim Personal Law which allows polygamy as void, as offending arts 14 and 15; to declare Muslim Personal Law which enables a Muslim male to give a unilateral *Talaaq* to his wife without her consent and without resort to judicial process of courts, as void, offending arts 13, 14 and 15 of the Constitution; to declare that the mere fact that a Muslim husband takes more than one wife is an act of cruelty within the meaning of sub-s (8) of s 2 of the Dissolution of Muslim Marriages Act, 1939; to declare ss 2(2), 5(ii) and (iii), 6 and Explanation to s 30 of the Hindu Succession Act, 1956, as void as offending arts 14 and 15 read with art 13 of the Constitution of India; to declare s 2 of the Hindu Marriage Act, 1955 as void, offending arts 14 and 15 of the Constitution of India.
[35] *Chandanmal Chopra and anr v State of West Bengal*, AIR 1986 Cal 104.
[36] Entitled 'Uniform Civil Code for the Citizens' art 44 states: The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

considered in *Maharishi Avadesh v Union of India,*[37] where a petition seeking a writ of mandamus against the Government for the introduction of a common civil code was dismissed on the grounds that this was an issue for the legislature and the court had no mandate in such matters.[38] A similar limit in the courts' ambit was revealed in dismissing a petition seeking to strike down section 10 of the Indian Divorce Act 1869 (applicable to Christians) which it was claimed, discriminated between men and women.[39]

An authoritative pronouncement on the issue was made in *Pannalal Bansilal Patil v State of Andhra Pradesh*[40] where the Court stated that while a uniform civil code for all of India may be desirable, its enactment may be counterproductive to national unity.[41] Mindful of 'pluralist' nature of Indian society, and the diversity in faith, belief systems and language, the Court warned:

> In a democracy governed by the rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all peoples in one go. The mischief of defect which is most acute can be remedied by process of law at stages.[42]

III. Specific Features that Contributed to Development of PIL in India

The Indian example is a particularly appropriate one in the Irish context for a number of reasons: (1) India is a common law country whose legal system bears close resemblance to the Irish legal system (2) Like Ireland, India was a colony of Britain and to that extent, the similarities in its institutions stems from that commonality. (3) India provides an apt comparison to Ireland since the Indian Constitution has been influenced by the Irish Constitution and contains provisions such as the dual language issue and the notion of directive principles borrowed from the Irish Constitution.

The enormity of the task facing the creation of a Constitution in India was effectively captured in the words of Dr. B.R. Ambedkar the chief architect of the Indian Constitution:

> On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the

[37] (1994) 1 Supp SCC 713.
[38] The petition also requested an order nullifying the Muslim Women's Protection of Rights on Divorce Act 1986, also declined, as was the request to direct the Government not to enact a Shariat Act, on the grounds that it would affect the rights of Muslim women.
[39] *Reynold Rajamani v Union of India*, AIR 1982 SC 1261, 1263, 1264.
[40] AIR 1996 SC 1023 para.12.
[41] The context of that particular case was for the extension of the Andhra Pradesh Hindu Religious and Charitable Endowments Act, 1987 to persons professing a variety of religions rather than it being applicable solely to Hindus. As cited in Bakshi (n 84 above) 89.
[42] *Pannalal Bansilal v State of Andhra Pradesh*, AIR 1996 SCW 507, 515: (1996) 2 SCC 498

> principle of one man one value. How long shall we continue to live this life of contradictions?[43]

This statement is augmented in that law had traditionally been viewed as a colonial imposition, used by a tiny proportion of the Indian population during the British era. In the words of Bhagwati these were, unsurprisingly:

> ...the affluent... who were repeat players of the litigation game. The poor having been priced out of the judicial system.[44]

As mentioned above, two specific provisions of the Constitution are worth highlighting since they are arguably the engine room for the development of public interest litigation in the sphere of economic social and cultural rights.

> Article 32 (a)
> The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by [Part III of the Constitution, containing fundamental rights] is guaranteed.
>
> Article 226:
> Every High Court shall have the power ... to issue any person, or authority including in appropriate cases any Government ... directions, orders or writs, including writs in the nature of[45] *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.[46]

There are several technical features of these articles that make them particularly amenable to public interest litigation:

- Article 32 makes the Court accessible for a wide variety of enforcement of fundamental rights;
- The range of remedies available to the court is wide enough for the Court to consider an array of remedies;
- The range of remedies available, including stay orders and injunctions, has given the Court considerable elasticity in using private law remedies in the discharge of public law functions;
- Where public interest is involved the Courts have been slow to reject an application on the grounds of delay.[47]

In commenting on the manner in which the Indian courts have interpreted the provisions of the two articles Sathe, a leading commentator on the judicial activism of the courts points out:

> ...the court developed a new paradigm of judicial process consistent with the rights discourse it has generated through judicial activism. The new paradigm envisions an affirmative, proactive role of the Court for facilitating access to justice for those who did not possess either the know-how or the resources for invoking the judicial process on their behalf and for ensuring greater public

[43] *Constituent Assembly Debates* Vol.12 p.979 25th November, 1949 (Government of India)
[44] Bhagwati 1987 p.24
[45] The use of the term 'in the nature of' was further testimony to the use friendliness of the Constitution. In *T.C. Basappa v T. Nagappa* AIR 1954 SC 440 it was held that the Court would not stand on the formality of the request prayed for, instead if a violation was established the Court would issue an appropriate remedy. Thus form would not defeat substance.
[46] 'for any other purpose' was deemed by the Supreme Court of India as meaning the enforcement of any statutory as well as common law right. See *Calcutta Gas Co. v State of West Bengal* AIR 1962 SC 1044 (1963) 1 SCJ 106
[47] *Dr. Kashinath G. Jalani v the Speaker* (1993) 2 SCC 703

> participation in the judicial umpiring of the constitutional government. The new paradigm was for a court that had to protect the rights of the poor and illiterate people of Indian and to ensure that the rule of law was observed by citizens as well as rulers.

This doctrinal activism of the Court was actively supported by procedural and substantive changes, nonetheless still respecting the doctrine of parliamentary sovereignty i.e. still maintaining the nature of the Courts as upholders of Parliamentary will, but relying heavily on the Constitution to interpret this will.[48] This activism was undertaken for three primary objectives: (a) For bringing the redressal of grievances of the victimized sections of society within the purview of the Court; (b) In addressing procedural innovations with a view to making justice less formal, cheaper and more expedient, and (c) For making the judicial process more participatory, polycentric, and result oriented.[49]

IV. Ireland, Public Interest Litigation and the Justiciability Question

Without a doubt the central issue on the nature of economic, social and cultural rights revolves around whether they are 'justiciable' i.e. whether remedies can be sought from a Court for law in cases where violations have occurred. The example of the Indian Supreme Court has highlighted above, when supplemented by examples from jurisdictions such as South Africa, Australia, the United States of America and New Zealand suggest that the question can be answered with some certainty.

Minister of Justice, Equality & Law Reform Minister Michael McDowell is a good exponent of one who argues against the justiciability of economic, social and cultural rights. In a speech given on the theme of Irish Culture and the Law at St. Patrick's College in Drumcondra in April 2003 he observed:

> The past few decades too have seen a tension develop between those who advocate, on one side, that the fundamental law of the State, our Constitution, should contain a justiciable corpus of rights relating to economic and social issues, and those on the other, who question the desirability or indeed, necessity for such a course of action. I am in firmly in the latter camp.[50]

He gleans support for this position from the Constitution of the State and in this context states:

> ..most of what are called 'economic and social rights', with the notable exception of the right to free primary education, cannot be enforced in the Courts. In article 45, the Constitution sets out 'Directive Principles of Social Policy' which are intended for the general guidance of the Oireachtas. The Constitution states that application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be 'cognisable by any Court under any of the provisions of the Constitution'. In other words it is not open to anyone to seek a direction from the Courts to secure the

[48] For a detailed reading of the history of the Supreme Court, especially in the context of its relationship with the executive see Verma, SK and Kusum, Kumar (eds.), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (New Delhi: Indian Law Institute, Oxford University Press, 2000).
[49] Sathe S.P. *Judicial Activism in India: Transgressing Borders and Enforcing limits* (Oxford: Oxford University Press, 2002) p.201
[50] Transcript on file with author.

> implementation of any of those principles. It is thus argued by many people that economic and social rights, such as those identified in the ICESCR, should be incorporated in the Constitution in such a way that an individual could seek from the Courts redress if his or her rights under the Covenant had not been met. It is argued that unless these rights are justiciable, they are not effective.[51]

He also asks whether the Courts are the correct bodies to adjudicate on these issues:

> There is an important political and philosophical question yet to be answered satisfactorily; that is whether the protection and achievement of policy values in the social and economic sphere is property for the legislative and executive arms of the State or for enforcement through the judicial system… I, for my part, believe passionately in politics as the means for conducting and resolving social and economic issues.[52]

A further rationale given for this position is the belief that 'classical civil and political rights' are 'public goods' while economic and social rights are 'private goods'.[53] Thus the suggestion is that while it is appropriate that the Courts cast judgement on the first he suggests that the latter are in his view 'the stuff of politics and not at all appropriate to be decided by the Courts. The problem with the suggestion of 'politics' as a means for conducting and resolving social and economic issues' comes down squarely to the question of uneven access to politics.

Vulnerable groups, by virtue of their position in society are severely disadvantaged in accessing politics, in very many instances being forced to be concerned with day-to-day survival rather with long-term strategic political involvement. If constitutionally guaranteed fruits are denied to them by virtue of their socio-economic position, this would create an obligation upon states to pay attention to their empowerment. Since a major factor in indigence is the lack of resources it is hard to understand how the 'political realm' can be engaged without the largesse and generosity of majority population. This would make access to constitutional guarantees a question or charity rather than one rights.

The non-justiciability argument is also challenged by the Committee for Economic, Social and Cultural Rights (CESCR) the monitoring body for the International Covenant for Economic, Social and Cultural Rights (to which Ireland is bound), who often meet this argument. They make three telling points in their general comment on the subject, drawing on the work of the International Law Commission which differentiates between 'obligation of conduct' and 'obligation of result', suggesting that the paucity of dramatic results in the realm of economic and social rights promotion could not abdicate the obligation of conduct by the State to guarantee and protect such rights. Just because the rights contained the Covenant are not framed as direct entitlements in the same way as civil and political rights are, does not means that there are no obligations on state parties. Thus while

[51] Ibid.
[52] Ibid.
[53] Against this see the various writings in the context of EU law as contained in Hervey T. & Kenner J. (eds.) *Economic and Social Rights under the EU Charter of Fundamental Rights* (Hart, 2003)

recognizing the difficulty of delivering economic and social rights, the committee nonetheless stresses that:

> … while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination…"[54]

The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("*s'engage à agir*") and in Spanish it is "to adopt measures" ("*a adoptar medidas*"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.[55]

A second issue emphasized as being of great importance was the need and importance of judicial remedies:

> Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.[56]

Finally, with regards to resources, the Committee stressed the importance of creating an atmosphere where economic and social rights can thrive:

> …The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.[57]

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[54] UNCESCR General Comment 3 entitled "The Nature of States Parties Obligations (Article 2 paragraph 1) 14/12/90 fifth session, paragraph 1.
[55] Ibid. paragraph 2
[56] Ibid. paragraph 5
[57] Ibid. paragraph 11

In any case this latter option is not relevant to a fast-expanding state such as Ireland which regularly reports increases in tax revenues.

Conclusion

In the final analysis this paper seeks to make the following points:

- The utility and value of public interest litigation is growing all over the world, especially in contexts where civil societies are active. This is because groups and their advocates have realised that many of the violations of their rights are due to structural deficiencies that result in persistent and institutionalised discrimination that cannot always be addressed adequately on an individual basis.

- Among the technical adjustments required in law to enable public interest litigation to be more feasible are the following: (a) a Supreme Court empowered with a range of remedies; (b) relatively unrestricted rules *vis-à-vis locus standi*; (c) genuine belief in the Courts as providers of adequate remedies; (d) a progressive relationship between the courts and the executive.

- Public Interest litigation is a vital tool for the furtherance of economic and social rights, with several examples of issues that have been raised in this realm that highlight its utility in enunciating a coherent vision of such rights. Further the obligation to put in place adequate judicial remedies for the furtherance of such rights would be ideally met by the development of legislation based on public interest litigation.

Finally it needs to be emphasized that for a society that truly believes in the inherent dignity and worth of every individual human being, it is inconsistent to only focus on the civil and political rights of its citizens. By engaging and embracing the remedy of public interest litigation, societies can take an important step towards realising their own constitutionally enshrined rights, and providing their citizens with the indivisible fruits of economic, social, cultural, civil and political rights.