

Public Interest Law and Litigation

Celebrating 50 Years of FLAC

A research report by Trinity FLAC,
in association with PILA and FLAC



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Trinity FLAC 50th Anniversary Public Interest Law Research Report

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Foreword

Professor Gerry Whyte

When FLAC was established in April 1969, it had three objectives:

- a) To oblige the State to establish a comprehensive scheme of civil legal aid and advice;
- b) In the meantime, to provide free advice to those unable to afford the services of private practitioners; and
- c) to improve the education of law students by giving them an opportunity to be involved in providing legal support to marginalised individuals and communities.

Fifty years later, FLAC's services, and the services of other legal aid organisations, are still in great demand, a telling reflection on the limitations of the State scheme of civil legal aid, first introduced in 1980 and put on a statutory footing in 1995. But in addition to making a very significant contribution to the provision of civil legal aid and advice, FLAC has also contributed significantly to the education of law students, in particular, through the operation of FLAC societies in most of our law schools.

Trinity College's involvement with FLAC goes back to FLAC's earliest days when undergraduate students like Susan Denham and Alan Shatter worked as FLAC volunteers and Kadar Asmal sat on FLAC's executive as one of four advisors representing each of the four institutions of legal education in Dublin at the time. Trinity FLAC was established in 1986/1987 and formally recognised as a college society in 1990/91. Since that time, it has pursued the twin aims of providing legal advice to Trinity students and also raising awareness among the student population about the need for legal and social reform in certain areas.

Marking the fiftieth anniversary of the establishment of FLAC, Public Interest Law and Litigation in Ireland continues in the proud tradition of Trinity FLAC, providing a well-researched and very accessible analysis of four key issues relevant to Irish public interest lawyers. These issues are the system of protection for socioeconomic rights in this

jurisdiction, the impact of rules of practice and procedure and legal costs on public interest litigation, the issue of standing in public interest litigation and, finally, the legal regime regulating multi-party litigation here. In relation to each topic, the report provides a comparative analysis of other common law jurisdictions.

Public interest law entails the use of political campaigning and, where appropriate, litigation to address the needs of marginalised groups and individuals. Over the past fifty years, FLAC has established a reputation as Ireland's leading public interest law organisation and has inspired generations of law students to give of their time and energy in the pursuit of social justice. This current publication continues in that proud tradition and is a testimony to the values of social solidarity and empathy that animate Trinity FLAC.

Gerry Whyte

Introduction

TCD FLAC Legal Research Officer: Celia Reynolds

In recognition of the 50 year anniversary of the founding of national FLAC, Trinity FLAC decided to conduct this research project on public interest law and litigation in Ireland. The intention of this paper is to provide an analysis of the key issues in PIL, evaluating the current legal system and providing a comparative analysis to other jurisdictions. The hope is that this project will be accessible to both law and non-law students as well as legal and non-legal campaigning organisations. The recommendations that will be made in the concluding remarks will reflect the positions advanced by the volunteer researchers.

Part I of this paper will begin by discussing the system of protection of socioeconomic rights that exists in Ireland. The purpose of this part will be to provide public interest litigation in context, exploring judicial conservatism with reference to the background principles that form the underpinnings of the Irish justice system. The analysis will support O'Conneide's assertion that Anglo-American constitutional systems usually lack a 'social dimension', rejecting attempts to direct the executive and legislative branches of government from giving effect to principles of social justice.¹ For the purpose of this Part, it should be noted that the existence of socioeconomic rights will be assumed.² Section I.I will attempt to summarise the main arguments advanced against judicial protection of socioeconomic rights, making reference to key Irish judgments that have framed this debate. Efforts will also be made to capture the academic response to such conservative arguments, ultimately attempting to provide a brief overview of the legal discourse.

Section I.II will further this discussion by providing a comparative analysis of socioeconomic rights protections in other jurisdictions. The intention, of course, is to bring the Anglo-American background principles that form Irish legal discussion into contrast with thematically opposed constitutions. This will be particularly effective when having regard to

¹ Colm O'Conneide, 'Zones of Constitutionalisation and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order' 37 DULJ 173 (2014).

² This is not an accepted matter in the Irish legal system, controversies exist surrounding the identification of such rights, and whether they may be implied into the Constitution, or read from various provisions.

the Indian and South African constitutions. Canadian vindication of socioeconomic rights will also be considered, providing a useful example of an Anglo-American Constitution that supports judicial protection in this arena.

Part II of this report will focus upon the rules of practice and costs of litigation that shape the Irish justice system, first with reference to the general access to justice, and then secondly with a focus on public interest litigation in particular. Acute attention will be paid to how costs of ascertaining legal advice and taking claims acts as a barrier to justice. A brief comparison of the Irish approach will also be given to other common law jurisdictions, with the intention of placing Ireland in a global context. Section II.I will also draw attention to the various rules that affect public interest litigation, including those concerning Ireland's 'loser pays' system, maintenance, champerty and the doctrine of mootness.

The legal issue of standing in public interest litigation will be brought into focus in Part III, noting how narrow or broad interpretations of this doctrine may impede or empower the advancement of social justice. A simplified history of the doctrine of locus standi will be provided in the Section III.I, noting the doctrine's limited flexibility. Focus will be paid as to the treatment of campaigning groups in Irish jurisprudence and it will be concluded that the legal system should better embrace the goals of public interest law. The second half of this part, Section III.II will again provide a comparative analysis of Ireland's legal approach to other jurisdictions, in this case with a particular focus on Canada and the United States. Canada will be identified as having a favorable approach, in creating a division between private standing and 'public standing', such that public interest issues may be appropriately brought into the remit of a court's decision.

The final and largest part of this paper, Part IV, will discuss multi-party litigation, a litigation tool that adequately matches the goals of public interest law. The current system of representative actions in Ireland will be criticised as under utilised and overly constrained. Case studies will be provided of the few successful representative actions that have been taken. These will be contrasted to different models of multiparty litigation, firstly in the US in Part IV.II. Class action lawsuits as a tool for advancing the public interest will be discussed in

great detail, with recognition of the controversial model's advantages and disadvantages. The final section will provide a comparative analysis to several other jurisdictions, South Africa, India and Canada.

As a final note, appropriate thanks must be given to all the amazing volunteers, their hard work in researching and collaborating their sections made this project possible. The research report would not exist without them. Thanks should also be given to Professor Gerry Whyte of Trinity College Dublin Law School, who provided incredibly useful guidance at the beginning of this project. His book, *Social Inclusion and the Legal System*³ was an invaluable resource for all of the volunteers. Lastly, a final thanks should also be given to Rachel Power and Eilis Barry, the Strategic Development Manager and CEO of FLAC respectively, who graciously offered their time to help provide guidance and resources to the volunteers. Trinity FLAC is incredibly grateful for their assistance.

Celia Reynolds

Legal Research Officer Trinity FLAC

Dublin 04/04/2019

³ Gerry Whyte, *Social Inclusion and the Legal System* (Institute of Public Administration 2016).

Part I: Socioeconomic Rights

This part intends to discuss the system for protection of socioeconomic rights that currently exists in Ireland, while providing a comparative analysis to other jurisdictions. It should be noted that in Ireland, the advancement of public interest litigation is often impeded by the failure to make socioeconomic rights expressly justiciable. As a consequence, it is necessary to evaluate our current system, and provide a comparison to jurisdictions such as India, South Africa and Canada where meaningful guidance may be found.

I.I Socioeconomic Rights in Ireland

Nicola O'Corrbui, Roisin Casey, Celia Reynolds

Jurisprudential criticism and praise of judicial recognition of socioeconomic rights has traditionally centered around four key issues. Principally, there are constitutional concerns (namely related to the separation of powers, the nature of fundamental rights and various constitutional provisions), questions of democratic legitimacy, issues regarding judicial capacity to recognise and enforce socioeconomic rights, and, of course, the risk of uncertainty in the law. A brief overview of each of these areas will be given in turn. Following this, an analysis of key Irish case law regarding judicial protection of socioeconomic rights will be undertaken, however it should be noted that due to the confines of this paper, an in depth critical analysis will not be provided. Lastly, this section will speculate as to how the Irish approach to socioeconomic rights may change in the future.

Overview of Issues

Constitutional Concerns

Separation of Powers

One of the issues most frequently highlighted in discussing judicial involvement in socioeconomic rights is the risk of the judiciary may contravene the doctrine of the separation of powers. The doctrine of the separation of powers is enshrined in our Constitution throughout

several provisions.⁴ While these provisions do leave open some scope in determining where exactly the boundaries between arms of the government lie, High Court and Supreme Court jurisprudence⁵ has set down clear parameters throughout the years restraining judicial involvement in socio-economic rights. There have been strong arguments made by the judges in these cases as well as commentators⁶ that if the judiciary were to make decisions on socio-economic rights they would be encroaching on the powers of the legislature and the executive and thereby acting contrary to the Constitution. On the converse, there have also been commentators, principally Gerry Whyte, who have argued that the literal text of the Constitution does not explicitly lay out such boundaries; and that it may be perfectly constitutional for the judiciary “to engage in activism on behalf of disadvantaged groups.”⁷

The Nature of Fundamental Rights

The Irish Constitution contains a series of overlapping liberal and communitarian principles in its protection of personal rights. Articles 40-44 share many characteristics with Anglo-American constitutions that prize the limiting of public power and the protection of individual freedoms, “no citizen shall be deprived of his personal liberty save in accordance with law.”⁸ These articles demonstrate a state that prioritises the sanctity of negative liberty

⁴ The Constitution never explicitly prescribes a separation of powers doctrine; however it has been considered inherent in Article 6, ‘1. All powers of government, legislative, executive and judicial derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good. 2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.’ Reference to Article 15.2.1, Article 28.2 and Article 34.1 may also be made. In *TD v Minister for Education* [2001] 4 IR 259, 360; Hardiman J cites Article 15.2.1 (‘the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State’), Article 17.2 (‘Dail Eireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public monies unless the purpose of the appropriation shall have been recommended to Dail Eireann by a message from the Government signed by the Taoiseach’), Article 28.2 (‘The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government’) and Article 28.4.1 (‘The Government shall be responsible to Dail Eireann’).

⁵ See *O’Reilly v Limerick Corporation* [1989] ILRM 181, *Sinnott v Minister for Education* [2001] IESC 63; and *TD v Minister for Education* [2001] 4 IR 259.

⁶ See Eoin Carolan, ‘Democratic Control or ‘High-Sounding Hocus-Pocus’? – A Public Choice Analysis on the Non-Delegation Doctrine’ (2007) 29 DULJ 111, Hardiman, ‘The Role of the Supreme Court in our Democracy’, in Mulholland (ed.), *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (2004), p.32, O’Mahony, ‘Constitutional Amendment and Judicial Restraint: How Restrained should an Irish Court be?’ in Carolan (ed.), *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury Professional, 2012) at p.161 and Brady, *Legal Certainty: The Durable Myth* (1973) VIII *Ir. Jur. (n.s.)* 18.

⁷ Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd ed., 2015).

⁸ Art 40.1.

and the separation of powers over the regulation of state aims and public policy. Yet these articles also contain communitarian considerations of social justice, an example being the State's ability to limit the exercise of property rights on occasion "with a view to reconciling their exercise with the exigencies of the common good."⁹ Similarly, the 'Directive Principles for Social Policy' envisages a state that "pledges itself to safeguard with especial care the economic interests of the weaker sections of the community."¹⁰ Provisions like these, as well as the Preamble, suggest a state that is committed ideologically to an aim of social inclusion and the protection of socioeconomic rights.¹¹

Yet since the Constitution's inception, Ireland has predominantly focused on maintaining classical Anglo-American liberalism. O'Connell describes this as evidence of the process of 'constitutionalisation,' whereby the freedom of action of public bodies is constrained by the requirement to adhere to higher-order constitutional norms.¹² Issues regarding socioeconomic rights have been conceptualised as issues of policy while the scope of civil and political rights is prevented from acquiring an overtly 'social' dimension.¹³ Every legal text necessitates that interpreters draw on background principles that they supply. When a text is described as having "a plain meaning", it is because there is "no disagreement about the appropriate background principles."¹⁴ In the Irish context, these background principles preserve a presumption against an expansion of judicial power and state intervention. Drawing on pre-interpretative values is not a constitutional sin, yet it means that advocates for judicial restraint cannot present their argument as reflecting an established constitutional rule. Social justice and Christian values that would empower the judiciary exist alongside the

⁹ Art 43.2.2.

¹⁰ Article 45.4.1.

¹¹ Preamble of the Irish Constitution, '... [a]nd seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations.'

¹² Colm O'Connell, 'Zones of Constitutionalisation and the Regulation of State Power: The Missing Social Dimension of the Irish Constitutional Order' [2014] 37 DULJ 123.

¹³ *ibid*, 183.

¹⁴ Cass Sunstein, *The Partial Constitution* (Cambridge University Press 1993) 103-4.

liberal underpinnings of Bunreacht na hEireann, and no single interpretation can claim to enjoy exclusive constitutional legitimacy.¹⁵

Fundamental rights have been interpreted¹⁶ in this jurisdiction to be, for the most part, negative rights which do not require active involvement by the State. Articles 40-44 contain the bulk of the express rights provisions within the Constitution, ensuring a right to equality, personal liberty, education, family rights, freedom of expression, among others. The majority of these rights can be described as civil or political rights, rather than socioeconomic.¹⁷ Attempts have been made to utilise civil or political rights to identify socioeconomic rights,¹⁸ yet, for the most part the unenumerated rights doctrine have been the primary instruments used to identify implied socioeconomic rights. This practise eventually fell into disrepute, and while the courts remain eager to explore the scope of rights previously identified, identification of new rights has become rare.¹⁹

Objections to judicial protection of socioeconomic rights are generally framed in the manner that the courts may only make substantive choices in relation to civil and political rights.²⁰ These ‘negative rights’ curb government action, while socioeconomic, ‘positive’ rights require it, imposing a financial burden on the taxpayers. On the other hand, Sunstein argues that “so-called negative rights are emphatically positive rights,”²¹ in that all rights require some form of government intervention. If the right to vote or to a free trial was dependent

¹⁵ Whyte, ‘The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman’ [2006] 28 DULJ 1, 19; Whyte discusses the Christian values in the Constitution that would support judicial protection of socioeconomic rights. Also see Article 45, ‘The Directive Principles of Social Policy’, which sets out an extensive list of social values and aspirations that are supposed to guide the legislature in discharging its law making functions; while non-cognisable for the Courts with regard to striking down legislation, Whyte disagrees as to whether it may be utilised in other respects.

¹⁶ Hardiman, “The Role of the Supreme Court in our Democracy”, in Mulholland (ed.), *Political Choice and Democratic Freedom in Ireland: 40 Leading Irish Thinkers* (2004), p.32

¹⁷ It should be noted that most rights do not fit neatly into either of these categories.

¹⁸ See *TD v Minister for Education* [2001] 4 IR 259. The applicants invoked a right to be placed and maintained in secure residential accommodation so as to ensure their education, tying this to Article 42; this claim failed.

¹⁹ Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008).

²⁰ Cass Sunstein, ‘Social and Economic Rights? Lessons from South Africa’ (2000) 11 ConstF 123.

²¹ Gerry Whyte, *Social Inclusion and the Legal System* (2nd edn, Institute of Public Administration 2015).

upon public financing for their vindication, they would cease to be rights, but aspirations.²² On the other hand, Doyle suggests a distinction between process and non-process rights; where Courts are granted the power to protect rights that preserve the fairness of a process, but no more.

Constitutional Provisions

Certain constitutional provisions seem to strongly suggest that socio-economic rights are outside the court's jurisdiction. This can be seen first in Article 17.2 which deals with the powers of the Dáil and reads "Save in so far as may be provided by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year."²³ The effect of this article is that it is solely of the Oireachtas to deal with financial matters, and considering that enforcing socio-economic rights involves making decisions on social-expenditure the presumption is that the courts cannot enforce them as they do not have the power to make financial decisions.

Secondly, the wording of Article 45 of the Constitution seems to imply that the socio-economic rights are not for the judiciary to decide upon but instead are issues to be dealt with solely by the Oireachtas. This can be seen clearly in preface of this article "The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The 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 this Constitution."²⁴

Democratic Theory Issue

The primary democratic theory argument against judicial involvement in socio-economic rights is that it is counter-majoritarian. The basis for this argument is that judges are not held to account in the same way the members of the executive and legislature are as they cannot simply be voted out. By allowing them to extend their power to socio-economic rights there is a risk that the democratic will of the people will be ignored, and the democratic functions

²² Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press 2008).

²³ Article 17.2 of the Irish Constitution.

²⁴ Article 45 of the Irish Constitution.

of the government would be usurped. On the converse, it has been argued that ordinary politics is not able to protect marginalised groups. This an argument that is made by Michael Perry in ²⁵defence of constitutional activism in the US who cites “indeterminacy of constitutional morality” or the indeterminacy of constitutional directives requires a certain amount of judicial activism in order to adequately protect marginalised groups. This view is compounded with the idea that these decisions are made in situations of judicial penultimacy where the political process still have opportunities to respond and the Constitution may be amended easily through referenda. Therefore there remains opportunities for the democratic will of the people to be invoked even where judges make decisions on socio-economic rights.

Capacity of the Courts Issue

Capacity of the courts is a pragmatic rather than a principled argument, unlike other arguments. The basis of this argument is that the courts do not have the capacity to accurately deal with or introduce socio-economic rights as they are confined to addressing the issues in the case before them. The nature of socio-economic rights is that they are highly individualistic, a risk of allowing courts to interfere in these matters is that a court make a decision on one case that may set precedent that is disadvantageous to others. This is in contrast to government agencies and boards who are not bound by previous decisions but can decide cases on an ad hoc basis. This issue was described well by commentator David Gwynn Morgan,

“The place and procedure within which judges must take their decisions are peculiarly ill-designed as forums for decisions [relating to taxation and large-scale public expenditure]. The focus of a court is naturally upon the individual litigants who are before it. The contest between the plaintiff (sometimes carefully selected, just because s/he amounts to an especially hard case) and the defendant before the court is not designed to bring out the general context and ramifications of the decision. Thus, shrouded from the court's gaze are the different circumstances of persons not before the court; the pros and cons of alternative

²⁵ Michael Perry, *The Constitution in the Courts: Law or Politics?* (Oxford University Press, 1994).

choices to the measure whose constitutionality is at issue; and the knock-on effects of any court case. Yet these matters are the very stuff of socio-economic policy-making."²⁶

While this is certainly a concern, there are arguments in favour of a judicial recognition of judicial involvement in socio-economic rights that address this issue. Gerry Whyte comments that "Acknowledging that the political process does have greater capacity for addressing issues of social policy, I consider that, in such cases, the judiciary should generally employ a standard of reasonableness review that is appropriately deferential to executive or legislative decisions on matters that lie beyond the technical expertise of the judiciary."²⁷

Uncertainty of Law Issue

Finally, there is a fear that by allowing judicial activism in this area the courts would introduce a great deal of uncertainty into the law. The case law since the introduction of the Irish constitution has been for the most part against judicial involvement in socio-economic rights, and to go against that would undermine decades of precedent. Furthermore, as the socio-economic rights are found through the doctrine of unenumerated rights, there is potentially no end to the amount of socio-economic rights which might be found. This has the potential to make it extremely difficult for the legislature and executive to formulate functional budgets and make financial decisions as a new socio-economic right may be found which would require a large amount of expenditure.

Leading Cases in Socioeconomic Rights Jurisprudence

There have been a number of cases through which the Irish courts have demonstrated their unwillingness to enforce socioeconomic rights.

²⁶ David Gwynn Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork UP 2001) 63.

²⁷ Gerry Whyte, 'Judicial capacity to enforce socio-economic rights' (2014) 37 DULJ.

*O'Reilly v Limerick Corporation*²⁸ has been recognised as the leading case in demonstrating the role which the separation of powers doctrine plays in enforcing socioeconomic rights.²⁹ The case involved members of the Travelling community living on unofficial sites in Limerick which lacked running water, toilets and means for storing or collecting rubbish. They wished to secure a mandatory injunction against the corporation to provide them with a suitable site with these services. They also claimed damages for a breach of an unenumerated constitutional right to be provided by the State with basic human living conditions.

Costello J, distinguishing between commutative and distributive justice, held that the judicial function did not hold the power to compel either the executive or the legislature to spend money to vindicate rights. He said that in making a judgement on the claim '...the Court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise, namely, an adjudication on the fairness or otherwise of the manner in which other organs of State had administered public resources.'³⁰ He continued to say that this is not the assigned role of judges under the constitution and furthermore that the courts would be an unsuitable place for judgements of this type.

This case established that the Courts will not order affirmatively that legislation will be passed. They will instead declare something unconstitutional and that it should be fixed. The reasoning by the court here limits the identification and protection of implied socio-economic rights by the court on the basis of a rigid understanding of the separation of powers, and was approved by a number of later cases in the Supreme Court.³¹

²⁸ [1989] ILRM 181

²⁹ Gerry Whyte, *Social Inclusion and the Legal System: public interest law in Ireland* (2nd edn, Institute of Public Administration 2015)

³⁰ [1989] ILRM 181 at 195.

³¹ See *MhicMhathuna v Ireland* [1995] 1 IR 484 *Sinnott v Minister for Education and TD*.

*FN v Minister for Education*³² concerned a three year old child who had a condition which meant he had to be treated in a secure facility by a psychiatric team which the State had failed to provide for him. Geoghegan J. agreed that this embodied a failure by the State to vindicate the constitutional rights of the child under Article 42.5 and as a result granted a declaration that the child's constitutional rights had been violated.

The result of *FN* spurred new case law in the area. One such case was *DB v. Minister for Justice*³³ Kelly J. granted an order directing the Minister for Justice "to provide funding and to do all things necessary for the building, opening and maintenance of a high support unit" for young offenders.³⁴ The applicant was a young offender who required a secure detention facility for their own welfare, but due to a shortage had not been able to attain a place in one. The court decided that it had the jurisdiction to make such orders, stressing that more than three years had gone by since the decision in *FN* and that exceptional measures were now required from the courts to adequately defend the rights of the children. The court stated that they did not believe they were making policy through this decision, emphasising that the Minister had already agreed to build the unit.³⁵ Despite this, Hogan says that it is '...just one example from a long line of cases where very elaborate orders have been made: orders from the High Court directing the provision of special teachers and special classes are now quite common.'³⁶

The next significant case to address the socioeconomic right issue was *Sinnott v Minister for Education*.³⁷ This case concerned the extent of the right to primary education under Article 42, the only express provision recognised by the courts which impose an express obligation

³² [1995] 1 IR 409.

³³ [1999] 1 IR 29.

³⁴ [1999] 1 IR 29 at 33.

³⁵ Philip Smith 'Deference under the Separation of Powers: An increasingly acceptable trait amongst the Irish Judiciary?' (2010) <<https://arrow.dit.ie/cgi/viewcontent.cgi?referer=https://search.yahoo.com/&httpsredir=1&article=1044&context=aaschssldis>> (accessed 15 March 2019).

³⁶ Gerard Hogan 'Directive principles, Socio-Economic Rights and the Constitution' (2001) 36 Irish Jurist 186.

³⁷ [2001] IESC 63.

on the State to provide a form of socioeconomic benefit for its citizens.³⁸ The twenty-three year old plaintiff was claiming an entitlement to a particular kind of ongoing educational therapy for people with autism as he had received no more than three years of primary education because of his disorder.

In the High Court, Barr J deemed the constitutional provision requiring the state to provide primary education to be an open ended provision, also saying that ‘... it will continue as long as such education and services are reasonably required by him.’³⁹ He awarded damages for a breach of the plaintiff’s and his mother’s constitutional rights and also directed the Minister to provide the plaintiff with free primary education appropriate to his needs for as long as he was capable of benefiting from it and that he be given funding for the applied behavioural analysis home based programme for sufferers from autism for two and a half years.

On appeal in the Supreme Court however the court did not answer the question of whether this therapy could be understood under the guise of primary education but held by six votes to one that the educational provisions found in the Constitution were not open ended but in fact only applied to children, and thus ended after someone reached eighteen years of age. Denham and Geoghegan JJ commented that mandatory injunctions could only be obtained, if at all, in very exceptional circumstances. While these comments were obiter, Hogan has said it is obvious that they ‘surely presage judicial thinking on these issues.’⁴⁰

*TD v Minister for Education*⁴¹ involved children in secure state care who had psychological problems and as a result had been determined as possible threats to themselves. There was a repeated and ongoing failure of the state to provide the required facilities for these children. There were a series of court cases preceding this one where the High Court heard claims of

³⁸ Gerry Whyte, *Social Inclusion and the Legal System: public interest law in Ireland* (2nd edn, Institute of Public Administration 2015).

³⁹ [2000] IEHC 148.

⁴⁰ Gerard Hogan ‘Directive principles, Socio-Economic Rights and the Constitution’ (2001) 36 *Irish Jurist* 187.

⁴¹ [2001] 4 IR 259.

children who were at risk as a result of the government's failure to provide the necessary services.

Kelly J sat on the case in the High Court and had been issuing non-mandatory orders in this area for years but to no avail. He declared that under *Boland*⁴² it is possible to have judicial review when in clear disregard of the Constitution, which he said the State were as they had ignored previous orders. He proceeded to make a mandatory order requiring that the Minister for education build a number of facilities, including details such as locations and timelines of the buildings, and also ordered them to give him regular reports and provide reasons for delays. He argued that he was not making policy here but rather enforcing it, as the state had already nominally made this policy but had yet to follow through.

The government appealed to the Supreme Court and argued that the High Court's decision had removed core policy competences. In the Supreme Court a 4-1 judgement reversed Kelly J's order, with the court said that the only time it would make a mandatory order would be in the most exceptional circumstances. The core of the judgement was based on very rigid understanding of the separation of powers. Hardiman J said that the only instance in which the court could make a mandatory order would have to be highly exceptional; 'absolute final resort in a circumstance of great crisis for the protection of the constitutional order itself'⁴³ Murray J agreed arguing that a mandatory order could not be made against the executive could only be in the most exceptional circumstances. He said the *Boland* standard would still apply but that in this context 'clear disregard' has to mean a conscious and deliberate disregard for rights accompanied by bad faith or recklessness.

Gerry Whyte has argued that this test is too restrictive in requiring evidence of bad faith or recklessness, and that '...a more appropriate test would focus on whether or not the executive had been afforded a reasonable opportunity to vindicate the right but had failed to avail of it.' He cites the approach proffered by O'Hanlon J in *O'Donoghue v Minister for Health* and

⁴² *Boland v An Taoiseach* [1974] IR 338.

⁴³ [2001] IESC 101 Hardiman J at 372.

taken by Barr and Kelly JJ in *Sinnott* and *DB v Minister for Justice* as more suitable options.⁴⁴

Whyte has also remarked that the decisions in *Sinnott* and *T.D.* remain ‘serious obstacles to the use of litigation in promoting social inclusion.’⁴⁵ Despite this however, the question of whether the Constitution protects implied socio-economic rights has yet to be authoritatively decided by the Supreme Court, and so that question remains open.⁴⁶ While the judgement in *O’Reilly*⁴⁷ strongly stressed the courts’ inability to become involved in cases regarding distributive justice, it appears that upon retirement Costello J. had a change of heart.⁴⁸ Addressing a conference he called for a constitutional amendment to definitively protect socioeconomic rights. Remarking upon inequalities in Irish society he declared ‘...Sixty years of constitutional adjudication by the courts had shown that Article 40 was not adequate to redress that imbalance, while the consensus was that the courts had enhanced the protection of the basic rights included in the Constitution. There is no reason to assume that the enjoyment of the economic and social rights of the underprivileged and deprived would not be similarly enhanced if they too were constitutionally protected.’⁴⁹

Future Irish Approach to Socioeconomic Rights

In developing Ireland’s approach to socioeconomic rights, there are two key avenues that could be taken. Firstly, the Court could heed arguments made by academics, such as Gerry Whyte, and recognise a judicial duty to identify and vindicate implied socioeconomic

⁴⁴ Gerry Whyte, ‘Judicial Capacity to enforce socio-economic rights’ (2014) 37 DULJ.

⁴⁵ Gerry Whyte, *Social Inclusion and the Legal System: public interest law in Ireland* (2nd edn, Institute of Public Administration 2015).

⁴⁶ Gerry Whyte, *Social Inclusion and the Legal System: public interest law in Ireland* (2nd edn, Institute of Public Administration 2015).

⁴⁷ *O’Reilly v Limerick Corporation* [1989] ILRM 181

⁴⁸ Gerard Hogan ‘Directive principles, Socio-Economic Rights and the Constitution’ (2001) 36 Irish Jurist 183

⁴⁹ The Irish Times, November 14, 1998

rights.⁵⁰ For obvious reasons, many of which are outlined above, it is unlikely that the judiciary will make adopt any new approaches that would substantially change their current trajectory. On the other hand, the Court could also be empowered by the Constitution to make such recognitions, consequently bypassing many issues regarding constitutionality.

In March 2014, the Constitutional Convention on Socioeconomic (ESC) rights voted that there should be such an amendment to the Constitution to protect socioeconomic rights. The proposed model before the Convention was as follows, ‘the State shall progressively realise ESC (socioeconomic) rights, subject to maximum available resources and that this duty is cognisable by the Courts.’⁵¹ Making socioeconomic rights cognisable to the courts would have the effect of empowering the courts to vindicate rights expressly contained in Article 45, as well as implied through Article 40.3. While issues would perhaps persist regarding democratic legitimacy (although it could be argued that a referendum would provide a sufficient democratic mandate for the courts to intervene) and judicial capacity to act in areas of expertise, it would substantially remove (or at least substantially weaken) constitutional arguments precluding the judiciary from acting in this area. Unfortunately, there has been little development in this arena since the Convention’s vote.

Conclusion

As this section has sought to demonstrate, arguments exist both for and against judicial recognition of implies socioeconomic rights. Current jurisprudence, such as the judgments of *O’Reilly, DB, FN, Sinnott* and *TD* previously discussed, indicates that it is unlikely that the courts will alter their approach of judicial restraint, This section has also discussed Whyte’s assertion that such a conservative tradition rests on pre-interpretative background

⁵⁰ For an extensive discussion of judicial capacity to adjudicate socioeconomic rights see: Gerry Whyte, ‘Judicial Capacity to enforce socio-economic rights’ [2014] 37 DULJ; Cass Sunstein, ‘Social and Economic Rights? - Lessons from South Africa’ (2000) 11 Const F 123. Both Whyte and Sunstein discuss judicial capacity to enforce socioeconomic rights with regard to the reformative South African Constitution, which makes such rights expressly cognisable in the Constitution. Whyte discusses this system in regard to the Constitutional Convention on Socioeconomic Rights, which considered empowering the judiciary to identify and protect these rights through a constitutional amendment. This was a marked departure from the position advocated by Whyte in the 2002 version of his book *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Institute of Public Administration 2002) ch 1, where Whyte advocated for a liberalisation of the rules of standing, similar to that taken in India.

⁵¹ The Convention on the Constitution, ‘8th Report: Economic, Social and Cultural Rights’ (2014) 6, <http://escr-irl.org/wp-content/uploads/2016/01/CC_ESC_Report.pdf> accessed 1 April 2019.

values, rather than the explicit provisions of the Irish Constitution. While acceptance of this argument indicates that it is possible for the judiciary to adapt their approach within their constitutional confines, it has ultimately been shown that the most meaningful change would occur through an amendment to the Constitution. Accordingly, this paper recommends, in keeping with the aims and ideology of FLAC, that the Executive and Legislature heed the recommendations of the 2014 Convention and hold a constitutional referendum as to whether we should empower the courts in this manner.

I.II Comparative Analysis of Other Jurisdictions

Chloe Dalton, Caoilainn McDaid, Ella Woolfson

In order to gain a better insight into how socio-economic rights operate in a constitutional context, it is beneficial to consider the approaches taken in other jurisdictions. Constitutions often reflect the historical and cultural identity of a country. Written constitutions often act as a statement of the aspirations of a country and have even been termed as ‘mission statements’ of countries⁵². Constitutional provisions regarding the fundamental rights and the separation of powers are arguably the most important functions of constitutions. Different countries have taken different approaches as to what types of fundamental rights are enshrined in their constitutions. Traditionally, the Anglo-American approach to constitutional rights has excluded a social aspect and focus instead on negative rights. In contrast, countries in the global south, which are often post-colonial states, tend to have a strong constitutional focus on social justice. Ireland’s approach to social rights in the constitution takes a more middle-ground approach⁵³. Therefore, it is instructive to examine socio-economic rights in other jurisdictions. This section will examine three jurisdictions in which there is a somewhat favourable approach to the enforcement of socio-economic rights by the judiciary: India, South Africa and Canada.

India

Background

⁵² Colm O’Cinneide, *Zones of Constitutionalisation and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order*, 37 *Dublin U. L.J.* 173 (2014) at p.175

⁵³ Colm O’Cinneide, *Zones of Constitutionalisation and the Regulation of State Power: The Missing Social Dimension to the Irish Constitutional Order*, 37 *Dublin U. L.J.* 173 (2014)

In 1947, the struggle for Indian independence from British imperial rule drew to a close with the passing of the Indian Independence Act, granting India freedom. Three years later, the Indian Constitution was adopted in 1950 after a process which began prior to the 1947 Act. A Constituent Assembly began its task of drafting a Constitution for an independent India in December 1946 and concluded in November of 1949. The proposed Constitution was put to the Indian electorate and approved by the majority, officially enacting the Constitution in January 1950⁵⁴. Many of the framers of the Constitution held socialist views and had a desire to distance themselves from capitalism, which in the minds of Indian people, was inextricably linked with British colonialism. Therefore, socio-economic justice was a priority for the Constituent Assembly who sought to create a dynamic, revolutionary Constitution which made provision for positive socio-economic rights as well as the traditional negative rights⁵⁵.

The Constitution, which remains in force today, contains approximately three hundred articles and twelve schedules. The Preamble of the Indian Constitution guarantees to grant its citizens ‘justice, social, economic and political; liberty of thought, expression, belief, faith and worship and; equality of status and of opportunity’⁵⁶. Part III of the Constitution sets out fundamental rights which are enforceable in the Indian judicial system. These rights were influenced by the American Bill of Rights, and include the right to life (Article 21), the right to freedom of speech and prohibits discrimination on the basis of birthplace, caste, race, religion or sex. Part IV of the Constitution contains the Directive Principles of State Policy (DPSP), which consist of non-enforceable socio-economic rights such as the right to work, the right to education, free legal aid and a living wage.

Relevant Constitutional Provisions

Part III and Part IV of the Indian Constitution have proved to be the most influential provisions regarding the vindication of socio-economic rights. Some commentators have

⁵⁴ Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012)

⁵⁵ Rehan Abeyratne, ‘Socioeconomic Rights in the Indian Constitution’ (2014), *Brooklyn Journal of International Law* 39:1

⁵⁶ Preamble of the Constitution of India

maintained that the drafters of the Constitution placed such high importance on these rights that they did not distinguish Parts III and IV of the Constitution with respect to their importance. Part III guaranteed many of the traditional constitutional rights which are not generally considered as socio-economic, but also made provision for affirmative action. This significant provision permitted the government to positively discriminate in order to advance groups which were traditionally underrepresented in Indian society⁵⁷.

Part IV deals with socio-economic rights in a more explicit manner. One of the most influential drafters of Part IV, B.N. Rau, was inspired by Article 45 of the Irish Constitution to create a set of rights which although unenforceable by the courts, were an important statement of Indian values and aspirations⁵⁸. Many members of the Constituent Assembly wanted to go further than Rau, making the Part IV judicially enforceable, in the spirit of the 1931 Karachi Resolution. However, a compromise needed to be struck and Rau's position prevailed due to distrust in the judiciary's ability to vindicate rights as well as a desire to give the legislature enhanced discretion⁵⁹. The Part IV provisions correspond with various sections of the United Nations' International Covenant on Economic Social and Cultural Rights (ICESCR). Many of the socio-economic and cultural rights contained within the ICESCR were subsequently made law by the Indian legislature to give effect to the ICESCR⁶⁰.

Development of Socio-Economic Rights

During British occupation of India, a tradition of judicial restraint was established, with judges often being appointed due to their conservatism and unwillingness to interfere with government decisions. This trend influenced the behaviour of the Indian judiciary in the early years of independence; Articles 21 and 32 were narrowly construed. Influenced by standing

⁵⁷ Constitution of India, Article 15(4) and 15(5)

⁵⁸ Rehan Abeyratne, 'Socioeconomic Rights in the Indian Constitution' (2014), *Brooklyn Journal of International Law* 39:1

⁵⁹ *ibid*

⁶⁰ S.Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008)

requirements in the British and American tradition, access to litigation was initially restricted to those who had been directly impacted by the provision in question⁶¹.

Initially, the Indian courts were reluctant to interfere with the original narrow interpretation of Article 21, the right to life. The landmark case of *Keshavananda Bharati Sripadagalvaru v. State of Kerala*⁶² fundamentally changed the constitutional framework of India. Although the case did not directly comment on Article 21, it demonstrated a shift in the separation of powers, with the judiciary becoming more powerful, compounded by the tumultuous political period known as the Emergency which lasted from June 1975 to March 1977. In a bid to retain political power the then Prime Minister persuaded the President to declare a national state of emergency in which ordinary civil and political rights, including elections were suspended⁶³. The power of the courts was severely restricted and many criticised the judiciary saying that ‘the Court had in the hour of need betrayed the nation’ for tolerating the government’s behaviour⁶⁴.

After the Emergency, the judiciary had to improve its reputation with Indian citizens, and therefore decided to take on a more active role in the vindication of rights, which is known as Public Interest Litigation (PIL). PIL was a judge-led movement which empowered traditionally marginalised groups to access the courts to enforce their rights. In the early 1980s, a broader interpretation of Article 21 established that the right to life encompassed the right to live with dignity in the case of *Mullin v. The Administrator, Union Territory of Delhi*⁶⁵. This was an innovative method of enforcing certain non-justiciable rights through the prism of enforceable Part III rights. Bhagwati J, one of the most prominent judges in the development of PIL stated in the landmark case of *S.P Gupta v. Union of India*⁶⁶, that the purpose of PIL was to ‘promote public interest litigation so that the large masses of people

⁶¹ Rehan Abeyratne, ‘Socioeconomic Rights in the Indian Constitution’ (2014), Brooklyn Journal of International Law 39:1

⁶² A.I.R. 1973 S.C. 1461, 1599 (India)

⁶³ Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012)

⁶⁴ Brij Kishore Sharma, *Introduction to the Constitution of India* (2nd edn, New Delhi: Prentice-Hall of India, 2004) p.229

⁶⁵ [1981] INSC 12

⁶⁶ AIR 1982 SC 149

belonging to the deprived and exploited sections of humanity may be able to realise and enjoy the socioeconomic rights granted to them and these rights may become meaningful for them instead of remaining mere empty hopes'. Bhagwati J later described the process of PIL as the applicant, the legislature and the judiciary working as a collective, rather than as opponents, to determine the best course of action to tackle pervasive social problems in India⁶⁷.

The Current Situation

The Indian judiciary, spearheaded by the Supreme Court, have ushered into a new era of judicial policymaking, indicating a glaring departure from the initial conservatism of the Court. The most obvious illustration of how the Supreme Court have increased their power to become a crucial body the development of Indian policy of socio-economic rights is the Right to Food litigation. The aforementioned case of *Mullin*⁶⁸ established that the right to food was implicit in the right to life some decades before the monumental case of *People's Union for Civil Liberties v. Union of India*⁶⁹ which directly confronted the right to food. Public outrage at the widespread starvation in some of the most disadvantaged regions of India culminated in successful litigation against the state. The Supreme Court, in an unprecedented move, ordered the government to implement programmes which would effectively ameliorate the starvation faced by many Indians. One of the most important of these schemes was the 'mid-day meal scheme' which obliged the government to provide a nutritional cooked meal to students in public schools within a year of the handing down of the judgement. Furthermore, the Court has established commissions which monitor the progress of these schemes, which often fail to meet the objectives of the schemes. Arguably, the Supreme Court have played an essential role in improving welfare and perhaps saving the lives of numerous Indian children⁷⁰.

⁶⁷ Rehan Abeyratne, 'Socioeconomic Rights in the Indian Constitution' (2014), Brooklyn Journal of International Law 39:1

⁶⁸ [1981] INSC 12

⁶⁹ Writ Petition (Civil) No.196/2001 (23 July 2001) Unreported ('PUCL case')

⁷⁰ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences*, (Routledge 2012)

However, the activism of the judiciary has not been immune to criticism. Some commentators have argued that the power of the Supreme Court has eclipsed the power of the elected legislature and is in some respect at odds with liberal democracy. The separation of powers in the Indian constitutional order appears to have shifted, which could in part be due to the historical failure of government to grapple with poverty. Nonetheless, it is clear that the Indian judiciary have played an instrumental role in the development and vindication of socio-economic rights which have improved the lives of many citizens. It is no wonder that the judicial activism seen in India has led to the Indian Supreme Court being dubbed ‘the most powerful court in the world’⁷¹.

South Africa

Background

The South African Constitution has been described as ‘the world’s leading example of a transformative constitution’⁷². Seminal rights doctrines often emanate from atrocities or periods of struggle and represent a commitment to ensuring that history will not repeat itself. The South African Constitution of 1996 was adopted against the backdrop of the oppressive apartheid regime, and is thus specific to the particular legacy of apartheid. The apartheid system was, itself, so associated with problems of persistent social and economic deprivation, and therefore the question of socioeconomic rights was at the forefront of debate when it came to adopting a new constitution. The South African Constitution may be viewed, as aforementioned, as transformative rather than preservative in that it sought to set out certain new aspirations which posed a challenge to longstanding practices, its overriding goal being to overcome the atrocities of the apartheid system.

Development of Socioeconomic Rights

The appropriate approach to socioeconomic rights was hotly debated in the period preceding ratification of the South African Constitution. The debate largely centred around whether it is appropriate to protect socioeconomic rights in a State’s Constitution, effectively equating them to civil and political rights. Traditionally, constitutional documents have solely dealt

⁷¹ Rehan Abeyratne, ‘Socioeconomic Rights in the Indian Constitution’ (2014), Brooklyn Journal of International Law 39:1

⁷² Cass Sunstein, ‘Social and Economic Rights – Lessons from South Africa’ (1999-2001) 11 Const. F. 123, 125

with civil and political rights without addressing minimum conditions of life⁷³ However, in the late twentieth century, a trend towards creating rights to food, shelter, healthcare and more could be gleaned. Sceptics have often doubted that socioeconomic rights should be constitutionally protected, as a constitution is traditionally seen as a “bulwark” of liberty for the people against the oppression of the state⁷⁴ Viewing constitutions through this lens, it is not logical to impose positive duties on a state by way of protecting socio-economic rights.

In South Africa, proponents of the inclusion of socioeconomic rights in the new constitution pointed out that it makes little sense to protect the civil and political rights of the people whilst they ‘continue to be at the mercy of the elements and of social exploitation’⁷⁵ Notwithstanding this, opponents argued that it would be equally destructive to the legitimacy of the constitution if it promised too much, creating rights with corresponding duties with which the state might fail to comply⁷⁶. Furthermore, concerns were raised as to the increased capacity and jurisdiction of the judiciary which might result from a constitutional socioeconomic rights doctrine and the challenges this might pose to the separation of powers. It was claimed by some that the judiciary, as independent agents, were not the appropriate organ to deal with social and economic policy and budgetary matters, and that this should be addressed by the parliament as the representative of the people⁷⁷

It was ultimately decided that the new constitution would contain a doctrine of socioeconomic rights which are directly justiciable. The Constitution protects, for example, the right to “an environment that is not harmful to their health or wellbeing”⁷⁸, housing⁷⁹ and

⁷³ Cass Sunstein, ‘Social and Economic Rights – Lessons from South Africa’ (1999-2001) 11 Const. F. 123, 124

⁷⁴ Cass Sunstein, ‘Social and Economic Rights – Lessons from South Africa’ (1999-2001) 11 Const. F. 123, 124

⁷⁵ Christof Heyns and Danie Brand, ‘Introduction to Socio-Economic Rights in the South African Constitution’ (1998) 2 Law Democracy & Dev. 153, 154

⁷⁶ Christof Heyns and Danie Brand, ‘Introduction to Socio-Economic Rights in the South African Constitution’ (1998) 2 Law Democracy & Dev. 153, 154

⁷⁷ Christof Heyns and Danie Brand, ‘Introduction to Socio-Economic Rights in the South African Constitution’ (1998) 2 Law Democracy & Dev. 153, 154

⁷⁸ The Constitution of the Republic of South Africa, Section 24

⁷⁹ The Constitution of the Republic of South Africa, Section 26

health, food, water and social security⁸⁰ The provisions in the final doctrine adopted are closely akin to the those in the International Covenant on Economic, Social and Cultural Rights which firmly recognises socioeconomic rights and commits signatory states to ‘take steps... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the Covenant by all appropriate means, including particularly the adoption of legislative measures’⁸¹ The majority of the socioeconomic rights contained in the South African Constitution take a similar form, stipulating that the ‘state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right’. Thus, most of the rights are qualified and must operate within the bounds of reasonableness and the available resources. This pronouncement of rights seemingly creates a system whereby the state is expected to take measures towards the realisation of the enumerated rights, and the courts are entrusted with policing such rights by ensuring the state has, in fact, taken these reasonable steps⁸². Furthermore, the South African Human Rights Commission operates as a “soft” enforcement mechanism with a monitoring role in respect of all human rights.

The Current Situation

In practice, the Constitutional Court of South Africa has afforded deference to legislative and executive policy choices within the bounds of reasonableness⁸³. *Soobramoney v. Minister of Health, Kwazulu-Natal*⁸⁴ was the first case before the Constitutional Court, in which the claimant challenged a hospital policy which prioritised curable cases for publicly funded dialysis treatment at the expense of terminal cases such as the claimant. The Court found that, in light of the limited available resources for health services, the policy was reasonable and

⁸⁰ The Constitution of the Republic of South Africa, Section 27

⁸¹ The Constitution of the Republic of South Africa, Section 2.1

⁸² Certified in *Ex parte Chairperson of the Constitutional Assembly, Re Certification of the Constitution of the Republic of South Africa* (1996) (10) BCLR 1253 (CC) para 78

⁸³ Natasha Menell, ‘Judicial enforcement of socioeconomic rights: a comparison between transformative projects in India and South Africa’ (2016) 49 *Cornell Int'l L.J.* 723, 732

⁸⁴ (1997) (1) SA 765 (CC) (S. Afr.)

did not violate the constitutional right to emergency healthcare. In *Republic of South Africa v. Grootboom*,⁸⁵ the court required the government to implement a ‘coherent...program directed towards the progressive realisation of a constitutional right within the state’s available means,’ which would be ‘capable of facilitating the realisation of the right’. In this case, the Court held that a government housing project violated this obligation as it failed to prioritise those ‘living in intolerable conditions or crisis situations’. In *Occupiers of 51 Olivia Road, Berea Township v. City of Johannesburg*,⁸⁶ the Court went further in its analysis in suggesting procedural requirements for socioeconomic policy development. It required that the government engage in good-faith consultations with the community before pursuing evictions. The Court has generally imposed a standard of reasonableness on policymakers while refusing to award individual remedies to successful litigants, ‘reinforcing an understanding of socioeconomic rights in South Africa as creating obligations for the government to pursue progressive realisation rather than achieve individual entitlements’⁸⁷.

The system implemented by the South African Constitution seeks to strike a balance between the position that, on the one hand, socioeconomic rights are non-justiciable, and on the other hand that socioeconomic rights create an absolute duty on the government’s part to ensure protection for everyone who needs them.⁸⁸ By their very nature, socioeconomic rights require different enforcement mechanisms to civil and political rights, and the South African Constitution has effectively implemented an administrative law model in order to accommodate this⁸⁹ in imposing standards of reasonableness and deferring, to a certain extent, to decision makers. On this view, the inclusion of socioeconomic rights in the Constitution constrains the government by requiring it to ‘devote more resources than it otherwise would’ to, for example, housing for the disadvantaged. An advantage of this approach is that it gives individuals who may be unable to make progress in the political

⁸⁵ (2000) (1) SA 46 (CC) (S. Afr.)

⁸⁶ (2008) (3) SA 208 (CC) (S. Afr.)

⁸⁷ Natasha Menell, ‘Judicial enforcement of socioeconomic rights: a comparison between transformative projects in India and South Africa’ (2016) 49 *Cornell Int'l L.J.* 723, 735

⁸⁸ Cass Sunstein, ‘Social and Economic Rights – Lessons from South Africa’ (1999-2001) 11 *Const. F.* 123, 130

⁸⁹ Cass Sunstein, ‘Social and Economic Rights – Lessons from South Africa’ (1999-2001) 11 *Const. F.* 123, 131

arena the opportunity to strengthen the right to shelter, food or healthcare. The Court's approach provides protection of these rights in a way which remains respectful to the separation of powers and 'the simple fact of limited budgets'.⁹⁰ Although concerns have been raised that expansive judicial enforcement of socioeconomic rights may infringe on democratic decision-making, the South African Court's deference to political policy making alleviates these concerns whilst still seeking to effect reform through the enforcement of consultative and reasonable decision making.

Canada

Background

Canada is among the wealthiest countries in the world and is known for its relatively progressive views in terms of the role of the state in supporting the social and economic needs of its citizens. The state provides social housing and social assistance programmes, and publicly funded education is a right. Canada has publicly funded and universally accessible healthcare system. It can therefore be said that Canada is a country which, in socioeconomic terms, is quite similar to Ireland, which merits an examination of the protection of socioeconomic rights in its Constitution which will provide a useful comparison to the situation in Ireland.

The Constitution Act 1982 identifies an amalgamation of documents as comprising the Constitution of Canada. The most important of these documents in relation to the examination of socioeconomic rights is the Canadian Charter of Rights and Freedoms (the Charter), which brought about the 'constitutional entrenchment of a judicially enforceable catalogue of fundamental rights'.⁹¹ The Charter is predominantly concerned with the protection of civil and political rights and does not contain explicit reference to the protection of socioeconomic rights. However, it has been used in a small number of cases as a mechanism for the enforcement of socio-economic rights, and it has been argued that there is

⁹⁰ Cass Sunstein, 'Social and Economic Rights – Lessons from South Africa' (1999-2001) 11 Const. F. 123, 131

⁹¹ Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 109

scope for significant expansion of the use of the Charter when trying to uphold socio-economic rights.

There are two sections of the Charter which, it has been argued, ‘provide a solid basis’ for the asserting of socioeconomic rights, especially when ‘read in light of a perceived Canadian commitment to social justice and the welfare state’.⁹² These two sections are section 7, which states that ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice,’⁹³ and section 15, which states that ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’⁹⁴ There was successful pressure by advocacy groups and human rights experts to frame the rights in the Charter, including the right to equality, as expansively as possible. It was argued that this would allow the Charter to be a more flexible and responsive document, that would retain its relevance into the future, while also giving a tool to the judiciary to potentially enforce a wide range of socio-economic rights.

There has been a significant amount of litigation in which it has been argued that both section 7 and section 15 of the Charter protect the socio-economic rights of citizens. While the lower courts in Canada have largely rejected claims that these sections offer protection for socioeconomic rights, the Supreme Court has left open the possibility of reading socio-economic rights, such as the right to healthcare, housing and social assistance, into the Charter. In reality, the issue of socioeconomic rights in the context of the Canadian Constitution is one that has been somewhat sidestepped in many Supreme Court decisions. There has been no definitive answer as to whether these rights can ever be fully vindicated by the courts.

⁹² Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 110

⁹³ Canadian Charter of Rights and Freedoms, s 7.

⁹⁴ Canadian Charter of Rights and Freedoms, s 15(1).

Section 7 Litigation

One of the first cases in which the Supreme Court of Canada left open the possibility of section 7 being interpreted as asserting a constitutional right to medical care, housing, clothes and food was that of *Singh v. Minister of Employment and Immigration*.⁹⁵ In the later case of *Slaight Communications Inc. v. Davidson*,⁹⁶ the court held that ‘the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified’.⁹⁷ The decision of the court in this case showed the potentially vast protection of socioeconomic rights that could be read into the Charter, if indeed the rights established in international human rights documents such as the ISESCR (which will be examined later) are read into the Charter. In *Irwin Toy Ltd. v. Quebec*,⁹⁸ the Supreme Court maintained the possibility that ‘the State may have a positive obligation to provide financial assistance or other measures necessary to ensure access to adequate food, housing and other necessities, in order to comply with the right to security of the person under section 7’.⁹⁹

Section 7 has been used to put a positive duty on the government. In the case of *New Brunswick (Minister of Health and Community Service) v. G.(J.)*,¹⁰⁰ it was held that the state had a duty to provide publicly funded legal aid in child custody cases or other cases in which section 7 rights are at issue. This case showed that the Supreme Court is not entirely deferential to the government in terms of the allocation of public funds, which has been seen to be an issue in socioeconomic rights cases.

⁹⁵ [1985] 1 SCR 177

⁹⁶ [1989] 1 SCR 1038

⁹⁷ *Slaight Communications Inc. v. Davidson* [1989] 1 SCR 1038, 1056–1057.

⁹⁸ [1989] 1 SCR 927

⁹⁹ Bruce Porter and Martha Jackman, ‘Canada: Socio-Economic Rights Under the Canadian Charter’ in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 209, 221.

¹⁰⁰ [1999] 3 SCR 46

The potentiality of far-reaching protection of socioeconomic rights under section 7 of the Charter has been lessened somewhat by two more recent cases. The first of these is *Gosselin v. Quebec (Attorney General)*,¹⁰¹ which related to the payment of social welfare. The court held that ‘nothing in the jurisprudence thus far suggests that s.7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state’s ability to deprive people of these’.¹⁰² This ruling dampened the hopes of many who hoped that section 7 of the Charter would lead to the creation of socioeconomic rights, although the Chief Justice left open the possibility of future development, indicating that ‘One day s.7 may be interpreted to include positive obligations.’¹⁰³ In *Chaoulli v. Quebec (Attorney General)*,¹⁰⁴ the claimants, in whose favour the court found, challenged the ‘provincial government restrictions on private health care funding designed to protect the universal medicare system’.¹⁰⁵ Binnie J, in his dissenting judgement, cautioned that ‘the Canadian Charter should not become an instrument to be used by the wealthy to “roll back” the benefits of a legislative scheme that helps the poorer members of society’.¹⁰⁶ The decision in *Chaoulli* can be seen as the use of a provision in the Charter to further the interests of relatively wealthy individuals, rather than to advance the development and wellbeing of those who are marginalised in society, and should therefore be viewed as a somewhat regressive step.

Section 15 Litigation

It was hoped by many that the expansive conception of equality laid out in section 15 of the Charter would carry with it ‘the promise that section 15 of the Charter will extend beyond mere formal equality... to embrace the protection of the substantive material needs of

¹⁰¹ [2002] 4 SCR 429

¹⁰² *Gosselin v. Quebec (Attorney General)* [2002] 4 SCR 429 at para. 81

¹⁰³ *Gosselin v. Quebec (Attorney General)* [2002] 4 SCR 429 at para. 81

¹⁰⁴ [2005] 1 SCR 791

¹⁰⁵ Bruce Porter and Martha Jackman, ‘Canada: Socio-Economic Rights Under the Canadian Charter’ in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 209, 222.

¹⁰⁶ *Chaoulli v. Quebec (Attorney General)* [2005] 1 SCR 791 at para 94

disadvantaged and excluded sections of society’,¹⁰⁷ and that this section would be an adequate mechanism for advancing economic and social equality. The first significant case in relation to section 15 rights was that of *Eldridge v. British Columbia*,¹⁰⁸ in which the Supreme Court held that while it was unclear whether or not section 15 imposed on the government positive obligations to take measures to alleviate systematic disadvantage, ‘once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner’.¹⁰⁹ This would, in various circumstances, ‘require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons.’¹¹⁰

In *Vriend v. Alberta*,¹¹¹ the court ruled that there was no distinction between positive actions by the state which infringe on section 15 rights, and omissions by the state, in this case in the Alberta Individual Rights Protection Act 1988, which result in violations of Charter rights. Cory J held that the Act in question, ‘in its underinclusive state’,¹¹² denied substantive equality to members of the LGBT community. This broadening of the concept of substantive equality under section 15 of the Charter led to an optimism that the court would further expand its protection of socioeconomic rights. However, the judgement of the Supreme Court in the case of *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*¹¹³ ‘appears to confirm that section 15 will only be implicated in circumstances where government has acted in an underinclusive manner, and not where it has completely refrained from acting’.¹¹⁴ This decision effectively quashed any hope of section 15 being used as an effective mechanism for the judicial enforcement of substantive equality.

¹⁰⁷ Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 117.

¹⁰⁸ [1997] 3 SCR 624

¹⁰⁹ *Eldridge v. British Columbia* [1997] 3 SCR 624 at para. 73

¹¹⁰ *Eldridge v. British Columbia* [1997] 3 SCR 624 at para. 73

¹¹¹ [1998] 1 SCR 493

¹¹² [1998] 1 SCR 493 at para. 82

¹¹³ [2004] 3 SCR 657

¹¹⁴ Paul O’Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012) 123

International Covenant on Economic Social and Cultural Rights (ICESCR)

Canada is the signatory of a number of international human rights documents, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Canada signed and ratified in 1976. The ICESCR enshrines a wide range of socioeconomic and cultural rights, such as the right to an education,¹¹⁵ social security,¹¹⁶ and an adequate standard of living.¹¹⁷ Article 2(1) of the Covenant provides that ‘Each State Party to the present Covenant undertakes to take steps... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means’.¹¹⁸ The Covenant would offer sweeping protection of socioeconomic rights if its provisions were read into the Canadian Charter, however this has not yet occurred and there is little scope for it occurring in the future.

The Current Situation

While there have been some developments in the use of the Canadian Charter of Rights and Freedoms to vindicate socio-economic rights, Canada is still far from having a situation where there is a wide range of judicially enforceable socio-economic rights. The Supreme Court has to a large extent sidestepped the issue of whether the state has a positive constitutional obligation to provide assistance to those who do not have adequate housing, healthcare, food, education or decent work.¹¹⁹ The deferential nature of the Supreme Court to the government, especially in relation to how public funds are spent, means that there is little scope for a great expansion of the protection of socioeconomic rights under the Charter.

¹¹⁵ Article 13 ICESCR

¹¹⁶ Article 9 ICESCR

¹¹⁷ Article 11 ICESCR

¹¹⁸ Article 2(1) ICESCR

¹¹⁹ Bruce Porter and Martha Jackman, ‘Canada: Socio-Economic Rights Under the Canadian Charter’ in Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 209, 228.

Conclusion

This section has examined three jurisdictions in which there is an at least somewhat favourable approach to the constitutional enforcement of socio-economic rights. Significantly, it is Canada, which is the wealthiest of the three states and the jurisdiction which, socioeconomically, is most similar to Ireland, that has the weakest constitutional protection of social and economic rights. The approaches in the three jurisdictions to the judicial enforcement of socioeconomic rights differ quite significantly and offer a varying levels of protection for these rights. The Supreme Court of India is arguably the most powerful and progressive in terms of the vindication of socioeconomic rights, and the South African Supreme Court offers a relatively robust protection of these rights. The Canadian constitutional system offers a lot of potential for the vindication of socioeconomic rights, but in reality only a small amount of protection for these rights has been obtained under the Charter. However, this section has demonstrated that it is indeed possible, and arguably favourable, for the courts to play a role in the vindication of social and economic rights.

Part II: Rules of Practice and Costs of Litigation

This Part will discuss the rules of practice and costs of litigation, with a particular focus as to how this impacts access to justice in general, and public interest litigation in particular. As Whyte notes, in this jurisdiction, procedural rules have traditionally been influenced by individualism, and other liberal principles that form the moral background of our legal system.¹²⁰ As a consequence, public interest litigation has sparred with many of these individualist tendencies, being more concerned itself with the interests of groups, rather than individual parties.

II. Rules of Practise and Costs of Litigation

Aislinn Finnegan, Sierra Mueller-Owens, Matthew O’Shea, Campbell Whyte

There has been a longstanding recognition by the Irish judiciary that the costs of litigation are ‘frightening’ and are a ‘major deterrent to people who wish to have access to the Courts and may in many cases actually prevent parties from availing of rights nominally guaranteed to them by the Constitution.’¹²¹ In addition to cost acting as a strong deterrent to those of limited means who do not qualify for legal aid, those who decide to represent themselves face many challenges. These lay litigants, unfamiliar with rules of evidence and procedure are considered to be a major cause for concern, with some going as far as to state that litigation involving unrepresented persons is ‘guaranteed to lengthen proceedings, add layers of confusion and complexity and run up far higher costs in the added court time’ than litigants who are represented.¹²²

This section will primarily focus upon the costs of litigation, noting how this may impede general access to justice, and affect the use of public interest litigation in particular. It will in turn exam the current system for providing access to civil legal aid and criminal legal aid,

¹²⁰ Gerry Whyte, *Social Inclusion and the Legal System* (Institute of Public Administration 2016), 117.

¹²¹ *MacGairbhith v Attorney General* [1991] IR 412.

¹²² The Secret Barrister, ‘The Secret Barrister: Stories of the Law and How It’s Broken’ (1st edn, Picador 2018) 219, Transform Justice, ‘Justice Denied? The experience of unrepresented defendants in the criminal courts’, April 2016, <http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf>.

including the effect of ‘Ireland’s Loser Pays System.’ The failure to make use of protective cost orders in this jurisdiction will also be examined and it will be concluded that the rules used to apply PCOs are too restrictive. Comparison will also be drawn to other jurisdictions, followed by an analysis of the procedural rules in Ireland that impact access to justice.

Costs of Litigation

General Access to Justice

The current Chief Justice, Frank Clarke has stated that the cost of going to court is a barrier to justice and that a cap on fees in court cases should be considered.¹²³ This option is currently being examined by Mr Justice Peter Kelly, President of the High Court as part of a review he is undertaking into the administration of civil justice in this jurisdiction.¹²⁴

As a preliminary note, it is difficult to determine the extent to which legal costs exclude persons who would otherwise avail of legal services. In the 2005 Report of the Legal Costs Working Group, it was noted that the lack of transparency regarding costs, coupled with large variations in fees charged for similar cases makes the prohibitive effect of legal costs difficult to assess.¹²⁵ While the Law Society of Ireland and the Bar Council of Ireland set out the factors which are to be taken into account when practitioners calculate their fee, there is no set scale. The Law Society of Ireland is empowered to investigate claims of excessive charges by solicitors and following the conclusion of a case, there is a procedure by which legal costs can be sent to a Taxation Master to assess ‘fair and reasonable remuneration’ that a party has to pay the other side.¹²⁶ It is often acknowledged that legal fees may dwarf an

¹²³ Shane Phelan, ‘Cap on fees in court cases should be considered’ Irish Independent (September 29th 2018) <https://www.independent.ie/irish-news/cap-on-fees-in-court-cases-should-be-considered-37366487.html> accessed March 10 2019.

¹²⁴ Shane Phelan, ‘Cap on fees in court cases should be considered’ Irish Independent (September 29th 2018) <https://www.independent.ie/irish-news/cap-on-fees-in-court-cases-should-be-considered-37366487.html> accessed March 10 2019.

¹²⁵ Legal Costs Working Group, ‘Report of the Legal Costs Working Group’, [2.2], [3.22] <http://www.inis.gov.ie/en/JELR/Pages/Legal-costs-working-group-report> accessed March 12 2019

¹²⁶ Courts Service, ‘Taxation of Costs: an information booklet’ (2015) [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/681C14C83675610680257DE0005E17C1/\\$FILE/Taxation%20of%20Costs%202015.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/681C14C83675610680257DE0005E17C1/$FILE/Taxation%20of%20Costs%202015.pdf), 2.

award of damages made by a court even where the applicant is successful, something which cannot be considered to be in the interests of justice.¹²⁷

Public Interest Litigation

Legal aid is not available for so called ‘test cases’ which seek to establish a ‘precedent in the determination of a point of law [...] in which the members have an interest’.¹²⁸ Nor is it available to those who take representative actions or to those who involved in multi-party litigation.¹²⁹ PILA has noted the view held by many that the public interest applicant is no different than any other applicant and thus must accept the risk that they too may have to pay for the other party’s costs. While on occasion Irish courts have recognised the exceptional nature of certain public interest cases and have exercised their discretion to depart from the usual cost rule, the Supreme Court has been unequivocal that the decision to deviate from the norm must be left to the Courts discretion.¹³⁰

Criminal Legal Aid Compared with Civil Legal Aid

It has been recognised in Ireland since 1976 that the criminally accused, unable to pay for legal representation have a Constitutional right to legal aid.¹³¹ There is no fixed criteria on which the decision to grant legal aid is made: the accused applies to the judge for legal aid on the first day and furnishes a financial means form and where the judge finds the individual to be eligible, they are assigned a solicitor by the court.¹³² The trigger for the granting of legal aid has been described as the presence of a ‘risk to liberty or something which may affect

¹²⁷ Barniville, ‘Insurance Premiums and Legal Costs’ (2016) 21(3) Bar Review 83.

¹²⁸ Civil Legal Aid Act 1995 s 28(9)(a)(viii).

¹²⁹ Civil Legal Aid Act 1995, s 28(9)(a)(ix), FLAC, ‘Submission on the Multi-Party Actions Bill 2017’ (February 2018) pg 9 < https://www.pila.ie/download/pdf/submission_to_joc_mpa_bill_2017.pdf?issuusl=ignore > accessed March 10 2019.

¹³⁰ *Curtin v Clerk of Dáil Eireann & Ors* [2006] IESC 27, *Dunne v Minister for the Environment, the Attorney General and Dun Laoghaire-Rathdown County Council* [2007] IESC 60.

¹³¹ *State (Healy) v Donoghue* [1976] IR 325.

¹³² Legal Aid Board, ‘Criminal Legal Aid’ < <https://www.legalaidboard.ie/en/our-services/criminal-legal-aid/> > (accessed March 28 2019).

welfare and livelihood'.¹³³ Those who are granted criminal legal aid are not required to contribute to the costs of litigation.

In contrast to the flexibility of the Criminal Legal aid system which allows for legal aid to be granted on a case by case basis where the individual lacks means and there is a risk of either imprisonment or grave consequences to a person's livelihood or welfare, civil legal aid employs distinct criteria. The test has been described by former FLAC Director, Noeline Blackwell, as 'totally rigid' and 'ineffective' given the statutory hurdles and long waits. This criteria will be discussed below.

Income

There are strict financial eligibility criteria which must be met before a person can be eligible for legal aid, they must then further satisfy a merits test. An applicant's disposable income must be less than €18,000 *and* their disposable capital must not exceed €100,000, down from €320,000 in 2002.¹³⁴ In 2016, the Civil Legal Aid Regulations 1996-2016 were amended to provide that legal aid and legal advice be granted to an applicant without reference to the financial resources of that individual in limited circumstances.¹³⁵ The Merits Test is based on reasonableness, as assessed by the Legal Aid Board, and in most cases on the chances of winning on the case with limited exceptions such as child welfare cases.¹³⁶

Subject Matter Exclusion

It was noted by FLAC in 2005 that there was a 'worrying lack of diversity in the work done within the civil legal aid scheme' with entire areas of law excluded.¹³⁷ This remains the case

¹³³ Blackwell, 'Access to Legal Aid as part of access to justice: A rigid or discretionary right?' Paper delivered to the Legal Aid Board Annual Conference 2014 on 18 June 2014 < <https://www.flac.ie/news/2014/06/30/access-to-legal-aid-as-part-of-access-to-justice-a/> > (accessed March 18 2019).

¹³⁴ S.I No. 272/2016 Civil Legal Aid Regulations 1996 to 2016, Regulation 13(4) Civil Legal Aid Regulations, 1996 and 2002.

¹³⁵ S.I No. 272/2016 – Civil Legal Aid Regulation

¹³⁶ Civil Legal Aid Act 1995, Sections 24,28 see also FLAC, 'Access To Justice, A Right Or A Privilege' (2005) < <https://www.flac.ie/publications> > accessed March 2019

¹³⁷ Flac, 'Legal Aid; A right of a Privilege' (2005) pg 3,

in 2019, areas such as employment, social welfare and housing disputes continuing to be outside the remit.¹³⁸ This is despite the complexities of these areas and the huge impact these areas can have on an individual's life. The reality is that the current civil legal aid system remains unable to provide the legal aid that is required to ensure real access to justice in Ireland.

The Financial Contribution

Everyone availing of legal aid must financially contribute towards the legal services provided, with minimum contributions being €30 for legal advice and €130 for legal aid, with certain exceptions such as proceedings pursuant to the Domestic Violence Act 1996.¹³⁹ Those in direct provision are expected to pay €10 for legal aid/advice.¹⁴⁰ While it may be argued that such fees are necessary for the practical implementation of state a stated funded scheme for civil legal aid, such costs still act as a disincentive for litigants to pursue actions through the courts.

The Effects of Having to Rely on Legal Advice

The exclusion of certain areas of law, including a total lack of right to legal aid for representation before tribunals, cannot but be viewed as oppression of disadvantaged socioeconomic groups given the huge impact that decisions at employment and social welfare tribunals for example, have on a person's life. These are tribunals that make large numbers of decisions about the most fundamental parts of a person's life and will be the first port of call for a huge number of people in Ireland.¹⁴¹ They were established primarily with the aim of reducing the workload of the courts, but perhaps they are effectively an inconspicuous hurdle for the individual of limited means to fall at.

¹³⁸ Civil Legal Aid Act 1995 section 28(9)(a)

¹³⁹ Legal Aid Board, 'Annual Report 2017' (2017), < <https://www.legalaidboard.ie/en/about-the-board/press-publications/annual-reports/> > accessed March 11 2019, S.I No. 626/2017 – Civil Legal Aid Regulations 2017

¹⁴⁰ Flac, 'Flacsheet, Civil Legal Aid in Ireland' (2015) < https://www.flac.ie/download/pdf/civil_legal_aid_guide_final2.pdf?issuusl=ignore > accessed May 11 2019

¹⁴¹ Blackwell, 'Access to Legal Aid as part of access to justice: A rigid or discretionary right?' Paper delivered to the Legal Aid Board Annual Conference 2014 on 18 June 2014 <<https://www.flac.ie/news/2014/06/30/access-to-legal-aid-as-part-of-access-to-justice-a/>> (accessed March 18 2019).

Even for those whose applications for civil legal aid are successful, PILA noted that the average waiting time for a first consultation was approximately four months.¹⁴² As of January 2019, this has risen to just under 5 months, with those in Finglas waiting on average 11 months for their first consultation with a solicitor.¹⁴³ In implementing a system of legal aid, the State has acknowledged that there is a real problem regarding access to justice, but the current civil aid scheme is still unsatisfactory.

The Loser Pays System

The 2005 Report on Legal Costs Working Group also examined features of the legal service market which it considered inhibited the ‘efficient and fair working of the market contrary to the welfare of individuals and society in general’.¹⁴⁴ It noted the unique feature that professionals within this industry may have an expectation that it will be a person other than the litigant who will pick up the bill, due to the ‘loser pays’ system. The 2005 Report suggests that in the context of this “no foal, no fee” system, the litigant may not be incentivised to ‘exercise adequate control over the level of their costs’.¹⁴⁵ As a result, defendants may face great difficulty in limiting costs incurred by the other party.¹⁴⁶ The report also noted the lack of information available to the public surrounding costs involved in litigation in addition to the litigation process itself, problems compounded by the prevalence of highly technical language used by legal professionals.

While the offering of legal services on a ‘no foal, no fee’ basis has been instrumental in allowing applications without the financial means to litigate, this only works to the extent that the other party is well resourced. The Working Group noted that this incentive structure ‘can lead to excessive costs and usage of the legal system to the detriment of both users and

¹⁴² PILA, *The Costs Barrier and Protective Cost Orders* (2010), 7.

¹⁴³ Legal Aid Board, ‘Management Information’ (January 2019) <https://www.legalaidboard.ie/en/our-services/legal-aid-services/waiting-times/january-2019.pdf> accessed March 12 2019.

¹⁴⁴ Legal Costs Working Group, ‘Report of the Legal Costs Working Group’, <<http://www.inis.gov.ie/en/JELR/Pages/Legal-costs-working-group-report>> accessed March 12 2019, [5.2].

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*, [5.3].

society in general'.¹⁴⁷ The Working Group considered a number of international models and concluded that two common law models, that of New Zealand and the United States had adopted measures that might encourage 'more prudent behaviours on parties in civil litigation' either by limiting the amount recoverable, or by requiring the parties to cover their own costs.¹⁴⁸ The Group did however conclude that the current system 'allows for persons of modest means to engage a solicitor to vindicate their rights' even if this is limited to cases where the case is likely to be successful and the other party is well resourced and recommended that this model should not be abandoned.¹⁴⁹

The 2010 PILA Report further notes that the tradition of practitioners offering legal services on a 'no foal, no fee' basis and the occurrence of pro bono litigation may contribute to the supply of legal aid, but 'provides no safeguard against the risk of incurring an order for costs of the opposing party in the event of the litigation being unsuccessful'.¹⁵⁰

Protective Cost Orders

A protective (pre-emptive) costs order (PCO) may be defined as 'an order made at the outset of litigation, by which the applicant can ensure certainty as regards costs.'¹⁵¹ Essentially, this means that litigants can enjoy the assurance that they will not incur significant costs if such an order is granted. As costs are widely regarded as the biggest barrier to litigation in Ireland, protective or pre-emptive costs orders may mean the difference between pursuing a cause of action in the public interest and leaving it unheard before the Court.¹⁵² Therefore, the justification for granting a PCO is that it allows for litigation which, without such orders,

¹⁴⁷ *ibid*, [5.9].

¹⁴⁸ *ibid*, [5.11] – [5.15].

¹⁴⁹ *ibid*, [5.17].

¹⁵⁰ PILA, *The Costs Barrier and Protective Cost Orders* (2010), <<https://www.pila.ie/resources/public-interest-litigation-the-costs-barrier-prote/>> accessed 2 April 2019, 7.

¹⁵¹ Public Interest Litigation Alliance (PILA), *The Costs Barrier & Protective Costs Orders* (FLAC 2010), <https://www.pila.ie/download/pdf/flac_pila_report_final.pdf> accessed 2 April 2019, [9].

¹⁵² PILA, 'Public Interest Law and Litigation Conference' (PILA Press Release, Conference by Mel Cousins BL, 2005), Dublin, FLAC, October 2005 <<https://www.flac.ie/news/events/2005/10/>> accessed 2 April 2019.

would not take place.¹⁵³ Some cases in which PCOs have been granted include licenses granted to a university for animal experimentation,¹⁵⁴ as well as a decision to close a hospital section.¹⁵⁵

Considerations for Granting PCOs

The best-established principles governing the granting of a PCO are set out in the English and Welsh Court of Appeal judgment of *R(Corner House Research) v Secretary of State for Trade and Industry*.¹⁵⁶ In this case, the applicant sought to bring an action challenging new approval rules for export credit guarantees. In his expansive and detailed judgment, as prepared by Brooke LJ, Lord Phillips of Worth Matravers MR sets out the following grounds on which a PCO may be granted:¹⁵⁷

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
 - i) The issues raised are of general public importance;
 - ii) The public interest requires that those issues should be resolved;
 - iii) The applicant has no private interest in the outcome of the case;
 - iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
 - v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

¹⁵³ de Blacam M, *Judicial Review* (3rd edn, Bloomsbury Professional 2017), [52.11].

¹⁵⁴ *R (on the application of the British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2006] EWHC 250.

¹⁵⁵ *R (ex parte Compton) v Wiltshire Primary Care Trust* [2008] EWCA 749.

¹⁵⁶ *R(Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192.

¹⁵⁷ *ibid*, at [74].

3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.¹⁵⁸

However, it must be noted that these grounds, as set out by the learned judges, give rise to certain issues – particularly with regard to requirement 1(iii).¹⁵⁹

As set out by the English Supreme Court Act 1981, applicants for judicial review are required to demonstrate ‘sufficient interest’ to bring the claim in the first place.¹⁶⁰ While this legislation is not binding in Ireland, it is mirrored by the Rules of the Superior Courts Act 2012 (O.84, r.21).¹⁶¹ Additionally, the decision in *Corner House* has been endorsed by the Irish Judiciary in *Friends of the Curragh Environment Ltd v An Bord Pleanála*,¹⁶² where Kelly J described these principles as appearing to ‘represent the appropriate principles which courts in this jurisdiction ought to have regard to in deciding whether or not to exercise their discretion to make orders of the type sought.’¹⁶³ Thus, it is reasonable to conclude that the *Corner House* principles are in line with the law in this jurisdiction.

This requirement, though, highlights a fundamental flaw in the *Corner House* principles – how can a litigant bring forward a cause of action (by illustrating the required ‘sufficient interest’) and simultaneously have ‘no private interest in the outcome of the case’? When considering the *Corner House* principles, De Blacam reasons that if read strictly ‘[it] would confine the availability of a PCO to the altruistic stranger.’¹⁶⁴ He opines that “a better formulation would...preclude a PCO where the litigation is primarily directed at securing a

¹⁵⁸ *ibid.*

¹⁵⁹ Public Interest Litigation Alliance (PILA), *The Costs Barrier & Protective Costs Orders* (FLAC 2010) para 34.

¹⁶⁰ Supreme Court Act 1981, s 31 (3).

¹⁶¹ Rules of the Superior Courts Act, S.I. No. 691, 2011.

¹⁶² *per Kelly J; Friends of the Curragh Environment Ltd v An Bord Pleanála* [2006] IEHC 243.

¹⁶³ *ibid.*

¹⁶⁴ Mark de Blacam, *Judicial Review* (3rd edn, Bloomsbury Professional 2017) para 52-14

private benefit.”¹⁶⁵ This is, perhaps, a better alternative to the potentially prohibitive requirements of *Corner House*, as it would allow for a wider range of persons to be eligible for a PCO.

Granting PCOs in Ireland

The most significant case regarding PCOs in Ireland is that of *Schrems v Data Protection Commissioner*,¹⁶⁶ as this is the first and only instance of a PCO being granted in this jurisdiction. This case concerned the transfer of data by Facebook Ireland Ltd to Facebook Inc. (US Parent Company), and whether the transfer of this data was lawful under Irish and European data protection legislation. It was held that the issues of data protection, in particular how the transfer of EU user data to the US made EU users susceptible to NSA conveyancing was certainly a matter of public importance. The applicant in this case satisfied all of the relevant criteria for a PCO to be granted, and so, McGovern J in the High Court held that it was just and reasonable to do so – to the amount of €10,000.¹⁶⁷ This case marked a major point in the timeline PCOs in Irish jurisprudence, as up until this point, protective costs orders appeared to be unattainable for public interest litigants.

The most recent case in which the granting of such an order has been considered is the High Court judgment of *Swords v Minister for Communications, Energy and Natural Resources*.¹⁶⁸ This case was more in line with previous jurisprudence regarding the granting of PCO in Ireland, with the Court holding that it was ‘superfluous’ to grant such an order,¹⁶⁹ following the pattern set out by judgments in *Village Residents Association Ltd v An Bord Pleanála and McDonalds*¹⁷⁰ and *Friends of the Curragh Environment Ltd v An Bord Pleanála & Ors*.¹⁷¹

¹⁶⁵ *ibid.*

¹⁶⁶ *Max Schrems v Data Protection Commissioner* [2016] IEHC 414.

¹⁶⁷ *ibid.*, per McGovern J.

¹⁶⁸ *Swords v Minister for Communications, Energy and Natural Resources* [2016] IEHC 503.

¹⁶⁹ *ibid.*, [94].

¹⁷⁰ *Village Residents Association Ltd v An Bord Pleanála and McDonalds* [2000] 5 JIC 0502.

¹⁷¹ *Friends of the Curragh Environment Ltd v An Bord Pleanála & Ors.* [2006] IEHC 243.

Overview

Obtaining a PCO in Ireland has proven rather difficult in Ireland, as courts have been reluctant to grant such orders. Not only does persuasive precedent in England and Wales surrounding this issue give rise to stringent requirements, but the binding precedential history of PCOs in Irish jurisprudence is similarly restrictive. It is contended that the grounds under which PCOs are granted are too strict. The question must be considered: what is the relevance of orders protecting public interest litigants from incurring significant costs existing when, in practice, they are seldom granted? Ireland has failed to utilise this mechanism to meaningfully contribute to access to justice, ultimately exacerbating the exclusive nature of costs.

Comparative Costs in Other Jurisdictions

When attempting to understand the costs of litigation in Ireland, it is important to consider comparative approaches. It is necessary to bear in mind that Ireland uses ‘exceptionality’ as its standard when deciding if the costs should be distributed differently in a public litigation case. Toohey J, in an Australian conference on international law, said that the costs to litigation are paradoxical-if litigants cannot afford to go to court, there is little reason to have opened the doors to them in the first place¹⁷². This section will discuss other common law jurisdictions and their approach to the costs of public interest litigation.

England and Wales

As in many areas of law, Ireland shares many similarities with the approach of England and Wales. The aforementioned case of *Corner House*¹⁷³ illustrates that English courts are less reluctant to allow PCOs than Irish courts. As mentioned in Part 2, the Irish High Court¹⁷⁴

¹⁷² Toohey J.’s address to the International Conference on Environmental Law, 1989 quoted in *Blue Mountains Conservation Society Inc. v Delta Electricity* [2009] NSWLEC 150 [19].

¹⁷³ *R (ex parte Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192. [74]

¹⁷⁴ *Friends of the Curragh Environment Ltd. v An Bord Pleanála & Ors* [2006] IEHC 243.

endorsed *Corner House* in 2016. Later, in the *Compton* case¹⁷⁵, the UK Court of Appeal continued the assessment of *Corner House* by arguing that the case was about creating a necessary power to decide on litigation for the common good that would normally not be heard.

Australia

The *Oschlack*¹⁷⁶ case is the authority in Australia on public interest litigation. The Court determined that a public interest case may be characterised and aided by denying that the applicant pay for a successful respondent's legal fees. In this case, the court decided that public interest cases should be treated differently, however refrained from providing a definition of 'the public interest.' Later decisions have applied *Oschlack* restrictively.

In the more recent case of *Corcoran v Virgin Blue Airlines Pty Ltd*,¹⁷⁷ Australia added a maximum cost order. In that case the plaintiffs argued that requiring disabled passengers to have a carer was discriminatory. The court decided to cap the costs that they would be asked to cover should they lose. They also discussed requirements for when a case should be considered for a maximum cost order: the timing of the application, the complexity of the issue, the amount of damages, the nature of the Applicant's claims, whether there was any public interest in the action and the undesirability of the litigation being ceased.

United States

The U.S. has the unique position of having frequent class action lawsuits. Although other common law countries do accommodate multi-party litigation, the U.S. has more frequent uses of this type, with a well-developed class action model. A plaintiff will file a lawsuit as a representative of a larger group of people who are unnamed. The unnamed plaintiffs can opt out of the 'class' and may choose to litigate individually or not at all. Plaintiffs who opt out are not entitled to the damages. Class actions are helpful because they allow a plaintiff to

¹⁷⁵ Re [2019] EWCA Civ 126

¹⁷⁶ *Oschlack v Richmond River Council* [1998] HCA 11.

¹⁷⁷ *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

bring a case that would be too costly if litigated individually.¹⁷⁸ A large group of individuals will find it easier to negotiate, litigate and settle. However, a larger group of individuals with different experiences may limit their options.¹⁷⁹ The US system of multi-party litigation will be discussed to a greater extent in Part IV.II.

Canada

In the case of *British Columbia v Okanagan*¹⁸⁰ there was a dispute between Native Americans and the Canadian government about the ownership of land. The Native Americans held a title to the disputed land but lacked the financial resources to continue. In this case, the court ordered a preliminary hearing about the costs and it was decided that the government would completely fund the legal costs of the other party. The court held that for an order like this to be made, the applicant must demonstrate that they could not afford to pay for the litigation and no other option exists, the claim to be adjudicated was prima facie meritorious, the issues transcend the individual interests of the particular litigant where public importance had not yet been resolved in previous cases.¹⁸¹

Procedural Rules

Public interest litigation is a valuable means of allowing issues of importance to be illuminated. However, in the interests of controlling the litigation that appears before the Courts, there are established rules on what actions may be brought and what is permissible in practice. In this section, some of the many rules of practice that affect public interest litigants will be examined.

Maintenance and Champerty

¹⁷⁸ Chayes, "The Role of the Judge in Public Law Litigation"(1976) 89 Harvard Law Review 1281.

¹⁷⁹ Justia, 'Class Action Lawsuits' (Justia Litigation, 2009) < <https://www.justia.com/trials-litigation/>> accessed 23 March 2019.

¹⁸⁰ *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 S.C.R. 371, 2003 SCC 71.

¹⁸¹ PILA, 'Public Interest Litigation: The Costs Barrier and Protective Costs Orders' (2010).

The rules of maintenance and champerty are quite strict in Ireland, and development in this area of law is behind other common law jurisdictions. The law in this area prohibits the funding of litigation by third parties who do not have a legitimate interest in the proceedings, particularly with a view to receiving a percentage of the sum awarded. Charitable intent is permissible as a legitimate interest, and as much funding of litigation will not count as unlawful maintenance if it is done with charitable intent.¹⁸² Maintenance and Champerty is both a tort and a criminal offence, and therefore anyone who suffers damage because of an agreement for maintenance may seek and receive damages. Agreements made in contravention of these rules are unenforceable. In *O'Keeffe v Scales*,¹⁸³ the Courts did not extend the rules of champerty to allow it as a defence to an otherwise reasonable cause of action before plenary hearing, but did hold that if successful in establishing her claim, the appellant could sue the maintainer for all damage suffered. Lynch J commented that the rules of maintenance and champerty, if extended, could deprive litigants of their rights to access to the Courts, and that this extension was therefore undesirable.

In the recent case of *Persona Digital Telephony v Minister for Public Enterprise*¹⁸⁴, the appellants appealed to the Supreme Court on the issue of maintenance and champerty. The appellants propounded a more nuanced approach of analysing the individual transactions in question. The plaintiffs also suggested that maintenance for public interest litigation should not be illegal, and relied on the authority of other common law jurisdictions which had changed their laws on maintenance and champerty. The Court held that third party funding of lawsuits was still illegal under the current rules of Maintenance and Champerty as set out in the Statute Law Revision Act, 2007, which did not abolish the offences of maintenance and champerty despite explicitly abolishing many others.

The traditional rationale for this ban is the protection of administration of justice: Glazebrook J noted in *Waterhouse v Contractors* that ‘such control might tempt the allegedly champertous maintainer, for his or her personal gain, to inflame the damages, to suppress

¹⁸² *Thema International Fund Plc v HSBC International Trust Services (Ireland) Ltd* [2011] IEHC 357.

¹⁸³ [1998] 1 ILRM 393.

¹⁸⁴ [2016] IEHC 187.

evidence, to suborn witnesses or otherwise to undermine the ends of justice.¹⁸⁵ Though some commentators have stated that these rules should not be ‘extended to deprive persons of their constitutional right to litigate and access justice’¹⁸⁶, others have stated that ‘funding agreements will only facilitate selective access to justice dictated by the commercial decisions of the funder’ and that ‘the better option is to retain the status quo.’¹⁸⁷ The Courts have acknowledged that this ban is stricter than other common law countries and have acknowledged that it may be at odds with the constitutional right of access to the courts, but have not gone so far as to change the law.

Though these rules apply to all litigation, they may be particularly onerous on public interest litigants who have limited means to bring cases. Third party funding may allow litigants who otherwise would not have the means to do so to bring cases of public importance to the Courts, and as recognised by the Supreme Court, it is arguable that reform in this area would better vindicate citizens’ rights. However, the detrimental effects sought to be avoided by these rules are not to be overlooked, and to make litigation an unrestricted investment opportunity would be to the detriment of the rule of law.

Rules of Standing and Mootness

The rules of standing and mootness also present a barrier to public interest litigants. Irish Courts have considered these issues since *Cahill v Sutton*¹⁸⁸, *SPUC v Coogan*¹⁸⁹ and *Crotty v An Taoiseach*¹⁹⁰. *Crotty v An Taoiseach* gave rise to multiple cases including *McGimpsey v*

¹⁸⁵ [2014] 1 N.Z.L.R. 91.

¹⁸⁶ Trevor Murphy, *Recent Developments in Litigation Funding in Ireland*, (2016 23(8) Commercial Law Practitioner 203.

¹⁸⁷ Construction, Energy and Engineering Law Journal 2016, *Third Party Funding Agreements* in Ireland by Jeffrey Horahan.

¹⁸⁸ [1972] IR 269.

¹⁸⁹ [1989] 1 IR 734.

¹⁹⁰ [1987] 1 IR 713.

*Ireland*¹⁹¹, *O'Malley v An Taoiseach*¹⁹² and *McKenna v An Taoiseach*¹⁹³ in which litigants did not have to show that they themselves were affected particularly, but simply that the matter was of constitutional importance for all citizens. In *SPUC v Coogan*, the applicants were allowed to bring an action on behalf of the unborn. However, in *Cahill v Sutton*, the plaintiff was not allowed to plead that a legislative provision may be unfair to a certain class of litigants where the unfairness did not apply to her. The primary principles arising from these cases is that a litigant may not plead the rights of others in a self-serving manner, but may advocate on behalf of those who cannot defend their own rights, and may litigate if he/she is not affected directly but is a member of an affected class. The rules relating to standing will also be discussed in great detail in Part XX, with a particular focus on standing of campaigning groups in Public Interest Litigation.

In *Goold v Collins*¹⁹⁴, the Court ruled litigation moot and refused to adjudicate on the constitutionality of domestic violence legislation where the parties had come to an agreement on the 'live' issue of the protection order, even where the allegedly unconstitutional domestic violence legislation was still in effect and could affect other parties. However, in *M.F. v Superintendent of Ballymun Garda Station*¹⁹⁵, the Courts relaxed these rules in order to decide on a constitutional matter even where it would make no difference in the case at hand. The Court clearly thought it beneficial to overlook a strict application of the rules on mootness in order to analyse the rights of those who could not litigate for themselves, namely children. Most recently in *NHV v Minister for Justice*¹⁹⁶, the Supreme Court allowed an appeal to go forward where the appellant had ceased to be affected by the impugned legislation regarding the right to work. O'Donnell J stated that as the impugned legislation was still in effect, it was desirable that the matter should be decided then. However, in

¹⁹¹ 1990 1 IR 110

¹⁹² [1990] ILRM 461

¹⁹³ (No. 2) [1995] 2 I.R. 10

¹⁹⁴ [2004] IEHC 38.

¹⁹⁵ [1990] 1 IR 189.

¹⁹⁶ [2017] IESC 35.

*Merriman v Fingal County Council*¹⁹⁷, the Court stated that the individual litigant did not have standing to challenge a decision to grant planning permission. Although the Applicant had standing to contend for a recognition of the right to the environment, he had not had the right to participate in the decision while it was being made, and therefore had no standing to challenge it afterwards. This is, with respect, another bar to justice. It is arguably the planning permission decisions in which no external participation was allowed that should be most subject to review to fully vindicate the rights of those affected.

The rationale for restrictive rules of standing and mootness is essentially floodgate concerns. These rules are meant to protect the legal system from legal claims brought by meddlesome parties that are irrelevant to the facts at hand. However, many claims brought by litigants who may lack the required standing are far from irrelevant, and these rules may act to defeat claims brought by well-informed and well-intentioned litigants who were or may be directly affected by the subject matter of litigation. Furthermore, where the Supreme Court dismisses such a claim due to lack of standing, the issue cannot be tried again until another litigant with the required standing brings a legal claim. The increasing cost and complexity of litigation makes it less likely that another such litigant will be willing to go to Court, and thus the issue of public interest may go unaddressed. Despite concerns of legal efficiency, the negative impact of these rules on public interest litigants must be recognised. The Courts' willingness to relax these rules where needed is a welcome practice, although their approach is not entirely clear and may not fully allay the concerns of public interest litigants for whom the spectre of these rules still presents a challenge to the full administration of justice.

Amici Curiae

An amicus curiae is someone who is not a party to the litigation and has no interest in the litigation but offers assistance to the Court on the legal matters arising in the litigation. Amici curiae have appeared quite rarely in Irish law, but their use is more common elsewhere and may become more common in Ireland.

¹⁹⁷ [2017] IEHC 695.

The Attorney General has appeared as an amicus curiae to explain points of law¹⁹⁸, and the Chief Rabbi of Ireland has appeared as an amicus curiae to give evidence on Jewish religious practice.¹⁹⁹ Furthermore, section 10(2)e of the Irish Human Rights and Equality Commission Act allows the Irish Human Rights and Equality Commission to apply to the High Court or Supreme Court to act as an amicus curiae “in proceedings before that Court that involve the human rights or equality rights of any person”. The Commission has exercised this right in cases involving disability rights²⁰⁰, the right to silence²⁰¹ and the rights of people in detention for reasons of mental health²⁰².

The appointment of an amicus curiae is still at the discretion of the Court, and Clarke J. in *Fitzpatrick v F.K.*²⁰³ identified factors to be considered in determining whether to allow a party as an amicus curiae. These included the amicus’ partiality, any special knowledge possessed by the amicus that would not be available to the Court otherwise, the stage reached in the proceedings and the equality of arms in the litigation. In *Fitzpatrick v F.K.*,²⁰⁴ Clarke J. took these factors into consideration in refusing a religious society permission to act as an amicus curiae in proceedings regarding a blood transfusion given to a Jehovah’s Witness. These factors were later referred to in *Data Protection Commissioner v. Facebook Ireland Ltd & Maximillian Schrems*,²⁰⁵ and only parties with a bona fide interest and unique knowledge

¹⁹⁸ *AG v Tyrell* [1970] IR 294; *Brady v Cavan Co. Council* [1999] 4 IR 99

¹⁹⁹ *Quinn’s Supermarket Ltd v AG* [1972] IR 1.

²⁰⁰ Irish Human Rights and Equality Commission, ‘Rights of Persons with Disabilities to Reasonable Workplace Accommodation at Question in Supreme Court Case (IHEC Press Report, 14 March 2019) <<https://www.ihrec.ie/rights-of-persons-with-disabilities-to-reasonable-workplace-accommodation-at-question-in-supreme-court-case-2/>> accessed 2 April 2019.

²⁰¹ Irish Human Rights and Equality Commission, ‘Human Rights and Equality Commission Granted Liberty to Appear Before Supreme Court in Right to Silence Case (IHEC Press Report 19 February 2019) <<https://www.ihrec.ie/human-rights-and-equality-commission-granted-liberty-to-appear-before-supreme-court-in-right-to-silence-case/>> accessed 2 April 2019.

²⁰² Law Society, ‘IHREC join ward of court case as amicus curiae’ (Gazette Desk, 19 October 2018) <<https://www.lawsociety.ie/gazette/legal-analysis/human-rights-body-joins-ward--of-court-case-as-amicus-curiae>> accessed 2 April 2019.

²⁰³ (No.2) [2008] IEHC 104.

²⁰⁴ (No.2) [2008] IEHC 104.

²⁰⁵ 2016 No. 4809 P.

were allowed to act as amici curiae. This case also illustrated that the Irish Courts have become more willing to appoint amici curiae parties with a strong interest in the proceedings, as long as the amici do not become party to the action itself.

The use of amici curiae is potentially helpful for public interest litigants who do not have the same resources at their disposal as the amicus may, particularly if the amicus is a large body such as the Irish Human Rights and Equality Commission. This is one way of easing the burden placed on litigants to conduct their own research, which is a great deal more onerous in common law jurisdictions than in civil law countries and presents its own barrier to justice. It therefore may allow the rights of the disadvantaged to be more fully vindicated and is a welcome development to public interest law.

Time Barriers

There are time barriers to litigation that may act to defeat public interest litigation. Section 19 of the Local Government (Planning and Development) Act 1992 states that decisions of planning authorities must be challenged by means of judicial review, the application for which must be made within two months of the relevant decision by a motion on notice. Furthermore, the High Court will only grant this leave for judicial review where it is satisfied that there are substantial grounds on which the decision may be quashed. In *Goonery v Meath County Council*²⁰⁶, it was held that this provision prevented a litigant from obtaining the reliefs sought against a decision of Meath County Council regarding cement and quarry works where she had made her application *ex parte* and not on notice to the respondents. The relevant legislation is no longer the Local Government (Planning and Development) Act 1992 but instead section 42 of the Planning and Development Act 2000, as cited in *Merriman v Fingal County Council*.²⁰⁷ However, this section contains no change from section 19 of the Local Government (Planning and Development) Act 1992. More generally, under Order 84, rule 21(1) of the Rules of the Superior Courts 1986, applications for judicial

²⁰⁶ [1999] IEHC 15

²⁰⁷ [2017] IEHC 695.

review of decisions affecting personal liberty must be made within three months of the date when the grounds for application arose, or six months where the relief sought is certiorari. The Court does, however, have some discretion to extend this time limit. Though it is beneficial in a legal system to encourage timely litigation, these rules may apply detrimentally to public interest litigants who seek to bring claims on matters of environmental protection or personal rights. These rules must therefore be tempered by an understanding of the Courts that there may be sufficient grounds for extending these time limits in some instances.

Rules of practice are established to protect the legal system and are beneficial in this regard. However, an increased understanding on the part of Courts and the legislature of the challenges and costs involved in bringing public interest litigation would be welcome. This understanding would serve to allow these rules, which present technical barriers to otherwise valid claims of public importance, to be tempered, and would therefore allow litigants with bona fide claims to more easily seek redress.

Conclusion

Access to justice involves significantly more than a notional legal right to justice, and the pursuit of justice in society can never truly be considered complete. In this section, we have sought to show some of the ways in which the Irish justice system presents obstacles to public interest litigants, including general costs to litigants, the narrow scope of civil legal aid, protective costs orders, comparative costs and restrictive rules of practice. It is submitted that the Irish legislature and judiciary should seriously consider these barriers to public interest litigants if our legal system is to allow the rights of the disadvantaged to be more fully vindicated.

Part III: Standing of Campaigning Groups

The potential for public interest litigation, and the ability of campaigning groups to utilise the justice system to facilitate social inclusion of excluded communities, is heavily dependent upon how far and flexible the boundaries of legal standing are drawn. It inevitably raises important legal questions pertaining to whether a lobby group should be able to take action in defence of the public interest where either, they are asserting that the rights of a group have been breached, or where they cannot claim to be more affected by the challenged action than any other member of the general public. Ultimately, standing rules are procedural measures designed, often judicially, to limit access to courts based on the personal interest of a litigant in a disputed matter.²⁰⁸

This Part will be split into two sections. The first, III.I, will explore Irish jurisprudence on standing of campaigning groups. The second, III.II will provide a comparative analysis to Canada and the United States.

III.I Irish Jurisprudence on Standing of Campaigning Groups

Adam Elebert, Eolann Davis, Gareth Foynes

Introduction

This section will first provide a brief jurisprudential history of the rules of standing in Ireland, and the exceptions created thereunder. It will be discussed how established principles have had an impact on access to justice, with a particular focus on the use of public interest litigation by campaigning groups. Accordingly, this section will frame the discussion in part III.II, where a comparative analysis will be drawn to Canada and the United States.

Irish Jurisprudence on Standing

The subject of the present analysis, *locus standi*, is employed doctrinally to establish the right of a person to seek a particular remedy before the courts, and the person's right to advance

²⁰⁸ Cian Henry, 'Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States' [2018] 21 TCLR 315.

particular arguments in seeking that remedy.²⁰⁹ It is a set of rules that determine whether a person should bring legal proceedings to ensure that there is a proper allocation of judicial resources, to prevent vexatious suits brought by ‘busy bodies’ and that the particular requirements of the adversary system are being met i.e ‘justiciability.’ The minutiae of the Irish jurisprudence on standing will be explored later, but as a preliminary note, it is important to set out the traditional locus standi principles. *Cahill v Sutton*,²¹⁰ remains the leading case in Irish jurisprudence, establishing the primary rule that the person challenging the constitutional statute must be able to assert that his interests have been adversely affected. The rationale for limitations of standing such a broad was articulated by O’Higgins CJ,

‘[the jurisdiction of the Court] should be exercised for the purpose for which it was conferred- in protection of the Constitution and of the rights and liberties thereby conferred. Where the person who questions the validity of a law can point to no right of his which has been broken, endangered or threatened by reason of the alleged invalidity, then, if nothing more can be advanced, the Courts should not entertain a question so raised. To do so would be to make of the Courts the happy hunting ground of the busybody and the crank. Worse still, it would result in a jurisdiction which ought to be prized as the citizen’s shield and protection becoming debased and devalued.’²¹¹

A determination of sufficient interest is largely dependent upon the particular facts of a case, and consequently an exact test may not be enumerated.²¹²

That said, there are limits to this broad approach taken by the Irish Courts. In *Law Society of Ireland v Carroll*,²¹³ the plaintiff attempted to restrain two individuals from holding themselves out to the public falsely as qualified solicitors.

²⁰⁹ Tom Hannon, ‘Locus Standi: Considering the Irish Perspective’, (1996) 8, 1 International Legal Perspectives, 73.

²¹⁰ [1980] 1 IR 269.

²¹¹ [1980] IR 269 [276].

²¹² *The State (Lynch) v Cooney* [1982] IR 337 [369], per Walsh J, ‘In each case the question of sufficient interest is a mixed question of fact and law which must be decided upon legal principles but, it should be added, there is a greater importance to be attached to the facts because it is only by examination of the facts that the Court can come to a decision as to whether there is a sufficient interest in the matter to which the application relates.’

²¹³ [1995] 3 IR 145.

‘Unlike many of the cases in which parties with no personal or direct interest have been granted locus standi there is no evidence before the Court that, in the absence of the purported challenge by the Appellant, there would have been no other challenger. Indeed the evidence appears to be to the contrary.’²¹⁴

Murphy J held that as the ‘gist’ of the plaintiff’s action was potential damage to members of the public rather than to the plaintiff itself, it would be inappropriate to allow a claim for passing off.

An exception to this rule was outlined in *Crotty v An Taoiseach*,²¹⁵ where the Supreme Court dictated that where the impugned legislation will, if made operative, affect every citizen, the plaintiff has *locus standi* to challenge the act notwithstanding his failure to prove the threat of any special injury or prejudice to him. Similarly, in recognition of the innately public nature of many disputes, an exception was further carved out in *Mulcreavy v the Minister for Environment, Heritage, Local Government and Dun Laoghaire-Rathdown County Council*,²¹⁶ where partly on the site of some archeological remains of significance, the defendants were building a motorway. The courts acknowledged the fact that if the standing of public interest groups is not recognised, there will be no opposition to the fabric of Ireland’s history and the historical residue will not be secured thereby.

The recent case of *IPRT v. Governor of Mountjoy Prison*²¹⁷ may be noted as a partial departure from the jurisprudence laid out in *Cahill and Carroll*.²¹⁸ In *IPRT*, the Court allowed the plaintiff, who was not directly affected by the issue at hand, to initiate proceedings and assert the constitutional rights of others. The campaigning group, the Irish Penal Reform Trust, had sued the prison on the basis that they had failed in their constitutional obligation to provide adequate psychiatric treatment in Mountjoy prison.

²¹⁴ *ibid.*

²¹⁵ [1987] 1 IR 713.

²¹⁶ [2004] 1 IR 72.

²¹⁷ [2005] IEHC 305

²¹⁸ Tomas Bailey, ‘Judicial Discretion in Locus Standi: Inconsistency Ahead’ [2010] 4, Galway Student Law Review 1.

Gilligan J had reasoned that if IPRT were denied locus standi, the interests they represented would likely not have an effective way of bringing issues involved in the proceedings before the court.

Impact on Access to Justice

Access to justice is a key tenet of a functioning justice system and is inextricably linked to the rules on standing of a jurisdiction.²¹⁹ Should the rules on standing be too narrow in scope, marginalised communities, or organisations (such as the IPRT mentioned above), would be unable to represent their interests in the justice system. An appropriate standing doctrine must recognise a variety of barriers that can exist for a plaintiff, including not only the costs associated with taking an action to court, but also social, psychological and cultural barriers that may exist amongst disenfranchised communities. In order to ensure that the largest amount of people possible can reasonably have recourse to the courts, and therefore access to justice, it is necessary for the rules on standing not to be applied in an overly-stringent way. An examination of the link between standing and access to justice can be achieved through studying the jurisprudence in the Irish courts on constitutional litigation up to this point.

Constitutional Litigation

As noted earlier in this paper, the rules of standing require that the litigant be directly affected by the issue in question. This seems initially to preclude any action being taken on behalf of an individual who cannot themselves take the case, or on behalf of a group of people all similarly affected, but not individually ‘targeted’ by an impugned breach. However, in the case of *Cahill*, Henchy J espoused a qualification to the traditional rule on standing, where a third party could take a case on behalf of others where those ‘prejudicially affected by the impugned statute may not be in a position to assert adequately, or in time, their constitutional rights.’²²⁰ This recognition of situations where those affected most by a breach of constitutional rights simply may not have the resources, nor the time, nor the requisite

²¹⁹ Chiduzza and Makiwane, ‘Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An analysis of the Provisions in the New Zimbabwean Constitution’ (2016) 19 PER / PELJ.

²²⁰ *Cahill v Sutton* [1980] IR 269.

knowledge to challenge the breach is a pragmatic approach which reflects the practical reality of litigation.

This approach was extended further in *SPUC (Ireland) Ltd v Coogan and Ors.*, in which the Supreme Court held that those with a ‘bona fide interest to invoke the protection of the courts to vindicate the constitutional right in question’ could bring a case.²²¹ Given the unrivalled importance constitutional rights enjoy in Irish law, it is understandable that the courts have been willing to depart from the traditional rules on standing in order to ensure that they are protected as much as possible.²²² It is submitted that this approach is commendable and recognises that strict rules on standing, in certain circumstances, serve only to restrict access to justice for people of limited means and legal knowledge.

Trade Unions and Public Interest

An extension to the traditional rule on standing has been granted in two other areas of Irish law – cases where an association takes an action on behalf of its members, and cases relating to the public interest at large.

Briefly, trade unions have standing to take cases on behalf of their members,²²³ while the situation for other unincorporated bodies remains uncertain.²²⁴ Trade unions being able to take action on behalf of their members is perhaps a recognition by the courts of the special role that such bodies play,²²⁵ and that disallowing them from doing so would result in individual employees being required to bring numerous actions (on the same ground) on their

²²¹ *SPUC (Ireland) Ltd v Coogan and Ors* [1989] IR 734.

²²² See Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn Institute of Public Administration, 2015), in which the author points to two further cases, *Irish Penal Reform Trust v Governor of Mountjoy Prison* [2005] IEHC 305, and *Digital Rights Ireland Ltd v Minister for Communications* [2010] 3 IR 251 as evidence of the law in Ireland recognising a right to have a third party body assert a right on behalf of other persons where those persons are not in a position to assert their rights and the body has a bona fide interest.

²²³ *Rafferty v Bus Éireann* [1997] 2 IR 440.

²²⁴ *Construction Industry Federation v Dublin County Council* [2005] 2 IR 496. In this case, the Supreme Court found that the plaintiff body did not have standing, but left open the possibility of unincorporated bodies being able to represent their members in other such cases.

²²⁵ This can be linked to the constitutional freedom of association in Article 40.6.1 and 40.6.2.

own. Again, widening the scope of standing to encompass trade unions is a recognition of the practical reality that their main purpose is to represent members in situations such as this. This serves to provide more people with access to justice than would otherwise have been the case had the individual members been forced to take action themselves.

In cases falling within the second category mentioned above, certain members of the public are found to have standing on issues where the duty involved is owed to the public at large.²²⁶ The effect of the jurisprudence is to extend standing for this issue, so as to meaningfully ensure that justice is done in situations where there has been a breach of some duty owed to the public, but there is no one person who is affected greater than others as a result. This is to be welcomed as yet another recognition of the overly-restrictive implications of a narrow view of standing. It is axiomatic that a breach of constitutional rights to the public at large should be remedied, and sometimes this is necessarily done through the courts. Widening the scope of standing so that a case can be brought on this ground allows for justice to be done more expediently and without the need for a specific wrong being done against a specific person. It allows one person to take a case in order to bring about justice for a wide range of other persons.

Public Interest Litigation

Public interest litigation and traditional common law litigation are fundamentally divergent in a number of key factors. Traditional litigation is, inter alia, bipolar, retrospective, and typically self-contained within a single lawsuit. In contrast, PIL is indeterminate in scope and party structure, as well as often being forward looking, predictive, and legislative, in terms of both the factual inquiry within the case, along with the relief procured.²²⁷ Such divergence ensures there will always be tension between the operation of PIL and the procedural limitations, such as standing, that are confined within. Irish jurisprudence on the standing of campaigning groups demonstrates that while the judiciary will adhere to conventional standing rules in most situations, they are not totally unsympathetic to PIL. Over time, they

²²⁶Cian Henry, 'Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States' (2018) 21 Trinity College Law Review 315, 325.

²²⁷ Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harvard Law Review 1281, 1282-1283.

have developed a less rigid approach to the requirement of a personal interest, along with exceptions for organizations who wish to engage in PIL on behalf of the people they represent, with the allowance of amicus curiae briefs as an important dimension of this.

As mentioned earlier in this report, the Supreme Court decision of *Mulcreavy v Minister for the Environment* allowed for a plaintiff with no personal interest to oppose a local authority decision that would damage an archaeological site. Reflecting on this decision, the Supreme Court in *Grace v An Bord Pleanála* held that the former case suggested the range of persons entitled to challenge a decision was dependent on the nature of the impugned measure.²²⁸ Whyte has noted that these developments seem restricted to cases where there is a general public interest implication and the likelihood of another party pursuing an action is slim. Of greater importance to PIL is whether a similarly civic-minded plaintiff could take an action on behalf of another member or section of the public.²²⁹

Section 41 of the Irish Human Rights and Equality Commission Act 2014 permits the Commission to take legal proceedings to protect human rights, but this exception is exclusively limited to the IHREC. For other organizations acting in the public interest, the courts are willing to grant exceptions for legitimate organizations with a legitimate interest. In *Cahill v Sutton*, Henchy J, obiter, allowed for the expansion, exception and qualification of rules on standing where the justice of the case required it.²³⁰ *IPRT v Governor of Mountjoy* caused some confusion, as the Supreme Court quashed an order permitting the plaintiffs to take action on behalf of mentally ill prisoners against the State, despite Gilligan J holding in the High Court that the Trust was a bona fide organization, had a genuine interest, and was acting on behalf on some of the most vulnerable people in society who were unlikely to initiate proceedings themselves.²³¹ Some clarity on this matter was provided in *Digital Rights*

²²⁸ [2017] IESC 10 [6.7].

²²⁹ See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn Institute of Public Administration, 2015) ch 3.

²³⁰[1980] IR 269, 285.

²³¹ [2005] IEHC 305, (2 September 2005) HC 13-14.

Ireland v Minister for Communications.²³² In finding that the plaintiff enjoyed both a personal interest along with an *actio popularis* to challenge legislation requiring the retention of mobile phone users data, McKechnie J listed a number of factors influencing his decision. He took into account that DRI were not cranks, but a bona fide organization. The case raised important questions regarding constitutional privacy rights that potentially affected almost the entire population, which made the plaintiffs pursuing an action quite effective. McKechnie J also had regard to considerations of the plaintiff's right of access to the courts, the duty of the Court to uphold the Constitution, and the overall public good.²³³ It is submitted that while these criteria are likely not exhaustive, they provide a salient description of the circumstances where the Courts will grant an exception, and exemplify what Whyte posits to be the Court's attempts to accommodate PIL within the procedural strictures of conventional standing rules.²³⁴

The Courts are noticeably more restricted in their attempts to account for parties affected by litigation, another essential feature of PIL. It has been held that a party must have a material or direct interest in the case to be joined in the proceedings. This standard was used to allow school chaplains to be joined to the proceedings in *Campaign to Separate Church and State v Minister for Education*,²³⁵ as the outcome of the case would determine whether they would still be employed. Similarly, in *Fitzpatrick v K*,²³⁶ Clarke J refused to join the Watch Tower Bible and Tract Society of Ireland to litigation taken by the hospital seeking a declaration to administer a blood transfusion against the patient's consent, based on her beliefs as a Jehovah's Witness. Clarke J held that an interest in the precedent of a case such as this one was not a direct enough interest to warrant joining an organization in the proceedings. It is submitted that this decision is pragmatic, as joining the Society may have slowed down proceedings when the patient's health was at risk. However, given the absolute religious

²³² [2010] 3 IR 251.

²³³ *ibid* 292.

²³⁴ See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn Institute of Public Administration, 2015) Ch 3.

²³⁵ [1998] 3 IR 321.

²³⁶ [2007] 2 IR 406.

prohibition of Jehovah's Witnesses towards blood transfusions, it is questionable that this is less material or of less significance to the applicants than a temporary loss in employment to the chaplains in the previous case. Comparison of these cases highlights a common criticism of judicial treatment of PIL within rules of standing; even when satisfactory decisions are made that produce results that are conducive to PIL, these still amount to unprincipled compromises.²³⁷

The Irish courts have been more receptive to joining parties as amici curiae²³⁸ than as named parties to the proceedings. Previously, an amicus curiae was limited to acting in a disinterested manner. In recent years, many common law jurisdictions have started to allow for them to act in a partisan fashion.²³⁹ This view was endorsed in Ireland in *HI v Minister for Justice, Equality and Law Reform*.²⁴⁰ The Supreme Court affirmed their inherent jurisdiction to determine when amici curiae were required. Factors that a court should consider have been put forward in cases such as *O'Brien v Personal Injuries Assessment Board*²⁴¹. Chief among these considerations is the level of public importance, and whether the party seeking to be added is neutral or partisan.

Conclusion

It is recommended that principles regarding standing should be relaxed, such that they may accommodate campaigning groups who represent socially excluded communities. To do so would be in recognition of the social and financial barriers that may exist for these members of society and could meaningfully encourage campaigning groups to take more action in public interest litigation. It would also appropriately address the practical reality that in the

²³⁷ Cian Henry, 'Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States' (2018) 21 Trinity College Law Review 315, 347.

²³⁸ This translates to 'Friends of the Court' and refers to parties not named in the proceedings but who assist the court through providing expert evidence and technical insight.

²³⁹ Whyte points to such reform in Canada, Australia, New Brunswick and the United Kingdom. See Gerry Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland* (2nd edn Institute of Public Administration, 2015) Ch 3.

²⁴⁰ [2003] 3 IR 197.

²⁴¹ [2005] 3 IR 328.

modern era, many pressing issues, such as global warming, are confined to a distinctly public arena and cannot be accommodated in traditional adversarial proceedings. While positive measures have been taken by the courts to allow claims from campaigning groups where they represent marginalised interests, such allowances should be the rule, rather than the exception. Inspiration may be drawn from the IHREC Act 2014, as well as the jurisdictions of Canada and the US, which will be analysed below.

III.II Comparative Analysis of Other Jurisdictions

Ronan McGurrin, Nathan O'Regan, Seamus Small

This section will provide an analysis of standing issues in different jurisdictions using by examining two diametrically opposed approaches. The liberalised, Canadian approach will be discussed first, followed by a comparison to the conservative counterpart in the United States. Being both common law jurisdictions, with similarly developed doctrines of standing, these two countries offer useful comparative analysis to Ireland.

The Legal Standing of Campaigning Groups in Canada

Unlike Ireland, the Supreme Court of Canada has developed a separate doctrine for cases involving the public interest, establishing lower standards for PIL. This relatively new doctrine has its origins in three constitutional cases, *Thorson v Attorney General of Canada*,²⁴² *Nova Scotia (Board of Censors) v McNeil*²⁴³ and *Canada (Minister for Justice) v Borowski*.²⁴⁴

Thorson involved a piece of legislation whereby the Canadian government were planning to provide money to implement a scheme relating to the Official Languages Act. The plaintiff, as a taxpayer, opposed this implementation and sought to have the legislation overturned. At trial, the judge dismissed the case, finding that the plaintiff, as a regular taxpayer, had not suffered any special damage under this Act. On appeal, the Supreme Court found that the taxpayer had sufficient standing in challenging the constitutionality of Federal legislation and

²⁴² [1975] 1 S.C.R. 138

²⁴³ [1978] 2 S.C.R. 662

²⁴⁴ [1981] 2 S.C.R. 575

that this was a matter particularly appropriate for the exercise of judicial discretion. In essence, the taxpayer had a genuine interest in the validity of the legislation and as such the judiciary should have the discretion to decide as to whether this validity was justified.

The second of the constitutional cases came in the form of *Nova Scotia (Board of Censors) v McNeil*. Here, a number of film censorship laws within the province of Nova Scotia were challenged on the basis that the Regulation Board was acting outside its powers in enacting this legislation. Under Canadian law, criminal laws could only be legislated by the federal government. The Board of Censors argued that McNeil, as a private citizen had no *locus standi* to commence this action, but McNeil relied on the *Thorson* case to claim that he had sufficient public interest in the Act. This precedent was upheld by each of the Trial, Appeal and Supreme Courts before which the case was brought. The decision of the courts to allow this was significant for a number of reasons. Firstly, it expanded the scope of public interest standing as this case involved a different type of legislation from *Thorson*. Further, the case cleared up some of the grey areas *Thorson* had left behind and developed an interesting precedent surrounding public interest standing.²⁴⁵

The most significant of the public standing cases, however, came in the form of *Canada (Minister of Justice) v Borowski*. The judgment of this case developed the ‘Borowski test’ for public interest standing. This cleared up the grey areas surrounding public interest law much clearer than the earlier cases. Borowski was a pro-life activist who sought to challenge legislative provisions which allowed for abortion to be carried out. The defence reasonably claimed that Borowski had no standing in this case. As a man, Borowski was not directly affected by the provision of abortions, but the Court, in a seven to two decision, found that he still had standing. Reasoning on the aforementioned cases, Martland J found that Borowski had a genuine interest in the validity of the legislation:

“I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a

²⁴⁵ David Mullan, ‘Standing After McNeil’ (1976) 8:32 Ottawa Law Review 32

citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.”

This approach may likely be seen as quite broad when compared to Ireland. A private citizen could challenge the constitutionality of legislation if they had a genuine interest in it and no other reasonable manner to test the validity existed. The Supreme Court of Canada in *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*²⁴⁶ summarised the testing as having three main requirements. For public interest standing to exist the Court said that each of these aspects must be considered:

1. Is there a serious issue raised as to the invalidity of legislation in question?
2. Has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity?
3. Is there another reasonable and effective way to bring the issue before the court?

This is an intriguing approach to public interest standing. Where there appears to be a genuine need to test the validity of legislation, if no direct victim of the legislation can be found, public interest groups can take the case instead. While comparisons may be drawn to Article 26 references which may be made in Ireland,²⁴⁷ such a procedure still precludes public interest groups in playing any role.

In the cases following *Canadian Council of Churches*, the Supreme Court determined the three step test enunciated quite broadly. In *Vriend v Alberta*,²⁴⁸ the Court granted Vriend not only standing to challenge the employment provisions of Alberta human rights legislation, which permitted discrimination on the grounds of homosexuality, but all other provisions of the human rights act, such that no discrimination on the basis of sexuality could be allowed. The Court rejected a strict reading of the third category, in that expecting all other provisions to be challenged would be to impose an inefficient and unfair burden on unknown potential

²⁴⁶ [1992] 1 S.C.R. 236

²⁴⁷ Article 26 of the Constitution provides that the President of Ireland may, after consultation with the Council of State, refer Bills of the type prescribed in that Article to the Supreme Court for a decision as to whether any such Bill or provision(s) thereof are repugnant to the Constitution.

²⁴⁸ [1998] 1 SCR 493

litigants. Similarly, in *Chaoulli c. Quebec (Procureur general)*,²⁴⁹ Justice Binnie noted that while some people may hypothetically exist to bring a case, it is not fair to expect people who are sick and/or vulnerable to bring wide reaching systemic court challenges to the healthcare system.²⁵⁰ Likewise, *Morgentaler v New Brunswick*²⁵¹ held that while other private interest litigants existed, giving the intensely personal nature of abortion services, and the cost and timing restraints of litigation, it was not reasonable to expect litigants to bring the case themselves.²⁵² *Chaoulli* and *Morgentaler* are important decisions, in that they indicate a pragmatic acceptance of the personal realities of plaintiffs. Most notably, they suggest that standing rules should be appropriately modified where issues pertaining to the case at hand are personal or sensitive.

Most recently, a landmark decision in relation to public interest litigation was made in *(AG) v Downtown Eastside Sex Workers United Against Violence (SWAUV)*.²⁵³ *SWAUV* was an organisation involved in protecting vulnerable sex workers, who challenged the constitutionality of criminal code provisions that prohibited brothels, arguing that the prohibition deprived women from the ability to do their jobs safely. Justice Cromwell criticised the test enunciated in *Canadian Council of Churches*, specifically reformulated the third arm, such that rather than asking if there is ‘no other reasonable and effective means’ to bring a case, the third stage of the test now asks whether the current action is a ‘reasonable and effective means’ to bring the case.²⁵⁴

In short, it would serve the Irish legal system well to establish a separate legal doctrine for public interest standing, as endeavoured by the Canadian courts. In reformulating rules of locus standi in such a manner, Ireland would reduce the onus on a prospective public interest

²⁴⁹ 2005 SCC 35 (CanLII)

²⁵⁰ *ibid*, [189].

²⁵¹ 2009 NBCA 26 (CanLII).

²⁵² *ibid*, [59].

²⁵³ 2012 SCC 45 (CanLII).

²⁵⁴ *ibid*, [50].

litigant and remove a judge's ability to hide behind hypothetical, but unlikely private litigants.

Standing of Campaigning Groups in the United States

This section shall discuss the legal standing of campaigning groups in the United States, in particular political and environmental groups. In the United States, the doctrine of locus standi, as it applies to campaigning groups, is substantially more developed, likely as a result of the greater prevalence class action litigation and amicus curiae briefs, which allow the issue of standing to be circumvented. Many of the core principles regarding locus standi are nonetheless common to both legal systems, making the US system a useful jurisdiction for comparison.

Unlike in Ireland, the doctrine of standing in the United States has enumerated constitutional roots. The constitutional basis for locus standi is found in the first clause of article 3(2) of the US Constitution, which establishes what has come to be known as the 'case or controversy' clause. Commentators, such as Justice Rehnquist, have remarked that the 'case or controversy' clause has not been defined 'with complete consistency' by the courts over the years, but nonetheless several principles have been identified therein.²⁵⁵ Locus standi, as an identifiable doctrine in the US courts, dates to two cases from the early 1920s, *Fairchild v Hughes*²⁵⁶ and *Massachusetts v Mellon*²⁵⁷, where the Supreme Court affirmed the criteria required in order to have standing. In order to have the legal standing necessary to bring a case before the courts in the United States, there are three elements a plaintiff must satisfy. Firstly, they must demonstrate they have suffered, or imminently will suffer, an injury-in-fact, an 'invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.' Secondly, they must prove there is a causal connection between the injury and the action complained of, so that is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some

²⁵⁵ *Valley Forge Christian College v Americans United for Separation of Church and State* 454 US 464 (1982).

²⁵⁶ 258 US 126 (1922).

²⁵⁷ 262 US 447 (1923).

third party." Finally, it must be likely that a decision by the court in favour of the plaintiff, will redress the injury.²⁵⁸

In *Fairchild*, the plaintiff sought to challenge the validity of the ratification of the Nineteenth Amendment to the United States Constitution, which prohibits states from denying citizens the right to vote on the basis of their sex. He alleged that the Attorney General had acted unconstitutionally by threatening to impose penalties on election officers who refused to permit women to vote.²⁵⁹ The Supreme Court held that as he was not an election officer, he had no legal standing upon which to take a suit and that, while, as a citizen, he had a right to require that the government be administered according to law, this general right did not entitle him to begin a legal suit to challenge the validity of a proposed constitutional amendment.²⁶⁰

This prohibition against plaintiffs attempting to assert the rights of third-parties precludes, with certain limited exceptions, campaign groups from taking claims on behalf of others. In *Warth v Seldin*²⁶¹ an action for declaratory and injunctive relief was brought, claiming that a town's zoning ordinance effectively excluded persons of low income from living in the town, which violated their constitutional rights. One of the plaintiffs was Metro-Act, a not-for-profit corporation whose purpose was to alleviate the housing shortage for low income persons in the area and who claimed it had legal standing to take a suit as some of its members had low incomes.²⁶² The Supreme Court rejected their claim that they possessed legal standing and held that Metro-Act was asserting the constitutional and statutory rights of third parties.²⁶³ Importantly, the court noted that the judicial power under Article III of the U.S. Constitution exists only to redress or protect against any injury to the complaining

²⁵⁸ These three elements were enunciated in *Lujan v Defenders of Wildlife* [1992] 504 US 555, 560.

²⁵⁹ *ibid* at 127.

²⁶⁰ *ibid* at 128-30.

²⁶¹ 422 U.S. 490 (1975).

²⁶² *ibid* at 490.

²⁶³ *ibid* at 498.

party.²⁶⁴ This limited the court's jurisdiction to cases where the plaintiff themselves have suffered some threatened or actual injury resulting from the allegedly illegal action.

Exceptions to the Prohibition of Third-Party Campaign Groups

The rule prohibiting third-party standing has never been absolute and the Supreme Court has authorized third-party standing in cases where it is difficult for a right-holder to assert their own rights and when relations exist between the right-holder and the party asserting them.²⁶⁵ However, these exceptions have been limited primarily to when the third party has economic interests with the claiming party, or where the person whose rights are being invoked is not in a position to assert those right effectively.

In the case of *Barrows v Jackson*,²⁶⁶ the respondent owned a house, the deed to which contained a covenant preventing her from selling it to African-Americans. Jackson breached the covenant and the Supreme Court ruled against its enforcement, holding that the possible financial loss of the respondent was so close to the purpose of the covenant, which violated the constitutional rights of African Americans, as to give her legal standing.²⁶⁷ Notably, in the Supreme Court's analysis, it insisted that the 'rule denying standing to raise another's rights ... is only a rule of practice.'²⁶⁸

In *NAACP v. Patterson*,²⁶⁹ the state had obtained a court order requiring the NAACP to produce membership lists and upon its refusal to comply, the appellant was held in contempt. The Supreme Court reversed the decision, allowing the NAACP to assert the rights of its members and noting that because litigation by individual NAACP members would require disclosure of their identity, destroying the very right threatened by the court order, the

²⁶⁴ *ibid* at 499.

²⁶⁵ See Fallon "As-Applied and Facial Challenges and Third-Party Standing" 113 Harv. L. Rev. 132 (2000)

²⁶⁶ 346 U.S. 249 (1953).

²⁶⁷ *ibid* at 259.

²⁶⁸ *ibid* at 259.

²⁶⁹ 357 U.S. 449 (1958).

NAACP was a proper party to act on the members' behalf to assert their constitutional rights.²⁷⁰

The limits to these exceptions can be seen from the case of *Kowalski v. Tesmer*²⁷¹, where the Court denied standing to attorneys who sought to challenge a state law, restricting the appointment of legal counsel during the appeal for poor defendants who had pleaded guilty. The Supreme Court denied that they had a "close" relationship with the persons whose right they attempted to assert and held that the possibility of a future attorney-client relationship with hypothetical criminal defendants was not a sufficiently close relationship.²⁷² The Court also denied that there was anything to prevent poor defendants' asserting their constitutional rights for themselves and rejected the claim that their lack of means and education were sufficient grounds.²⁷³

Political Campaigning Groups

In the context of political campaigning groups, the Supreme Court has in the past expressed a desire to avoid putting members of the judiciary in a position of arbiting purely political disputes. This was stated clearly in *Flast v Cohen*.²⁷⁴ The plaintiffs in this case were unhappy about the share of federal funding being given to certain religious schools. They sought to argue the expenditure was unconstitutional and that they had locus standi to bring the case entirely on the basis that they were tax-paying citizens. The Court rejected their claim and declined to weigh in on the distribution of expenditure, which is an age-old source of partisan dispute and a key target for lobbying by campaigning groups. It remains the case that taxpayers *qua* taxpayers, either individually or as a group, do not have locus standi to challenge the constitutionality of federal expenditure.

²⁷⁰ *ibid* at 460.

²⁷¹ 543 U.S. 125 (2004).

²⁷² *ibid* at 131.

²⁷³ *ibid* at 132.

²⁷⁴ 392 U.S. 83 (1968).

It should be noted that the US Supreme Court has taken an alternate approach to generalised grievance cases, when compared to the Irish *Crotty* exception.²⁷⁵ In *Frothingham v Mellon* it was dictated that the Court will not resolve constitutional claims brought by a plaintiff who could not demonstrate an injury greater than other members of the general public.²⁷⁶ A narrow exception to this barrier was established in *Flast v Cohen*, where a taxpayer alleges a violation of the Establishment and Free Exercise Clauses of the First Amendment.²⁷⁷ However, this exception has been subsequently confined to the facts of *Cohen*.²⁷⁸ Henry concludes that, ‘by forcing public actions to submit to the same general rules of standing, US courts have reified distinctness of injury as an indispensable component of a constitutional claim, effectively insisting that such claims must take the same form and character as a private law claim.’²⁷⁹

Environmental Campaigning Groups

Difficulties also arise for campaigning groups where an attempt is made to bring a claim in respect of hypothetical or future injury, which is often the scenario for environmental campaigning groups in particular. In this context, for example, despite the comparatively flexible position on locus standi in the US compared to Ireland (via the acceptance of class action lawsuits etc), the requirement for the plaintiff to suffer an identifiable injury or harm has caused many headaches for environmentalists.

In trying to bring a case on behalf of the general population (eg against the US government to try and block or invalidate potentially environmentally threatening legislation), environmentalist groups have had a high threshold to cross to establish standing (the

²⁷⁵ Cian Henry, ‘Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States’ [2018] 21 TCLR 315., 337.

²⁷⁶ [1923] 262 US 447.

²⁷⁷ [1968] 392 US 83.

²⁷⁸ See *Schlesinger v Reservists Committee to Stop the War* [1974] 418 US 166; *Valley Forge Christian College v Americans United* [1982] 454 US 464.

²⁷⁹ Cian Henry, ‘Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States’ [2018] 21 TCLR 315, 338.

exception to this is where a class action lawsuit is brought by a campaigning group on the basis that an injury will presently befall its members).²⁸⁰

The most significant judgment on this point came in *Lujan v Defenders of Wildlife*²⁸¹, in which a number of conservationist groups were attempting to challenge funding regulations from the Departments of Commerce and the Interior. In *Lujan v. Defenders of Wildlife*, the respondents, a wildlife and environmental organisation, challenged regulations regarding the geographic area to which the Endangered Species Act 1973 applied. They claimed that US funding of development projects in Egypt and Sri Lanka could harm endangered species there.²⁸² The Supreme Court held that the injury-in-fact test required that the party seeking judicial review be directly injured as result of the appellants actions. The fact that the respondents had a special interest in the issue and had visited the areas before was not enough.²⁸³ To invoke the judicial power to determine the validity of executive or legislative action “it is not sufficient that [the respondent] has merely a general interest common to all members of the public”, they must prove a direct and material injury.²⁸⁴ In *Lujan v Defenders of Wildlife*, the Supreme Court espoused that the claimant bears the burden of proof in establishing these elements and that the same degree of evidence is required as any other matter in which the plaintiff bears the burden of proof. The Supreme Court rejected the claimants’ argument that the legislation would give rise to locus standi for the general population. Justice Scalia wrote derisively in *Lujan* against the idea of ‘an abstract, self-contained, non-instrumental ‘right’ to litigation by campaigning groups in situations where the would-be claimant has not actually experienced any injury or harm.

It can therefore be a more attractive option for campaigning groups to pursue their legal objectives via amicus curiae briefs, which allows them to offer expertise or advice to a

²⁸⁰ Barry Hough, ‘Standing for pressure groups and the representative plaintiff’ 77 (1991) Denning LJ 6.

²⁸¹ 504 US 555 (1992).

²⁸² 504 U.S. 555 (1992) at 563.

²⁸³ *ibid*.

²⁸⁴ *ibid* at 573.

plaintiff who has fulfilled the requirement of suffering injury or harm. The American Civil Liberties Union (ACLU) is an example of a campaigning group with considerable financial resources which has had many successes in the past in assisting claimants with their cases without having to attempt to justify its own legal standing as a plaintiff.²⁸⁵ As noted by Hough, the briefs of amici curiae can be just as significant as the plaintiff's own submissions in a case, especially when the amicus curiae is a well-resourced campaigning group.²⁸⁶

It remains the case in the US as in Ireland that in order to have locus standi, you ordinarily must demonstrate an injury or harm which you yourself have suffered. The difference between jurisdictions lies in the greater latitude given to public policy considerations, eg in the acceptance of amicus curiae briefs from the likes of the ACLU which allows campaigning groups to circumvent the doctrine of locus standi. Although workarounds like class action lawsuits and amici curiae are more available in the US than in Ireland, the fact remains that unless the campaigning group has itself suffered some kind of wrong for which it seeks justice, it will be very difficult for that group to argue that it has locus standi. In this way, the idea is that the courts remain the domain for the genuinely aggrieved to receive genuine redress.

Conclusion

The legal standing of campaign groups to bring claims asserting the rights of third-parties is quite limited and the rule of practice is generally that a plaintiff may only assert their own rights in the courts. In the few instances where campaign groups have successfully sought third-party standing it appears almost exclusively to have been when they have economic interests with the third-party, or where the person whose rights are being invoked is not in a position to assert those rights effectively. The courts' bar for what constitutes not being in a position to assert one's rights has been quite high however, severely limiting the instances where campaign groups will be granted third-party standing.

²⁸⁵ See ACLU, 'The Successes of the American Civil Liberties Union' (ACLU) <<https://www.aclu.org/successes-american-civil-liberties-union>> (accessed 26 March 2019).

²⁸⁶ Barry Hough, 'Standing for pressure groups and the representative plaintiff' 77 (1991) Denning LJ 6.

Overall Conclusion

It is submitted that the Canadian jurisprudential differentiation between standing rules for a private interest and standing rules for a public interest is an appropriate and desirable formulation of locus standi. Such an approach, would allow Irish courts to remain responsive to the practical realities of litigants, while maintaining a limit on frivolous litigation. It is recommended that the flaws of US doctrines of standing be noted - that by requiring applicants be injured in a manner that is concrete and particularised, the US Supreme Court has inappropriately public interest issues to private law theory. It must be acknowledged that particularly in the realm of PIL, many constitutional claims will fail to fit into the mould of a traditional common law dispute. As Henry notes, '[w]hereas many claims in private law derive from straightforward interpersonal relationships, constitutional violations frequently arise from the operation of large-scale government programmes.'²⁸⁷ Ultimately, meaningful guidance should be taken from the Canadian approach, and Ireland should seek to liberalise current standing laws and jurisprudence in a similar manner.

²⁸⁷ Cian Henry, 'Standing on Thin Ice: Standing Rules and Public Interest Litigation in Ireland and the United States' [2018] 21 TCLR 315, 342.

Part IV: Multi-Party Litigation

Order 15, rule 9 of the Rules of the Superior Courts 1986 provides for a mechanism, the representative action, whereby large numbers of people may be joined as parties to a particular piece of litigation in certain limited circumstances. The provision reads as:

‘Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court to defend in such cause or matter, on behalf, or for the benefit, of all persons so interested.’

Generally, such procedures are used to accommodate situations in which more than one person has the same or similar claims or potential liability.²⁸⁸ Representative will be discussed in great detail in Section IV.I, and it will be noted that their use is relatively infrequent. Comparison will be drawn to other jurisdictions that utilise similar multi-party litigation, including the United States, South Africa, India and Canada.

IV.I Representative Actions in Ireland

Alan Eustace, Arlene Walsh-Wallace, Hannah Edwards, Eoin Forde

This section will first discuss the procedural rules in relation to representative actions in Ireland. It will then provide an analysis of the few representative action cases that have been taken in Irish history. Finally, an analysis of the advantages and disadvantages of representative action procedures will be given.

Procedural Rules

In Ireland, the current representative action procedure allows one action to be brought to resolve issues on behalf of different parties with the same interests. Unfortunately, the procedure’s efficacy is limited and as a result, it is rarely used. Order 15 Rule 9 of the Rules of the Superior Courts 1986 provides a specific mechanism, the representative action procedure, whereby large numbers of people may be joined as parties to a particular piece of litigation in limited circumstances.

This formulation stated above limits the use of representative actions in two key ways. Firstly it restricts representative actions to only individuals with similar interests, potentially

²⁸⁸ Seymour, 'Representative Procedures and the Future of Multi-Party Actions' (1999) 62 MLR 564.

requiring such interests to be identical. Secondly, it creates practical burdens, requiring that each individual litigant sign onto the legal proceedings. In relation to the former point, restricting representative actions to only litigants with identical circumstances suggests that an action sounding in tort or seeking damages could not be taken.²⁸⁹ Such an approach limits multi party litigation to only groups of individuals with the same interest in the same remedy. Failure to dictate whether ‘same interest’ should be construed narrowly or broadly has likely dissuaded legal professionals to initiate representative actions. A flexible approach has been taken to this condition in the UK.²⁹⁰ In *Irish Shipping Ltd. v Commercial Union Assurance Co. plc.*,²⁹¹ the Court of Appeal held a representative action could be taken against a group of insurance companies, who were subject to identical although separate agreements, despite the fact that some of the issues raised would not affect all of the companies in equal measure. Unfortunately, it remains unclear whether the courts are willing to endorse such an approach in the Irish jurisdiction.

In relation to the second point, this Superior Court rule also necessitates that each member of the class must approve the taking of proceedings on their behalf for such an action to be allowable. In *Madigan v Attorney General*,²⁹² the court refused to grant a representative order which would allow the plaintiff to sue on behalf of “all persons who are assessable persons” under the impugned legislation in question, as no evidence had been presented to show any authorisation of the plaintiff to act on their behalf. O’Hanlon J also held that the case in question was inappropriate for a representative action, as no figures were available to indicate the number of individuals wishing to challenge the statute’s validity or how many other individuals had instituted their own proceedings independent of the plaintiff. However, a

²⁸⁹ Gerry Whyte, *Social Inclusion and the Legal System* (2nd edn, Institute of Public Administration 2015) 185.

²⁹⁰ In *Prudential Assurance Co.Ltd v Newman Industries (No. 1)* [1981] ch 299, it was held that a representative action seeking damages in tort could proceed where permitting the action would not give a right of action on a member of the class who would not otherwise be able to assert such a right in other proceedings or bar a defence potentially available to the defendant in a separate action, where the class possesses a common interest, and where the court is persuaded that allowing the action to proceed is of benefit to the class in question.

²⁹¹ [1991] 2 QB 663.

²⁹² [1986] ILRM 136.

more relaxed approach was taken in *Greene v Minister for Agriculture*.²⁹³ This case will be discussed in greater detail below.

It remains unclear whether the more flexible approach to the preconditions adopted by Murphy J will be accepted as an appropriate manner by which to authorise the taking of representative actions. Whyte notes that until further clarification is given, the legal team mounting the action will have to continue to take instructions from each member of the class, in order to be certain of satisfying the requirement as it stands.²⁹⁴ It would appear that the greater the size of the class, the more onerous the requirement becomes. This was evident when FLAC instituted the largest representative action to be taken in Ireland on behalf of over 1,700 married women claiming social welfare arrears under EC Directive 79/7/EEC, which will be discussed below.

Alongside these two noted restrictions, Heffernan points out that there are several further difficulties attaching to the procedure at present.²⁹⁵ She notes that the authority of the Irish courts to award damages in representative actions remains unclear. While the traditional approach of an entitlement to only declaratory and injunctive relief has been relaxed in England in recent years, a strict approach continues to hold sway in Ireland. Heffernan also considers that the representative action does not have the ability to fully exhaust the underlying legal issues – a judgment or settlement can only bind the parties who are “present by representation”,²⁹⁶ and even within the represented class, any party may seek leave to be exempt from the judgment.²⁹⁷

Examples of Representative Actions in Ireland

Greene v Minister for Agriculture [1990] ILRM 364

²⁹³ [1990] 2 IR 17.

²⁹⁴ Gerry Whyte, *Social Inclusion and the Legal System* (2nd edn, Institute of Public Administration 2015), 186.

²⁹⁵ Liz Heffernan, “Comparative Common Law Approaches to Multi-Party Litigation: The American Class Action Procedure” (2003) 25 DULJ 102.

²⁹⁶ *Commissioner of Sewers v. Gellatly* (1876) 3 Ch.D. 610.

²⁹⁷ *Moore v. Attorney General (No.2)* [1930] I.R. 471.

The European Union operates a Common Agricultural Policy in order to stabilise the food market in Europe and support farmers' incomes – indeed, to this day, the CAP accounts for the lion's share of the EU budget. In 1975, the EU (then called the European Economic Community) adopted Council Directive 75/268/EEC providing for supplementary payments to be made to farmers in 'less-favoured areas', such as mountainous areas, where conditions like weather and soil quality make farming significantly less economical. The aim of the policy was to encourage people who lived in these areas to continue farming, so as to address the 'large-scale depopulation of farming and rural areas' the Council acknowledged was occurring in Western Europe at the time.

It was left to each Member State to fix the rate to be paid to farmers in less-favoured areas within a range set by the Directive itself; the Member States were then able to recoup about 50% of the cost of these payments back from the EEC budget. Ireland implemented the Directive almost immediately, by means of an administrative scheme that paid a supplemental allowance to farmers who kept cattle or sheep in mountainous areas designated as less favourable under the scheme. Initially, the scheme merely required the farmers meet certain criteria relating to animal welfare and disease control; however, from 1979, the State set a cap on annual 'off-farm income' for eligibility for the scheme. In 1982, this was tightened further: not only did a *farmer* have to have an annual off-farm income below a certain level to avail of the supplemental allowance, but the off-farm income of the farmer *and his or her spouse* must not exceed a certain level, putting married farmers at a disadvantage compared to unmarried farmers.

In 1987, nearly 1,400 farmers subscribed to a 'fighting fund' to finance a challenge to this condition. Six plaintiffs, comprising of farmers and spouses of farmers who had been refused the payment on the basis that their combined family income was too high, took a High Court case, *Greene v Minister for Agriculture*. Murphy J ruled that the condition was unconstitutional because it unfairly burdened married couples as against unmarried cohabiting couples, and that this was a violation of the State's duty to protect the institution of marriage under Article 41 of the Constitution. Strictly speaking, the farmers had not satisfied the conditions for a representative action: the plaintiffs purported to sue 'on behalf

of themselves and on behalf of all farmers in such areas, and in particular those farmers who are listed in the schedule²⁹⁸ which was attached to the statement of claim and listed the names of the 1,400 farmers who had subscribed to the fund. These farmers had not signed any specific authorisation that would allow the plaintiffs to take a representative action on their behalf. Nonetheless, the Court adopted a flexible approach, concluding that each of the farmers had subscribed to the fund ‘on the basis that they would be persons on whose behalf and for whose benefit the proceedings would be brought’.²⁹⁹ As it happened, however, the Court was able to declare the condition unconstitutional without requiring that it be a representative action³⁰⁰ – the six plaintiffs themselves were entitled to such a declaration, and the striking down of the condition would benefit the other farmers anyway. The Court held it could not award damages, because the constitutional duty to protect the institution of marriage was not a personal right that inhered in the plaintiffs individually.³⁰¹

Tate v Minister for Social Welfare [1995] 1 ILRM 507

In 1979, the then European Economic Community adopted Council Directive 79/7/EEC, providing for equal treatment between men and women in respect of entitlements to social welfare payments. At the time, Irish law provided that an unemployed married woman, living with her husband, was not entitled to unemployment benefit and was only entitled to a much lower level of other social welfare payments; an unemployed married man, on the other hand, was entitled to the full level of benefits.

Ireland had until 1984 to implement the Directive, but failed to do so. Although by 1986 changes were made to the social welfare system that brought it in line with the Directive, these were strictly prospective, so married women lost out on 2 years’ worth of benefits to which they were entitled under EEC law. In early 1985, two women had sued the State over its failure to implement Directive 79/7/EEC, and after two trips to the Court of Justice in

²⁹⁸ [1990] ILRM 364, 375.

²⁹⁹ [1990] ILRM 364, 376.

³⁰⁰ [1990] ILRM 364, 375.

³⁰¹ [1990] ILRM 364, 374-75.

Luxembourg, *Cotter & McDermott v Minister for Social Welfare*³⁰² found that the Directive had direct effect after the date for implementation, and therefore the State was liable to compensate married women for their lost benefits. The Irish government dragged its feet; compensation was paid to the plaintiffs in that case, and 2,700 other women who had filed lawsuits of their own, but without admission of liability and without making any efforts to contact other women who were similarly entitled. There were, by 1995, 8,500 cases pending before the courts – but the Department of Social Welfare knew there were approximately 70,000 women entitled to compensation. The Department estimated the financial cost to be between IR£265 million and IR£354 million.

In an effort to force the State's hand, FLAC began contacting women who should have benefitted from the *Cotter & McDermott* decision. Almost 1,900 women signed up to the representative action taken by FLAC in 1993, *Tate v Minister for Social Welfare*, the largest in the history of the State. Carroll J in the High Court granted a declaration as to the plaintiffs' entitlements, and damages dating from 1984 to 1986. In the immediate aftermath, the State announced it would finally pay compensation to the 70,000 women affected.

Advantages

While the scope of representative action in Ireland is quite limited compared to its multi-party neighbours in England and Wales and its class action cousin in the United States, the procedure as outlined by Order 15 of the Rules of the Superior Courts is not without its benefits.

Autonomy of Litigants

Perhaps the most pronounced difference between our representative system and that of a class action system for example is the loss of autonomy of the individual litigants under the latter. In our representative action procedure, the court must be satisfied that the members of the class engaging in litigation have all authorised the representative party to act in a representative capacity.³⁰³ This was confirmed in the case of *Madigan v Attorney General*,

³⁰² [1990] 2 CMLR 141.

³⁰³ Law Reform Commission Report on Multi-Party Litigation (Class Actions) (2005), 4.

where O'Hanlon J rejected the application for a representative action on the grounds that: '[n]o evidence was adduced to suggest that any other persons had authorised the said plaintiff to sue on their behalf'.³⁰⁴

As a result, it is clear that the bar for opting in to a representative action is set quite high in Ireland, a feature absent from the class action procedure in the United States. On this note, it should also be acknowledged that the proposed Multi-Party Actions Bill 2017 currently making its way through the Oireachtas, though it has been stalled for a year and a half, features a provision requiring potential litigants to 'opt-in' to group litigation for it to be valid. Such a provision would bring the proposed legislation in line with the Mutli-Party litigation systems of England and Wales, which has the same requirement.³⁰⁵ This Bill will be discussed in greater detail below.

The potential issues with moving towards an 'opt-out' approach as employed by the United States class action system are numerous. As noted by the Law Reform Commission, parties to class action cases may 'compromise rights that they would otherwise enjoy in the litigation process'. On this point it may be suggested that if our representative system were to be altered, a move towards an opt-in system may be more preferable than an opt-out alternative.

Specificity of Representative Actions

While Order 15 Rule 9 of the Superior Courts is the primary vehicle by which representative actions are taken, it is not the sole one. For example, s 28 of the Civil Liability Act 1961 features provision for representative actions pertaining to fatal accidents, and s 212 of the Companies Act 2014 deals with derivative actions in relation to minority shareholders in a company. As a result, the scope for development of representative actions which fall exclusively under Order 15 Rule 9 is limited. While this may appear restrictive, it also follows that reduction of fields of litigation may allow for a more moderate and tempered development of the doctrine.

³⁰⁴ Madigan v Attorney General [1986] ILRM 136, 148.

³⁰⁵ s 4, Multi-Party Actions Bill 2017.

That being said, our representative system is not so restrictive as to not feature innovation. The courts have dealt with cases from litigants with similar but not identical claims by individual litigants simultaneously. Order 15 Rule 1 allows for such efficient administration of justice and was invoked for example in the case of *Abrahmson v Law Society*.³⁰⁶ In *Abrahamson*, a multitude of law students challenged a decision to deny them an exemption for entrance exams. Despite the particulars of their complaints being slightly different (e.g. some students were from different colleges), the High Court heard all of their complaints together. It is clear that there is still scope for development within the confines of the already established Superior Court rules.

Costs of Litigation

Finally, a more latent benefit to our representative action system can be seen in the Irish jurisdiction's approach to allocation of litigation costs. Ireland follows a "costs follow the event" system, where successful litigants have their costs paid for by the defendant, and vice versa in the case of an unsuccessful claim.³⁰⁷ While our representative system may be considered cumbersome compared to systems such as the class action approach of the United States, the lower costs involved in representative actions might make it more feasible for less financially endowed potential litigants to pursue a case.

Conclusion

In summation, it is clear that while at times restrictive and antiquated, the representative system as outlined by Order 15 is not without its advantages. However, its inability to adequately deal with large amounts of potential claimants, its inflexible 'same interest' rule, and other latent issues are outlined in the next section and show it to be a system in need of reform.

Disadvantages

³⁰⁶ [1996] 1 IR 403.

³⁰⁷ Liz Heffernan, 'Comparative Common Law Approaches to Multi-Party Litigation: The American Class Action Procedure' (2003) 25 DULJ 102, 104.

As it has been noted above, there are two preconditions to the taking of a representative action, limiting the extent to which they can be used. The first of these, known as the ‘same interest’ requirement, has created a number of difficulties in relation to the usefulness of this procedure. First of all, it has led to the courts refusing to extend representative actions to tortious claims. It has been noted that this position is at odds with one of the primary rationales for these procedures: the possibility of combining numerous small claims in tort that would not be economically capable of standing alone.³⁰⁸ Secondly, this ‘same interest’ requirement acts as a bar to the court in awarding damages. As stated in *Market & Co v Knight Steamship Co*: ‘Where the claim is for damages the machinery of a representative suit is absolutely inapplicable. The relief which he is seeking is a personal relief applicable to him alone, and does not benefit in any way the class with whom he purports to be bringing the action.’³⁰⁹

The second precondition of the taking of a representative case is that, following *Madigan v Attorney General*,³¹⁰ each individual member of the class must authorise the named party to represent them in the proceedings on their behalf. Though this approach may have been relaxed somewhat by *Greene v Minister for Agriculture*³¹¹ in which the courts did not insist upon written authorisation, it remains unclear whether this approach will be accepted as the comments were merely obiter.

The second precondition leads us on to another issue with this procedure. It has been noted by the Law Reform Commission that the nature of representative actions in this regard means that they are largely reserved for ‘situations in which the class is relatively small or has a pre-existing relationship or bond with the representative.’³¹² Given the extent of power that the representative is granted over the running of the litigation which is binding on all members of

³⁰⁸ Law Reform Commission Report on Multi-Party Litigation (Class Actions) (2005), 6.

³⁰⁹ [1910] 2 KB 1021

³¹⁰ [1986] ILRM 136

³¹¹ [1990] 2 IR 17

³¹² Law Reform Commission Report on Multi-Party Litigation (Class Actions) (2005), 6.

the class party to the representation, a level of confidence in the representative is required of the members of the class that may not often be seen to exist. If people are accordingly reluctant to be party to such actions, it limits their overall utility. This is mainly a result of the concern that the rights of the class members may be jeopardised in the sense that they are having their cases determined without being afforded the normal procedural rights that would be afforded to them at trial. This conflict of interest between the representative and the other class members can be avoided by attempting to “balance the normal rights of claimants and defendants and the interests of a group in pursuing litigation as a whole.”³¹³ However, this can be a difficult balance to strike.

A further limitation is the lack of finality created by ‘the inability of the representative action to fully exhaust the underlying legal issues.’³¹⁴ The judgment of the court binds all those who are ‘present’ by representation. However, this does not extend to members of the class who were not joined to the proceedings. This creates issues for the defendant as the possibility of defending similar claims in the future is not precluded by this procedure. Moreover, this may be seen as a waste of the courts’ time as it involves “needless duplication of legal proceedings in relation to common issues.”³¹⁵

There is also no legal aid available for representative proceedings. Under Section 28 of the Civil legal Aid Act 1995, legal aid will not be granted where “the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings concerned.”³¹⁶ As noted by Gerry Whyte, the costs of taking such an action can consequently be prohibitive, especially when the cost of notifying class members of the litigation are taken into consideration.³¹⁷

³¹³ Seymour, ‘Representative Procedures and the Future of Multi-Party Actions’ (1999) 62 MLR 564.

³¹⁴ Law Reform Commission Report on Multi-Party Litigation (Class Actions) (2005), 9.

³¹⁵ Law Reform Commission Report on Multi-Party Litigation (Class Actions) (2005), 52.

³¹⁶ s. 28(9)(a)(ix) of the Civil Legal Aid Act 1995.

³¹⁷ Gerry Whyte, *Social Inclusion and the Legal System* (IPA, 2nd edn., 2015), 188.

Whyte has additionally flagged the issues of the difficulty of identifying the appropriate class, and concern about the extent of the involvement of the judiciary in these actions.³¹⁸ It has been noted that the judge has a large management role in these cases. They have extensive powers over representative actions, including deciding whether or not to certify the litigation as a representative action; imposing conditions on class representatives, even as significant as redefining the class; and prescribing particular measures to prevent undue confusion and repetition, thus deciding the course of the proceedings.³¹⁹

A final complaint in relation to the approach to representative actions is that there is a lack of clarity regarding the circumstances in which a case is more likely to succeed. As stated by Seymour, “those claims which have proceeded have done so without any useful test being articulated, or in circumstances where the representative nature of the claim is not referred to at all.”³²⁰

As a result of these criticisms, the representative action procedure has been described as ‘virtually redundant,’³²¹ rendering it an inadequate vehicle for class action claims. The Law Reform Commission have instead proposed that a ‘class action procedure’ be set up.³²² This procedure should be voluntary in nature and should be supervised by the courts. Issues caused by the ‘same interest’ rule in relation to representative actions would be overcome as the court would have the authority “to deal with common issues and individual issues within the framework of a single proceeding.”³²³

Conclusion

³¹⁸ *ibid.*

³¹⁹ *ibid.*

³²⁰ Seymour, ‘Representative Procedures and the Future of Multi-Party Actions’ (1999) 62 MLR 564.

³²¹ Law Reform Commission Report on Multi-Party Litigation (Class Actions) (2005), 52.

³²² Law Reform Commission Report on Multi-Party Litigation (Class Actions) (2005), 111.

³²³ *ibid.*

In summary, representative actions in Ireland are limited first by the preconditions of the procedure – the same interest rule and the authorisation requirement. Further issues stem from the potential for a conflict of interest between the representative and the class members; the lack of finality; the bar to legal aid; the difficulty of identifying the class; the extent of judicial involvement; and a general lack of certainty surrounding this area of law. It has consequently been suggested by the Law Reform Commission that a class action procedure may be a more viable approach to the issue. As noted previously, the Multi-Party Actions Bill while recommending reforms to the current system of representative actions, has been subject to a variety of delays since November 2017.³²⁴ Concern has been drawn by various commentators that this Bill may fail to implement the reforms needed.³²⁵ It is recommended that in the Bill's delay, legislators rethink the suggestions made by the LRC and also this paper.

³²⁴ Houses of the Oireachtas, 'Multi Party Actions Bill 2017' (Government Website, 16 November 2017) <<https://www.oireachtas.ie/en/bills/bill/2017/130/>> accessed 2 April 2019.

³²⁵ Riccardo Savona Siemens, 'Between Sector-Specific and Horizontal: A New Proposal for Ireland's Implementation of Collective Litigation Mechanisms' (2018) 17(1) *Hibernian Law Journal* 92.

IV.II Comparative Analysis to the United States

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Class action lawsuits provide an avenue to pursue justice in that they incorporate real people who share in suffering and seek legal remedy. Currently, there is no national registry in the U.S. that exists that can tell us how many class actions there are, or what types of situations led to them, which makes studying this form of litigation more challenging. This section addresses the historical context of class action lawsuits, the overall court process, the advantages and disadvantages of this type of suit, and finally offers a comparison between class action suits in the United States and Ireland.

By definition, a class action lawsuit “is a legal action filed against a defendant by a group of individuals. It is designed for situations in which many individuals have suffered similar injuries as a result of actions committed by the defendant.”³²⁶ Essentially, it utilizes the concept that there is power in numbers, and seeks remedy through the courts. As the prohibitive cost of litigation can pose a barrier to individually seeking remedies through the justice system, pursuing such cases as a large group allows for the “class actions [to] provide a solution to this economic obstacle by gathering many individual claims together into a single lawsuit that can support the cost of litigation.”³²⁷

One of the earliest class action lawsuit-related cases in U.S. federal case law was the 1820 case of *West v. Randall*. In his judgement, Story J. held that: “It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants, in the subject matter of the bill ought to be made parties to the suit, however numerous they may be.”³²⁸ This case made way for class action lawsuits.

³²⁶ Marianne Bonrner, ‘What is a Class Action Lawsuit’ (30 August 2018) The Balance <<https://www.thebalancesmb.com/what-is-a-class-action-lawsuit-3623787>> accessed 23 March 2019.

³²⁷ Janet Cooper Alexander, ‘An Introduction to Class Action Procedure in the United States’ (21 June 2000) Duke University School of Law <<https://www.law.duke.edu/grouplit/papers/classactionalexander.pdf>> accessed 23 March 2019.

³²⁸ *West v. Randall* (29 F. Cas. 718 (R.I. 1820)).

Procedure of Class-Action Lawsuits

Despite the large number of plaintiffs involved, the general functionality of class action lawsuits is not altogether complicated, due to the U.S. Federal Law that governs this process. After a collective group decides to pursue legal action, the group will file a lawsuit relating to the harm each individual has suffered. In doing so, the plaintiffs ask the courts to grant the title of “Class Action” to the group to allow for further proceedings. To qualify for this classification, a number of criteria must be met:

- “There is a legal claim against the defendant(s).
- There is a significantly large group of people who have been injured in a similar way and the cases of members of the class involve similar issues of fact and law as the case of the Lead Plaintiff(s). Class certification might be denied, for example, if people have suffered different kinds of side effects from a defective drug. The differences in injury would require different evidence for many class members.
- The Lead Plaintiff is typical of the class members and has a reasonable plan and the ability to adequately represent the class.
- The Lead Plaintiff must also have no conflict with other class members.
- A Lead Plaintiff who seeks money damages for him or herself, but is willing to agree to coupons for all the rest of the class, is probably not adequately representing the class.”³²⁹

Once these criteria are satisfied, the lawsuit can begin under the classification of a class action. Once the class has been certified, the court will order that all members of the class be notified, either by mail or other means. With the advent of modern technology and social media, the ability to reach potential plaintiffs has increased, expanding representation and often creating a larger class. Furthermore, it is worth noting that “class membership is automatic in all but very few cases.”³³⁰ If an individual is suffering or has suffered as a result

³²⁹ “Class Action Lawsuits: What they are and how they work” (2018) Free Advice <https://law.freeadvice.com/litigation/class_actions/class-action-lawsuit.htm> accessed 23 March 2019.

³³⁰ “Class Action Lawsuits: What they are and how they work” (2018) Free Advice <https://law.freeadvice.com/litigation/class_actions/class-action-lawsuit.htm> accessed 23 March 2019.

of a company's negligence or wrongdoing, then he or she will be grouped with the class action lawsuit, unless he or she explicitly decides to opt out.

The class representative, or "lead plaintiff", plays a central role in a class action lawsuit. This individual will be charged with most of the decision-making. The other members of the class action are merely represented by the lead plaintiff and are seldom involved in court proceedings unless a specific circumstance arises, often related to offering tangible, clear-cut evidence that would bolster the facts of the case. Moreover, individuals within the class action "are not involved in the decision of whether or not to accept a settlement offer."³³¹ Instead, the lead plaintiff works with the class action attorneys who advise on whether to accept or reject an offer. Once this is finalised, the other class members only have the option of accepting or opting out of the settlement.³³²

Once a settlement is agreed upon, the courts are tasked with deciding how to split the damages awarded to the group. They must take into consideration the overall legal fees to pay the attorneys, which are "often calculated as a percentage of the entire recovery."³³³ Following the lawyers is the lead plaintiff, who will "receive an amount partly determined by their participation in the lawsuit."³³⁴ This in turn leaves the rest of the awarded amount to be split amongst the remaining class action members.

Benefits

The numerous benefits to class action lawsuits include, but are not limited to: lower litigation costs per individual, strength in numbers, societal change and less pressure on the court system. These topics are further addressed below.

³³¹ 'Class Action Lawsuits: What they are and how they work' (2018) Free Advice <https://law.freeadvice.com/litigation/class_actions/class-action-lawsuit.htm> accessed 23 March 2019.

³³² 'Class Action Lawsuits: What they are and how they work' (2018) Free Advice <https://law.freeadvice.com/litigation/class_actions/class-action-lawsuit.htm> accessed 23 March 2019

³³³ 'Class Action Lawsuits: What they are and how they work' (2018) Free Advice <https://law.freeadvice.com/litigation/class_actions/class-action-lawsuit.htm> accessed 23 March 2019.

³³⁴ 'Class Action Lawsuits: What they are and how they work' (2018) Free Advice <https://law.freeadvice.com/litigation/class_actions/class-action-lawsuit.htm> accessed 23 March 2019.

When many people think of class action lawsuits, movies such as *A Civil Action* and *Erin Brockovich* come to mind. These films have popularized the notion of a group of people banding together against “corporate bad guys” in complex litigations.³³⁵ As previously mentioned, there is power in numbers. One of the typical scenarios in a class action lawsuit is when a large corporation is undeterred by complaints or lawsuits from individuals and continues to profit. Essentially, this gives immunity to corporations for harmful acts while consumers go without remedy. Sometimes, class actions lawsuits can be the *only* way to level the playing field between individuals and large corporations, turning a *David versus Goliath* situation into *Goliath versus Goliath*.

Class action litigation is a form of collective action that can bring about real societal change. One of the key examples of this was in *re Agent Orange Product Liability Litigation*.³³⁶ This case concerned the use of herbicides in combat, specifically the use by the U.S. military of Agent Orange (herbicide) from 1964 until 1975. Veterans returning from Vietnam complained of problems relating to chemical exposure but were denied benefits related to these claims. In 1979, a group of veterans filed a class action lawsuit against the five manufactures of the herbicide.³³⁷ The case was eventually settled, but the impact of the litigation had just begun. This case led to new regulations relating to the use of chemicals in the military and scientific studies on herbicides that continue to this day.

The case of *Anderson et al v. Pacific Gas & Electric Co.*³³⁸ was taken by plaintiffs who allegedly suffered health impacts due to the contamination of their drinking water. This case made history when in 1996 a settlement of \$333 million was reached, the largest settlement in a direct-action lawsuit in U.S. history. This case was arguably made possible because of the outcome of the Agent Orange litigation.

³³⁵ Natalie C. Scott, ‘Don’t Forget Me – The Client in a Class Action Lawsuit’ (2002) Vol 15 Georgetown Journal of Legal Ethics 564

³³⁶ In Re Agent Orange Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984)

³³⁷ Institute of Medicine (U.S.) Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides. ‘Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam’ [1994] National Academies Press 34

³³⁸ Superior Ct. for County of San Bernardino, Barstow Division, file BCV 00300

Disadvantages

While there are many benefits to class action lawsuits, there are also, arguably, a number of downsides, including lack of control, money imbalance between the plaintiff and lawyer, and varied interests.

Depending on the subject of class action, there can be thousands of plaintiffs worldwide. During the 1960s and 1970s, the amount of litigation relating to personal injuries caused by exposure to asbestos increased, with estimates of deaths caused by asbestos-related diseases far exceeding 200,000.³³⁹ This was a conservative estimate, as the disease has a substantial latency period. One of the common fears among victims and plaintiffs was that the huge litigation costs associated with asbestos claims threatened to deplete the limited assets of the asbestos producers before all of the victims and survivors could be compensated for their illnesses, which ranged from minor respiratory ailments to mesothelioma (fatal cancer).³⁴⁰

The case of *Georgine v Amchem Products*, was one of the most significant asbestos-related cases to be taken in U.S. courts. The decision of Reed J. in the Federal District Court in Philadelphia, which ‘would have provided payments to current victims of asbestos exposure while sharply limiting the ability of future victims to file health claims against 20 large asbestos makers’³⁴¹ was struck down by the Federal appeals court in Philadelphia, in a judgement that was upheld by the U.S. Supreme Court.³⁴² The settlement was challenged on the basis that it was impossible to provide adequate notice of the settlement to millions of people whose identities could not be determined, people who may not even have known they

³³⁹ Natalie C. Scott, ‘Don’t Forget Me – The Client in a Class Action Lawsuit’ (2002) Vol 15 Georgetown Journal of Legal Ethics 566

³⁴⁰ Stephen Labaton, ‘Overturning of \$1.3 Billion Settlement With Victims of Asbestos Exposure is Upheld’ [1997] The New York Times

³⁴¹ Stephen Labaton, ‘Overturning of \$1.3 Billion Settlement With Victims of Asbestos Exposure is Upheld’ [1997] The New York Times

³⁴² *Amchem Products Inc. v. Windsor*, No. 96-270

were at risk.³⁴³ The U.S. Supreme Court ruled against the class certification in this case because the number of claimants was too large and the individuals had too many varied interests.

Since *Georgine v Amchem Inc*, federal courts have not favoured the mass asbestos class action suits they once did. In *Ortiz v Fibreboard Corp.*, the Supreme Court ruled against certifying an asbestos class action.³⁴⁴ This was a big change from the 1960s and 1970s, although State courts have generally been more willing to certify than the Federal courts.

By 2017, more than 4,000 asbestos lawsuits had been filed in the U.S., and it is now said that combining the varied lawsuits into a single class action would not be beneficial for the individuals filing them because each exposure case is so unique.³⁴⁵ It is now common for people to use alternatives to mesothelioma class action lawsuits including out-of-court settlements or pursuing individual legal action.

Another critique of class action lawsuits is in relation to payment. Often, class action litigation results in a big paycheck for lawyers and a little satisfaction for the injured clients.³⁴⁶ Consumer advocates look to these lawsuits to impose penalties for corporate wrongdoing that may result in harms that are quite modest on an individual basis but lead to mass sums for these companies – for example if a company is overcharging individuals by a few cents or dollars. Those individual losses are so small it does not make sense for each individual to pursue legal action, but class action can resolve this issue for individuals and deter this behaviour by corporations in the future. However, the remedies in these cases are often low for individual plaintiffs. For example, in a settlement in a case concerning credit card fraud, ‘class members could look forward to a \$5 credit (which they probably would not bother to

³⁴³ Stephen Labaton, ‘Overturning of \$1.3 Billion Settlement With Victims of Asbestos Exposure is Upheld’ [1997] *The New York Times*

³⁴⁴ *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)

³⁴⁵ Joe Lahav ‘History of Mesothelioma and Asbestos Class Actions’ [2018] <<https://www.asbestos.com/mesothelioma-lawyer/class-action-lawsuit/>> accessed 19 March 2019

³⁴⁶ Natalie C. Scott, ‘Don’t Forget Me – The Client in a Class Action Lawsuit’ (2002) Vol 15 *Georgetown Journal of Legal Ethics* 565

claims if it were not for the class action, leaving the money in the defendants' pockets) while class counsel received \$1.5 million'.³⁴⁷ This is a massive imbalance.

Moreover, the size of the class could be considered an issue. The lawyers' client group is typically quiet large compared to the standard one or two individuals. Class members will frequently have differing opinions on how to proceed with the litigation or when/whether to settle.³⁴⁸ Additionally, consumers do not always know that they are part of a class action lawsuit unless they happen to catch it online or on the news, or they receive a class action settlement notice in the mail.³⁴⁹ In reference to a previous point, technology has eased the process of receiving notice and being involved in class action suits; however, this process is not free of issues. If an individual was unaware they were part of a class action lawsuit and never opted out, and then received the settlement notice, the individual would be barred from taking individual legal action on the matter in the future. Even if the individual was aware of the class action, they may not receive their preferred outcome as all class members could have differing opinions.

In recent years, class action litigation has remained a contentious issue, especially in the area of food and agriculture, in which the number of cases taken each year continues to increase. It is argued that many of these cases are frivolous, with the contention that they only benefit the lawyers involved and are evidence of the overly litigious society in the U.S.³⁵⁰ One case in particular encompasses the 'frivolous' nature of modern class action litigation: In 2013, an individual posted a photograph on social media of a Subway 'footlong' sandwich beside a measuring stick showing it to be less than one foot in length.³⁵¹ This led to a class action

³⁴⁷ Natalie C. Scott, 'Don't Forget Me – The Client in a Class Action Lawsuit' (2002) Vol 15 Georgetown Journal of Legal Ethics 565

³⁴⁸ Gregg H. Curry, 'Conflicts of Interest Problems for Lawyers Representing a Class in a Class Action Lawsuit' (2019) Vol 24 The Journal of the Legal Profession 398

³⁴⁹ Natalie C. Scott, 'Don't Forget Me – The Client in a Class Action Lawsuit' (2002) Vol 15 Georgetown Journal of Legal Ethics 561

³⁵⁰ Baylen J. Linnekin, 'Using Online Tools to Assess Consumer Perceptions of Class-Action Food Litigation' (2019) Vol 31:1 Loyola Consumer Law Review 5

³⁵¹ *In Re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, No. 16-1652 (7th Cir. Aug. 25, 2017)

lawsuit being brought against the company. While the parties reached a settlement in 2016, this was later thrown out by a federal judge, who stated that it had no benefits for the plaintiffs and rather only benefited plaintiffs' attorneys.³⁵²

The origins of class action lawsuits aimed to provide remedy for great harm inflicted upon people by companies; however, over time, these cases have lost their legal importance. Clearly there is a place for class action lawsuits in society to remedy wrongs, but to what extent? There are still obvious disadvantages that could mean that class action is perhaps not the best approach, dependent on the circumstances of the case at hand. The variety of harm inflicted upon the victims in mass-harm cases means that a one-size-fits-all settlement may not satisfy all parties. In the asbestos cases, some victims suffered from mesothelioma and others suffered from more minor respiratory afflictions, meaning that each individual would require various degrees of remedy tailored to their specific harms suffered.

Comparison with Ireland

From this analysis, it is clear that the U.S. courts view class action lawsuits as one of the 'most powerful legal tools available'³⁵³ for citizens in the country. Ireland in comparison aims to restrict the bringing of class action suits as much as possible through a strict set of criteria. The reasons for these starkly contrasting attitudes will be expanded upon below.

Irish representative action legal framework is not enshrined in the text of the Constitution, which is not the case in the U.S., where class action procedures are written into the Article III of the Constitution, creating the judicial branch with the goal of 'case and controversy'³⁵⁴ resolution. Due to the lack of legislation surrounding class action in Ireland, the judiciary is reluctant to direct the development of case-law and Irish precedent towards this area. Representative actions in Ireland are only allowed when the plaintiff has 'locus standi (...) a bona fide serious concern' and where the action being brought pertains to 'macro politics and

³⁵² Baylen J. Linnekin, 'Using Online Tools to Assess Consumer Perceptions of Class-Action Food Litigation' (2019) Vol 31:1 Loyola Consumer Law Review 1

³⁵³ Janet Cooper Alexander "An Introduction to Class Action Procedure in the United States"

³⁵⁴ The Constitution of the United States. Article III Section II

constitutional developments³⁵⁵. The action has to pertain to constitutional matters that affect the ‘powers and operation of the State’ as opposed to constitutional matters that affect rights of individual citizens. Class action lawsuits involving Non-Governmental Organisations are an exception which sees the Irish Court taking a more relaxed stance. NGO suits allow for the filling of ‘an enforcement gap where third parties are unable to bring the suit themselves’³⁵⁶, for example, suits regarding abortions and the rights of the unborn child. This specification means that class actions in Ireland are often judicial reviews of legislative and/or executive matters, and this strict adherence to the separation of powers is where the Court’s reluctance to entertain them comes from. This approach shows a fear of the potential issues that class actions could lead to; where citizens abuse the system as a means of political protest, instead of effecting legislative change through constitutionally established procedures such as holding referendums. The U.S. does not require similar specifications for class action cases, and instead tends to favour the opposite: class actions brought on the grounds of ‘concrete disputes about individual rights’³⁵⁷. Cognisant of the sensitive issue of maintaining the separation of powers that currently limits the Irish judiciary in this respect, the U.S. Court has interpreted Article III of their Constitution very narrowly, limiting the judiciary to deal with remedying or alternatively protecting classes from harm caused by illegal actions.

In Ireland, a representative action case is either approved or rejected by the Court based on the strict application of a test which calls for all members of the class bringing the legal action to have very similar, almost identical claims. Furthermore, the representative must have been authorised by each individual in the class to take the case. This gives rise to a huge issue, as this requires members of a class subject to mass-harm to locate all potential plaintiffs in order to obtain their authorisation. Statistics show that in America, it is not unusual for upwards of 40% of the class to not file a claim³⁵⁸. Public notices for future consumer claims, seeking to alert all potential plaintiffs, are often advertised in the newspaper, on the television or via other media means. There is no certainty that all those

³⁵⁵ Cian Henry “Standing on Thin Ice” 21 Trinity College Law Review

³⁵⁶ Cian Henry “Standing on Thin Ice” 21 Trinity College Law Review

³⁵⁷ Cian Henry “Standing on Thin Ice” 21 Trinity College Law Review

³⁵⁸ Janet Cooper Alexander “An Introduction to Class Action Procedure in the United States”

affected by the potential defendants will receive the message, or even give their approval for the case to go forward without their participation. Conversely, the U.S. courts champion the class action lawsuits as a means of promoting equal access to justice. In the U.S., the representative action mechanism is directed by Rule 23 of the *Federal Rules of Civil Procedure*, which dictates that representative action lawsuits must fulfil four criteria: numerosity, commonality, typicality and adequacy of representation. Classes must be numerous, and have been known to range from thirty-five to thousands or millions of people. The class must be united by a common harm, and the representative may be a member of the class, but above all must justly and ‘adequately’ represent the claims of class.

While the American government has enshrined the right to class action lawsuits in Rule 23 of the *Federal Rules of Civil Procedure*³⁵⁹, Irish legislation moves in the opposite direction in banning Civil Legal Aid for representative actions. Section 28 (9)(a)(ix) of the Civil Legal Aid Act 1995 prohibits any applications for civil legal aid made by or for persons involved in representative actions³⁶⁰, which makes it even more difficult for economically disadvantaged people who were afflicted in mass-harm cases to bring their case to court and receive remedies. In the United States, not only can citizens looking to bring class actions seek civil legal aid and bring the actions in any court, they can also rely on the “American rule” of legal practice: each party bears its own costs, regardless of who wins. Oftentimes, class action lawsuits are conducted on a ‘contingency fee’ basis, where the class only has to pay if the Court rules in its favour - otherwise, legal fees are waived. Contrast this with the Irish system, which subscribes to the “British Rule”: also known as the “loser pays” rule, the losing party has to cover the legal costs of themselves *and* the winning party. This increases the stakes of class actions in Ireland, as it introduces the risk of the class losing and having to pay for the expensive corporate lawyers hired by the other party in the legal suit. One similarity between the two jurisdictions is that they both take a common law approach to class actions - not unusual in Ireland but slightly out-of-line in the U.S.. For instance, in the U.S. there is the judge-made common fund doctrine, with fairness at its core. The common fund doctrine is the most used means of funding representative actions, and calls for all

³⁵⁹ Federal Rules of Civil Procedure [2014]

³⁶⁰ Civil Legal Aid Act [1995]

beneficiaries of a class action lawsuit to equally divide a common fund financed by the litigation to pay for the cost of the suit's resolution. The losing party of a case would not have this common fund, and therefore would pay any incurred legal fees independently.

It is important to note that despite the Irish judiciary's reserved stance towards representative action lawsuits, a Directive proposed in April 2018 by the European Commission³⁶¹ may force the Court to give deeper consideration to future representative action lawsuits if it is passed. The framework for cases led by consumers against corporations would be applicable within the legal systems of all member states, and this new Directive would automatically be transposed into Irish law. The Directive would introduce a legal framework to facilitate a certain type of representative action, specified in the title of the draft Directive as being 'representative actions for the protections of the collective interests of consumers'³⁶². If approved, this would be the first instance of legislative regulation of representative action in Ireland. In the draft Directive, the idea of representative action 'the European way' is stressed upon, with the Commission highlighting its proposal's distinct 'difference from the U.S.-style class actions'³⁶³. The key difference between the proposed framework and the current U.S. system is that under the legislation, cases may only be brought by 'qualified entities'³⁶⁴ within the member states. To compare: in the U.S., representative action cases regarding commercial breaches of consumer rights, where consumers are seeking legal relief, are typically brought to court by the consumers themselves or by law firms hired by them to represent them. The draft Directive defines a 'qualified entity' as being a non-profit

³⁶¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [2018]

³⁶² J Murphy-O'Connor, M. Finn 'Representative Actions in Consumer Litigations: Dawn of a New Era?' [*Matheson: News and Insights*, 30 November 2018'] <<https://www.matheson.com/news-and-insights/article/representative-actions-in-consumer-litigation-dawn-of-a-new-era>> accessed 20 March 2018

³⁶³ Conor Pope 'Irish Consumers May Win Right to Bring Class Actions' [Irish Times, 11 April 2018] <<https://www.irishtimes.com/news/ireland/irish-news/irish-consumers-may-win-right-to-bring-class-actions-1.3458315>> accessed 20 March 2018

³⁶⁴ J Murphy-O'Connor, M. Finn 'Representative Actions in Consumer Litigations: Dawn of a New Era?' [*Matheson: News and Insights*, 30 November 2018] <<https://www.matheson.com/news-and-insights/article/representative-actions-in-consumer-litigation-dawn-of-a-new-era>> accessed 20 March 2018

organisation with a ‘legitimate interest in ensuring compliance with EU laws’³⁶⁵, qualified within the member state. For example, representative action brought in Ireland must be brought by an entity qualified in Ireland. While this approach is arguably flawed due to the lack of stringency that characterises the criteria needed to be met for an entity to be considered qualified, it is nonetheless an approach that has strong safeguards in place in order to significantly reduce the risk of ‘abusive or unmerited litigation’, which is arguably the case in relation to the approach to class action lawsuits in the U.S.

While the proposed Directive would apply only to mass-harm cases involving consumers, specifically seeking to redress mass-harm caused by ‘unfair commercial practices, such as aggressive or misleading marketing,’ it could trigger a more widespread exploration of potential class action legislation options by the Oireachtas, which would pave the way for the Irish judiciary to relax its attitude towards representative action. It should be stated that until the draft is approved by the Commission, and incorporated into Irish law accordingly, it is difficult to determine the full extent of the impact that the Directive will have on Irish class action litigation.

From the analysis above, it is apparent that the Irish legal system is lacking the proper mechanisms to enable class action lawsuits, and allow for individuals to defend their rights and interests as consumers. Class actions are necessary in order to further the democratic values of the State, and further expand the realm of Irish public interest litigation. Currently, there is no framework for this type of litigation, which provides remedy for mass-harms, and this is something that would be highly beneficial to legislate for. While the U.S. system has its disadvantages, it does at least provide a system that allows individuals to collectively seek relief.

³⁶⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC [2018]

IV.III Comparative Analysis to Other Jurisdictions

Jack Synnott, Orla Murnaghan, Nadine Fitzpatrick

This section will provide insight into representative actions in three countries; South Africa, India and Canada. Multi-party litigation in these countries is a relatively new concept and as such, it is relevant to consider the legal implications it has had in each jurisdiction. Class action lawsuits contribute to access to justice in a variety of ways, all of which will be analysed and discussed using case law examples, critical commentary and academic analysis.

South Africa

Introduction

Class action suits were formally introduced in South African law in 1994. Previously, a personal interest in a case would first have to be established by the litigant.³⁶⁶ Section 38(c) of the (post-apartheid era) Constitution of the Republic of South Africa 1996, provided sufficient legal basis for the institution of a class action to enforce any constitutional right.³⁶⁷ Section 38 states that “anyone acting as a member of, or in the interest of, a group or class of persons” or “anyone acting in the public interest” may approach a court to bring a class action.

The introduction of class action suits to South Africa was welcome, lessening the risk of injustices in the nation.³⁶⁸ The success of class action as a legal tool has been enhanced by the monetary incentive for lawyers in taking on such lawsuits. While individual cases are sometimes too minor for lawsuits to be worthwhile, a class action may aggravate many claims to the point where they are economically beneficial to undertake.³⁶⁹

³⁶⁶ Jade Weiner, ‘Class Action Lawsuits in South Africa’ (Helen Suzman Foundation, 28 March 2018) available at <<https://hsf.org.za/publications/hsf-briefs/class-action-law-suits-in-south-africa>> accessed 14 March 2019.

³⁶⁷ Woulter L R De Vos, ‘Judicial Activism Gives Recognition to a General Class Action in South Africa’ (2013) *Journal of South African Law* 370.

³⁶⁸ *ibid.*

³⁶⁹ Janet Cooper Alexander ‘An Introduction to Class Action Procedure in the United States’ (Duke University Law School, 21 June 2000) <<https://www.law.duke.edu/grouplit/papers/classactionalexander.pdf>> accessed 14 March 2019, ‘The class action is among the most powerful legal tools available in the United States.’

It should be noted that unlike the Irish Constitution, the South African counterpart expressly accommodates socioeconomic rights, recognising them as cognisable to the courts and imposing broad obligations on the government. The socioeconomic rights are subject to progressive realisation and the extent of the state's maximum available resources. For greater discussion of South African vindication of socioeconomic rights, see Part I.II, which develops a comparative analysis of South African jurisprudence to Ireland.

Background

Class action lawsuits are particularly useful in countries with high rates of poverty, like South Africa. Such litigation allows members of the population, who may not be able to afford the extortionate costs of litigation, to take legal cases and assert their rights. In 1996, Wouter L R De Vos wrote that he never thought he would see class action introduced into South African law in his lifetime. In the same journal article, he defines a class action as “a procedural device that enables a large group of people, whose rights have been similarly infringed by a wrongdoer, to sue the defendant as a collective entity.”³⁷⁰

Current Situation

In May 2018, South Africa's largest ever class action was settled in a case involving miners who developed lung disease while working for gold producers. The seven producers agreed to financially compensate the thousands of miners who contracted silicosis and occupational tuberculosis through their inhalation of silica-dust in the mines.³⁷¹ The parties involved in the settlement agreed that it was beneficial for both sides, with the statement reflecting on the “huge step” taken towards comprehensive solutions to issues relating to compensation for occupational lung disease in the gold mining industry in South Africa.³⁷²

³⁷⁰ Wouter De Vos, ‘Reflections on the introduction of a class action in South Africa’ (1996) 4 *Journal of South African Law* 639.

³⁷¹ Bill Corcoran, ‘Class Action secures payout for S Africa goldminers over fatal diseases’ *The Irish Times* (Dublin, 3 May 2018) <www.irishtimes.com/news/world/africa/class-action-secures-payout-for-s-africa-goldminers-over-fatal-diseases-1.3483217> accessed 15 March 2019.

³⁷² *ibid.*

Perhaps more interestingly, members of the class action will be compensated based on the severity of their illness, not the number in the group. With no cap on the settlement, it could end up being worth hundreds of millions.³⁷³ The suit began over a decade before the settlement was reached, with a key ruling in 2016 by the South Gauteng High Court in Johannesburg. The Court held that the class action was certified to go ahead because the existing workers compensation program, which had been developed during apartheid, did not bar suits against employers.³⁷⁴ In December 2017, groups representing both the producers and the miners requested a postponement of the hearing while settlement discussions continued. This was granted by the High Court in January 2018 and led to the conclusion of the class action.³⁷⁵

The reaching of the settlement will undoubtedly open the doors to thousands of litigants who have been affected by the diseases. Indeed, lawyers involved have indicated that they will pursue compensation for miners who have contracted life-threatening diseases while working for coal mining companies in South Africa.³⁷⁶ It was claimed that a settlement was reached out of concern for the “inevitable length and expensive litigation.”³⁷⁷ In this way, the case demonstrates a rebalancing of bargaining power between a traditionally weak party, an employee, and the traditionally stronger party, the employer.

The significance of the silicosis class action settlement is broad. First, the compensation payments awarded to the affected miners and their families will allow them to access medical assistance and financial security for life’s basic necessities. Second, the accountability of the employers for the harm that was caused. It is also hoped that deterrence will be an after-

³⁷³ Matt Chaney, ‘Making history: SC lawyer helps settle first South African class action’ *South Carolina Lawyers Weekly* (South Carolina, 11 May 2018) available at <www.go.galegroup.com/ps/i.do?p=LT&u=tcd&id=GALE|A538963357&v=2.1&it=r&sid=ebSCO> accessed 15 March 2019.

³⁷⁴ *ibid.*

³⁷⁵ ‘Gold miner silicosis litigation (re So. Africa)’ (*Business & Human Rights Resource Centre*, 2018) available at <www.business-humanrights.org/en/gold-miner-silicosis-litigation-re-so-africa> accessed 15 March 2019

³⁷⁶ Bill Corcoran, ‘Class Action secures payout for S Africa goldminers over fatal diseases’ *The Irish Times* (Dublin, 3 May 2018) <www.irishtimes.com/news/world/africa/class-action-secures-payout-for-s-africa-goldminers-over-fatal-diseases-1.3483217> accessed 15 March 2019.

³⁷⁷ Nico Gous, ‘Mining companies to fork out about R5-billion to mineworkers after silicosis settlement’ *Sunday Times* (South Africa, 3 May 2018) <www.timeslive.co.za/sunday-times/business/2018-05-03-mining-companies-to-fork-out-about-r5-billion-to-mineworkers-after-silicosis-settlement/> accessed 15 March 2019.

effect of the settlement, with gold-mining companies putting in place processes and programmes to reinforce health and safety. This particular class action should serve as an educational tool to South Africans who seek healthy and safe work conditions. Lastly, the class action settlement will reinforce rights and display how the law can and will be used to access justice.³⁷⁸

Requirements

The requirements for the commencement of a class action in South Africa were set out in the 2012 case *Children's Resource Centre Trust v Pioneer Food*.³⁷⁹ The criteria are as follows:

- The existence of a class identifiable by objective criteria and a cause of action;
- That there are issues of fact or law common to the members of the class;
- That the damages sought flow from a cause of action and are capable of determination;
- That there is an appropriate procedure to allocate damages to class members;
- That a suitable candidate has been proposed to conduct the action;
- Finally, that the class action has the appropriate means to determine members claims.³⁸⁰

However, in *Mukaddam v Pioneer Foods*³⁸¹, the Court maintained that the *Children's Resource Centre Trust* requirements must not be treated as conditions precedent, but instead as factors to be taken into consideration when determining where the interests of justice lie in a particular case.³⁸²

India

³⁷⁸ Penelope Andrews, 'South Africa's historic silicosis class action: why the settlement matters' (The Conversation, 9 May 2018) available at <www.theconversation.com/south-africas-historic-silicosis-class-action-why-the-settlement-matters-96234> accessed 24 March 2019.

³⁷⁹ 'South Africa: Class and Group Actions 2019' (*ICLG*, 5 November 2018) available at <www.iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/south-africa> accessed 24 March 2019.

³⁸⁰ *ibid.*

³⁸¹ [2011] ZAWCHC 102.

³⁸² Penelope Andrews, 'South Africa's historic silicosis class action: why the settlement matters' (The Conversation, 9 May 2018) available at <www.theconversation.com/south-africas-historic-silicosis-class-action-why-the-settlement-matters-96234> accessed 24 March 2019.

Introduction

India is the world's largest democracy, equipped with a common law system and population of 1.3 billion people. Since gaining independence from Britain in 1947, the Indian legal system has undergone a dramatic overhaul, enshrining its proud policy of "distributive justice" firmly in its new Constitution.³⁸³ Subsequent developments have led to the genesis of Public Interest Litigation (PIL) - a judicial procedure wherein any 'individual or organisation concerned with ongoing human rights violations can bring an action directly in the country's highest court against the national and state governments of India.'³⁸⁴ The archetypical demarcation of PIL is 'a doctrine of procedural relaxations in cases of human rights violations, in order to make both access and establishing proof easier.'³⁸⁵ The development of PIL, though suffering from the democratic deficit of questionably overstepping the constitutional separation of powers, is ultimately beneficial to those traditionally ostracised in Indian society - the working classes and women.

Procedural Developments

Public interest litigation emerged in the wake of the tempestuous period in Indian history known as the 'Emergency Period.' The autocratic premiership of Indira Gandhi suspended elections and civil freedoms in an adverse reaction to social unrest, from 1975 until 1977.³⁸⁶ To the horror of Indians, the Supreme Court remained silent and refused to intervene in executive affairs. Even the vindication of fundamental human rights went unchecked by the judiciary in the name of this national emergency.³⁸⁷ The desperate attempts to reaffirm the Court's legitimacy in the Post-Emergency period was an attempt to dispel the public's disillusionment with the justice system, and a series of sweeping reforms in the 1970s and

³⁸³Shehnaz Meer, 'Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa' (1993) 9(3) South African Journal for Human Rights 358.

³⁸⁴Avani Mehta Sood, 'Gender Justice Through Public Interest Litigation: Case Studies from India' (2008) 41(3) Vanderbilt Journal of Transnational Law 836.

³⁸⁵Wouter Vandenhole, 'Human Rights Law, Development and Social Action Litigation in India' (2002) 1 Asian-Pacific Journal on Human Rights 136, 144.

³⁸⁶ Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19(1) Indian Journal of Global Legal Studies 559.

³⁸⁷ *ADM Jabalpur V Shivakant Shukla* (1976) 2 SCC 521.

1980s fought virulently to reinstate justice in India's courtrooms. PIL was one such reform that aimed at making access to justice ubiquitous, especially favouring the marginalised communities of the working class, utilising the Constitution to move the judiciary to vindicate these long-neglected personal rights through representative action.

Perhaps the most important development in Indian PIL has been the expanded ambit of *locus standi*. Article 32 of the Indian Constitution reads: "The right to move the Supreme Court by *appropriate proceedings* for the enforcement of the rights conferred by this Part is guaranteed" [emphasis added].³⁸⁸ This understanding of "appropriate proceedings" has been vastly expanded upon, as witnessed in the *Gupta* case.³⁸⁹ Here, the definition of *locus standi* was relaxed to allow any Indian citizen to file an action on behalf of any group that "legally does have standing, but...are in fact unable to lodge a complaint because of poverty, helplessness or disability, or because of their socially or economically disadvantaged position."³⁹⁰ However, this standing is heavily qualified: representatives must be "acting bona fide," and are limited to cases where vital human rights of a determinate class are at stake.³⁹¹ The lowering of the bar for *locus standi* has enabled "a multitude of suits to address social, economic, civil and political rights abuses in India."³⁹² One such example has been the petition by activists to implore the Indian courts to eradicate child marriages.³⁹³ This effectively enables those who have no direct access to the courts to have their stories heard through another organ, and to see their personal rights properly vindicated in line with Indian Constitutional values.

³⁸⁸Article 32, Part III of the Indian Constitution

³⁸⁹ *Gupta v Union of India*, SC (1982) AIR 149, (1982) 2 SCR 365.

³⁹⁰*ibid.*

³⁹¹Wouter Vandenhoe, 'Human Rights Law, Development and Social Action Litigation in India' (2002) 1 Asian-Pacific Journal on Human Rights 136, 150.

³⁹² Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19(1) Indian Journal of Global Legal Studies 559, 571.

³⁹³ *Ramakant Rai v Union of India* WP (C) No 209 of 2003.

Epistolary jurisdiction is another development of PIL that enables a swift, satisfactory delivery of justice. This is a unique factor of Indian law, exclusively deployed in the Indian Supreme Court to enforce an order against the judiciary. This principle states that judges will readily respond to “letters or postcards alerting them to constitutional rights violations and to treat such submissions as formal writ petitions for PIL purposes”³⁹⁴. This is an important development in relation to practical concerns about procedural backlogs. As one judge decreed in the high-profile *Gupta* case, “It must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities.”³⁹⁵ This shows the willingness of courts to depart from the rigid requirements of traditional law. It is not necessary for the public to endure Kafkaesque bureaucracies and puzzling formal procedures in order to bring a case to justice. Allowing various forms of communication to substitute as writs has ensured that access to the Indian courts remains a simplified affair for the downtrodden and impoverished with its liberation from the bureaucratic process.

Public interest litigation has also spurred the development of an incredibly active judiciary in Indian courts. By using the conduits of Articles 12-35 of the Indian Constitution, judges have ‘transformed much constitutional litigation into social action litigation’ in the context of PIL.³⁹⁶ One remarkable facet of judicial activism was the discovery of positive constitutional rights in the case of *Maneka Gandhi V Union of India*.³⁹⁷ Prior to this landmark ruling, the courts had only recognised negative obligations on the state. However, the right guaranteed under Article 21 - ‘no person shall be deprived of his life or personal liberty, except according to procedure established by law’ - was interpreted as a *positive* right, requiring any state action that jeopardised one’s life to be ‘right, just and fair.’ Flowing from this judgement, Indian courts have recognised other positive rights from the interpretationist school, including the right to a speedy trial, the right to dignity, the right to be free from exploitation

³⁹⁴Avani Mehta Sood, ‘Gender Justice Through Public Interest Litigation: Case Studies from India’ (2008) 41(1) Vanderbilt Journal of Transnational Law 840.

³⁹⁵*Gupta v Union of India*, SC (1982) AIR 149, (1982) 2 SCR 365.

³⁹⁶ Shehnaz Meer, ‘Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa’ (1993) 9(3) South African Journal for Human Rights 358, 366.

³⁹⁷[1978] 1 SCC 248.

and the right to legal aid.³⁹⁸ Proactive judicial involvement in interpreting the Constitution dynamically has resulted in a larger ambit for those who suffer the most to have even more scope for challenging government negligence. Judicial activism has offered the destitute a platform to have their basic rights to survival and independent flourishing recognised, as governments now have an obligation to fulfil these fundamental needs for those who cannot themselves.

Disadvantages of Public Interest Litigation

The criticism most associated with PIL is that it facilitates judicial violation of the constitutional separation of powers. Since judges operate independently of the government, it is argued that they should possess power equal to that of the Executive.³⁹⁹ Conversely, it is argued that judicial activism inevitably strays into the operating planes of the executive, which violates the classical typification of the checks-and-balances system. This runs a risk of creating “judicial despotism” - a constitutional system wherein governments and citizens’ rights alike are at the mercy of unaccountable judicaires.⁴⁰⁰ It has become increasingly difficult to discern what is infringing upon executive power, and what is judicial activism. However, this judicial dynamism is justified by the courts in pointing to the failure of the legislature to deal effectively with Indian human rights crises swiftly. One such example is the *Vishaka* case, wherein the legislature had underperformed in attempting to ameliorate sexual assault cases and court intervention was necessary to further gender equality.⁴⁰¹ Without judicial intervention, one could argue that social progress would stagnate in India and remain entrenched in patriarchal, traditionalist views of society that paint women who are victims of sexual assault as victims forevermore. This psychological scarring, coupled with India’s anachronistic conservative slant on gender equality, are enough to justify the intervention of judges to allow society to modernize. The encroachment upon the separation

³⁹⁸Shehnaz Meer, ‘Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa’ (1993) 9(3) South African Journal for Human Rights 358, 366-368.

³⁹⁹Wouter Vandenhoe, ‘Human Rights Law, Development and Social Action Litigation in India’ (2002) 1 Asian-Pacific Journal on Human Rights 136, 201.

⁴⁰⁰Avani Mehta Sood, ‘Gender Justice Through Public Interest Litigation: Case Studies from India’ (2008) 41(1) Vanderbilt Journal of Transnational Law 840, 849.

⁴⁰¹*Vishaka v. Rajasthan*, (1997) 3 SCR.

of powers, therefore, can be justified as it prioritises those who need the state most in society to vindicate their very basic freedoms. The state organ of the judiciary comes to the aid of those who have no other recourse and judicial interference is a small price to pay for the mass vindication of civic rights in India through PIL.

Canada

Representative actions in Canada represent a severely underdeveloped area of comparative legal research. Despite this, key sources provide some important pieces of information. Overtime the practise has been articulated and refined, developing a unique and distinctly Canadian approach to collective relief. A relatively low bar has been set for class certification, and class proceedings have been certified in every province in almost every area of substantive law. It has further developed a reputation for being less adversarial and less litigious than that of the US.⁴⁰²

Origins

A key, if dated source is the Ontario Law Reform Commission's (OLRC) 1982 Report on Class Actions.⁴⁰³ At the time of this document's publication, representative actions in Canada could be taken under limited circumstances, but were uncommon due to a variety of procedural issues stemming from poorly drafted legislation.⁴⁰⁴ The OLRC's policy document recommended increased use of representative actions in Canada for three reasons: (a) to increase access to justice; (b) to increase the efficiency of Canada's judicial system; and (c) to deter the bad behaviour of potential defendants.⁴⁰⁵

⁴⁰² Christopher Naudie & Eric Prefontaine, 'Class/Collective Actions in Canada: Overview' (Hoskin & Harcourt LLP, 1 December 2016) <[https://ca.practicallaw.thomsonreuters.com/2-618-0466?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://ca.practicallaw.thomsonreuters.com/2-618-0466?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)> accessed 1 April 2019.

⁴⁰³ Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General Ontario, 1982) <https://digitalcommons.osgoode.yorku.ca/library_olrc/112/> accessed 1 April 2019.

⁴⁰⁴ *ibid.*

⁴⁰⁵ Ontario Law Reform Commission, *Report on Class Actions* (Ministry of the Attorney General Ontario, 1982) <https://digitalcommons.osgoode.yorku.ca/library_olrc/112/> accessed 1 April 2019.

Representative actions in Canada became more prominent following the introduction of the Ontario Class Proceedings Act in 1993⁴⁰⁶ and the British Columbia Class Proceedings Act in 1995.⁴⁰⁷ This more liberal legislation made it easier for Canadian citizens to take representative actions.⁴⁰⁸

Details of Class Actions

According to this legislation, Canadian class actions require, in the first instance, a cause of action. The class involved must be made up of two or more people identifiable as sharing some common cause, with the cases raising some common issue. Further, representative actions must be the preferable procedure for resolving such issues, with the representative plaintiff fairly and accurately representing the class, having a workable plan for processing the action, and having no conflict of interest with other class members.⁴⁰⁹

Legal Costs

A major challenge faced by Canadian legislatures in developing representative action suits was whether the representative plaintiff should be liable for the legal costs if the action fails.⁴¹⁰ This varies across provinces in Canada. In British Columbia, the plaintiff is only liable for “frivolous” failed actions.⁴¹¹ In Quebec, a nominal fee is paid by the losing plaintiff.⁴¹² In Ontario, costs can be recovered against representative plaintiffs in most cases, but to date few significant cases have been heard.⁴¹³

⁴⁰⁶ ch 6, Class Proceedings Act 1992.

⁴⁰⁷ ch 21 Class Proceedings Act 1995.

⁴⁰⁸ M McGowan, ‘Certification of Class Actions in Ontario: A Comparison of Rule 23 of the U.S. Federal Rules of Civil Procedure’ (1993) 16 *Carswell Practice Cases* 172.

⁴⁰⁹ Garry D Watson, ‘Class Actions: The Canadian Experience’ (2001) 11 *Duke Journal of Comparative and International Law* 269.

⁴¹⁰ *ibid.*

⁴¹¹ ch 21, Class Proceedings Act 1995, 37.

⁴¹² L Fox, ‘Liability for Costs: A Comparison of Bill 28 and Bill 29 and the Quebec Legislation’ (1992 Proceedings Of The First Yves Pratte Conference)

⁴¹³ Garry D Watson, ‘Class Actions: The Canadian Experience’ (2001) 11 *Duke Journal of Comparative and International Law* 11 269.

Notable representative action cases in Canada have included torts cases on product liability cases,⁴¹⁴ and “mass tort” cases involving the likes of subway crashes⁴¹⁵ and water pollution cases.⁴¹⁶ Representative actions have also played a role in contract law cases involving credit card companies,⁴¹⁷ housing developers,⁴¹⁸ and life insurance companies.⁴¹⁹ As Watson summarises, “some have been "mega cases" with "mega" recoveries, others have been relatively small cases, illustrating that there are many diverse instances where numerous people are wronged”.⁴²⁰

Conclusion

Scholars have noted the ability of representative actions to allow wronged individuals to circumvent prohibitive litigation fees,⁴²¹ to hold powerful groups to account when they commit wrongs which harm a large number of people,⁴²² and allowing the judiciary to respond to the claims of large, disaggregated groups of people.⁴²³ As Bogart puts it ‘[t]he

⁴¹⁴ *Nantais v. Telectronics Proprietary (Canada) Ltd.* [1995] 129 D.L.R. (4th) 110 (Ont. Gen. Div.) (Can.); *Serwaczek v. Medical Engineering Corp.* [1996] 3 C.P.C. (4th) 386 (Gen. Div.) (Can.); *Bendall v. McGhan Medical Corp.* [1993] 106 D.L.R. (4th) 339 (Ont. Gen. Div.) (Can.); *Godi v. Toronto Transit Comm'n* (Doc. 95 CU 89529) (Gen. Div.) (Can.). 44; *Brimner v. Via Rail Canada Inc.* [2000] 47 O.R. (3d) 793 (Ont. Sup. Ct.) (Can).

⁴¹⁵ *Godi v. Toronto Transit Comm'n* (Doc. 95 CU 89529) (Gen. Div.) (Can.)

⁴¹⁶ Colin Perkel ‘Walkerton Victims Want to Sue’ *The Toronto Star* (15 January 2001), available at <<http://www.thestar.com>> accessed 1 April 2019.

⁴¹⁷ *Smith v. Canadian Tire Acceptance Ltd.* [1995] 22 O.R. (3d) 433 (Gen. Div.) (Can.)

⁴¹⁸ *Windisman v. Toronto College Park Ltd.* [1996] 28 O.R. (3d) 29 (Gen. Div.) (Can.),

⁴¹⁹ *Dabbs v. Sun Life Assurance Co. of Canada* [1998] 40 O.R. (3d) 776 (Gen. Div.) (Can.); *McKrow v. Manufacturers Life Ins. Co.* [1998] O.J. No. 4692 (Ont. Gen. Div.)

⁴²⁰ Garry D Watson, ‘Class Actions: The Canadian Experience’ (2001) 11 *Duke Journal of Comparative and International Law* 11 269.

⁴²¹ *ibid*

⁴²² W A Bogart, ‘Questioning Litigation's Role: Courts and Class Actions in Canada’ (1987) *Indian Law Journal* 62 665.

⁴²³ Garry D Watson, ‘Class Actions: The Canadian Experience’ (2001) 11 *Duke Journal of Comparative and International Law* 269.

significance of [Canadian] class actions does not lie in the frequency with which they are brought, for they have been, and will be, a small percentage of the total of civil claims filed,⁴²⁴ however, it is clear that class actions have had a large impact on the nature of Canada's legal system. Whether they will continue to impact in the legal system in such a deep fashion, and whether their use will become more common going forward, remains to be seen.

Overall Conclusion

Many academic articles discussed in this research suggested that South Africa take a similar approach to India's class action procedural process. This generally concludes that representative action is a good system which helps the poor and those most in need of legal support. However, there are practical limitations in relation to India. The courts are clogged and there are questions surrounding how much resources should be devoted to PIL, especially considering the growth of the Indian population. With regard to the Irish jurisdiction, it should be considered that Ireland does not necessarily have the constitutional or administrative framework to facilitate such a system for vindicating rights. As discussed in previous sections, serious institutional change will have to occur if meaningful protection of economic, social and cultural rights is ever to be given.

⁴²⁴ W A Bogart, 'Questioning Litigation's Role: Courts and Class Actions in Canada' (1987) *Indian Law Journal* 62 665.