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# Legal Activism in Swedish Labor Law

## Introduction

Can the American Critical Legal Studies movement (CLS), with its descendants, be seen as a philosophy of legal activism, making it possible to reduce economic imbalance in society? Adam Gearey scrutinizes this question in his philosophically challenging and meticulously referenced book *Poverty Law and Legal Activism*.<sup>1</sup> The book's purpose is to conduct a radical and creative reading of Marx, Heidegger, Du Bois (and others) and unite their theories with traditional Civil Rights Scholarship as well as American CLS theory. Gearey believes that this philosophical foundation can be used as a stepping stone for British grassroot movements, organizing around poverty and welfare (or what Gearey calls “the new left”).

In this paper, I draw on the idea of CLS as a philosophical foundation for legal activism. However, I will challenge Gearey's idea of legal activism as a natural part of “the new left” by showing how the development of legal activism in Swedish labor law has come to be used by the other side of the political spectrum, namely by neoliberal and right-wing intelligentsias. My ambition is to (from my position) expose an immanent problem in the contemporary rights-based activism that is flourishing in the Western World<sup>2</sup> by presenting the Swedish case. However, no concrete solutions to this Gordian knot will be provided. Instead, I want to point out a few of the complicated threads that the larger issue encom-

<sup>1</sup> *Poverty Law and Legal Activism – Lives that Slide Out of View*, Routledge, 2019.

<sup>2</sup> Kennedy, *Three Globalizations of Law and Legal Thought* pp. 65–73.

passes. My hope is to fuel the academic conversation about rights based activism and conflicting interests.

## Statement

First and foremost, let me be clear on where I stand. I fully support the idea of a community-based law, as a tool for social justice. Legal activism can achieve great things, and be a uniting voice for minorities and oppressed communities. However, I see a problem with the progressive development of the rights argument in courts – a dangerous progress that is very present in the Swedish legal system. I believe that the case based law that emerges from legal activism might result in a greater dependence on official authorities – which is the exact opposite to the activists original aim. Rights based legal argumentation and litigation cannot provide protection from arbitrary forms of oppression. In this paper I explain why I believe this is the case, through an analysis of a Swedish labor case (AD 2017 nr 23), which possibly will be granted leave to appeal before the European Court of Human Rights.

## The Theory and Method of Legal Activism

Progressive right and left wing activists share the same agenda.<sup>3</sup> They all want to challenge the social regime in the name of their group interests.<sup>4</sup> Accordingly they also share a common view on law's function and legal method. Contemporary doctrine recognizes four core values that unite legal activists regardless of their political affiliation. The classification, however, is my own.

- I. The basic idea of an *existing* “social regime” in society,<sup>5</sup> which is supported and controlled by the everyday anonymous “depersonalized” administrative apparatus that was built during the 20<sup>th</sup> century.<sup>6</sup>

<sup>3</sup> Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought* pp. 110–111; Kramer, *The People Themselves* p. 244.

<sup>4</sup> Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought* pp. 111.

<sup>5</sup> Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought* pp. 108–111.

<sup>6</sup> Gearey, *Poverty Law and Legal Activism – Lives that Slide out of View* p. 26.

- II. The idea that there are groups that (in one way or the other) *stand outside* of this “social regime”.<sup>7</sup> Furthermore, they are being abandoned by the administrative state. This idea is based upon the theory that the legal administration of everyday life has led to a streamlined society, which is supplanting groups that do not fit in the hegemony of the majority (e.g. blacks under the white supremacy, queers in the heteronormative society, poor living in the capitalist order, and believers in a secular world).<sup>8</sup> In this narrative, the concept of *identity* is central.<sup>9</sup>
- III. The will to challenge this order through legal activism.<sup>10</sup> Or as Gearey puts it: “The activism of radical lawyers was rooted in a response to the disabling clientistic relationship between the welfare authorities and the poor”.<sup>11</sup>
- IV. The idea that victory for the suppressed can be found through legal litigation.<sup>12</sup> Legal activists favor arguments based on the existence of *human rights* – such as the European Convention.<sup>13</sup> (What I call the “rights argument”.)

Of course, the big difference between the distinct activist groups lies within their ideological foundations. They represent fundamentally different ideological spheres.<sup>14</sup> In the forthcoming passage I will discuss how this in a broader sense affects the legal development. But first, a Swedish case that illustrates the impact of legal activism.

<sup>7</sup> Finchett-Maddock, *Finding Space for Resistance Through Legal Pluralism: The Hidden Legality of the UK Social Centre Movement* p. 31 and 37.

<sup>8</sup> Gearey, *Poverty Law and Legal Activism – Lives that Slide out of View* p. 29; Kennedy, *The Critique of Rights in Critical Legal Studies* pp. 181–183 and 206–208.

<sup>9</sup> Kennedy, *Three Globalizations of Law and Legal Thought* p. 66.

<sup>10</sup> Gearey, *Poverty Law and Legal Activism – Lives that Slide out of View* p. 29.

<sup>11</sup> Gearey, *Poverty Law and Legal Activism – Lives that Slide out of View* p. 29.

<sup>12</sup> Gearey, *Poverty Law and Legal Activism – Lives that Slide out of View* p. 30; Kramer, *Popular Constitutionalism* pp. 242–244.

<sup>13</sup> See H Andersson, *The Tort Law Culture(s) of Scandinavia* pp. 224–229, *Ansvarsproblem* pp. 544–542; *Ersättningsproblem* pp. 828–832 for a discussion on the development in Swedish tort law with regard to the influence of the ECHR.

<sup>14</sup> An easy way to reach this conclusion can be by comparing the values found on the websites of the activist groups. See for a couple of Swedish examples <http://centrumfor-rattvisa.se/om-oss/>, <https://crd.org/sv/var-historia/> and <https://manniskorattsjuristerna.se/om-oss/>.

## The facts of the midwife-case. AD 2017 nr 23

The facts of the case were as follows: A prospective midwife applied for work at various women's clinics within an (publicly controlled) administrative county. When applying, the midwife informed the employers that she was unable to participate in abortions because of her religious beliefs. Because of this, her applications did not lead to any employment. She filed a lawsuit against the Swedish county for direct and indirect discrimination under the Swedish Discrimination Act, as well as violation of the European Convention of Human rights article 9 (freedom of thought, conscience and religion), article 10 (freedom of expression) and article 14 (anti-discrimination). The Swedish Labor Court (which is the final court for employment cases in Sweden with representatives from both sides of the labor market) rejected her application in total. According to the opinion, her refusal to perform all work tasks could not be excused with reference to her religious belief. Consequently, the court found that no direct discrimination had taken place. When considering the indirect discrimination the court found that the employer had applied a standard that appeared to be neutral, but was especially unfavorable for people with a certain religion. Prima facie the midwife had been discriminated – albeit indirectly. However, according to the Swedish Discrimination Act, the court has to strike a balance between the “neutral” standard and purpose behind it. Furthermore, according to the act, the means to achieve the purpose must be *appropriate*.

The court found that the main purpose behind the standard was the welfare right to good healthcare.<sup>15</sup> The court further recognized that good healthcare is provided at the women's clinic under the supervision of the employer. According to the court, this means that the employer's supervisory authority<sup>16</sup> will represent both the limit and the scope of “good healthcare”. At a theoretical level, this indicates that the employer's prerogative cannot be separated from the individual's right to good healthcare. The scope of good healthcare and the limits of the employer's

<sup>15</sup> For a brief introduction to the historic development of good healthcare in Sweden see Zillén, Hälso- och sjukvårdspersonalens religions- och samvetsfrihet pp. 46–47. See also Wilhelmsson, Varieties of Welfarism in European Contract Law.

<sup>16</sup> For an analysis of the employer's right of supervisory authority in the concrete case, see Zillén, Vårdvägran – några arbetsrättsliga implikationer pp. 116–118.

prerogative are furthermore treated together in the opinion, as parts of the question of the midwife's work duty.<sup>17</sup>

In addition to this, one can notice that the "spirit of consensus"<sup>18</sup> also can be said to be one of the explanations behind the outcome of the case. With "the spirit of consensus", I am referring to the Swedish historical agreement between the unions and the employers, according to which work management and peace in the labor market was ensured through collective agreements.<sup>19</sup> The collective agreements are determinative of the individual employment contract.<sup>20</sup> The rationality of the consensus thus supplants the individual's claims of special treatment. Because of that, the Labor Court considered the applied standard for employment as a midwife (taking part in abortions) as both appropriate and necessary for achieving the purpose of good healthcare. Her application was rejected.

## The Labor Court's Unique Position and Its Methodological Implications

As mentioned above, Swedish labor law is based on a general idea of consensus between the labor market parties. The theory and practice is founded on an idea of mutual respect. For a long time unions and employers have had self-government as a common goal. Conflicts between the parties were resolved by collective agreements – leaving the parliament as a legislative body outside the power to regulate the employment market. When a dispute arises over the wording of the collective agreements, the Labor Court decides the case. Of course, this makes the Labor Court's opinions somewhat different from other final courts opinions. For example, when examining the midwife case, you immediately get struck by the many arguments and statutes that are jumbled up in the court's opinion. Moreover it seems like little or no attention is paid towards the hierarchical differences between distinct sources of law. The reason behind this, I believe, is found in the court's strong focus on dis-

<sup>17</sup> Hellborg, *Diskrimineringsansvar* p. 276, 323 and 328.

<sup>18</sup> In Swedish "samförståndsandan". It has also been translated to "The spirit of Saltjöbaden" in Schmidt, *Law and Industrial Relations* p. 13 and "The Swedish Labour Model" in Eklund, Sigeman and Carlson, *Swedish Labour and Employment Law* p. 15.

<sup>19</sup> See Glavå & Hansson, *Arbetsrätt* pp. 27–32; Källström; Sigeman & Sjödin, *Arbetsrätten – En översikt* pp. 16–25.

<sup>20</sup> See 1 kap 4 § medbestämmandelagen. (Collective Bargaining Agreements Act.)

pute resolution. The court seems to be more interested in conciliating the dispute before it, than providing greater legal certainty.

However, it is of interest to closer examine the arguments that the midwife raised, since they illustrate how (human) rights based argumentation is working in practice.

## The Midwife's Cause of Action

The midwife argued that the court should make an individual examination of a possible infringement of article 9, 10 and 14 of the ECHR. She argued that the harm she had suffered was not only to be regarded as discrimination according to the Discrimination Act, but also as individual violations of the ECHR.

She also claimed that article 9.1 in the convention draws a distinction between *freedom of religion* and *freedom of conscience*, and that the latter cannot be limited under article 9.2. Therefore it was tactically important for her to see religion and conscience as different types of human rights. But it was also important to base the argumentation on the ECHR, since the discrimination act is not specifically designed as a human rights-act. It is a (albeit EU-based) normal Swedish statute, guaranteeing protection from discrimination and identifying who's responsible. (The possibilities of compensation are also regulated.) Semantically, it is not formulated in terms of rights.

As already mentioned, the Labor Court did not concur with the midwife. With reference to the subsidiarity principle, none of the articles in the ECHR was further tested. The Swedish Discrimination Act was considered to harmonize with the convention. However, the Labor Court considered the convention indirectly when interpreting the discrimination act. (This was done in a very curious way – and can be seen as an expression of the polycentricism that contemporary legal culture is now influenced by. However, this subject goes beyond the scope of this article.)<sup>21</sup>

<sup>21</sup> Selberg & Sjödin, Den polycentristiska arbetsrätten pp. 13–46.

## The Role of “Outside” Ideological Intelligentsias in the Midwife Case

The midwife has since decided to petition the European Court of Human Rights, claiming that Sweden has violated article 9 of the ECHR by not giving her an opportunity to work as a midwife due to her Christian belief. She claims non-pecuniary damages.<sup>22</sup> The nonprofit Christian law firm “Skandinaviska Människorättsjuristerna”<sup>23</sup> is acting as counsel in the case. In turn, they are supported by the international lobby organization Alliance Defending Freedom (ADF).<sup>24</sup> The latter is an American Christian nonprofit organization working worldwide with the outspoken purpose to advocate for religious freedom and preserve “the right of people to freely live out their faith”.<sup>25</sup> According to their tax income form from 2018 they have used \$ 822 536 for “Human Rights Legal Work” last year, only in Europe.<sup>26</sup>

It is not yet<sup>27</sup> decided whether the European Court of Human Rights will grant leave to appeal or not. However, the prospects for raising the case for review are not bad – the case is unique and the situation has never been tested.<sup>28</sup> The purpose of this text however, is not to examine the substantial question of the case: Whether the midwife is entitled to invoke freedom of conscience<sup>29</sup> for the purpose of obtaining an em-

<sup>22</sup> See H Andersson, *Ersättningsproblem* pp. 614–628, for a discussion on the development of non-pecuniary damages in Sweden.

<sup>23</sup> Meaning “Scandinavian Human Rights Lawyers” in English.

<sup>24</sup> <http://www.adfmedia.org/files/GrimmarkBrief.pdf>. <http://www.adfmedia.org/News/PRDetail/9796>. <https://adfinternational.org/detailspages/press-release-details/sweden-faces-human-rights-problem>. <https://adflegal.blob.core.windows.net/international-content/docs/default-source/default-document-library/resources/media-resources/europe/linda-steen-v.-landstinget-i-j%C3%B6nk%C3%B6pings-l%C3%A4n/linda-steen-swe-den---robert-clark-interview.pdf?sfvrsn=6>.

<sup>25</sup> <https://www.adflegal.org/about-us>.

<sup>26</sup> <https://pdf.guidestar.org/PDF/Images/2014/541/660/2014-541660459-0b80fce4-9.pdf>.

<sup>27</sup> Fall 2019.

<sup>28</sup> The closest connecting cases are cases *Eweida and others v. U.K* and *R.R. v. Poland* no. 27617/04. (One can say that they differ a lot from the Swedish case.)

<sup>29</sup> See Moyns, *The Last Utopia* p. 18, on the notion of freedom of conscience as a “new” form of right, inviolable by the state.

ployment.<sup>30</sup> Instead, the rest of the article will be discussing rights based court activism in general. To me it is clear that the legal activism used by these conservative Christian organizations aims to take the Swedish law in hand – forcing it to take a turn towards a more pro-life direction. Further, this theme is closely connected to another issue, which Gearey examines in his book:

Is legal activism the right tool to use in the process of helping poor and reducing social and economic imbalance in society?

## The Rights Based Argument

When analyzing the case it is obvious that references to *human rights* play a central role in the midwives argumentation. The reason for appealing for a right, are of course many. On a technical level the rights based argument has many advantages, which are useful for legal activism. First and foremost, rights cannot be reduced to a mere “value judgment” stating that one outcome is better than another. It has both subjective and objective immanent components. (Given that facts are supposed to be objective and values subjective.)<sup>31</sup> This is manifested in the fact that only subjects can be entitled to human rights but the court is the forum where the rights should be realized. When the midwife claims that she has a human right to conscience, she argues that her subjective right objectively exists within the law. Further, rights are supposed to exist ontologically – both inside and outside of the juridical spectrum.<sup>32</sup> Kennedy has described this in a sharp way:

“In classic Liberal political theory, there was an easy way to understand all of this: there were ‘natural rights’, and We the People enacted them into law. After they were enacted, they had two existences: they were still natural, existing independently of any legal regime, but they were also legal. The job of the judiciary could be understood as the job of translation: translating the preexisting natural entity or concept into particular legal rules by examining its implications in practice.”<sup>33</sup>

<sup>30</sup> For an analysis of the question see Fahlbeck, *Barnmorskedomen – Politiken vann, juridiken förlorade* pp. 218–227; Zillén, *Conscientious Objection to Abortion in Sweden*. A commentary on the Swedish Labour Court Grimmark Case, AD 2017 nr 23.

<sup>31</sup> Kennedy, *The Critique of Rights in Critical Legal Studies* p. 184.

<sup>32</sup> Kennedy, *The Critique of Rights in Critical Legal Studies* pp. 184–186.

<sup>33</sup> Kennedy, *The Critique of Rights in Critical Legal Studies* p. 186.



This leads to the conclusion that the case does not consist of mere question of rule application.<sup>34</sup> The midwife argued that because of the lack of protection of her religious belief, the court should create a remedy for her violated right by rule-making.<sup>35</sup> In AD 2017 nr 23, one side of the conventional rights argument is legal, since it is based on the ECHR, which is part of the legal system (incorporated in the Swedish law). The other side is political and normative, since it alleges how the “outside” right should be introduced (by interpretation) in the legal system. She claims that the (both the Labor Court as well as the European) court’s role is to identify and protect her “outside rights” through the legal system. That should be a case, as a result of the fact that rights are neither mere value arguments nor entetites outside of the juridical spectrum. Technically, this is done by claiming damages. If the court should find the county liable, her right would be guaranteed.

Hypothetically, the next argument should be that the midwife’s group right (freedom of religion and freedom of conscience) is connected to the interests of the whole Swedish society. Please note though, that this is not explicitly stated in the case. However, it is not uncommon to hear legal activists saying that the very purpose of human rights is to serve as minority protection in the hegemony of the majority; in the long run this will deepen democracy.<sup>36</sup> This aligns to the above-mentioned list. Further, according to this view there is little difference between legal argumentation and legislative interpretation. They both serve democracy as a whole, and not agreeing on the value of rights makes you “wrong – rather than just selfish and powerful”<sup>37</sup>.

Rights are vague, indeterminate and flexible. The rights based argument can thus be used by almost anyone. The argument is available to all. It is clear that liberal, socialist as well as conservative intelligentsias can argue that their unique group interests should be recognized in law – which hopefully this case also shows. But by framing the group interest as a question of human rights, the activist will give the courts the power to decide whether they should be recognized or not. Do we want to de-

<sup>34</sup> Kennedy, *The Critique of Rights in Critical Legal Studies* pp. 185–187.

<sup>35</sup> AD 2017 nr 23 p. 25. ”I avsaknad av ett effektivt rättsmedel och för att undvika konventionsbrott, ska domstolen därför genom normutfyllnad skapa ett rättsmedel”.

<sup>36</sup> Epp, *The Rights Revolution* pp. 4–5; Jonsson, *Juridical Review and Individual Legal Activism: The Case of Russia in Theoretical Perspective* pp. 175–188.

<sup>37</sup> Kennedy, *The Critique of Rights in Critical Legal Studies* p. 188.

pend upon the good will of the adjudicators, when social injustice is to be reduced?

## Conclusion

In *Poverty Law and Legal Activism*, Gearey provides highly insightful analyzes of the philosophical foundations of legal activist work. The question of the lawyer's ethical role in society is of course of mayor importance to lift. An ethically conscious lawyer must, according to me, bear in mind the immanent vagueness of the rights argument. In all legal activism, one has to remind oneself of the risk of pushing the rights argument too far, as other groups, with other ideological interests based on other identities, may use it against the group you initially wanted to help. There is no sharp line between identity politics and institutional change of society.