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Legal capacity in international human rights law

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Chapter 5: Advancing legal capacity jurisprudence

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1. Abstract ⁴⁶⁹

This paper addresses the role of strategic litigation of the right to legal capacity of people with disabilities. It places legal capacity within international human rights law and sets out how it is particularly resonant in the context of disability where its withdrawal leads to arbitrary removal of rights such as right to property, healthcare decision-making, working and voting. The paper examines Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), a treaty which, at the time of writing, had been signed by all 27 Member States of the European Union (EU) and ratified by 18. In addition, the EU has acceded to the Convention, the CRPD being the first UN human rights treaty that has provided this

⁴⁶⁹ Parts of this article were presented at a disability litigation conference on 13 November 2009 at American University, Washington DC, organised by Disability Rights International and the Open Society Foundations. I wish to thank Michael Bach, Lycette Nelson and Gerard Quinn for their incisive comments on an earlier draft.

opportunity.⁴⁷⁰ The paper provides a review of European jurisprudence in the area of legal capacity and suggests that litigation can play a valuable role in highlighting the wrongs in guardianship systems, and opening up areas for advocacy and law reform.

2. The emergence of legal capacity as a right

Legal capacity is a construct which enables law to recognise and validate decisions and transactions which a person makes. Jurisdictions differ in their laws, but denial of legal capacity can mean that a person is stripped of the legal authority to make decisions about where and with whom to live, how to manage their own property and finances. Their rights to vote and seek political office are removed, as are their right to join political parties, trade unions and non-governmental associations. Marriage and parenthood are also compromised, as are transactions of an every-day nature: contracting with a utility company or mobile phone firm. Denial of legal capacity locks an individual out from accessing justice systems on an equal basis with others. Legal capacity therefore underpins the enjoyment of a range of fundamental rights.

Two approaches to legal capacity are still widespread in Europe,⁴⁷¹ despite their rejection by international human rights law. Both are based on the now increasingly questioned assumption that the right to legal capacity is dependent upon, or equitable with, requisite mental/functional capacity. The first is the status-based approach in which a medical diagnosis of a mental health or intellectual impairment forms the basis for removing legal capacity. The second is an outcome-based approach which utilises psychiatric assessments in order to cast doubt over the integrity of a person's decision-making process, seeking to prevent decisions which others deem bad or

⁴⁷⁰ See Article 44 of the CRPD which allows for “regional integration organizations” to accede to the Convention, a step which the European Union took on 23 December 2010.

⁴⁷¹ For more on the approaches, see Dhanda, A. (2007) “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future”, 34 *Syracuse J Int'l L & Com*, 429, and Keys, M (2009) “Legal Capacity Law Reform in Europe: An Urgent Challenge”, in Quinn, G. and Waddington, L. (eds) *European Yearbook of Disability Law*, Intersentia.

irrational from having a deleterious effect on the person or other people. Once legal capacity is deprived or restricted, the individual is placed under (what many jurisdictions call) guardianship, and decisions are made by a guardian. There are various forms of guardianship: partial (for example decisions can only be made in relation to the person's finances but the individual retains decision-making in other fields such as healthcare), or it can be plenary measure where all legally-relevant decisions are made by the guardian.

Legislation regulating legal capacity can be remarkably broad, allowing for the medical and judicial systems to work together to declare someone incompetent. For example, guardianship is available in Croatia on the basis that the adult "is not able to care for his or her own needs, rights and interests, or who presents a risk for the rights and interests of others".⁴⁷² No further guidance is given in law as to what these terms mean or how they are to be assessed.

The effect of these approaches has been to remove decision-making authority from people, rather than provide supports to those who may need such assistance. In Hungary, for example, research which the Mental Disability Advocacy Center carried out revealed that around 67,000 people are deprived or restricted of legal capacity and are "subject to significant, arbitrary and automatic deprivations of their human rights. These include a deprivation of their right to property, to work, to family life, to marry, to vote, to associate freely, and to access courts".⁴⁷³ Like many jurisdictions in continental Europe, guardianship is the Hungarian law's only legal response to people who require assistance to make decisions. Although legal reforms are taking place, the statute book does not yet contain alternatives such as supported decision-making (where a person or network provides tailored informational and/or interpretation/communication assistance in a structured way), advance directives (where an adult specifies her wishes now to plan for a future time in which she is unable to make such decisions) or powers of attorney (where an

⁴⁷² Section 159 of the Family Act (*Obiteljski zakon*, Official Gazette nos. 116/2003, 17/2004, 136/2004 and 107/2007), cited in European Court of Human Rights judgment of *Krušković v. Croatia*, judgment 21 June 2011, Application No. 46185/08, para. 13.

⁴⁷³ Mental Disability Advocacy Center (2007) *Guardianship and Human Rights in Hungary: Analysis of Law, Policy and Practice*, p. 6.

adult specifies a person to take decisions at a future time in which she is unable to make such decisions).

The research which has been carried out has suggested that guardianship laws are vague and broad, making it easy for someone to be deprived of their legal capacity.⁴⁷⁴ It is MDAC's experience that once a person has been placed under guardianship, access to justice barriers accentuate the difficulty for that person to apply to a court to regain their legal capacity. There are both legal and practical barriers, which interact with a person's impairment and by doing so "hinder their full and effective participation in society on an equal basis with others".⁴⁷⁵ The main legal barrier is that once deprived of legal capacity, courts view that person as lacking legal standing to bring cases, blocking the opportunity to initiate any legal action, including an action to have their capacity restored. Other legal barriers include the fact that a person's signature becomes invalid, so that a person is legally unable to grant a power of attorney for legal representation. Another is the excessively short time periods to file an appeal.⁴⁷⁶ Practical barriers include a lack of information about appeals and complaints processes, insufficient access to legal advice and representation, legal proceedings taking place without informing or involving the individual, and lack of adjustments in justice systems to accommodate a person's disability.

The functional approach differs from the status-based and outcome-based approaches because, unlike them, it does not label a person as wholly incapacitated or incompetent. Rather, it tests a particular function of a person (for example, making a bank transaction) and assesses whether a person can perform that function. The functional approach theoretically does not take into account the wisdom of the decision made,⁴⁷⁷ but in practice it may be all too easy for practitioners to attach a label of incompetence to a person with

⁴⁷⁴ See reports by Mental Disability Advocacy Center (2008) *Guardianship and Human Rights in Bulgaria*, and similar reports with regard to the Czech Republic, Hungary and Russia.

⁴⁷⁵ See Article 2 of the CRPD.

⁴⁷⁶ For examples of all of these issues, see the European Court of Human Rights case of *Shtukaturov v. Russia*, judgment 27 March 2008, Application No. 4009/05.

⁴⁷⁷ For a legislative example of this, see the English and Welsh Mental Capacity Act 2005. One of the five statutory principles listed in section 1 of the Act is that "A person is not to be treated as unable to make a decision merely because he makes an unwise decision."

whose decision they disagree. The approach recognises the need to establish safeguards to minimise the number of people whose decisions are made by others on their behalf (known as “substituted decision-making”); the length of time for which a person is subject to such a measure; and the potential for abuse. Generally, the emphasis is on ensuring that the least restrictive arrangement is put in place.

While the functional approach is an improvement conceptually over the status and outcome approaches to assessing mental capacity as a foundation for legal capacity, it is rooted in the idea that legal recognition of an other’s right to legal capacity is dependent on their demonstrating their rationality. “A sound mind in a sound body”, claimed John Locke in 1692, “is a short, but full description of a happy state in this World: he that has these two, has little more to wish for”.⁴⁷⁸ Twentieth century human rights discourse is faithful to this Enlightenment belief in human reason and rationality. The 1948 Universal Declaration of Human Rights proclaims that men are “endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.⁴⁷⁹ From this perspective, the grandparent of modern human rights law frames the individual as a singularly rationalistic entity, standing “as a person before the law”,⁴⁸⁰ but not necessarily one who is embedded within it or admittedly dependent on others. “This masterless man,” notes Gerard Quinn ironically, “this atom colliding in beneficial ways with other atoms – is rational”.⁴⁸¹

At the international level a significant rhetorical shift has been taking place, one which moves towards an embrace of autonomy, self-determination and support. The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) sought to close the gender differential in recognition before the law and in the exercise of legal

⁴⁷⁸ John Locke, *Some Thoughts Concerning Education*, 1692.

⁴⁷⁹ *Universal Declaration on Human Rights*, adopted by the UN General Assembly, 10 December 1948, Article 1.

⁴⁸⁰ *Universal Declaration on Human Rights*, Article 6.

⁴⁸¹ Gerard Quinn “Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD”, paper presented at a conference of the Harvard Project on Disability, 20 February 2010.

capacity.⁴⁸² It was twenty years later, in 1999, that the Council of Europe's Committee of Ministers issued what remains the most developed international law exposition of the functional approach to legal capacity. In a Recommendation entitled "principles concerning the legal protection of incapable adults" (itself quite a revealing title), the highest political body of the Council of Europe rejects the status-based and outcomes-based approaches in support of a functional approach in which decision-making ability is assessed according to the nature and point in time of the decision which needs to be made.⁴⁸³ The nature of the decision is important as a person may be able to understand information relating to a dental procedure or buying a loaf of bread, but not that related to heart treatment or buying an apartment. Point in time relates to fluctuating ability throughout our lives – all of us are sometimes more able than not to make certain types of decision, and the capability of people with certain mental health issues may fluctuate.

The 1999 Recommendation sets out a wish-list directed at European governments and is accompanied by an elegantly-drafted explanatory memorandum. Among the recommendations made in the document are that every effort should be made to put in place alternatives to restriction of legal capacity,⁴⁸⁴ as well as measures which allow people to plan for future incapacity.⁴⁸⁵ The document recommends that there should be no automatic removal of legal capacity. It is recognised that "different degrees of incapacity may exist and that incapacity may vary from time to time", the document states decisively that "a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned".⁴⁸⁶ It is of course very difficult to define such a "necessity", and to operationalise such a

⁴⁸² Article 15(1) of CEDAW accords equality to women before the law, and Article 15(2) goes on to set out a State obligation to "accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals." CEDAW, adopted by the UN General Assembly, 18 December 1979.

⁴⁸³ Committee of Ministers of the Council of Europe (1999), Recommendation No. R(99)4 on principles concerning the legal protection of incapable adults, adopted on 23 February 1999.

⁴⁸⁴ Committee of Ministers of the Council of Europe (1999), Recommendation No. R(99)4 on principles concerning the legal protection of incapable adults, adopted on 23 February 1999, Principle 2(4).

⁴⁸⁵ Recommendation No. R(99)4 (op cit), Principle 2(7).

⁴⁸⁶ Recommendation No. R(99)4 (op cit), Principle 3(1).

system which is based on protection of the self – a notion which is open to moral as well as legal objection. The 1999 Recommendation builds in safeguards to ensure that substituted decisions are taken as thoughtfully and humanely as possible, so that, “the interests and welfare of that person should be the paramount consideration”.⁴⁸⁷ Decisions should be made taking into account any current or previously-expressed wishes or desires of the adult.⁴⁸⁸ (There is nothing to prevent these wishes or desires to then be ignored by the substitute decision-maker: one of the weaknesses of the functionalist approach). The duration of guardianship or other such measure should be limited, the Recommendation insists, and reviewed on a change of circumstances.⁴⁸⁹

Although it has some intuitive appeal over the odious discrimination in the status-based approach and the value-laden outcomes approach, the functional approach is subject to critique from a number of fronts. The standard test of rationality, and its inherent limitations from a social and human rights model of disability is neither questioned or unsettled with this approach. The functional approach is sociologically counterfactual: most of us simply do not take solo decisions, especially important ones like where to live, which medical treatment to choose or where to go on vacation. To the extent that capability assessments are limited to how a human being performs on his or her own without supports, the functional approach is open to accusations of being disablist and sanist. It allows for a person with disability to be classed as incompetent and incapacitated – albeit limited in time and type of decision and with so-called safeguards. It has been shown that labelling a person as incompetent can contribute to stigma and result in deleterious outcomes.⁴⁹⁰

A finding of incompetence may end up being a self-fulfilling prophecy: we lose skills if we do not practice them. If other people take our decisions for us, we will become less talented at taking them ourselves. Stripped of decision-making authority, a person’s existence may become, as philosopher Jonathan

⁴⁸⁷ Recommendation No. R(99)4 (op cit), Principle 8(1).

⁴⁸⁸ Recommendation No. R(99)4 (op cit), Principle 9.

⁴⁸⁹ Recommendation No. R(99)4 (op cit), Principle 14.

⁴⁹⁰ See Brian Winick (1995) “The side effects of incompetency labeling and the implications for mental health law” 1(1) *Psychology, Public Policy, and Law*, 6.

Wolff puts it, mundane and dreary, in which “individual life becomes an epiphenomenon of other people’s decisions”.⁴⁹¹ This raises a question which is key as a matter of moral philosophy and as a matter of law, namely whether there is in practice a bright line between substituted decisions and supported decisions. This question is prompted by the adoption of the UN Convention on the Rights of Persons with Disabilities. The question is hardly one of theory; CRPD-inspired legal capacity law reform discussions are taking place in many European jurisdictions.⁴⁹²

3. UN Convention on the Rights of Persons with Disabilities

Legal capacity was fiercely negotiated by the Ad Hoc Committee which developed the text which was adopted as the CRPD by the UN General Assembly in December 2006.⁴⁹³ Article 12 has five paragraphs which will now be outlined. Paragraph 1 sets out the “right to recognition everywhere as persons before the law”, as well as the recognition that people with disabilities “enjoy” (not merely have) “legal capacity on an equal basis with others in all aspects of life” (Article 12(2)). This contrasts to the functional approach which removes a person’s legal capacity, at best for a certain transaction and a certain time. The suggestion that all people with disabilities should have legal capacity on an equal basis with others is a radical reframing of legal capacity, elevating the importance for States to ensure that laws respect the autonomy of people with disabilities and people with intellectual or cognitive disabilities and people with psycho-social (mental health) disabilities in particular. Paragraph 2 is phrased as a right, and no exceptions (based on, for example available resources or type or severity of impairment) are listed.

⁴⁹¹ Jonathan Wolff, “Cognitive Disability in a Society of Equals” in Eva Feder Kittay and Licia Carlson (eds) (2010) *Cognitive Disability and Its Challenge to Moral Philosophy*, Wiley-Blackwell.

⁴⁹² At the time of writing, MDAC is engaged in discussions with civil society organisations and/or governments in Bulgaria, Croatia, Czech Republic, Hungary, Iceland, Ireland, Latvia, Lithuania, Moldova, Poland, Portugal, Russia, Slovakia and Spain on legal capacity law reform.

⁴⁹³ For a history of negotiations on Article 12 of the CRPD, see Dhanda, A. (2007) “Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future”, 34 *Syracuse J Int’l L & Com*, 429.

To help put the right to legal capacity into practice, paragraph 3 sets out a State obligation to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” That people with disabilities “may” need support in exercising legal capacity is, at a basic level, no more than a universal sociological observation: everyone – irrespective of disability – may require some support in exercising their legal capacity. In summary, paragraph 2 rejects the default substitution model which has been imposed on people with disabilities and reframing legal capacity as a universal right. Paragraph 3 sets up a system of societal supports, a natural way which humans make decisions. In a very moving section, the Latvian Constitutional Court stated in the context of legal capacity that “the right to private life means that an individual has the right to their own private space and the right to live as they choose and enjoy personal development with minimal interference from the state or other persons. These rights encompass the individual’s right to be different and to develop qualities and talents that differentiate him or her from others as an individual.”⁴⁹⁴

In this way, legal capacity in the CRPD is a shield which defends us against other people’s unwanted decisions, as well as a “sword to forge our own way”.⁴⁹⁵ Thus, implementing Article 12 of the CRPD can open up “zones of personal freedom” by repatriating the human rights principle of autonomy into a disability-specific document, and in doing so, reversing the erosion of self-determination of people with disabilities in various international legal texts.⁴⁹⁶ In this way, the CRPD is a declaration of interdependence: it is

⁴⁹⁴ Judgment of the Latvian Constitutional Court, Case No 2010-38-01, 27 December 2010, para. 7.

⁴⁹⁵ Gerard Quinn, “Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 of the UN Convention on the Rights of Persons with Disabilities”, paper presented at Harvard Law School, 20 February 2010.

⁴⁹⁶ See, for example, General Comment 25 of the UN Human Rights Committee which, without any explanation, restricted voting rights of people with mental disabilities. See also the non-binding “Principles for the protection of persons with mental illness and the improvement of mental health care”, adopted by General Assembly resolution 46/119 of 17 December 1991, which sets out notions of consent to treatment, and then proceeds to dilute the notion so as to make it almost meaningless for people deemed to have mental health problems. For a compelling account of the need for the CRPD, see Gerard Quinn and Theresia Degener, *The current use and future potential of United Nations human rights instruments in the context of disability*, Office of the High Commissioner for Human Rights, 2002.

grounded in liberal individualism and it recognises that all our lives are pursued with others.

The term “supported decision-making” has come to mean that which substituted decision-making is not. It is a cluster of various models and elements which can take various forms.⁴⁹⁷ Some essential elements of supported decision-making are that the adult retains full legal capacity and a supporting group or network is recognised (but not imposed) by a court. Supporters are appointed with the consent of the adult, and the relationship is one of trust. Supporters do not make decisions on behalf of the adult but rather assist the adult in reaching his/her own decisions without exercising undue influence and without obtaining undue advantages from the adult’s legal transactions or statements. Supporters play a role in providing advice whenever the adult is negotiating a contract, is conducting a legal transaction with an agency/authority or is a participant in court or administrative proceedings. A third party (e.g. a bank) entering into a legal relationship with the adult may contact the supporters to counter-sign the contract, and some registration mechanism of the supporters is therefore required. When counter-signing any document, supporters specify in writing the role that they played, and if the adult enters into a binding transaction without the knowledge of the supporters, the adult and the supporters are entitled to challenge the transaction before a court.⁴⁹⁸

Article 12(4) of the CRPD encourages States to put in place safeguards. The aim of these safeguards is to prevent and remedy exploitation, violence and abuse of, for example, adults who are elderly, have disabilities or who have otherwise been placed in a position of vulnerability.⁴⁹⁹ Another type of safeguard is one which ensures that supporters communicate and interpret decisions rather than impose their own views on the adult or communicate

⁴⁹⁷ Anna Lawson and Oliver Lewis (2011) *International developments on the fundamental rights of people with intellectual disabilities and people with mental health problems*, European Union Agency for Fundamental Rights, Vienna.

⁴⁹⁸ This is taken from principles developed by Hungarian NGOs in the process of developing legal capacity legislation. See also Robert M. Gordon, “The emergence of assisted (supported) decision-making in the Canadian law of adult guardianship and substitute decision-making” *Int J Law Psychiatry*, 2000 Jan-Feb;23(1):61-77.

⁴⁹⁹ Article 16 of the CRPD guards against exploitation, violence and abuse. See also the Committee of Ministers of the Council of Europe (2005) Resolution ResAP(2005)1 on safeguarding adults and children with disabilities against abuse.

their own decisions to third parties. There is some debate, however, as to whether the Article 12(4) safeguard requirement is a deliberate (albeit tacit) acknowledgement of the legitimacy of substituted decision-making, whether the safeguards have reference solely to supported decision-making systems, or whether Article 12(4) exists as a political compromise which enabled the more important paragraphs 2 and 3 to be agreed upon.⁵⁰⁰ Some are of the view that Article 12(4) applies to substituted decision-making, whilst acknowledging that the number of people subject to such a system and the amount of coercion and abuse within it should be minimised.⁵⁰¹ An alternative interpretation is that Article 12(4) applies to supported decision-making only and should not be understood to imply the need for substituted decision-making.⁵⁰² It may be difficult, however, to envision how people in some situations (e.g. a person in a coma who has not established a prior planning/advance directive document) can be supported to make decisions.

Paragraph 5 sets out financial rights, ensuring the “equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit”, adding that no arbitrary deprivation of property is allowed. This paragraph speaks directly to the primary reason in many countries for instigation of guardianship proceedings, namely that a family member wants to legally steal the property of the person with disabilities.

If a protectionist guardianship model amounts to civil death, implementation of Article 12 of the CRPD gives rise to civil life.⁵⁰³ Encouraging and engraining support networks within communities, as envisioned by Article 12 of the CRPD, may well contribute to a person’s sense of subjective as well as inter-subjective well-being and happiness.⁵⁰⁴ Scholars and activists are continuing

⁵⁰⁰ Amita Dhanda, 2007, *op cit*.

⁵⁰¹ See, for example, the reservations to Article 12 of the CRPD entered by Australia and Canada.

⁵⁰² See OHCHR (2009), paragraphs. 44-47. See also United Nations Committee on the Rights of Persons with Disabilities (2009) which instructs States to report on ‘[t]he existence of safeguards against abuse of supported decision-making models’ and does not mention substituted decision-making.

⁵⁰³ The “civil life” idea comes from Valentin Aichele, head of the German CRPD national monitoring body.

⁵⁰⁴ Sissela Bok (2010) *Exploring Happiness: from Aristotle to Brain Science*, Yale University Press, p. 103.

to carry out definitional work on Article 12 of the CRPD, and in time we will be able to assess the distance between the old and the new systems in legislation and practice. Moving from one system to another may give rise to laws which contain elements of two or more approaches to legal capacity. Similarly, legislation may be grounded in one approach but may be operationalised by those at the legal capacity coalface (medical experts, judges, lawyers, bank clerks, family members) in a way which legislators did not intend.⁵⁰⁵ One role of legal capacity litigation is to nudge States towards developing better systems by highlighting the failings of systems, and this role is discussed in the next section.

4. Bulldozing away barriers to the life-world

Compliance with the CRPD requires considerable work at a number of levels: law and policy reform,⁵⁰⁶ systems development, awareness-raising “throughout society”,⁵⁰⁷ working on media sensitisation,⁵⁰⁸ ensuring accessible justice mechanisms,⁵⁰⁹ coordinating policy within government,⁵¹⁰ ensuring independent monitoring implementation,⁵¹¹ and garnering the participation of people with disabilities and their representative organisations in development and implementation of laws, policies and programmes,⁵¹² and in monitoring.⁵¹³ To effectively highlight social injustice and call for reform, litigation should ideally be pursued in parallel to other forms of evidence-based advocacy and capacity-building.

⁵⁰⁵ See Jill Peay, 2003, *Decisions and Dilemmas*, Hart Publishing. This work examines how legal decisions about compulsory medical treatment and the loss of liberty get made by doctors and social workers.

⁵⁰⁶ Article 4(1)(b) of the CRPD.

⁵⁰⁷ Article 8 of the CRPD.

⁵⁰⁸ Article 8(2)(c) of the CRPD.

⁵⁰⁹ Article 13 of the CRPD.

⁵¹⁰ Article 33(1) of the CRPD. For more on the entirety of Article 33, see Mental Disability Advocacy Center (2011) *Building the Architecture for Change: Article 33 of the UN Convention on the Rights of Persons with Disabilities*, Budapest, Hungary.

⁵¹¹ Article 33(2) of the CRPD.

⁵¹² See Article 4(3) of the CRPD.

⁵¹³ See Article 33(3) of the CRPD.

Having written in 2002 that guardianship issues “remain under-reported and under-litigated”, significant progress has been made in less than a decade.⁵¹⁴ There is now a substantial body (admittedly not huge) of both research and case-law from which we can draw in order to do some analysis and develop strategies. I suggest that legal capacity litigation can be divided into three clusters. The first cluster chips away at the guardianship edifice, the second decouples legal capacity from subsequent losses of human rights, and the third encourages the State to set up alternatives to guardianship. I focus on the first cluster as these sorts of cases are particularly ripe for the court-room and there is some experience in Europe of litigating them. Before coming to these, I will deal briefly with the second and third clusters.

The second cluster of cases are those which disentangle losses of rights subsequent to deprivation or restrictions of legal capacity.⁵¹⁵ One example is the intimate relationship between legal incapacity and institutionalisation, which litigation can seek to prise apart. Incapacity and institutionalisation are the two main mechanisms which have resulted in the segregation and isolation of people with disabilities from society. In many European jurisdictions the vast majority of residents in long-term institutions have been deprived of legal capacity, with some managers of residential institutions going so far to make deprivation of legal capacity a prerequisite for admission. As uncovered in the Shtukaturov case, guardianship is also used to place a person against their will in a psychiatric hospital, and to sideline safeguards available to people with full legal capacity.

⁵¹⁴ Oliver Lewis, “Mental disability law in central and eastern Europe: paper, practice, promise”, *Journal of Mental Health Law*, December 2002, 293-303, at 301.

⁵¹⁵ Recommendation No. R(99)4 (op cit) states in Principle 3 that “a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.” The Parliamentary Assembly of the Council of Europe (2009) *Access to rights for people with disabilities and their full and active participation in society*, Resolution 1642 (2009), 26 January 2009 states that in line with the CRPD, “people placed under guardianship are not deprived of their fundamental rights (not least the rights to own property, to work, to a family life, to marry, to vote, to form and join associations, to bring legal proceedings and to draw up a will), and, where they need external assistance so as to exercise those rights, that they are afforded appropriate support, without their wishes or intentions being superseded”.

Strategic litigation can play a useful role in decoupling incapacity and institutionalisation. In its March 2008 judgment in *Shtukatur*, for example, the ECtHR found that the applicant was detained. This was not a difficult conclusion to draw: the doors were locked and the hospital refused a visit by his attorney. The applicant was detained for seven months. The Court found deprivation of liberty despite the Russian law classifying the hospitalisation as “voluntary” because the applicant’s mother/guardian had provided proxy consent to the hospitalisation. In a parallel case brought by the same applicant, in February 2009 the Russian Constitutional Court quashed a provision in mental health legislation which allowed guardians to provide proxy consent.⁵¹⁶ The ECtHR has already dealt with a case in which the applicant was an autistic man not technically under anyone’s guardianship. He was assenting (not objecting) to being in hospital but lacked ability by himself to consent to being in the hospital. In this case the ECtHR found that the applicant was detained for the purposes of Article 5 of the ECHR, and therefore safeguards, such as regular court reviews of the necessity of detention, should have been provided.⁵¹⁷

In the pending case of *Kedzior v. Poland*, the applicant alleges he was restricted partially then deprived fully of legal capacity, his brother was appointed as his guardian, and decided to send the applicant to a long-term social care institution where the applicant was detained.⁵¹⁸ Similar points about the detention of a person under guardianship in a social care institution is made by the applicant in the case of *Stanev v. Bulgaria*.⁵¹⁹ Domestic litigation before the Russian Constitutional Court has resulted in quashing a legislative provision in which a person under guardianship was not subject to

⁵¹⁶ Russian Constitutional Court decision, 27 February 2009. The Constitutional Court quashed three legal provisions: (1) The Code of Civil Procedure provisions which allowed courts to decide on a person’s legal capacity on the strength of one psychiatrist’s report and to deny the participation of the person whose legal capacity is in question, (2) The Code of Civil Procedure provisions which allowed courts to deny an appeal against a guardianship order even for people who knew nothing about the initial court proceedings, and (3) The 1992 Law on Psychiatric Assistance provisions which allowed a person deprived of legal capacity to be involuntary detained in a psychiatric hospital solely with the ‘consent’ of their guardian (even where it’s obvious that the detainee has not consented), with the effect that there is no court review of the lawfulness of detention.

⁵¹⁷ *H.L. v. the United Kingdom*, judgment 5 October 2004, Application No. 45508/9992.

⁵¹⁸ *Kedzior v. Poland*, Communicated 7 May 2009, Application No. 45026/07.

⁵¹⁹ *Stanev v. Bulgaria*, admissibility decision 29 June 2010, Application No. 36760/06.

a judicial review of the lawfulness of detention in psychiatric hospitals.⁵²⁰ Other cases in this cluster include de-coupling legal capacity from the right to political participation,⁵²¹ the right to marry,⁵²² the right to paternity,⁵²³ and right to bring up one's children.⁵²⁴

A third cluster of cases contains those which demand alternatives to guardianship.⁵²⁵ These are cases which seek to put in place the building blocks to establish systems of supported decision-making as alternatives to guardianship. For example, for the CRPD to be implemented, forms of supported decision-making with reasonable accommodations in support structures need to be established, laws need to be put in place which recognise different decision-making statuses through which legal capacity is exercised,⁵²⁶ and pilot initiatives for supported decision-making need to be established and evaluated. Advance directives and other planning documents need to be legally recognised and utilised. It seems to me that litigation plays a more marginal role here: it may be that with an active judiciary and on legal systems which offer injunctive relief, one could make some headway, but these advances are likely to be made outside the court-room, and for this reason this is all I say on the third cluster.

⁵²⁰ Judgment of the Russian Constitutional Court, 19 January 2011, No. 114-O-P.

⁵²¹ *Kiss v. Hungary*, judgment 20 May 2010, Application No. 38832/06. See also judgment of the Czech Constitutional Court, 12 July 2010, reference IV.ÚS 3102/08.

⁵²² See the admissibility decision of *Lashkin v. Russia*, in which the Russian government defended legislation which bars people deprived of legal capacity from marrying: “firstly, it is impossible to establish the genuine will of an incapacitated person who wants to marry; and secondly, mentally ill people often give birth to mentally ill children. Therefore, the law defends the interests of other people. Therefore, the law defends the interests of other people.”

⁵²³ *Krušković v. Croatia*, judgment 21 June 2011, Application No. 46185/08. “As a person divested of his legal capacity he is not allowed to institute any proceedings to have his paternity established. In that respect he is entirely dependent on the actions of the competent social welfare centre.” at para. 33.

⁵²⁴ *X v. Croatia*, judgment 17 July 2008, Application No. 11223/04, in which the ECtHR held that “Under the domestic legislation in force, the applicant, being a person divested of the capacity to act, was not a party to the adoption proceedings, nor was she informed that they had taken place. Only later did the applicant find out that her daughter had been given up for adoption”. (para. 20). In finding a violation of Article 8 of the ECHR, “the Court has difficulty in accepting that every person divested of the capacity to act should be automatically excluded from adoption proceedings concerning his or her child, as the applicant was in the present case.” (para. 53).

⁵²⁵ For ideas about how a post-CRPD legal capacity compliant might look like, see Michael Bach and Lana Kerzner (2010) *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, Law Commission of Ontario.

⁵²⁶ The word “status” sounds more rigid than it is: the idea is that one can flow between these legal categories as needed.

I return to the group of cases which sculpt a new paradigm by chipping away at the guardianship edifice or – continuing the construction industry metaphor – cases which bulldoze away barriers to the life world.⁵²⁷ These cases advance Article 12(2) of the CRPD, that everyone has legal capacity on an equal basis with others, and use legal tools to argue that guardianship is an unnecessary or disproportionate constraint on individual freedoms. Courts are not the only arm of the State which should carry out such a demolition job. To fully realise all human rights for people with disabilities, CRPD says that governments must, “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.⁵²⁸ Abolishing laws can be best done through parliament, again emphasising how other forms of advocacy should be carried out to advance legal capacity law reform.

Within this bulldozing cluster I include everything about the guardianship order itself and how someone gets into and out of guardianship. Cases raising procedural issues might challenge the following:

Insufficiently clear and specific statutory basis for filing an application to restrict legal capacity, low quality of evidence required to restrict legal capacity.

Expert’s report recommends the adult is “too mentally ill” to attend court, and the judge proceeds without further scrutiny.

A judge restricts legal capacity in a case where the adult received no or inadequate notification about the pending court hearings, was denied access to information related to the procedures, was not given an opportunity to take part in court proceedings, precluded from presenting and challenging evidence (including calling and cross-examining witnesses), or received no/inadequate State-funded legal representation.

⁵²⁷ Gerard Quinn, Harvard paper, op cit.

⁵²⁸ Article 4(1)(b) of the CRPD.

The guardian has a person with a conflict of interest (e.g. is the director of a residential service where the adult lives), and there is no effective procedure for assessing and preventing and remedying such conflicts of interest.

No effective appeal mechanism to challenge the guardianship (some jurisdictions, for example specify that the adult can appeal within ten days after the court sends notification, irrespective of when the adult receives the notification.), no effective procedure for the adult to challenge the identity of the guardian (e.g. when the guardian is abusive), no complaints mechanism to challenge the guardian's (in)actions (e.g. guardian does not seek wishes of the adult before taking decisions).

Lack of, or ineffective, procedure for regaining full legal capacity.

In jurisdictions with a guardianship law and nothing else, cases need to focus as tightly as possible on demonstrating how a deprivation of legal capacity is never necessary, rather than arguing peripheral points which may result in making a bad system better.

Finally, four points about why litigators should pay attention to legal capacity case selection and presentation, and why establishing an emotional connection between litigant and judge is important. First, legal capacity cases can be perceived as raising dull and technocratic legal issues. Second, legal capacity cases ask judges to confront centuries of civil law (not to mention moral and political philosophy) and/or interpret an international human rights treaty, two tasks which take judges outside their comfort zone. Third, given that people with disabilities have been locked out of justice systems through guardianship and institutionalisation, appellate and higher court judges lack experience dealing with litigants with disabilities which means that there is a significant risk that vigorous legal analysis gets overshadowed by judicial prejudice.⁵²⁹ And fourth, attorneys can be very bad at lawyering.

⁵²⁹ On several occasions I have heard senior jurists say phrases to the effect that this person is so disabled / incompetent / mad that of course they need plenary guardianship. This “need” is universalised so that anyone displaying characteristics of

Attorneys representing people in legal capacity proceedings are often on a list of court-appointed attorneys with no training and little knowledge of the human rights issues involved, or interest in the clients' rights. Often the attorneys' advocacy is minimal: they do not challenge evidence including experts' reports and in some cases even work against their client in agreeing that the person needs to be deprived of legal capacity. Because attorneys do not proceed in a combative or vigorous way, judges are not used to treating legal capacity issues as adversarial proceedings and may resist appointment of experts favourable to the client and admission of non-expert testimony.

5. Jurisprudential tracks

Where are we in terms of the travel of case-law in Europe? There are very few examples of legal capacity litigation available in English.⁵³⁰ At the time of writing, the UN Committee on the Rights of Persons with Disabilities has adjudicated on no individual complaints,⁵³¹ and has issued one set of concluding observations.⁵³² In its April 2011 concluding observations on Tunisia the Committee states that it is, “concerned that no measures have been undertaken to replace substitute decision-making by supported decision-making in the exercise of legal capacity”. It recommends that Tunisia “review[s] the laws allowing for guardianship and trusteeship and take[s] legal and policy action to replace those regimes of substitute decision-making by supported decision-making.”

This section looks at legal capacity jurisprudence primarily under the European Convention on Human Rights. Many legal capacity cases pre-date the CRPD, and not all States have ratified the CRPD. Further, the ECHR will remain a key arena for legal capacity-related litigation. The European Court of Human Rights (ECtHR) has made reference to the CRPD, saying that it is the

the same group such as diagnosis or behaviour “need” plenary guardianship. These stereotypes are a significant barrier not only to litigation, but to law reform.
⁵³⁰ MDAC’s jurisprudence tracker contains major human rights cases concerning people with intellectual disabilities and psycho-social (mental health) disabilities: www.mdac.info.

⁵³¹ An individual complaint system is established by an Optional Protocol to the CRPD.

⁵³² UN Committee on the Rights of Persons with Disabilities (2011) Concluding Observations: Tunisia, Fifth session 11-15 April 2011.

basis for the existence of a European and universal consensus on the need to protect persons with disabilities from discriminatory treatment.⁵³³

Two provisions of the ECHR can be used to challenge monolithic guardianship systems. The first is to challenge the necessity of guardianship itself, and the second is to challenge all the unfair ways in which guardianship is imposed. In ECHR terms the first of these has been dealt with under Article 8 of the ECHR which sets out the right to respect for private and family life, home and correspondence, and the second under Article 6 of the ECHR on right to a fair trial.

6. Article 8 of the ECHR

A court finding that a person lacks the ability to take decisions will invariably constitute an interference with that person's private life and may amount to a breach of the right to respect for private life, family, home and correspondence under Article 8(1) of the ECHR. Privacy, the ECtHR has found, includes a person's physical and psychological integrity and the guarantee which it affords is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.⁵³⁴

A court ruling that a person is incapable of making any decision will strip that person of the very essence of his or her personal autonomy, human dignity and human freedom. Such a court decision renders a person in some respects a 'non-person', stripped of their identity as an individual human being.⁵³⁵ Only in the face of compelling evidence and judicial scrutiny could such a determination be made. Such a finding denies the person the right to privacy in virtually every arena of his or her life; it gives third parties access to the person's private papers and medical history; it places severe restrictions on

⁵³³ *Glor v. Switzerland*, Application No. 13444/04, judgment 30 April 2009. At the time of judgment Switzerland had not even signed the CRPD; this did not prevent the ECtHR commenting on the CRPD's significance.

⁵³⁴ *Botta v. Italy*, judgment of 24 February 1998, para. 32.

⁵³⁵ See, *inter alia*, *Pretty v. UK*, judgment 29 April 2002, Application No. 2346/02, para. 62; *Mikulić v. Croatia*, judgment 7 February 2002, Application No. 53176/99, para. 53; *Christine Goodwin v. UK*, judgment 11 July 2002, Application No. 28957/95, para. 90.

the person's ability to enter into social activities and relationships and almost certainly negates any possibility of his or her developing intimate or sexual relationships. Such a decision has the power to strip the individual of the right to refuse medical treatment and most probably render the person liable to forced medication – possibly without the person administering the medication requiring any prior judicial approval. In *Shtukaturou v. Russia*, the ECtHR acknowledged that “the interference with the applicant’s private life was very serious”, because the applicant was totally deprived of legal capacity for an indefinite period, was fully dependent on his guardian in almost all areas of his life, and could challenge his deprivation of legal capacity except through the guardian.⁵³⁶

The point that plenary guardianship is a disproportionate measure is one which has been made by several higher domestic courts across Europe. In June 2009 the Czech Constitutional Court held that the limitation of legal capacity “must be viewed as an extreme measure” and “is a manifest relic of the former regime. The ordinary courts should always consider more moderate alternatives ... by which the aim could well have been achieved. The aim is the protection of competing practical rights or public interests which can be inferred from the constitutional order.”⁵³⁷

In December 2010 the Latvian Constitutional Court ordered the Latvian government to introduce alternatives to total guardianship, finding both that the aim of guardianship is “safeguarding the rights of the mentally ill person”, and that guardianship “significantly restricts a person’s right to private life”⁵³⁸ and is not a proportionate way of achieving this aim.⁵³⁹ Similarly, the Polish Constitutional Court has held that “most countries are currently departing from the rigid limitation of rights and freedoms of [people with mental

⁵³⁶ *Shtukaturou v. Russia*, op cit, para. 90.

⁵³⁷ Judgment of the Czech Constitutional Court, 18 August 2009 (I. ÚS 557/09), para. 23. Cited in *Stanev v. Bulgaria*, admissibility decision 29 June 2010, Application No. 36760/06, para. 86.

⁵³⁸ Judgment of the Latvian Constitutional Court, Case No 2010-38-01, 27 December 2010, para. 7.

⁵³⁹ *Ibid*, paras. 10 and 11.

disabilities] in favour of more flexible solutions that can match a particular situation”.⁵⁴⁰

The Latvian case is clearly a cluster one case (chipping away of guardianship edifice) as it strikes down the offending statutory provisions setting out plenary guardianship from 1 January 2012. The case is also an example of a cluster three case, one which contributes to putting in place alternatives to guardianship, because the Court provides examples of “partial restriction of legal capacity, support in decision-making, personal assistants, observance of previous [planning documents]”, going on to observe that “less restrictive measures do exist and they can be used to more effectively achieve the legitimate objective [of safeguarding a person’s rights]”.⁵⁴¹ In a creative and robust way, the Constitutional Court orders the government “not only to make appropriate amendments to substantive and procedural [legal] provisions, but also to establish the material and institutional structure to successfully operate, provide training for judges and other persons applying the legal provisions and conduct other necessary measures”.⁵⁴²

Because of the draconian consequences for an individual of such a decision being made, Article 8(1) ECHR places significant positive obligations on States to secure for such persons – to the maximum extent possible – effective respect for their integrity.⁵⁴³ Such an obligation has as an essential object the protection of the person from arbitrary interference by the public authorities and brings with it procedural obligations to ensure that interferences in

⁵⁴⁰ Judgment of the Polish Constitutional Court, 7 March 2007, ref 24/3/A/2007. In this case the Ombudsman’s office applied successfully to the Constitutional Court to revoke the statutory provision which excluded the adult deprived of legal capacity from the circle of people entitled to initiate proceedings to restore capacity or change the scope of the restriction of legal capacity.

⁵⁴¹ Ibid, para. 13.

⁵⁴² This case is an example of what can be achieved through strategic litigation. It was initiated by the Latvian advocacy organisation “Zelda” and litigated by its contracted attorney who argued a host of legal arguments, including the ECHR, the *Shtukurov v. Russia* judgment, and Recommendation No. R(99)4 of the Council of Europe. The breadth of international legal material presented to the Constitutional Court was undoubtedly a factor in the case’s success. By litigating the case, Zelda has been invited by the government to the policy table to advise on legal capacity law reform.

⁵⁴³ See for example, *Glass v. UK*, paras. 74-83.

personal autonomy and all other aspects of the Article 8(1) right are minimised.⁵⁴⁴

An additional procedural component may be able to be read into Article 8 of the ECHR. Any interference with the rights of a person who is adjudged to lack sufficient functional capacity will be considered to be “necessary in a democratic society” (see Article 8(2) ECHR) for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued. Although States enjoy a “margin of appreciation”, the margin is narrower where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights.⁵⁴⁵ In “such a complex matter as determining somebody’s mental capacity, the authorities should enjoy a wide margin of appreciation”, as they “have the benefit of direct contact with the persons concerned and are therefore particularly well placed to determine such issues”.⁵⁴⁶ Procedural safeguards available to the individual are especially material in determining whether a State has, when fixing the regulatory framework, acted within the margins: in particular whether the decision-making process leading to measures of interference is fair and such as to afford due respect to the interests safeguarded.⁵⁴⁷

The ECtHR has additionally emphasised that the vulnerable position of a particular group of persons means that some special consideration should be given to their particular needs both in the relevant regulatory framework and in reaching decisions in particular cases.⁵⁴⁸ People with mental disabilities are, the ECtHR has found, “a particularly vulnerable group in society, who have suffered considerable discrimination in the past”, and as such “the State’s margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question” – in this case, a restriction to the right to vote. The Court goes on to say that “[t]he reason for this approach, which questions certain classifications *per se*, is that such groups were

⁵⁴⁴ *Botta v. Italy*, para. 33.

⁵⁴⁵ See, for example, *Dudgeon v. the UK*, judgment 22 October 1981, para. 52; and *Gillow v. the UK*, judgment 24 November 1986, at para. 55.

⁵⁴⁶ *Shtukaturv v. Russia*, op cit, para. 87.

⁵⁴⁷ See *Buckley v. the UK*, judgment 26 September 1996, para. 76; and *Chapman v. UK*, judgment 18 January 2001, Application No. 27138/95, para. 92.

⁵⁴⁸ *Connors v. the UK*, judgment 27 May 2004, Application No. 66746/01, para. 84.

historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs”.⁵⁴⁹

To this extent, it can be argued that Article 8 of the ECHR creates a positive obligation to ensure that there is a procedure available to people restricted of their legal capacity, so that they are able to challenge significant interferences, such as medical treatment decisions, restrictions on their liberty and significant restraints (even if these interferences fall short of a deprivation of liberty in ECHR terms). The obligation to provide a procedure for challenging such fundamental restrictions should exist even if the applicant does not resist the measures (including medical treatment or detention), since the right to personal integrity protected by Article 8(1) is too important in a democratic society for a person to lose it simply for the reason that she or he is not considered to be resisting.⁵⁵⁰ This sort of argument could be made in jurisdictions which provide for no appeal against a guardian’s decision by the person under guardianship.

7. Article 6 of the ECHR

Turning now to the right to fair trial, which is the other provision which the ECHR offers in cases which seek to challenge the monolithic guardianship provisions. Admittedly the arguments are similar to those above under the procedural wing of Article 8 ECHR, but there are some helpful jurisprudential principles under Article 6 of the ECHR, and other arguments in mental disability cases under Article 5 of the ECHR (the provision which regulates deprivations of liberty) which we can draw into arguments under Article 6 of the ECHR.

We can say with some certainty that in assessing whether or not a particular measure (e.g. partial guardianship) meets the requirements of fair trial which is set out in Article 6(1) of the ECHR, all relevant factors fall to be considered,

⁵⁴⁹ *Kiss v. Hungary*, Application No. 38832/06, judgment 20 May 2010, para. 42.

⁵⁵⁰ See by analogy *H.L. v the UK*, op cit, para. 90; and *De Wilde, Ooms and Versyp v. Belgium*, judgment 18 June 1971, paras. 64-65

including the nature and complexity of the issue before the domestic courts, and what was at stake for the individual in question.⁵⁵¹ These sorts of issues could be bolstered by raising Article 13 of the CRPD, which sets out a wider provision on the right to access justice.⁵⁵²

The ECtHR has clarified that when examining fair trial issues for persons with mental disabilities under Article 6 of the ECHR, it will read across from Articles 5(1) of the ECHR (legal criteria for legalising a deprivation of liberty) and Article 5(4) of the ECHR (court review of the necessity of detention).⁵⁵³ The fundamental requirements of fair trial in legal capacity cases can be summarised to include the following.

A judge must take reasonable steps to ensure that the individual was aware of the application for deprivation of legal capacity,⁵⁵⁴ or that the person was being subjected to a forensic psychiatric examination for the purposes of legal capacity proceedings.⁵⁵⁵ States should ensure that applicants have the opportunity to present their case effectively and that they are able to enjoy “equality of arms” with the party making the application.⁵⁵⁶ The individual must be afforded the right to participate in the proceedings,⁵⁵⁷ to present and challenge evidence, and to be heard either in person or, where necessary, through some form of representation.⁵⁵⁸

⁵⁵¹ *Shtukurov v. Russia*, op cit, para. 68.

⁵⁵² A good example of arguing for the right to a fair trial from both ECHR Article 6 and CRPD Article 13 can be found in a recent UK Upper Tribunal decision which ruled in favour of a person who was detained in a psychiatric hospital and had requested that his mental health review tribunal hearing be held in public, The Upper Tribunal found that he had such a right under Article 6 of the ECHR, “reinforced by Article 13 of the CRPD.” *AH v. West London Mental Health Trust and Secretary of State for Justice*, 2011 UKUT 74 AAC, para. 22.

⁵⁵³ *Salontaji-Drobnjak v. Serbia*, op cit, para. 124

⁵⁵⁴ *Shtukurov v. Russia*, op cit, para. 69

⁵⁵⁵ *Shtukurov v. Russia*, op cit, para. 69

⁵⁵⁶ See, among many other examples, *De Haes and Gijssels v. Belgium*, judgment 24 February 1997, para. 53.

⁵⁵⁷ In some jurisdictions a doctor can advise that the adult is too mentally ill to attend court, thereby foreclosing the adult’s right to participate. See the facts of *Lashkin v. Russia* (admissibility decision 5 January 2011, Application No. 33117/02) in which the ECtHR found that a district court held a hearing about the applicant’s legal capacity “in the absence of the applicant, having decided that ‘... [the applicant’s] mental condition prevented him from taking part in the hearing, and, moreover [the applicant’s] presence would be prejudicial to his health’.”

⁵⁵⁸ *Winterwerp v. the Netherlands*, judgment 24 October 1979, para. 79; *Shtukurov v. Russia*, op cit, paras. 69 and 71; *Salontaji-Drobnjak v. Serbia*, op cit, para. 127.

The question of whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon (i) the importance of what is at stake for the party in the proceedings, (ii) the complexity of the relevant law and procedure and (iii) the person's capacity to represent him or herself effectively.⁵⁵⁹ First, in cases where the consequences could be a severe (or even a 'total') negation of a person's ability to make decisions for him / herself, the importance of what is at stake – deprivation of legal capacity (including subsequent and automatic loss of the right to vote, work, associate, family life, privacy, deciding where to live), mental health detention, forced psychiatric treatment – cannot be overestimated. Second, while it may be possible to envision domestic law and procedures of such elemental simplicity that legal advice and assistance could never be required, legal capacity issues are usually contested legal hearings with expert evidence and these hearings necessitate effective legal representation.⁵⁶⁰ And third, given that the person's capacity is what is being adjudicated in such proceedings, there is a clear and self-evident need for representation to protect the person's procedural and substantive rights.

It follows that in cases of this nature there must, at the very least, be a presumption that the measures taken by a State to satisfy its Article 6(1) obligation will include the provision of a lawyer who provides quality legal assistance to the person (not merely a cosmetic nicety in the courtroom) together with a legal aid scheme.⁵⁶¹ Regardless of the individual's wish to participate in the proceedings, where a decision concerning legal capacity is to be taken, the presiding judge (or perhaps an independent and impartial professional with the requisite understanding of the law concerning mental incapacity) should have direct visual contact with the applicant and the opportunity to question him or her. Anything less may be found unreasonable and in breach of the principle of adversarial proceedings.⁵⁶² Furthermore, the

⁵⁵⁹ *Steel and Morris v. the UK*, judgment 15 February 2005, Application No. 68416/01, para 59; *Airey v. Ireland*, judgment 9 October 1979, para. 26.

⁵⁶⁰ *Megyeri v. Germany*, judgment 12 May 1992, Application No. 13770/88, para. 23.

⁵⁶¹ *Pereira v. Portugal*, judgment 26 February 2002, Application No. 44872/98, emphasised in *Salontaji-Drobnjak v. Serbia*, op cit, para. 127.

⁵⁶² *Shtukurov v. Russia*, op cit, paras. 73 and 91.

court needs to weigh the evidence carefully,⁵⁶³ and the procedure must take place within a reasonable period of time.⁵⁶⁴

Although States enjoy a “margin of appreciation” as to the means to be used in guaranteeing parties their fair trial rights, the obligation remains that these measures must ensure for all individuals, an effective right of access to the courts for the determination of their “civil rights and obligations” (this is the language of Article 6(1) of the ECHR).⁵⁶⁵ Accommodating the needs of persons with mental health disabilities “should not affect the very essence of the applicant’s right to a fair hearing as guaranteed by Article 6”,⁵⁶⁶ and needs to attend to the requirements of reasonable accommodation as specified in the CRPD.⁵⁶⁷

8. The value of litigation

There is a growing body of domestic and European Court of Human Rights jurisprudence on issues related to rights of persons with intellectual disabilities and psycho-social disabilities to retain their capacity and picking up on various rights that are interfered with through restrictions of their legal capacity. But the very restrictions placed on such persons and their frequent isolation from society have meant that the number of people seeking remedies for violations of their rights and the number of attorneys litigating such cases have been relatively small. As the CRPD beds down and people with disabilities become more aware of its provisions and how domestic laws do not meet its standards, litigators are likely to be asked to become engaged in litigating legal capacity cases, in law and policy reform and capacity-building of civil society.

⁵⁶³ See the friendly settlement decision in the case of *Dudarevs v. Latvia*, decision 14 June 2011, Application No. 28621/10. A central issue argued by the Applicant was that “the lower court had relied exclusively on the outcome of the medical forensic tests, which had been narrow and had not disclosed the applicant’s capabilities, and that the court had failed to assess the other evidence brought before it.”

⁵⁶⁴ *Matter v. Slovakia*, judgment 15 July 1999, Application No. 31534/96.

⁵⁶⁵ *Airey v. Ireland*, judgment 9 October 1979, para. 26

⁵⁶⁶ *Shtukaturov v. Russia*, op cit, para. 68; *Salontaji-Drobnjak v. Serbia*, op cit, para. 126

⁵⁶⁷ See, in particular the definition of reasonable accommodation in Article 2 of the CRPD, and the prohibition of discrimination (which includes a failure to provide reasonable accommodation) in Article 5 of the CRPD.

Although strategic litigation is especially helpful in shining a light on the wrongs of a system which is not fit for purpose, it has its challenges and limitations. Routes of litigation are often inaccessible, raising serious access to justice questions. Law sometimes provides safeguards which amount to little more than a cosmetic nicety: there is ample evidence now of judicial rubber-stamping of guardianship applications without probing the evidence or questioning the adult concerned.⁵⁶⁸ Domestic litigation is constrained by legislation, even in cases where international laws are invoked. Judges' hands are further tied in jurisdictions where there is a binary legal capacity system of plenary guardianship and little else. Judges come with their own cognitive biases against people with disabilities. They adjudicate in systems with embedded concepts such as deficit, best interests, and protectionism where the least restrictive alternative may coexist as the most restrictive.

The cases which have been taken and have been outlined in this paper demonstrate that challenges can be overcome by tenacious litigants and smart litigators. Strategic litigation can yield significant benefits for individual applicants. In the Shtukaturrov case, for example, the European Court of Human Rights ordered the Russian government to pay the Applicant 25,000 EUR in compensation for the human rights violations he had suffered. His legal capacity was restored in subsequent domestic proceedings, in which he took part and was able to present evidence.

Strategic litigation enables progressive jurisprudence by encouraging a positive outcome in a particular case. Bringing a case to court plays a human rights documentation role, as judicial findings carry more weight with politicians and the public than reports of non-governmental organisations or indeed national human rights institutions. Courts are seen, in democracies at least, as generally fair and balanced as they have to take into consideration competing factors and weigh evidence presented by at least two sides.

Cases can test the willingness of the judicial system to offer declaratory or injunctive relief to people with disabilities who have historically been

⁵⁶⁸ Mental Disability Advocacy Center (2007) *Guardianship and Human Rights in Hungary: Analysis of Law, Policy and Practice*, and (2007) *Guardianship and Human Rights in Bulgaria: Analysis of Law, Policy and Practice*.

sidelined as holders of rights. As this paper has outlined, legal capacity cases can often be framed in mainstream civil and political human rights terms such as fair trial rights and privacy rights, using concepts such as arbitrariness, disproportionality and discrimination. These claims help challenge the unhelpful view held by many policy-makers and lawyers that disability is inherently a social issue.

Law reform can be instigated on the back of a judgment which finds that a law is not in compliance with international human rights law or otherwise constitutionally faulty, highlighting again the way in which strategic litigation is a tool which is most effectively deployed in conjunction with other advocacy methods. By framing personal misery as a matter of judicial concern, litigation holds to account those who act in an unwanted and unwarranted way in the name of the State (and in many cases, in the name of therapy, care, or one's own protection).

Judgments can be used in various capacity-building and awareness-raising activities, a point which is especially relevant as legal capacity is an area of human rights which rarely hits the headlines. In this way, litigation can engage the media, and therefore policy-makers, taxpayers and voters. It is the only advocacy tool which puts the victim – in other fora conceptualised as helpless and passive – in control of proceedings. Litigation re-balances power by putting the State in the dock. Litigation can have an empowering effect of others similarly situated to the applicant, and can shore up the interest of other potential litigants. It can make available a seat at the policy table, creating an opportunity for the disabilities community to engage in law reform efforts.⁵⁶⁹ By enforcing norms, litigation is an element in the iterative process of law reform and review. A judgment can be the catalyst for root and branch reform.

Advancing legal capacity jurisprudence can create a space for a positive reframing of the issues which in time will lead to better laws and better individual outcomes. By forcing a fundamental re-evaluation of positions, strategic litigation can advance the educational and expressive value of human

⁵⁶⁹ See, in particular Article 4(3) of the CRPD.

rights.⁵⁷⁰ Pursuing a strategy of bringing cases which chip away at the guardianship edifice in jurisdictions which rely on substituted decision-making systems is likely to yield several specific outcomes which trickle out into law and policy. On its own, litigation may not erode the devaluation of particular differences, but it does provide a basis from which to challenge the power that operates to define some differences as less worthy and deserving of respect and rights than others. It may even spark a more constructive conversation about personhood and the kind of supports which individuals may need to exercise legal capacity on an equal basis with others.

⁵⁷⁰ See Oliver Lewis, “The expressive, educational and proactive roles of the UN Convention on the Rights of Persons with Disabilities”, in *Rethinking Rights-Based Mental Health Laws*, edited by Bernadette McSherry and Penny Waller, Hart Publishing, 2010.