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The Dog that Didn't Bark[1].

THE ISSUE OF ACCESS TO RIGHTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY DISABLED PEOPLE

Luke Clements and Janet Read[2]

1 Introduction

The influence of the European Convention on Human Rights (ECHR) has grown steadily since its adoption in 1950. Today its jurisdiction runs to 45 European states. The workload of its Strasbourg Court is no less impressive, with over 30,000 pending cases in 2002.[3] Its judgments span the entire spectrum of civil and political rights, dealing with issues such as murder, torture and disappearances as well as newspaper restrictions, sexual rights, unfair court hearings and property rights. These judgments have been highly influential in shaping the legislative codes of many countries.[4]

Although there is no current survey of the Court's activities (by reference to the subject matter of complaints), certain facts are readily apparent from the case list of past judgments. It is clear, for example, that the Art 6 right to a fair hearing attracts the highest number of complaints, followed by the Art 5 right not to be unlawfully detained. It is also clear that certain countries, including Italy, Turkey and increasingly Russia, appear with great frequency. These patterns are generally explicable. The high number of Art 5 and 6 complaints is probably due to the fact that they arise from situations already likely to involve lawyers who would generally be aware of the Strasbourg process. The high number of complaints made against Italy is due to particular problems relating to delay in Italian court proceedings; Turkey's frequent appearance is attributable to the activities of its security forces in the South-East of its country; and many of the complaints against Russia concern either unfair interferences with property rights or the problems in Chechnya.

What such a review suggests, is that the number of complaints generated bears no direct relationship to the severity of the human rights violation involved, and that certain complainants (for instance prisoners and litigants in the civil justice process) make a disproportionate number of the applications. Such a review also suggests that certain groups, like the sound of Sherlock Holmes' infamous dog, are notable by omission. Only

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[1] '"Is there any point to which you would wish to draw my attention?" – "To the curious incident of the dog in the night-time." – "The dog did nothing in the night-time." – "That was the curious incident," remarked Sherlock Holmes. [*Silver Blaze*, Sir Arthur Conan Doyle].

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[3] Council of Europe (2003) *Survey of Activities 2002* available at www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf

[4] See, for UK examples, the Mental Health Act 1983 and the Children Act 1989.

a handful of judgments, for instance, concern the rights of disabled people. Few text books give space to an analysis of disabled peoples rights under the Convention and few monographs have addressed this question.[5] Whilst the dearth of learned papers may be partially explained by the dearth of reported cases, the absence of significant numbers of complaints by disabled people is curious, particularly given that there is substantial evidence of the violation of their human rights.[6] It has been established, for instance, that the deaths of many disabled babies have been deliberately caused or hastened, even since the Convention, by 'selective non-treatment' or by the withholding of food and essential medical treatment.[7] There has also been long-standing concern over discriminatory assumptions underpinning the withholding of medical treatment from some disabled adults.[8] There has been growing recognition of the fact that both disabled children and disabled adults have been vulnerable to abuse and to unwarranted restriction of their liberty.[9] Many have been routinely separated from family, friends and community.[10] Unlike those living without impairments, they have been unable to take for granted their home or their social and personal life.[11] Many are left without any means (whether formal or informal) of communicating their preferences or their dissent.[12]

The Convention, then, would appear to have immense relevance to disabled people. It would provide them with a means of enforcing rights such as the right to life and to protection from abuse; the right to access to justice; the right to privacy and to a family life; the right to freedom to receive and impart information; and the right to associate and assemble. Why then, has such potentially fertile ground not been cultivated by disabled people? In this chapter we argue that the low profile of disabled people in the Convention case law is not because Convention rights have no relevance to disabled people. The problem lies, rather, in the difficulty they experience in accessing them.

2 The Issue of Access

Responsibility for the dearth of cases can, in large measure, be placed at the door of the usual culprits; the physical, social and economic barriers that prevent disabled people from exercising their rights. Some of these barriers to access are embedded in the circumstances in which many disabled people live their lives. Some are related to the

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[5] See, eg L Clements and J Read, *Disabled People and European Human Rights* (Bristol, Policy Press, 2003).

[6] See generally L Clements and J Read, ibid.

[7] See generally R Weir, *The Selective Non-treatment of Handicapped Newborns* (New York, Oxford University Press, 1984); and I Kennedy, *Treat Me Right. Essays in Medical Ethics* (Oxford, Clarendon Press, 1988).

[8] See, eg A Asch, 'Disability, Bioethics and Human Rights) in G Albrecht, K Seelman and M Bury (eds), *Handbook of Disability Studies* (London and Thousand Oaks, Sage Publications, 2001).

[9] H Westcott, *Abuse of Children and Adults with Disabilities* (London, NSPCC, 1993); Department of Health and the Home Office *No Secrets: Guidance on Developing and Implementing Multi-agency Policies and Procedures to Protect Vulnerable Adults from Abuse (*London, Department of Health, 2000).

[10] J Read and C Harrison, 'Disabled children living away from home in the UK: recognising hazards and promoting good practice' [2002] 2 *Journal of Social Work* 211-31.

[11] M Hirst and S Baldwin, *Unequal Opportunities (*London, HMSO, 1994).

[12] P Russell, *Having a Say! Disabled Children and Effective Partnership in Decision Making* (London, Council for Disabled Children, 1998).

unresponsiveness of the law, the judiciary and the practicalities of enforcement mechanisms to the needs and rights of disabled people.

Taking action to gain redress for a grievance always requires knowledge, support, confidence, energy and staying power. Due process is complex and frequently time-consuming. Worthwhile outcomes cannot be guaranteed. These issues, problematic enough in any circumstances, are likely to be magnified for many people with impairments. Disabled people often live in circumstances which are poorer, and more constraining and limiting than those of their non-disabled peers.[13] It is not uncommon for many to have faced years of stress, exhaustion and poor health without adequate support. In such circumstances it may well be difficult to exercise even a limited degree of autonomy and choice or to carry out activities regarded by the general population as ordinary. Embarking on the complex, taxing procedures attendant on bringing a challenge under the Convention would be regarded by many such disabled people as impossible. Research suggests that some disabled people feel ill-equipped to make complaints in the standard way and that they are often fearful of the possible negative consequences of voicing dissatisfaction. One important study into social welfare complaints procedures and people with learning difficulties [14] found that 'fear of the consequences' was 'by far the most commonly cited reason for not making formal complaints'. In short, the barriers disabled people face in their daily lives are complex and multi-layered.

Further, some disabled people will lack the intellectual capacity to make decisions about issues which fundamentally impact on their human rights. Such people are among those who are most at risk of human rights violations. They will often require another to act on their behalf. The fact that no appropriate person may be available to take on this role, and the very ambiguity of the law on representative action, undoubtedly constitutes an additional barrier in the way of their access to rights.

Whilst these particular types of barrier may help to explain the dearth of complaints brought by disabled people, they do not explain the reluctance of the Court and Commission to entertain sympathetically the few such complaints that do reach them. Other barriers reside within the judicial process itself.

Problems of access are of course, not unique to disabled people, and the Strasbourg Court has long accepted that human rights are of little value if inaccessible. Implicit within the Convention process, is the existence of the 'right of access' to the courts and other bodies able to provide redress. Whilst the Court has, in general, robustly challenged inappropriate barriers to the judicial process,[15] it has not done so where the barriers in question have affected disabled people specifically. *Skjoldager v Sweden*[16] is a good illustration of this point. The applicant, a psychologist, visited a care home for people with learning disabilities where he found a number of residents unlawfully locked in their rooms. Following his report, action was taken which eventually resulted in the removal of the locks. He was, however, denied further access to the residents. Where unlawful detention of this nature has occurred, Art 5(5) requires that compensation be paid. Because none was offered to the residents, the applicant complained to the

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[13] See, eg C Barnes, *Disabled People in Britain and Discrimination* (London, Hurst and Company in association with the British Council of Organisations of Disabled People 1991).

[14] K Simons, *I'm Not Complaining, but …(*York, Joseph Rowntree Foundation, 1995).

[15] See, eg, in relation to prisoners rights, *Golder v UK* (1975) 1 EHRR 524.

[16] (1995) 22504/93.

European Commission. He did so in a representative capacity, but in his own name because the municipality had refused to provide him with the names of the residents (who were incapable of lodging the complaint themselves). The case was rejected on the ground that the applicant had no specific authority to make the complaint. The residents were, therefore, effectively outside the protection of the Convention.

Malone v UK[17] raises similar issues. Mandy Malone, a wheelchair user, was the defendant in possession proceedings relating to her council house. Her request that these be heard in a court near to her home was refused. Consequently, in order to reach the court, she had to leave home at 4.30 am and undertake a 950 kilometre round trip. As a result, she was confined to her bed for four days and required medical assistance. Her complaint related to the unfairness of the process and the inaccessibility of the court building (she had to be carried up the steps of the court and experienced 'excruciating discomfort' due to the lack of suitable toilet facilities). The Strasbourg complaint was rejected on the grounds that she had 'failed to appropriately bring to the attention of the court her difficulties'.

3 Judicial Indifference

Why is it, then, that the courts are prepared to be robust in their defence of the rights of prisoners but not of institutionalised people with learning disabilities? Why is it that the Courts view disability as something that administrators need address only if forewarned; if, in effect, 'booked in advance'? Given that there are in the region of 8,600,000 disabled people in the UK, and given the extent of concern about the possible abuse and human rights violations to which they may be exposed, the lack of sympathy typified by the *Skjoldager* and *Malone* decisions is deeply troubling. It is simply inconceivable that the court would have responded to a complaint concerning a prisoner held *incommunicado* in the way that it responded in *Skjoldager*. It is simply unacceptable that the court should respond, as it did in *Malone,* by requiring disabled defendants to submit, in effect, to trial by battle; to litigate the able bodied way, without becoming drained, without requiring rest and without requiring a toilet.

There are various possible explanations for these leaden judicial responses. One might suggest that judges do not consider disabled people to be 'ripe for freedom'[18] in the same way that slaves, serfs, southern blacks and women were once thought not to be ripe for it. It would be pleasing if this suggestion could simply be dismissed out of hand, but the failure of the courts to conceptualise disability in any meaningful way, or to grasp any notion of what it feels like to live with the impairment and the social stigmatisation and exclusion that accompany it, does have throw backs to such unfortunate times.

4 Conceptual barriers

It may be, however, that the judicial misperceptions, or misconceptions, are altogether more jurisprudential in nature; that somehow human rights are not seen as relevant to disabled people. It is undoubtedly the case that disabled people have sometimes been considered by more powerful others as not entitled to full and automatic membership of the category of 'human'. They have sometimes been denied 'personhood' and been

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[17] (1996) 25290/94.

[18] AW Wood and G Di Giovanni (eds), *Kant Religion Within the Boundaries of Mere Reason and Other Writings* (Cambridge, Cambridge University Press, 1998).

construed as having less value than those who are not disabled.[19] There have been times when the results of this approach have been catastrophic, both for individual disabled people and for disabled citizens as a group.[20] When (as a result of active intent, neglect, or ignorance) certain individuals or groups are denied the status of 'human', *on the same terms as their peers*, the rights which accompany that status are also likely to be denied them. This tendency to regard disabled people as 'other', to place them in a separate category, may go some way towards explaining the failure of lawyers to articulate human rights in a language that renders justiciable[21] such concepts as a fundamental right to inclusion within society's mainstream institutions and processes, to independence and to a non-disabling personal and social environment. It might also help to explain the dearth of academic contributions in this field; the so-called 'silence of human rights scholars'[22]

Disabled people are often viewed, even by some of those who do not dehumanise them in the sense just outlined, primarily as recipients of health and welfare services rather than as citizens with the same rights as others. Indeed, the conflation of disabled people's rights with socio-economic and collective rights may have done much to obscure the central relevance of the Convention to them. This is not, of course, to deny the importance of socio-economic rights to disabled people. They, in common with other socially marginalised and disempowered groups, have need of decent public housing, of income support, and of health and social care services. This means that the European Social Charter, and many other socio-economic treaties, have particular significance for disabled people. It does not mean, however, that the European Convention on Human Rights, or any other civil and political rights treaty, will have diminished significance for them. Many lawyers are in danger of perceiving (albeit subliminally) a trade-off in this domain; a trade-off between services and civil rights. In return for services, on this view, the recipient would either relinquish certain human rights or, at least, cease to be in such immediate need of them. If this is indeed the case, then it constitutes a further, profoundly disabling, barrier in the way of people with impairments.

Whilst the problems of conceptualising disability in the language of the convention should not be underestimated, the difficulty lies primarily in the lack of vision of those who doubt or deny its applicability. Magna Carta was not undermined by the fall of feudalism, nor the Bill of Rights by the abolition of slavery, nor the US Constitution by the Supreme Court's ruling against racial segregation in education.[23] Nor has the Convention been devalued by its championing of the rights of women and racial minorities, or those of gay and lesbian people. The recognition of civil and political rights in these new domains has required vision. It has challenged established modes of communication, requiring the language of 'justiciable rights' to be used in new ways to accommodate new paradigms and create new conceptual vehicles.

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[19] S Vehmas, 'Discriminative assumptions of utilitarian bioethics regarding individuals with intellectual disabilities' [1999] 14 *Disability and Society* 37-52.

[20] See, eg A Shearer, *Everybody's Ethics* (London, Campaign for Mentally Handicapped People, 1984).

[21] See, eg Arai-Takahashi's analysis of the non-justiciable nature of such rights, in Y Arai-Takahashi, 'The Role of International Health Law and the WHO in the Regulation of Public Health' in R Martin and L Johnson (eds), *Law and the Public Dimension of Health* (London, Cavendish, 2001).

[22] A Hendriks, 'Disabled Persons and Their Right to Equal Treatment' in JM Mann, S Gruskin, MA Grodin and GJ Annas (eds), *Health and Human Rights* (London, Routledge, 1999).

[23] *Brown v Board of Education* (1953) 347 US 483.

These challenges have fundamentally reconfigured the grammar of the law and resulted in many memorable judgments condemning contemporary injustices. From such endeavours we have seen, within the last 50 years, the courts conceptualising (in the language of the law) principles such as 'separate but equal', 'indirect discrimination', 'positive obligations' and 'legitimate expectation'. These concepts have emerged slowly, been highly contested and, as a result, undergone continual refinement. In relation to the rights of disabled people, there is clearly still a long way to go. In the last twenty years, in both the formal and the grey literature of disabled academics and activists and their supporters, emphasis has been increasingly placed on the discrimination faced by disabled people as well as on the social and political factors which inhibit their equal opportunities and full participation. With the development of the 'social model of disability', disability rights activists have increasingly identified themselves as citizens who are routinely prohibited from exercising their civil and human rights.[24] The identification of disability as a human rights issue has, nevertheless, been slow to find effective expression within the law. It is, however, not only in relation to the rights of disabled people that there continues to be a struggle to translate political concepts into legal language

Wexler's[25] classic articulation of the failure of 'black letter law' to tackle the injustices experienced by poor people, for instance, remains valid today and has much resonance for other marginalised groups (including disabled people):

> Poor people are not just like rich people without money. Poor people do not have legal problems like those of the private plaintiffs and defendants in law school casebooks. … Poverty creates an abrasive interface with society; poor people are always bumping into sharp legal things. The law school model of personal legal problems, of solving them and returning the client to the smooth and orderly world in television advertisements, doesn't apply to poor people.

The fact that Strasbourg continues to have profound difficulty in identifying and addressing state responsibility for discrimination against disabled people is, likewise, not an affirmation of the inappropriateness of the medium but, rather, a failure of imagination. It represents a failure of advocates and judges to find a new way of expressing the language of the Convention. The fact that Art 14 does not specifically include disability as an example of a ground of unlawful discrimination is a consequence of a lack of vision on the part of the drafters of the Treaty; it is not proof that discrimination on grounds of disability is intrinsically different from other forms of discrimination.[26] The Convention is similarly silent on the rights of children and gay and lesbian people, but this has not prevented the Court developing a jurisprudence which identifies, articulates and attempts to remedy the injustice they experience.

The very difficulty of articulating these disparate manifestations of injustice in the restrictive language of the Convention is what ultimately maintains its relevance as a

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[24] See, eg M Oliver, *The Politics of Disablement* (London, Macmillan, 1990); and J Morris, *Accessing Human Rights: Disabled Children and the Children Act* (Barkingside, Barnardos, 1998).

[25] S Wexler, *Practising Law for Poor People* (1970) 79 Yale Law Journal 1049.???Start page as well as page of quote??

[26] There has, however, still been no Court finding of a violation of Art 14 on grounds of disability and in *McIntyre v UK* (1995) [29046/95; 21 October 1998] the UK Government refused to accept that disability was a 'status' protected by Art 14.

'living instrument'. Noam Chomsky in his essay on 'Language and Freedom'[27] argues that limitations within language and its principal structures reflect deeper 'restrictive attributes of the mind'. Far from regarding this as a negative characteristic, however, he argues that it is ultimately liberating:

> There is no inconsistency in the notion that the restrictive attributes of mind underlie a historically evolving human nature that develops within the limits that they set; or that these attributes of mind provide the possibility for self-perfection; or that, by providing the consciousness of freedom, these essential attributes of human nature give man the opportunity to create social conditions and social forms to maximize the possibilities for freedom, diversity, and individual self-realization.

5 Analogous Struggles

For all its 'restrictive attributes', the Convention (like other civil and political rights instruments) has retained its relevance through its repeated application to new domains of injustice. It is, to use the jargon of the Strasbourg Court, a 'living instrument' which develops new principles and conceptualisations in order to address contemporary ills. Accordingly, the analogous struggles of other socially oppressed groups, such as Roma, gay and lesbian people, have produced a jurisprudence which may be adapted to serve the needs of disabled people. In applying such jurisprudence in a disability context, however, the Court should take care, on the one hand, to refrain from adopting a generic or formulaic approach which does not reflect the distinctiveness of the experiences of disabled people and, on the other, to recognise the many common themes running through the testimony of socially stigmatised people. J Sachs expressed this dilemma, in the context of the struggle of gay and lesbian people for equal status in South Africa, as follows[28]:

> Human Rights are better approached and defended in an integrated rather than a disparate fashion. The rights must fit the people, not the people the rights. This requires looking at rights and their violations from a person-centred rather than a formula-based position, and analysing them contextually rather than abstractly.

It is not only from the injustices experienced by gay and lesbian people that disabled people may draw useful parallels. The struggle by Roma to persuade the Court to appreciate their 'untouchable' status has also resulted in the tentative development of a language of exclusion which can be 'read across'. In this discourse, Roma have focussed on the incremental nature of the socio-legal restrictions confronting them. This has been described by Jean Pierre Liégeois[29] as 'an accumulation of handicaps'; the layer upon layer of social and administrative regulation, individually innocuous but cumulatively fatal. Judge Pettiti, in *Buckley v UK,*[30] expressed the oppressive nature of this socio-legal process in the following terms:

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[27] TriQuarterly nos 23-24 (7) 52 (Evanston, Northwestern University Press, 1972) .

[28] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) South African Constitutional Court - CCT11/98: 9 October 1998; 1999 (1) SA 6 (CC); 1998 (1) BCLR 1517 (CC) para 112

[29] Gypsies and Travellers, J-P Liégeois (1987) Council of Europe, p 111.

[30] (1996) 23 EHRR 101 at 137

> The Strasbourg institutions' difficulty in identifying this type of problem is that the deliberate superimposition and accumulation of administrative rules (each of which would be acceptable taken singly) result, firstly, in its being totally impossible for a Gypsy family to make suitable arrangements for its accommodation, social life and the integration of its children at school, and secondly, in different government departments combining measures relating to town planning, nature conservation, the viability of access roads, planning permission requirements, road safety and public health that, in the instant case, mean the Buckley family are caught in a "vicious circle".

6 Judicial Recognition

It would be misleading to suggest that Human Rights Courts have not even begun to assemble the vocabulary and legal principles from which a jurisprudence of direct relevance to disabled people might eventually be constructed. In *Olmstead v LC,*[31] for instance, the US Supreme Court was prepared to conceptualise the disparate rates of institutionalisation of disabled and non-disabled people in terms of unlawful discrimination. It held that

> Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life' and that 'institutional confinement severely diminishes individuals' everyday life activities.

Some very positive developments also emerge from a handful of Strasbourg judgements. The most important of these is *Botta v Italy,*[32] in which the applicant (who had physical impairments) complained that he was unable to use the beach in his holiday destination due to the lack of access ramps and specially equipped toilets. He alleged that this was a breach of Italian law and, when this claim failed, that it also violated his human rights. His argument involved transporting the language of the Convention (in that case, Art 8) into the territory of the social model of disability; a 'reading across' which the Court was able to understand and willing (but only in principle) to accept. It held that the Art 8 concept of private life 'includes a person's physical and psychological integrity'[33]; and that this integrity is protected in order to 'ensure the development, without outside interference, of the personality of each individual in his relations with other human beings'.[34] Further, it ruled that[35]:

> While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves …

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[31] [1999) 527 US 581 119 S.Ct. 2176 (1999) at 2187.

[32] (1998) 26 EHRR 241.

[33] Ibid para 32

[34] ibid

[35] ibid

In *Price v UK*[36] (a case concerning the summary imprisonment of a Thalidomide impaired applicant), the Court was prepared to accept the uniqueness of a disabled persons' experiences and, consequently, indicated that treating them in the same way as a non-disabled person might well amount to degrading treatment under Art 3. According to Judge Greve[37]:

> It is obvious that restraining any non-disabled person to the applicant's level of ability to move and assist herself, for even a limited period of time, would amount to inhuman and degrading treatment – possibly torture. In a civilised country like the United Kingdom, society considers it not only appropriate but a basic humane concern to try to ameliorate and compensate for the disabilities faced by a person in the applicant's situation. In my opinion, these compensatory measures come to form part of the disabled person's bodily integrity.[38]

7 Judicial caution

Botta and *Price,* then, are cases in which the Court has been willing to listen and to recast its jurisprudence to accommodate the experiences of disabled people. As we noted at the beginning of this chapter, however, there are many cases in which Strasbourg has not been so amenable. Two recent cases, which presented the Court with opportunities to develop its nascent jurisprudence in this field, call for specific mention.

Zehnalová & Zehnal v Czech Republic [39] concerned the inability of the disabled (first) applicant to enter a large number of public buildings in her home town because of their inaccessibility to people with impaired mobility. The Applicant sought to apply the Botta principles in the concrete environment of her home town. The Court, however, ruled the complaint inadmissible, observing that[40]:

> Article 8 of the Convention cannot be taken to be generally applicable each time the first applicant's everyday life is disrupted; it applies only in exceptional cases where her lack of access to public buildings and buildings open to the public affects her life in such a way as to interfere with her right to personal development and her right to establish and develop relationships with other human beings and the outside world.

In the Court's opinion, then, although the State might have a positive obligation to ensure access to certain buildings, this particular complaint was 'too broad and indeterminate'. Had it wished to be imaginative, it could have developed the reasoning of Pettiti in the *Buckley* complaint and acknowledged that Mrs Zehnalova had been confronted by an accumulation of barriers and been subjected to a form of discrimination which was many layered. Such an approach would have allowed the Court to abandon its traditional search for a discrete and dramatic interference with a Convention right in favour of a new analysis that enabled it to respond to incremental injustices of the type in question. Indeed, the Court already has such a tool in the form of the principle of proportionality.

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[36] (2001) 34 EHRR 1285.

[37] Ibid at 1296

[38] From the concurring opinion of Judge Greve.

[39] (2002) Application no 38621/97.

[40] Ibid at page 12.

Sentges v Netherlands[41] is equally disappointing. The applicant (aged 7) was described as 'unable to stand, walk or lift his arms, and his manual and digital functions [were] virtually absent' so that, 'for every act he [needed] or [wished] to perform, including eating and drinking, he [was] completely dependent on assistance from third persons'. A request (endorsed by a rehabilitation specialist) for a robotic arm that would enable him to perform many basic functions unassisted, was refused by the authorities on financial grounds. Although the cost of the arm was substantial (€10,900 per annum), its purchase would have resulted in savings in other aspects of the care package.

Sentges presented the Court with an opportunity to develop the principles underlying the proportionality rule. On such extreme facts, the striking of a fair balance between the positive obligations inherent in Art 8(1) and the legitimate aims identified in Art 8(2) requires, if not a new dimension to the analysis, then at the very least a more sophisticated assessment of the competing claims. What is at stake is not mere discomfort or inconvenience but the very possibility of having meaningful relations with other human beings. In such cases, compensatory measures of this nature must form (to cite Judge Greve in *Price v. UK*) part of the disabled person's bodily integrity. Instead of analysing the extent and character of this obligation the court hid behind the discredited principle of the 'margin of appreciation'[42]. In its view, even if this was an exceptional case in which it could be argued that Art 8 might require positive state action[43]:

> regard must [also] be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole' especially when 'the issues involve an assessment of the priorities in the context of the allocation of limited State resources.

No one can sensibly disagree with this statement, but it does beg a number of questions: How is the balance to be struck? Is the process by which this balance is struck a legitimate concern of human rights law? Regrettably, the Court in *Sentges* had neither the vocabulary, the vision nor the humanity to conceptualise the applicant's predicament in terms of civil and political rights. As Lord Lester has observed, 'the court now appears to use the margin of appreciation as a substitute for coherent legal analysis'.[44]

8 Conclusion

In this paper we have endeavoured to identify the reasons why so few disable people have sought the protection of the European Court of Human Rights; why so few disabled people have sought to articulate the injustices they experience in the language of civil and political rights. The multi-layered restrictions routinely experienced by disabled children and adults in many aspects of their lives are the focus of activity of disability rights organisations in Europe and elsewhere. Advocacy provision (including self-advocacy) and other similar services may prove useful in supporting and empowering disabled people to engage in the otherwise disabling process of litigation. The tangible restrictions which are embedded in the judicial system (physical barriers to courts, indifferent judges and unsympathetic institutions) also require attention from activists and those supportive of their endeavours.

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[41] (2003) Application no 27677/02.

[42] See, in particular, Lord Lester of Herne Hill *Universality versus Subsidiarity: A Reply [1998] 1* EHRLR 73-81.

[43] Ibid at page 7.

[44] Op cit.

Over time, there is hope that a combination of awareness-raising and enforcement will foster more benign institutional environments that anticipate and respond to the concerns of disabled people. Initiatives of this nature may also address some judicial misconceptions and thoughtlessness.[45] Addressing the broader conceptual barriers, however, will present a greater challenge. Ultimately this will require the development of a new jurisprudence, a new vocabulary and grammar, which describes the particular discrimination and social exclusion experienced by disabled people. This will require the voice of disabled people to be heard by the legal system. It will require lawyers, including judges, to comprehend how, in this particular corner of the Twenty-First Century, the oppression experienced by disabled people manifests itself in a myriad of crude and subtle forms.

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[45] The Judicial Studies Board of England and Wales has taken a very positive first step in this direction with the publication of *Equality before the Courts: A short practical guide for judges* (London, Judicial Studies Board, 2002).