

**DR VINODH JAICHAND,**  
**Irish Centre for Human Rights, National University of Ireland, Galway**

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As a self-confessed activist member of the “human rights community” that the Minister for Justice, Equality and Law Reform referred to<sup>1</sup> I am concerned about where the debate on social, economic and cultural rights is heading. No one wants Ireland to perform some new and difficult deed against all legal odds and its better judgement. All we want is for Ireland to follow through on its international obligation undertaken in good faith when it ratified the International Covenant on Economic, Social and Cultural Rights on 8 December 1989. Failure to do so would place it in a category of countries like Chile under the Pinochet regime who ratified the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment on 11 November 1987<sup>2</sup> with no intention of honouring the undertakings therein.

The Mission Statement of the Human Rights Commission states that it “will pursue its objectives vigorously and independently. It will do its best to ensure that Irish law and practice is in line with the highest international standards, measuring our law and practice against the standards set out in the Constitution and in international human rights agreements to which Ireland is a party.” I therefore believe there is a duty upon the Human Rights Commission to draw attention to the one-sided nature of the socio-economic rights debate that rests on a rigid interpretation of the separation of powers. There is a duty upon the Commission to correct the perceptions of politicians and other public figures who appear to incite Ireland to ignore its international obligations. There is a duty upon the Commission to take cognisance of the General Comments of the United Nations Committee on Economic, Social and Cultural Rights<sup>3</sup> especially General Comment 9 which states, inter alia, that the internal laws of a country may not be used as a justification for its failure to perform its obligations under a multilateral treaty. And there is a duty to point out to best practices emerging in other countries.

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<sup>1</sup> Speech by Mr Michael McDowell, T.D on the theme of Irish Culture and the Law at St Patrick’s College, Drumcondra, 5 April, 2003.

<sup>2</sup> President Pinochet recommended the ratification of the Convention because it constituted an important step in the process of humanisation of international law...destined to become an adequate mechanism to promote a more effective enforcement of the rights that are guaranteed in several multilateral international instruments.

<sup>3</sup> See Observations on the Proposal Paper of the Disability Legislation Consultation Group (DLCG) under the discussion on justiciability under the CESCR.

Mr Justice Albie Sachs, one of the 11 justices of the Constitutional Court in South Africa, in a lecture titled “Enforcement of Social and Economic Rights” at the Centre for the Study of Human Rights at the London School for Economics<sup>4</sup> said:

*The enforcement of social and economic rights is not based on a disregard for all the queries that are raised because they are legitimate queries. It's not a case of the victory of social and economic rights over a conservative philosophy that sees the role of courts to be simply to defend basic liberties. It's based upon a reconciling of deep fundamental principles relating to the role of the courts in the 21<sup>st</sup> Century.....*

*It might be that the statement made, that I heard in Paris not too long ago, might well turn out to be true. The 19<sup>th</sup> Century was the century in which the executive took command of the state. The 20<sup>th</sup> Century was the century in which parliament took command of the executive. The 21<sup>st</sup> Century will be the century in which the judiciary secures the basic rules and processes and values of functioning of both parliament and the executive. I might mention it was a judge that made that prediction. But I think we are entering a new kind of era now and the question is ceasing to be whether or not one can enforce social and economic rights through the courts and the real question is how can it best be done?*

The approach of the South African Constitutional Court has reiterated<sup>5</sup> that it had the power to adjudicate on socio-economic rights because the Constitution gave them that power. In the Irish context, this conclusion will be more difficult to reach because the Directive Principles of State Policy appear to bar justiciability. Similar provisions exist in the Indian Constitution but the courts have taken a more activist approach to the Directive Principles which India borrowed from the Irish Constitution. I will revert to that point later.

The South African Constitutional Court also said that, within the debate around the separation of powers, it was entitled to examine this issue even if it had a financial implication.<sup>6</sup> I believe that where the legislature or executive is tardy on any legal issue, the judiciary, as a third (albeit independent) branch of government is duty-bound to give notice and direction to the legislature on corrective measures. The independence of the judiciary is not contra-democracy but a necessary quality for impartiality to adjudicate appropriately in any clash between the power of the state and the citizen. Further, because human rights are said to be “inalienable” the judiciary is best qualified to determine whether there has been any encroachment or violation of an individual’s human rights which can never be ceded to any government.

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<sup>4</sup> Enforcement of Social and Economic Rights, 27 February 2003. Centre for the Study of Human Rights, London School for Economics. Draft transcript.

<sup>5</sup> Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA ; 1997 (12) BCLR 1969 (cc) and Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA (CC); 2000 (11) BCLR 1169 (CC).

<sup>6</sup> See note 19.

The South African Constitutional Court applied the standard of reasonableness to the socio-economic right in question in Grootboom:

*The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.*

Therefore it is not the duty of the court to select the best option from a number of alternatives. Rather it will test the option selected by the legislature and executive for reasonableness. The usual thinking on social policy matters is that they are executive functions.<sup>7</sup> Social, economic and cultural rights are indeed the rights of the poor. To say that the only corrective measure to government inaction on these matters is through the exercise of the ballot may be callous. Such an attitude will entrench the status quo and all the inherent inequities that go with it. Only an independent judiciary can be the arbiter of these types of inaction.

In the Treatment Action Campaign case, the Constitutional Court was mindful of the suitability of courts to adjudicate upon socio-economic rights when it said:

*Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role of the court, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate balance.<sup>8</sup>*

The Directive Principles of State Policy in India, borrowed from the Irish Constitution,<sup>9</sup> state expressly that they “shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.”<sup>10</sup> In addition, the Indian Constitution has a number of fundamental rights which are justiciable. In Keshavananda

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<sup>7</sup> See Kevin Hopkins, “Shattering the divide-when judges go too far” <<http://www.derebus.org.za/archives/2002Mar/articles/dicide.htm>

<sup>8</sup> See paragraph 38.

<sup>9</sup> Other countries with similar provisions include Namibia, Sri Lanka and Nigeria. Article 45 of the Irish Constitution states: 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.

<sup>10</sup> Article 37 of the Indian Constitution

Bharati v State of Kerala<sup>11</sup> the Supreme Court was of the opinion that the fundamental rights and the Directive Principles of State Policy are complementary with neither part being superior to the other. It went on to state:

*Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its contents in the light of its experience. Restrictions, abridgements, curtailments and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV [the Directive Principles of State Policy].*

This approach has allowed the courts to guide legislative reform to achieve social objectives. For example, the right not to be deprived of life has been interpreted to include the right to a livelihood<sup>12</sup>, the basic necessities of life such as adequate nutrition, clothing, reading facilities<sup>13</sup>, and the rights to shelter<sup>14</sup>, health<sup>15</sup> and education.<sup>16</sup> Time and space does not permit a full examination of all the relevant cases.<sup>17</sup>

The issue of higher taxation is sometimes raised by politicians to frighten off any attempt to make social, economic and cultural rights enforceable in courts of law. In the absence of a National Plan of Action for the right to health, education, housing, food, water, social security, language and culture, it may not be possible to hold a government accountable. Therefore a complete audit of policy and promises on these issues must be undertaken by the Human Rights Commission. The performance of the government and monies spent must be reported on by the Human Rights Commission each year. Such a report might well reveal that certain departments are under spending their allocated budgets, or that there are other inefficiencies, not that more taxation is required. A report card on the performance of government is essential for any democratic country so as to take corrective measures sooner. A government that is not accountable to its citizens will fear scrutiny from the courts.

It is the function of the Human Rights Commission to create a culture of human rights in Ireland. To do so it must educate all branches of society on what rights they have and how such rights may be accessed. It need not take this exercise alone because the Irish Centre for Human Rights is willing to assist in the achievement of a better society for all, poor and rich.

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<sup>11</sup> (1973) 4 SCC 225

<sup>12</sup> Tellis & Other v Bombay Municipal Corporation and Others (1981) 2 SCR 516 at 529

<sup>13</sup> Francis Coralie Mullin v The Administrator, Union Territory of Delhi (1981) 2 SCR 516 at 529

<sup>14</sup> Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Others (1997) AIR SC 152

<sup>15</sup> Paschim Banga Khet Mazdoor Samity v State of West Bengal (1996) AIR SC 2426 (right to emergency treatment)

<sup>16</sup> Jain v State of Karnataka (1992) 3 SCC 666; Krishnan v State of Andhra Pradesh & Other (1993) 4 LRC 234.

<sup>17</sup> See Sandra Liebenberg, The protection of Economic and Social Rights in Domestic Legal Systems, in A.Eide (et al), Economic, Social and Cultural Rights, 2<sup>nd</sup> ed 55-84, 2001 Kluwer Law International, and Circle of Rights <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>

DR VINODH JAICHAND  
Lecturer in International Human Rights Law  
Irish Centre for human Rights  
National University of Ireland, Galway

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