Amnesty International Conference

A Deficit of Protection-Economic, Social and Cultural Rights in Ireland

The role of litigation: Giant Leaps and Baby Steps

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Introduction:

Traditionally people campaigning for economic, social and cultural rights in this jurisdiction would not have turned to the courts for support except perhaps to try to stop or delay an eviction or prevent the demolition of a Georgian building or an ancient monument.

There were good reasons for that attitude. The courts had shown a distinct hostility to trying to use the law to enforce such rights, spelled out starkly by then Chief Justice Ronan Keane in ***T.D v. Ireland*** in 2001 when he said he had "*the gravest doubts as to whether the courts at any stage should assume the function of declaring what are today frequently described as 'socio-economic rights' to be unenumerated rights guaranteed by Article 40 [of the Constitution]*[1].

The courts were also notoriously slow, legal aid was almost non-existent outside the areas of criminal and family law and there was a serious danger of ruinous costs orders being made against unsuccessful applicants. The law was a foreign and not very welcoming country to most activists on economic and social issues and judges were seen as remote, aloof products of elite schools and divorced from the lives of poor and disadvantaged people.

Like all generalisations, there were exceptions to these stereotypes, though not very many of them. And there was enough truth in the stereotype to make suspicion of the courts a perfectly understandable position.

Changing attitudes to economic and social rights:

But things have been a bit different in some other countries. In the United States provision for class actions, where a large number of applicants can take a case jointly to reduce costs, and a tradition by bodies like the National Association for the Advancement of Coloured People (NAACP) and the American Civil Liberties Union (ACLU) of using the Constitution to secure change have made strategic public interest litigation an important part of many campaigns. The most famous example is ***Brown v. Board of Education***[2] which led to an

[1] ***T.D. v. Ireland [2001] 4 IR 259. The attitude of the courts towards economic, social and cultural rights and public interest litigation up to 2001 is dealt with very comprehensively by Professor Gerry Whyte in his book 'Social Inclusion and the Legal System – Public Interest Law in Ireland', Institute of Public Administration, 2002***

[2] ***Brown v. Board of Education, 347 U.S. 483 (1954)***

order to de-segregate public schools and was a key factor in the in the Civil Rights movement in the 1960s. In post–apartheid South Africa, with a radical new Constitution and a Constitutional Court that included lawyers who had fought the apartheid regime, there has been a spate of transformative litigation, most notably the ***Grootboom***[3] case, requiring public authorities to provide accommodation for squatters and homeless families, and the ***Treatment Action Campaign*** case[4] which sought to compel the South African government to make anti-retroviral drugs widely available to combat the spread of HIV-Aids.

And in our nearest neighbour, the UK, with its similar legal system and traditions, there has been a striking increase over the last 12 years or so of cases on economic and social rights, for example: ***R (Bernard) v. Enfield Borough Council***[5], asserting the right to adequate public housing for a large family where the mother was severely disabled; a series of cases on the rights of Gypsies/Travellers and their right to adequate and culturally appropriate accommodation[6] ; ***Limbuela v. Secretary of State for the Home Department***[7]**,** holding that the UK authorities had an obligation to provide at least a sufficient level of social assistance to illegal immigrants so that they were not starving in the streets.

The catalyst for the UK courts, which had previously been as hostile to economic and social rights as the courts here, seems to have been the incorporation of the European Convention on Human Rights into domestic law via the Human Rights Act, 1998. And the European Convention itself, originally drafted to concentrate on civil and political rights, leaving economic, social and cultural rights to the weaker and less well known European Social Charter, has been progressively widened in its scope by innovative interpretation by the European Court of Human Rights.

In recent years the Strasbourg Court has strongly supported the rights of Roma/Travellers, including in the UK[8]; criticised the treatment of asylum-seekers[9]; and upheld rights to social welfare benefits[10].

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[3] ***Republic of South Africa & Others v. Grootboom & Others, 2001 (1) SA 46 (CC)***

[4] ***Minister of Health & Others v. Treatment Action Campaign & Others (1) 2002 (10) BCLR 1033 (CC)***

[5] ***R (Bernard) v. Enfield Borough Council [2001] EWCA Civ 1831 (4 December 2001)***

[6] ***Several of these cases eventually went to the European Court of Human Rights, which laid down standards in relation to Gypsy/Traveller accommodation: Connors v. UK (2004) 40 EHRR 189; and McCann v. UK, Application no. 19009/04, 13 May 2008***

[7] ***R (Limbuela) v. Secretary of State for the Home Department [2005] UKHL 66***

[8] ***See note 6 above***

[9] ***S. D. v. Greece, Application No. 53541/07, 11 June 2009; M.S.S. v. Belgium and Greece, Application No. 30696/09, 21 January 2009***

[10] ***Stec v. UK (2005) 41 EHRR 295***

The British courts have adopted and absorbed much of this Strasbourg jurisprudence - to the intense annoyance of the current UK government and its predecessor.

Developments in the Irish courts:

In this jurisdiction the courts have also been influenced by the incorporation of the European Convention, even if it was done in a very half hearted way. Over a number of years the courts had failed to protect the rights of Travellers living in dreadful conditions. However, in two cases, in 2007 and 2008, and both called ***O'Donnell v. South Dublin County Council***[11], High Court judges held that the rights under the European Convention of severely disabled Travellers living in cramped and unsuitable caravans had been breached.

In a number of other cases, where judgment was given in 2008-2009, High Court judges also held that Section 62 of the Housing Act, 1966, which allowed the eviction of council house tenants for alleged anti-social behaviour without any independent appeal procedure, was in breach of the European Convention[12].

While this might appear to have been primarily a procedural issue, the court in ***Donegan v. Dublin City Council*** held that the Council's action was in breach of Article 8 of the Convention (respect for private and family life and home), effectively saying that Article 8 included a right to secure occupation of one's home.

In ***McCann v. Monaghan District Court*** [13] Judge Mary Laffoy, who had also given judgement in one of the Traveller cases already mentioned and in the Donegan case, held that legislation that allowed a debtor to be imprisoned without legal representation and without her even being present in court, was unconstitutional. Ms McCann had also raised her Convention rights in the case and there is little doubt that Judge Laffoy's decision was informed by the Convention jurisprudence as well.

[11] ***O'Donnell (a minor) & Others v. South Dublin County Council [2007] IEHC 204; and O'Donnell & Others v. South Dublin County Council [2008] IEHC 454***

[12] ***Donegan v. Dublin City Council & Others [2008] IEHC 288, 8 May 2008, and IESC 265/08, 27 February 2012; Pullen v. Dublin City Council [2008] IEHC 379, 28 May 2009; Byrne v. Dublin City Council [2009] IEHC 122; Dublin City Council v. Liam Gallagher & Attorney General [2008] IEHC 354, and IESC 265/08, 27 February 2012. A declaration of incompatibility with the ECHR made in the Donegan case was later upheld by the Supreme Court but a similar declaration in the Liam Gallagher case was overturned by the Supreme Court***

[13] ***McCann v. The Judge of Monaghan District Court [2009] IEHC 276, 18 June 2009***

And in 2007, the High Court had declared that Irish law was incompatible with the European Convention because it failed to make any provision for legal recognition of ***Lydia Foy***, a transgender woman, in her acquired female gender[14].

Also, in 2010, in the case of ***Meadows v. Minister for Justice***[15], the Supreme Court changed the very rigid standard required for judicial review of a decision by a public authority to include whether the decision was proportionate in the circumstances. This could potentially make judicial review a more effective method of challenging administrative actions.

All this is by way of showing that the attitude of the Irish courts has changed in relation to economic and social rights, especially when reflected through the prism of the European Convention, and in cases where the jurisprudence of the Strasbourg Court indicates that if the Irish courts do not find for the applicant, the State will eventually be found in breach of the Convention by the court in Strasbourg with all the embarrassment that entails.

There is also European Union law, of course, which has expanded its remit from purely commercial and industrial relations issues to cover a very wide swathe of economic and social rights and interests. All these issues must now be interpreted compatibly with the EU Charter of Fundamental Rights, which not only replicates the ECHR but in some cases goes further than it.

In addition, some of the judges here, as can be seen from the cases referred to, are more open to arguments based on the European Convention and the Charter of Fundamental Rights than their predecessors would have been. And there is likely to be cross fertilisation with the Constitution, with the Convention jurisprudence informing the interpretation of the Constitution with its substantially greater powers.

In the background too are European and UN Conventions and Covenants with a much sharper focus on economic, social and cultural issues, like the European Social Charter, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities. Constitutionally these instruments are not justiciable unless incorporated into domestic law, but the Strasbourg Court has shown increasing willingness to refer to them in its jurisprudence, which must in turn be taken into account by the Irish courts.

Times are changing in the legal arena and the strategy and tactics of those campaigning for economic and social rights and for marginalised and disadvantaged groups should change as well and they should begin to think of incorporating a legal dimension into their overall strategy where appropriate.

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[14] ***Lydia Foy v. An t-Ard Chlaraitheoir & Others [2007] IEHC 470, 19 October 2007. This was the first declaration of incompatibility to be made under the ECHR Act, 2003. It became final in June 2010 when the Government dropped an appeal to the Supreme Court.***

[15] ***Meadows v. Minister for Justice, Equality and Law Reform [2010] IESC 3, 21 January 2010***

A case study of strategic litigation:

Let us look at an example of using the law combined with other methods to secure the rights of a particularly marginalised group: the ***Lydia Foy*** case, referred to above, which dealt with the rights of transgender persons, and was taken by Free Legal Advice Centres (FLAC).

Perhaps the first thing to say is that this was not a carefully planned strategic campaign. It basically developed as we went along, but we can learn lessons from that for better planned interventions in the future.

Lydia Foy was a transgender woman seeking a new birth certificate and legal recognition in her acquired female gender. When she set out on this journey, there was no transgender lobby group or NGO to support her. Transgender people were frightened, isolated and in the darkest closet they could find. So Lydia Foy came to FLAC to help her in 1996.

Bravely and with a lot of foresight, FLACs then solicitor Mary Johnson took her on. FLAC took her case to the High Court, doing a great deal of research and calling as witnesses several of the leading transgender specialists from the UK and the Netherlands. There were 14 days of detailed medical and personal evidence before the judge reserved his judgement.

He gave his decision two years later, in July 2002, rejecting Lydia Foy's application.

It was deeply disappointing, but was it a defeat? I do not think so. Prior to the case hardly anyone in the country knew anything about transgender people. The 14 days of evidence, widely reported in the media, raised awareness about this isolated and excluded group of people, gave them a human face, and got across something of the pain and humiliation suffered daily by transgender people.

By an odd coincidence the European Court of Human Rights gave judgment two days later against the UK on the same issue and under virtually the same legislation. And two years after that, in 2004, the UK brought in a Gender Recognition Bill to give legal recognition to transgender people.

Meanwhile, the European Convention Act (the ECHR Act), had been passed here and came into force at the beginning of 2004, requiring the courts to take account of the jurisprudence of the Strasbourg Court.

FLAC re-entered the case, this time relying directly on the ECHR Act. We did our homework again, collecting jurisprudence recognising transgender persons from Europe, the US, Australia and New Zealand and arguing that Ireland was now quite isolated in Europe in its lack of a gender recognition law.

We produced briefing documents to inform the media about the issue and achieved as much publicity as we possibly could. The aim was not to influence the court - we aimed to do that by six lever arch files of jurisprudence we had collected from around the world. We wanted rather to create a climate of public understanding and support which might help the court to

make a ground breaking judgement and we knew that legislation would probably be required, so we wanted to create a climate in which it would be passed.

This time Mr Justice McKechnie found for our client. He was the same judge who had rejected her application five years earlier but he had been strongly influenced by the evidence of how attitudes had changed elsewhere in the interim. He issued the first ever declaration under the ECHR Act that Irish law was incompatible with the ECHR on this issue.

A wider alliance:

The State appealed and it could have taken another 3 ½ to four years to get a hearing in the Supreme Court.

Up to then (2007) this had been almost entirely a legal battle. But now the Trans community had established a well run and effective NGO, Transgender Equality Network Ireland (TENI), and the gay and lesbian community and bodies like the Irish Human Rights Commission and the Equality Authority were also calling for change.

We put a lot of effort into lobbying international human rights agencies like the UN Human Rights Committee and the Council of Europe Human Rights Commissioner's office to get them to put pressure on the Irish Government on the issue, which they did very effectively, and TENI and other groups also joined in the campaign to get the Government to drop its attempt to overturn the Foy decision. The Government dropped its appeal in 2010 and set up a working group to begin drafting the Heads of a Bill.

It had not been planned that way, but the Foy case had turned out to be a good example of using the law, the media, lobbying and campaigning, all to bring about a change in the law. And a loose but effective coalition of organisations had worked together on the issue.

But has Lydia Foy got her new birth certificate and has the law been changed since she won her case and the declaration of incompatibility was made? The answer is still no.

The Government's working group – which had no transgender people on it – got tied up in technical issues and despite a commitment in the Programme for Government of the present administration, this issue has not been high enough up the Government's agenda for them to take a decision to go ahead and introduce the legislation.

Once again it is deeply disappointing and frustrating for Lydia Foy and the Trans community generally that nothing has happened five years after a very positive decision in the High Court. But there is now an active transgender NGO and strong support in the broader NGO community, and they have at their disposal a range of strategies to put further pressure on the Government, including the possibility of going back to court.

There is also a wider dimension to the Lydia Foy case. The failure of the Government to respond, after five years, to the first declaration of incompatibility made under the ECHR Act threatens to undermine the whole scheme of that Act, which was intended to bring the rights protected by the European Convention within reach of those who need them. Hopefully, the

broader human rights community will also see the importance of this and join in the campaign to implement the Foy decision as a matter of urgency.

The long delay is a useful reminder of another aspect of public interest/strategic litigation. ***Brown v. the Board of Education*** was decided by the US Supreme Court in 1954. The struggle to implement it and de-segregate US schools was still going on in the 1960s, 1970s and 1980s. The ***Grootboom*** case was decided by the South African Constitutional Court in 2001; the struggle to implement it is still going on in South Africa today.

Public interest legal cases do not stop when the judgment is read out and the Judge leaves the court. In many respects the struggle, or at least a new phase of it, is only beginning. Maybe that is part of what the conference organisers meant when they chose the sub-title of this talk: "*Giant leaps and baby steps*". Maybe the '*giant leaps*' are the ringing declarations by the courts that give endorsement and legitimacy to the changes that are sought, and the '*baby steps*' are the long, slow and incremental actions need to implement those grand declarations.

And, of course, while lawyers can play a part in the implementation phase, mobilisation of civil society actors is usually crucial to pushing the ball over the line.

Conclusion

In conclusion, I suggest that there have been significant changes in the legal climate over the last 10 or 15 years that have made the courts more open, though still not enthusiastic, about litigation around economic and social issues, especially where they can be brought within the ambit of the European Convention on Human Rights or the EU Charter of Fundamental Rights. And there are international and European quasi-judicial bodies where issues can be raised and the Government exposed to criticism by its peers when it clearly falls behind generally agreed European or international standards.

There have been developments as well in the legal profession, with more lawyers working for independent and community law centres, and with my colleagues in the Public Interest Law Alliance (PILA) working to develop a culture of private law firms doing pro bono work for NGOs, something which is commonplace in the US and South Africa and is growing in the UK.

I have tried to show how litigation - and other types of legal work – can advance the cause of marginalised and disadvantaged people and how even unsuccessful cases can sometimes serve to raise awareness about an issue and mobilise support for change.

I would suggest that NGOs, community groups and others working for social justice and an end to marginalisation and exclusion should consider whether there is a legal aspect to their work that could be advanced by litigation or representations to the European or United Nations human rights bodies. And, if so, can they build alliances with lawyers who are interested in the area?

Equally lawyers keen to use the law to secure economic and social rights for disadvantaged people should seek to work together with NGOs and community groups, learning from the

cases I have mentioned that success in the courts is rarely enough, by itself, to bring about significant social change.

Working together may have its difficulties but each side can learn from the other and, brought together, a partnership of civil society and public interest lawyers can achieve a lot.

Albie Sachs, the great human rights lawyer and judge of the South African Constitutional Court, giving the Law Society's first annual Human Rights Lecture in 2005, said that the ***Grootboom*** case "*showed the extent to which creative lawyers can help the poor to secure their basic rights*"[16]. I am sure he would have been happy to add that it also showed the value and power of an alliance between those creative lawyers and civil society organisations.

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[16] ***Albie Sachs: 'The Judicial Enforcement of Socio-Economic Rights', Inaugural Lecture, 23 June 2005, Law Society of Ireland***