

# Using the Law as a Tool for Social Change

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*Gerard Quinn.*

Wallenberg Chair, Wallenberg Institute & Faculty of Law (University of Lund) and professor of law, Leeds University (UK). Former founding director of the Centre for Disability Law & Policy, National University of Ireland (Galway).

Dedicated to the memory of Martin Naughton, R.I.P.

## **1. Open.**

We have a great panel before us and I am very much looking forward to their survey of the status of litigation strategies on disability across the Nordic region.

In prefacing their remarks let me stand back a bit to reflect on what is at stake.

At stake is the future of your social model in Sweden – something that has served well and has stood the test of time. The key question is whether a litigation strategy – a reliance on the law – serves to advance and underpin your social model or potentially undermines it. My emphatic answer is that it serves to underpin and advance your social model and prepares it better to face the 21<sup>st</sup> century.

I say so not just as a disability rights advocate. Indeed, I could equally say so as an advocate for justice for older people.

I also say so as a former member of the Council of Europe's main treaty body on social rights. It is not widely known that on that treaty body we could entertain Collective Complaints on alleged violation of social rights – a sort of quasi-judicial chamber. The experience was instructive and I will draw on it shortly.

## **2. The 'Myth System' of Law - and the 'Operation System' of Law.**

I come at this as a Legal Realist – someone interested in the Myth System of law and the Operation System of law. Often the Myth System is jarringly out of synch with the actual Operation System. What we are doing here today is exposing some myths and making space for a new approach. We are blowing the cobwebs of easy assumptions about your social model and creating space for the fresh breeze of litigation.

The first Myth is that litigation is appropriate – and only appropriate – when it comes to civil rights. Now civil rights are important – indeed the bedrock of a liberal-democracy (which we still have in Europe). Social rights, social entitlements, welfare measures (call them what you will) are equally important. They provide the social or material base on top of which people can enjoy their civil rights. That is why – using the rhetoric of international law – both sets of rights are said to be inter-dependent, inter-operable and mutually reinforcing. This is easy to assert but very hard to get Governments to follow-through on. Why?

Well social engineering is a complex task. Unlike civil rights, the design of a social rights system requires flexibility, responsiveness and a fine balancing of competing calls for resources. In other words, the field is characterised more by discretion and not by hard legal rules. Whereas civil rights cut down democratic space (intentionally) social rights require an unhindered democratic space to re-allocate resources as needs arise. What this really means is that the prerogative the Executive branch to configure and continually re-configure social rights and their means of implementation has to be open-ended and bounded only at the extreme edges by the law. So, it is said, to allow for litigation in this field would allow the 'tail to wag the dog.' That is to say, opening up litigation would upset carefully calibrated balances that have been crafted with a broad spread of needs in mind. Social justice would - the argument goes - be hijacked by individuals interested only in justice in their individual circumstances – a sort of selfishness encouraged by litigation.

And a form of con-associational social democracy reigns supreme when it comes to the social model. That is to say, Governments and civil society organisations co-decide major policy questions - and have a long tradition of cooperation and not competition to do so.

This requires trust, confidence, mutual risk-taking by actors who together see the big picture. The argument runs that this delicate cloth that has been woven of decades of trust stands to be torn apart if the ethic of individualization that characterises litigation were allowed to side-track the process.

Besides which, to allow such litigation would breach the invisible wall separating Executive from Judicial powers – a sort of inappropriate jurisdictional grab by the courts. Even if the law were to explicitly grant courts such powers the Courts may well effectively decline the jurisdiction under a narrow and narrowing theory of the ‘separation of powers’ in order to preserve their own legitimacy – the so-called ‘passive virtues’ of the judicial remit.

### **3. Litigation: the ‘tail wagging the dog’ in the field of disability.**

Now, port all this over to disability.

One of the interesting things about disability is that it vividly demonstrates the truth in the adage that civil rights are inter-dependent on social rights. What's the point of having the formal freedom to work if the social supports are not there to facilitate the exercise of the right?

Allow me a slight digression. Many DPOs and NGOs asserted in the very first Ad Hoc Committee meeting that social rights were part of the problem and not necessarily part of the solution. What they meant by this is that, by and large, social models around the world just cemented into place the exclusion of persons with disabilities. Social largesse was used to ‘purchase the absence’ of persons with disabilities. The corrective finally adopted was to blend together civil and political rights with social rights and entitlements. It was made as clear as day that the autonomy and liberty rights of the person came first – and that social rights sub-served to make these civil rights real in a material sense. What a profound shift! The primary frame of disability is no longer welfare or social services but individual autonomy and liberty!

And pardon some jargon. The UN puts forward human right indicators usually divided into three categories – Substance (has Sweden ratified x treaty), process (what policy steps is

Sweden taking to implement its obligations) **AND** Outcomes (how do people actually enjoy their rights on the ground). The third is new. Fairly explicitly this is saying its not enough to trust systems (no matter how inclusive and responsive and well resourced). Everything needs to be checked against **Outcomes** – the ‘worm’s eye view’ and not just the ‘bird’s eye view.’ And litigation quite obviously is one way of advancing the checking value of an outcomes-focused approach.

One possible reverse spill-over of this hesitancy about the appropriateness of litigation with respect to the social model here in the Nordic countries may well have been an undue hesitancy with respect to even the enforcement of civil rights. Although your civil rights are specified by law, litigation is sometimes not deemed the most appropriate way of challenging whether these rights are in fact respected. I am not in a position to say if this cross-contamination has in fact occurred here. But if it did then this is a clear violation of the rule of law in my view. Indeed, one thing many people forget is that there has to be a legal underpinning to the spread of social rights and entitlements. The social sphere is no less legalised than the civil sphere. To seek legal solutions through litigation in the social sphere is little different to the civil sphere at least from the theory of the rule of law.

Interestingly, the bridge between civil and political rights (apart from one set underpinning to the other) is equality. I look at this as a humble lawyer – seeking equal treatment between people with disabilities and others in the enjoyment of specific rights. The UN CRPD Committee has just published a much more sophisticated theory of inclusive equality in the General Comment on Equality. But lets just stay for the moment on a simple conception of equality that just seeks to highlight unjustified un-equal treatment and to reverse it.

#### **4. The Many Values of Litigation - underpinning a social model.**

I do not think the ‘tail will wag the dog’ if litigation is more openly welcomed. Why not?

Take **interdependence** of both sets of rights. Constitutional scholars have long denounced what is called ‘unconstitutional conditions.’ If a State cannot directly chill a civil right it might be tempted to do so by rigging access to social entitlements. The case that instantly

comes to mind is a Collective Complaint we entertained in Strasbourg on the housing rights of the Roma. True, they had their housing units. True they were in sufficient quantity. But guess what – they were located atop a local authority rubbish dump. In other words, the underlying motive in placing the housing on a dump was to humiliate, stigmatise and discriminate. You can expose this – or rather you can best expose this – by taking a case. If not allowed to do so then this form of perfidious discrimination would probably remain hidden.

I think there is a valuable lesson here for disability. We are all expected to be thankful for whatever supports and services are put our way. And we are. But sometimes the conditions that attach rankle. There may well be a deep logic but in the absence of litigation there seems little realistic opportunity to challenge that logic and to have these conditions removed or altered.

Take **Equality and non-discrimination**. Very often – I would say in a clear majority of cases – the real problem is not so much the effective denial of a right like inclusive education. Very often the real problem is the lack of equal treatment with respect to that right.

Usually differential treatment emerges because disability is siloed and one consequence is that a different kind of policy imperative relative to the mainstream takes over. The result is a segregated structure and system and an implicit acceptance of its exclusionary effects. That legacy lasts a long time and is almost impervious to criticism and change. To allow individuals to challenge this structure through the equality/non-discrimination frame has many positive advantages – for both the State and the individual.

It exposes unjustified differential treatment. It places the State at a different vantage point – one where it acknowledges that differential treatment has evolved and the need to undo its legacy. Bear in mind, that powerful interests may indeed have evolved to keep the status quo in place. In normal democratic politics it might be difficult to re-pivot the system. But the prodding of a court ruling is often enough to break the logjam. What this leads to is an understanding of the importance of systems re-design. In a way litigation expresses a theory of justification - the need to rationally justify existing structures and systems.

To my point about **vested interest groups**. We had an unusually interesting Collective Complaint against a country on the slow rate of accommodation of children with autism in the relevant education system. When pressed the Agent for the Government conceded that it take the country 120 years to catch up on its own plan. Case over!!! More interestingly, we heard later the Government was delighted because they wanted to move faster but were been held by by some vested interests. I have often wondered to what extent (probably a considerable extent) the public interest is prone to become captured by entrenched private interests. To this extent, believe litigation serves to create a clearing for a much more logical unpacking of the public interest which is after all about individual outcomes.

**And to my point about systems-change.** I just love the Olmstead case in the US Supreme Court – decided a full 19 years ago. The Court explicitly conceptualised segregation in an institution as a form of discrimination contrary to domestic anti-discrimination legalisation. Think about this. By the way, no European Court has so far followed suit.

My point is what this decision triggered in terms of systems-change. First, the US Department of Justice put in place a team to ‘enforce’ Olmstead against recalcitrant States. Many ‘settlements’ were reached whereby certain States agreed to initiate a process of deinstitutionalisation. Secondly, a new Federal Agency was set up to bring together disparate strands of existing Federal funding to more effectively assist States in their DI strategies (the Administration for Community Living). It is highly unlikely that this would have been done without the Supreme Court decision. The decision itself was finely calibrated (maybe a bit too finely calibrated) to the competing social and financial responsibilities of the States. This aside, it still had (and still has) a powerful driving effect in the evolution not just of policy but of flanking financial instruments. We can imagine new policies - but shifting how monies are spent is notoriously difficult. In a way the case broke the logjam and forced a completely novel approach to funding community living. Not perfect to be sure - but something that might have taken much longer without the Supreme Court.

Ah, finance. Presumably your Minister for Justice is listening – but so too is your Minister for Finance. That gets to another added value of litigation. Have you ever noticed just how irrational many disability policies are in so many countries? This is no accident. If you already frame a topic or a group in a silo you are bound to make mistakes. These mistakes often cost the State dearly. Overlapping or competing programmes evolve -possibly from different Ministries. The individual - the person who experiences the actual Outcomes – is often caught in the middle. Sometimes they will be caught on the horns of a dilemma – be honest and dis-entitle yourself or to lie about your assets which only generates cynicism. And you've probably noticed that in many parts of Europe the individual will have to impoverish themselves (offload assets) to remain entitled to programmes. Of course, the more you impoverish yourself the more you need and the larger the State intervention and the more passive the individual. A vicious circle worthy of Kafka. Rationality and cost efficiency in other words is not necessarily a key function of disability policy. Litigation exposes these failings and often in a way that a hearing before a Parliamentary committee cannot.

Interrogating the rationality of programmes, the perversity of outcomes and the damaging impact in lives is exactly what the equality/non-discrimination ideal seeks to achieve. You will notice that this is mostly about relativities - how disability is treated relative to others. At times litigation goes beyond this. A times it sinks into the substance of a right and inquires whether, e.g., the resources allocated are adequate. This is rare in litigation which tends to focus more on relativities. But it does happen.

On this I would say two things. First of all, understandings of 'progressive achievement' have evolved and crystallised over the past two decades. This is not an open-ended standard - nor is it one that is biased toward the plaintiff. Secondly, what tends to count more than numerical figures are whether the material support realistically enables a person to live a life of dignity and autonomy. Something everyone takes for granted. A case in point. The English case of two sisters forced to sleep in their wheelchairs because of local authority cutbacks. The holding was to the effect that their dignity and personhood rights were violated. I believe this was a good framing of the underlying problem - which was under-funding of mission-critical services.

And what about when you lose? Curiously, when you lose you often win. Although a court might find itself constrained to hold against you that does not necessarily mean an endorsement of a policy. In fact it helps to highlight the policy and its perverse effects. Some issues are just hard to run up the political agenda. But if the public conscience can be pricked by even a negative court ruling (or maybe especially a negative court ruling) then this helps compensate for the relative political weakness of some civil society groupings. A classic case comes to mind. Even though the right to education is guaranteed in our Constitution as a species of socio-economic right our Supreme Court declined to enforce it on a theory that to do so would breach the separation of powers. A perverse ruling to be sure. But the setback only emboldened the activists - and resonated directly with the voters. The result, some pretty advanced inclusive education legislation and policies.

## **5. Some tentative conclusions.**

First, litigation, far from undermining your social model helps to refresh it and turns it towards the most important indicator - Outcomes for the individual.

Secondly, litigation is really about rationality and an ethic of justification. This is especially important in a field that has evolved haphazardly and episodically. Litigation helps to flush out that irrationality. It closely interrogates the confluence or otherwise of existing laws and policies. It closely interrogates whether there is a rational relationship between means and ends. It sometimes goes to the adequacy of resources but largely in a way that frames allocational discretion in terms of dignity and autonomy.

Thirdly, litigation can be seen as an aid to the democratic process - as a spur for reform especially where the interests groups lined up against are powerful and where the civil society voice is relatively weak. This is especially needed in the 21st century as we come to terms with the limits of a social model crafted in mid-20th century and as new opportunities present themselves to enable us to build on that model into the future.