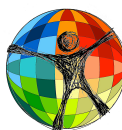


Disability Rights in a post-Convention Era: Protecting Legal Capacity at the European Court and Beyond



INTERNATIONAL HUMAN RIGHTS INTERNSHIP WORKING PAPER SERIES



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Abstract

The United Nation's Convention on the Rights of Persons with Disabilities (CRPD) was ratified in 2008 and aims to address the problems and abuses experienced by persons with disabilities. Given the recent nature of the Convention, there is little jurisprudence interpreting the novel rights it protects. The European Court of Human Rights (ECtHR) offers a jurisprudential model on issues of disability, specifically in its understanding of legal capacity as protected under article 12 of the CRPD. This paper argues that the European Court's jurisprudence offers a hesitant recognition of the importance of legal capacity for persons with disabilities, exposing the difficulties and limitations of applying the "paradigm shift" of the CRPD onto pre-existing human rights legislation.

Part I. Introduction

The Problem

Donaldo Rodas wanders around decrepit cement buildings, through the courtyard of Federico Mora psychiatric hospital in Guatemala City. Around him half-dressed patients sit hugging themselves and shaking. Some are tied to wheelchairs – others are lying still on the concrete floor of the courtyard. Only 28 and schizophrenic, Donaldo boasts about his ability to do his own laundry and take care of himself. He has little chance of ever leaving the hospital though, which houses detainees charged with serious crimes alongside persons with mental disabilities.

A scar above Donaldo's left eye hints at the violence he's witnessed. He doesn't know who hurt him, but describes what normally happens to patients who are caught fighting; the staff "give [them] injections... they lock them up." Isolation cells are common, and not only for residents who become violent. Patients who refuse medication are also sent to isolation, and then medicated by force.

Donaldo describes in detail the smell and the flies in toilets that no longer flush. The hospital, porously located next to the Guatemala's largest prison, is a sanitary disaster. There are too few mattresses, so patients are forced to share dirty mattresses or sleep on the floor. There is no clean drinking water and no warm water for washing. There are few personal hygiene products. Many patients lack shoes and clothing. There is not enough food and so patients go without. Donaldo describes how the patients receive nothing but beans to eat. On Sundays they look forward to a meat-substitute, even if Donaldo describes it as "food for the dogs."

Donaldo shakes his head when asked whether he has a girlfriend: "I don't want to have sex in here... I hear they have HIV." He describes desperate women who sell their

bodies to guards or police for a few quetzales (about 50 cents) so they can buy themselves something to eat. Sometimes the police take videos of the women. Donaldo is afraid of contracting HIV at the hospital.¹

The staff permanently confine women patients to a small ward to protect them from becoming victims of rape. Youth are placed in solitary confinement to avoid the same fate. Along with women and children, the hospital holds “forensic patients” – violent offenders deemed by judges to have psychiatric problems. There are numerous reports of sexual assault by these forensic patients, as well as police and the hospital’s guards, many of whom have ties to Central American gangs. It is unknown how many patients have HIV, but given the amount of sexual violence, the spread of HIV is inevitable. In spite of this, no testing is done. For patients who develop AIDS, there is no care or treatment.

In October 2012, Disability Rights International (DRI), an organization dedicated to the promotion of disability rights, applied for precautionary measures from the Inter-American Commission of Human Rights (the “Commission”) to protect the 334 adults and children detained at Federico Mora psychiatric hospital. The application for precautionary measures outlined a host of abuses at the hospital, including: (1) physical and sexual abuse; (2) denial of medical care, as well as negligent or inappropriate psychiatric and medical treatment; (3) exposure to serious and contagious illnesses and infections that result in a loss of life; (4) risk of contracting HIV, a problem compounded by the widespread sexual abuse in the institution; and (5) isolation rooms where patients are subjected to near total social and

¹ Information on the conditions in Federico Mora is taken from: John Rudolph, “Where Mental Asylums Live On,” *The New York Times* (1 November 2013) online: http://www.nytimes.com/2013/11/03/opinion/sunday/where-mental-asylums-live-on.html?pagewanted=1&_r=4&emc=eta1; Disability Rights International, “Application for precautionary measures in favor of the 334 people with mental disabilities interned in the Federico Mora Hospital, in Guatemala City, Guatemala,” October 12, 2012, (delivered to Inter-American Commission of Human Rights) [DRI Application]. Available at: <http://www.disabilityrightsintl.org/media-gallery/our-reports-publications/>.

sensory deprivation.² While the exact death rate is uncertain, staff at the institution estimate that the death rate is at least 20 persons per year.³

Federico Mora is the only publicly funded mental health service in Guatemala, a country of 16 million. To receive public psychiatric care, Guatemalans must give up their liberty, regardless of the severity of their condition.⁴ The Guatemalan Civil Code provides that the director of the hospital is the legal guardian of all patients, leaving them with no recourse to challenge their confinement or treatment. As a result, patients remain trapped there because of a lack of judicial review, lack of services in the community, and often because they have nowhere else to go.

The Paradigm Shift

In December 2006 Kofi Annan, then Secretary-General of the United Nations, greeted the passage of the *Convention on the Rights of Persons with Disabilities* (CRPD) by speaking of the dawn of “an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long.”⁵ As many disability rights activists have said of the CRPD, “there is much to celebrate.”⁶ The CRPD came into force in May 2008 to respond to the particular human rights problems faced by persons with disabilities, as well as the failure to apply already entrenched rights to the disabled. The CRPD places a positive obligation on states to protect persons with disabilities. Prior to the CRPD, no human rights treaty specifically protected persons with

² *DRI Application*, *supra* note 1 at 1.

³ *Ibid.*

⁴ *Ibid* at 3.

⁵ Quoted in Peter Bartlett, “The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law” (2012) 75:5 *Modern Law Review* 752 at 1 [Bartlett]. Available at: <http://ssrn.com/abstract=2141097> or <http://dx.doi.org/10.1111/j.1468-2230.2012.00923.x>.

⁶ *Ibid* at 1.

disabilities.⁷ The CRPD insists that already existing human rights apply to them, while also creating new rights particularly relevant to the challenges faced by persons with disabilities,⁸ including the right to respect for the home and family life,⁹ to health care,¹⁰ to habilitation and rehabilitation,¹¹ to work and to an adequate standard of living and social protection,¹² and the right to live in the community.¹³

Moreover, the CRPD enshrines the social model of disability. The social model draws a distinction between a person's impairment, or physical limitation, and his or her disability, imposed by the engineering of the physical world that excludes or fails to accommodate the impaired person as an equal member of society.¹⁴ That is, rather than focusing on the physical aspects of the person concerned, the social model insists that society creates disabilities, maintaining that "it is the physically engineered environment, and the attitudes that are reflected in its construction, that play a central role in creating the condition termed disability."¹⁵ The social model recognizes that disability is culturally constructed, and that disability is an aspect of social diversity.¹⁶ Michael Stein has outlined how the UN has been moving toward the social model of disability since the 1970s. The CRPD and its enthusiastic

⁷ Paul Harpur and Richard Bales, "The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience" (2012). 37:4 *Northern Kentucky Law Review* 363 at 265 [*Harpur and Bales*]. Available at: <http://ssrn.com/abstract=2000174>; Michael Stein, "Disability Human Rights" (2007) 95 *California Law Review* at 5 [*Stein*]. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900014.

⁸ Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" (2008) 30 *Human Rights Quarterly* at 5-6 [*Mégret*]. Available at <http://ssrn.com/abstract=1267723>; *Bartlett, supra* note 5 at 2-3.

⁹ International Convention of the Rights of Persons with Disabilities and its Optional Protocol, U.N. GAOR, 61st Sess., Item 67(b), U.N. Doc. A/61/611 (6 Dec. 2006) article 23 [*CRPD*]. Available at: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

¹⁰ *Ibid*, article 25.

¹¹ *Ibid*, article 26.

¹² *Ibid*, articles 26 and 27.

¹³ *Ibid*, article 19.

¹⁴ Jenny Morris. "Impairment and Disability: Constructing an Ethics of Care that Promotes Human Rights" (2001) 16:4 *Hypatia* 1 at 2 [*Morris*]. Available at <http://muse.jhu.edu/journals/hypatia/v016/16.4morris.html>.

¹⁵ *Stein, supra* note 7 at 13.

¹⁶ *Harpur and Bales, supra* note 7 at 368.

support of the social model have nevertheless been described as a paradigm shift in disability rights.¹⁷ This shift is visible in the sole case in which the Inter-American Court has applied the CRPD, which established that disability “results from the interaction between an individual’s functional limitations and the barriers that exist in the environment that prevent the full exercise of his rights and freedoms.”¹⁸

The social model of disability rejects the medical model, which focuses on physical limitations of the person rather than the limitations placed on them by society. The medical model sees the impairment and the disability as the same thing, both of which are the sole problem and responsibility of the person with the disability. Perhaps most problematically, the medical model has been used to justify treating persons with disabilities as second-class citizens with a medical condition, thereby preventing them from enjoying their full human rights.¹⁹ Since it assumes biological inferiority, the medical model was long used to justify institutionalization, forced sterilization, segregation, denial of medical treatment and the overall exclusion of persons with disabilities from society.

The Question

The conditions at Federico Mora raise serious allegations about a number of human rights abuses, including the rights to life, liberty, freedom from torture and degrading treatment, and judicial protection. While international human rights conventions such as the United Nations Universal Declaration of Human Rights and the American Convention on Human Rights (ACHR) recognize these rights, people with disabilities continue to be among the most marginalized and vulnerable members of society. The rights of persons with

¹⁷ *Stein*, *supra* note 7 at 25.

¹⁸ See *Artavia Murillo et al. (“In vitro fertilization”)*, (Costa Rica) (2012), Inter-Am Ct HR (Ser C) No 257 at paras 290-291. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf.

¹⁹ *Harpur and Bales*, *supra* note 7 at 367.

disabilities²⁰ have long been overlooked.²¹ At the same time, persons with disabilities are the world's largest minority group.²² Worldwide, it is estimated that over a billion people live with a disability, or about 10% of the population.²³ This average is even higher in post-conflict countries like Guatemala.

The legal question, therefore, becomes how to apply the CRPD to situations like Federico Mora psychiatric hospital in Guatemala City. On one hand, we have persons with disabilities living in dangerous conditions; on the other hand, there is an international instrument, celebrated as a paradigm shift in disability rights. Guatemala ratified the CRPD in April of 2009, and is also a signatory to the American Convention of Human Rights (ECHR).

The Actors

I became aware of the conditions at Federico Mora while interning at Disability Rights International in the summer of 2013. Disability Rights International (DRI) is a non-governmental organization that advocates for the rights of persons with mental disabilities, particularly children and persons who have been institutionalized. Focusing mainly on investigations and report writing²⁴ the organization has spent the last 20 years documenting abuses in psychiatric institutions around the world, including many in Eastern Europe. DRI works to document abuses, bring them to the public's attention, and ultimately force states into compliance with international standards. Visiting institutions across Latin America, DRI

²⁰ There is some debate as to terminology and whether "disabled person" or "person with disability" is more appropriate. Here I have chosen to mirror the language used in the CRPD. For more see *Morris, supra* note 14 at 3.

²¹ *Harpur and Bales, supra* note 7 at 366

²² Paul Harpur, "Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change" (2011) 45:3 *Valparaiso University Law Review* at 1271 [*Harpur*]. Available at: <http://ssrn.com/abstract=1804734>.

²³ *Stein, supra* note 7 at 2.

²⁴ Mutua has criticized international NGOs "naming and shaming" approach as reinforcing the idea of the West saving the helpless "third world." In disability rights however, "branch" NGOs such as DRI, staffed by locals, function independently in various countries. See Makau W. Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 *Harvard International Law Journal* at 224 (2001) Available at <http://ssrn.com/abstract=1525547>.

concluded that the conditions in Federico Mora were the most dangerous their investigators had witnessed anywhere in the Americas.²⁵

The case of Federico Mora is DRI's first attempt to use strategic litigation to advance the rights of persons with disabilities, a strategy that the Mental Disability and Awareness Centre (MDAC), has used successfully in Europe. By the time I arrived at DRI in the summer of 2013, the Inter-American Commission had already granted precautionary measures to protect the lives and security of the patients at Federico Mora.²⁶ The case of Federico Mora is the first time the DRI is attempting to have a case heard at the Inter-American Court of Human Rights (IACHR) on the merits.²⁷ In Europe, MDAC has been using strategic litigation for many years, representing applicants and bringing claims that argue rights protected under both the ECHR and the CRPD. Given the lack of jurisprudence on disability at the Inter-American system, especially on the CRPD, the Inter-American Court will likely base much of its future decisions on disability rights on the European Court's jurisprudence. The ECtHR has made a number of landmark decisions on disability rights since the CRPD came into effect in 2008 (indeed, in many of these cases the applicants were represented by counsel from MDAC). Unsurprisingly, the "strengthening of ECHR jurisprudence in respect to disability" occurred very shortly after the CRPD came into force.²⁸

To understand how the Inter-American Court will interpret the CRPD, I will begin by outlining the ECtHR's approach to the Convention thus far – an approach that, while not binding on the IACHR, will likely be persuasive. Indeed, "comparative law is an increasingly

²⁵ *DRI Application*, *supra* note 1 at 1.

²⁶ *Patients at the Federico Mora Hospital*, (Guatemala) (2012), Inter-Am Cm HR, PM 370/12. Available at: <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

²⁷ The Inter-American Human Rights system is made up of two organizations: the Commission and the Court. Only the Commission may forward applications to the Court. Conversely, the European Court system abolished the Commission in 1998 and now handles issues of admissibility of applications itself.

²⁸ In general, the acronym ECHR is used to refer to both the European Court of Human Rights and the European Convention of Human Rights. Here ECtHR will refer to the Court and ECHR to the Convention, though citations from other sources may use ECHR to refer to the Court; Jarlath Clifford. "The UN Disability Convention and its Impact on European Equality Law" (2011) 6 Equal Rights Review 11 at 21 [*Clifford*]. Available at: http://www.equalrightstrust.org/ertdocumentbank/ERR06_jarlath_article.pdf.

important aspect not only of the IACHR's jurisprudence but also of other tribunals', including the ECHR."²⁹ The Inter-American Court's approach in the case of *Artavia Murillo*, the sole IACHR case to cite the CRPD, draws heavily from the ECtHR's jurisprudence on the issue. The ECtHR is the leading international human rights court in interpreting the CRPD, and therefore presents an important starting point for understanding the Convention.

However, as I will show, courts can – and should – go further in interpreting the right to legal capacity and the subsequent loss of rights occasioned by the loss of juridical personality. Legal capacity is the most important right protected in the CRPD, and the most fundamental right for persons with disabilities. First, I will look at how juridical personality is an important right in itself that allows persons with disabilities the autonomy to make decisions in their own lives. Second, a loss of legal capacity leads to a subsequent loss of other fundamental rights. Last, legal capacity affects access to justice, as procedural rules require applicants to exhaust domestic remedies prior to applying to regional human rights systems. Focusing on these three areas exposes the limitations of mapping the CRPD onto pre-existing human rights legislation.

²⁹ Anne-Claire Gayet. "Contexts of Structural Discrimination in the Jurisprudence of the Inter-American Court of Human Rights" (2013) 1:3 McGill Centre for Human Rights and Legal Pluralism, International Human Rights Internship Working Paper Series, Available at: <http://www.mcgill.ca/humanrights/clinical/internships/working-paper-series>; Clifford, *supra* note 28 at 19.

Part 2: Legal Capacity and the Law

The legal issues in the Federico Mora case are many. Based solely on the rights enshrined in the American Convention of Human Rights, DRI will argue that institutional segregation violates the right to equal protection before the law,³⁰ the right to social life,³¹ the right to movement and residence,³² and the right to private life.³³ DRI will also argue that the conditions in the hospital – the use of restraints, unsanitary environment, overmedication, sexual abuse, spread of HIV, and inappropriate or forced medical treatment – violate the right to life³⁴ and the right to humane treatment.³⁵

The patients at Federico Mora are unable to challenge any of the above violations because they lack legal capacity. Under article 308 of the Guatemalan Civil Code, "directors [...] of social care facilities, which house minors or disabled persons, are their guardians and legal representatives from the moment of their admission."³⁶ In itself, this automatic deprivation of legal capacity, which is not subject to judicial review, violates the right to juridical personality.³⁷ The concomitant impossibility of accessing justice also violates the right to a fair hearing³⁸ and the right to judicial protection.³⁹

³⁰ American Convention on Human Rights (Pact of San Jose), 22 November 1969, OAS TS 36 at article 24 [ACHR]. Available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

³¹ *Ibid*, article 23.

³² *Ibid*, article 22.

³³ *Ibid*, article 11.

³⁴ *Ibid*, article 4.

³⁵ *Ibid*, article 5.

³⁶ Código Civil de Guatemala, Decreto-Ley 106, article 308 (translation from *DRI Application*, *supra* note 1 at 4-5).

³⁷ ACHR, *supra* note 30, article 3.

³⁸ *Ibid*, article 8.

³⁹ *Ibid*, article 25.

Legal capacity is the power to make decisions within the framework of the law. While most people take it for granted, legal capacity is essential to personal freedom; it allows adults to control their lives so that they may participate fully in society. Legal capacity includes being able to choose where one lives, consent to medical treatment, and manage one's finances. Legal capacity involves more than merely making decisions. It also includes the ability to act as a subject before the law and bring a claim before the courts. Article 12 of the CRPD refers to ability to both have and exercise rights.⁴⁰ Without legal capacity, persons with disabilities have no recourse to challenge their treatment before the courts, meaning they are not only deprived of their autonomy over their personal lives, but all their civil, political and human rights as well.

Despite the importance of legal capacity, legal guardianship systems around the world are outdated, as they neither "enable individuals to make decisions for themselves and expand their capacities to do so."⁴¹ In a number of countries, legal capacity for persons with disabilities, especially mental disabilities, remains the exception rather than the rule.⁴² Without legal capacity, persons with disabilities cannot hire a lawyer because they do not have standing before the courts. Without legal capacity and the ability to vindicate one's rights, all other legal rights become meaningless, making persons with disabilities even more vulnerable to abuse, exploitation, and arbitrary detention.

Given the importance of legal capacity, article 12 of the CRPD protects it explicitly: "persons with disabilities have the right to recognition everywhere as persons before the law." Juridical personality is also protected by article 3 of the American Convention of

⁴⁰ *Bartlett*, *supra* note 5 at 13.

⁴¹ Council of Europe, Commissioner for Human Rights, "Who Gets to Decide? Right to legal capacity for persons with intellectual and psychosocial disabilities" (2012) CommDH/IssuePaper, prepared by Anna Nilsson, [*Who Gets to Decide?*]. Available at: https://wcd.coe.int/ViewDoc.jsp?id=1908555#P340_43777.

⁴² "The revolution – or the paradigm shift – of Article 12 is probably not quite precise about the ultimate shape European legal capacity law should take but it is clear enough to enable us to characterise the bulk of European legal capacity systems as out-dated," *Ibid*; *Clifford*, *supra* note 28 at 15; *Bartlett*, *supra* note 5 at 10.

Human Rights.⁴³ While the European Convention of Human Rights does not explicitly protect the right to legal capacity, depriving individuals of their legal capacity may constitute a serious interference with the individual's right to respect for private life, as protected under article 8.⁴⁴ This strange discord, whereby the European Convention does not explicitly protect legal capacity, shows how the rights in the CRPD extend beyond existing human rights legislation.⁴⁵ The CRPD protects legal capacity as a right in itself, while the European Convention only considers legal capacity as a right when a lack thereof occasions subsequent losses of other rights. As we will see, this differing approach leads to a number of difficulties in applying the CRPD in the European system.

Legal Capacity as a right in itself

The facts in the case of *Stanev v. Bulgaria* (2012) resemble the issues at Federico Mora. After being diagnosed with schizophrenia, Mr. Rusi Stanev fell under the legal guardianship of a municipal bureaucrat. Without ever meeting Mr. Stanev, the guardian agreed to place him in Pastra Social Care Home, 400 kilometers from his hometown. The facilities were in a deplorable state of repair. The treatment of the residents was equally terrible.⁴⁶ Once Mr. Stanev was placed in the home, its director became his legal guardian.⁴⁷ The applicant repeatedly attempted to have his guardianship reviewed by the courts but always failed due to his lack of capacity and lack of support from his guardian. No procedural safeguards were in place to review either his incapacity or his placement in the home.

⁴³ "Every person has the right to recognition as a person before the law," *ACHR*, *supra* note 30, article 3.

⁴⁴ *Who Gets to Decide?*, *supra* note 41; *Shtukaturov v Russia*, No 44009/05 [2008] ECHR 223 at 87 [*Shtukaturov*]. Available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85611#{"itemid":\["001-85611"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85611#{).

⁴⁵ Oliver Lewis, "How can strategic litigation play a role in nudging States towards legal capacity utopia?" (Paper delivered at the Seminar on disability litigation at the American university, Washington DC, 13 November 2009). Available (for download) at: http://www.escri-net.org/sites/default/files/Strategic_Litigation_strategy_on_legal_capacity_0.doc. [*Lewis, Utopia*] at 5.

⁴⁶ European Court of Human Rights, Grand Chamber, *Stanev v. Bulgaria* (January 17, 2012) at para 76-82 [*Stanev*]. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108690>.

⁴⁷ *Ibid*, at para 17.

Stanev is one of the European Court's most important decisions on disability, because the Court found that the Applicant's situation violated his rights to liberty, security,⁴⁸ right to a fair trial,⁴⁹ as well as the prohibition of torture and degrading treatment.⁵⁰ Unfortunately, having found these violations, the Court refused to look at the issue of legal capacity separately, leaving open the question as to whether the guardianship regime in itself violated Mr. *Stanev*'s rights under article 8 of the European Convention (or article 12 of the CRPD).⁵¹ The European Court's failure to decide the legal capacity question is surprising given that Mr. *Stanev* repeatedly submitted to the Court that there was a conflict of interest with his guardian. Mr. *Stanev* alleged that the appointment of the director of the social care home as his guardian violated Article 12 of the CRPD, which affirms the need for safeguards to ensure equal protection before the law: "Such safeguards shall ensure that measures relating to the exercise of legal capacity [...] are free of conflict of interest and undue influence."⁵² The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), visited Pastra and voiced concern about the guardianship regime at the home. Its report stated that

One aspect of the role of a guardian is to defend, if necessary, the rights of incapacitated persons vis-à-vis the hosting institution. Obviously, granting guardianship to the very same institution may easily lead to a conflict of interest and compromise the independence and impartiality of the guardian.⁵³

Given the importance of a legal guardian in defending one's legal rights, independence and impartiality are crucial. Unfortunately, by not considering legal capacity as a separate issue, the ECtHR failed to pronounce on whether naming a director of an

⁴⁸ *Ibid* at para 132; *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, EurTS 5, article 5, [ECHR]. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴⁹ *ECHR*, *supra* note 48, article 6; *Stanev*, *supra* note 46 at para 248.

⁵⁰ *Ibid*, article 3; *Stanev*, *supra* note 46 at para 221.

⁵¹ *Ibid* at para 249-253.

⁵² *ECHR*, *supra* note 48, article 12(4). Emphasis added.

⁵³ *Stanev*, *supra* note 46 at para 86.

institution as the legal guardian amounts to a conflict of interest that violates the European Convention on Human Rights.

Oliver Lewis of MDAC speculates that the European Court failed to consider legal capacity in *Stanev* to avoid “opening the floodgates” since there are millions of persons with disabilities in social care homes across Europe.⁵⁴ While the majority did not look at the issue of capacity, two strong dissents argued that legal capacity needed to be considered as a separate issue arising from article 8 of the European Convention. First, the dissenting judgment of Tulkens, Spielmann, and Lafranque stressed the extent of the interference with Mr. Stanev’s private life, noting that the guardianship regime barred him not only from taking part in community life, but also from “developing relations with persons of his choosing.” The lack of legal capacity made it impossible for the applicant to make any decisions about his own life, essentially leading to “institutionalisation syndrome.” While the judgment admits that legal capacity is similar to issues that arose under findings of violations of liberty and degrading treatment, it stressed that legal capacity is a separate issue. For Tulkens, Spielmann, and Lafranque, considering legal capacity separately would at least allow the Court to consider whether the state has a positive obligation to set up a periodic review board or provide other safeguards.

A second dissenting decision by Judge Kalaydjieva also argued that the Court should have considered legal capacity separately under article 8 of the ECHR. Kalaydjieva’s dissent emphasized access to justice in particular, highlighting

the way in which guardianship and institutionalization conspire not only to invalidate a person’s will and preferences, but how they segregate people from our societies, exclude them from the political sphere and erase them from our legal consciousness.⁵⁵

⁵⁴ Oliver Lewis, “Stanev v. Bulgaria: On the Pathway to Freedom” (2012) 19:2 *Human Rights Quarterly Brief* at 5 [Lewis, *Pathway to Freedom*]. Available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1815&context=hrbrief>.

⁵⁵ *Ibid* at 6.

Because legal capacity is so fundamental to making decisions and to protecting other substantive rights, Judge Kalaydjieva argued that the Court should have considered it, as defined under article 12 of the CRPD, as the central issue in the petition, rather than relegating it to a subsidiary issue. The Court's failure to look at the issue separately demonstrates its hesitant protection of legal capacity as a mere sub-issue of protection of family life, rather than a substantive right in itself.

In *Sýkora v The Czech Republic* the Court went further in its analysis of legal capacity than it did in *Stanev*. In *Sýkora*, the Court found the applicant's lack of legal capacity to be a violation of article 8 of the ECHR. The facts of *Sýkora* were simple; Mr. Sýkora got into an argument with his girlfriend, who called the police. The police placed him in a psychiatric hospital since he had a psycho-social disability and had been in the hospital before. Mr. Sýkora informed doctors at the hospital that he was allergic to neuroleptic drugs but the doctors administered these drugs anyway, causing him to lose his eyesight. For over a year, Mr. Sýkora remained trapped in the hospital. His legal guardian, a local bureaucrat Mr. Sýkora had never met, signed some papers consenting to the hospitalization.⁵⁶

The ECtHR considers any interference with an individual's right to respect for his private life as constituting a violation of article 8 unless, it is, in accordance with the law, pursues a legitimate aim, and is necessary in a democratic society, in the sense that it is proportionate to the aims sought. While the Court gives a certain amount of discretion to State parties, the margin of appreciation depends on the safeguards in place.⁵⁷ In this sense the ECtHR's analysis mirrors the language of article 12(4) of the CRPD, which also establishes

⁵⁶ *Sýkora v Czech Republic*, No 23419/07, [2012] ECHR 1960 at 22-34 [*Sýkora*]. Available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114658#{"itemid":\["001-114658"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114658#{)

⁵⁷ *Ibid* at para 102.

the importance of appropriate safeguards.⁵⁸ Such safeguards for the ECtHR include “sufficiently reliable and conclusive evidence.” Further, the “degree of the applicant’s incapacity should be addressed in sufficient detail by the medical reports.”⁵⁹ The court making the decision to incapacitate should hear the applicant, “either in the first round or the second round of proceedings,” and formally notify the person when proceedings are instituted.⁶⁰ The Court also observed that legal representation at incapacitation proceedings is “necessary or even crucial” given what is at stake.⁶¹ In this case Mr. Sýkora was not even served with the decision to incapacitate. The Court therefore stated “that being aware of a judgment depriving oneself of legal capacity is essential for effective access to remedies against such a serious interference with private life.”⁶² Finally, the report of incapacitation must be recent enough to offer conclusive evidence. In *Sýkora*, incapacitation in 2004 was based on a report from 1998.⁶³ Given that on the facts of the case no safeguards were in place to protect the applicant, the Court found a violation of article 8 based on the deprivation of legal capacity. *Sýkora* is the European Court’s most progressive decision on legal capacity to date because, by finding failures in the legal protections that should surround any deprivation of legal capacity, it operationalised the paradigm shift enshrined in article 12 of the CRPD.

The European Court pulled back from its CRPD based analysis in *Lashin v. Russia*, released only a few months after *Sýkora*. Like the Czech Republic, Russia has signed and

⁵⁸ “States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.” *CRPD, supra* note 9 at 12(4).

⁵⁹ *Sýkora, supra* note 56 at para 103.

⁶⁰ *Ibid* at para 107; See, similarly, *Shtukaturov, supra* note 44 at 69-73 and 91.

⁶¹ *Sýkora, supra* note 56 at para 108.

⁶² *Ibid* at para 109.

⁶³ *Ibid* at para 111.

ratified the CRPD.⁶⁴ As in *Sýkora*, the Court found the procedural safeguards available to protect the applicant were insufficient. However, the Court in *Lashin* added to the analysis developed in *Sýkora* by insisting that, a “fair balance [...] has to be struck between the competing interests of the individual and of the community as a whole.”⁶⁵ It remains unclear from the judgment what kind of community interests are served by segregating persons with disabilities from the community. What is clear is the Court’s emphasis on the limitations provided for under article 8(2) of the European Convention, which states that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It is at this point that the ECtHR analysis departs from the CRPD. Unlike safeguards, “balance” is not mentioned in article 12 of the CRPD. By adding proportionality as a criterion, the Court is adding a way by which States can deny legal capacity to persons with mental disabilities, despite express provisions to the contrary in the CRPD. Indeed, *Lashin* has been described as bringing “to the fore the inherent tension”⁶⁶ between the ECHR and the CRPD, by showcasing the contradiction between the Convention’s clear protection of liberty and the Court’s insistence on limitations. As was the case for the appellant in *Stanev*, persons with disabilities are often institutionalized arbitrarily in social care homes because there is no other place for them to live. Would institutionalization for this reason qualify as being “interests of public safety” as defined under article 8(2)? The Court leaves this question unanswered. Perhaps even more strangely, the Court articulated the need for

⁶⁴ *Lashin v Russia*, No 33117/02 [2013] ECHR 63 at para 66. Available at: [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116020#{"itemid": "001-116020"}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116020#{).

⁶⁵ *Ibid* at para 79.

⁶⁶ Eilionoir Flynn, “New ECHR decision on legal capacity,” *Human Rights in Ireland*, (31 January 2013) online: <http://humanrights.ie/mental-health-law-and-disability-law/new-echr-decision-on-legal-capacity/>.

balance without actually applying such an analysis to the facts at hand, suggesting a possible attempt to limit findings of violations of article 8 in future.

Subsequent Loss of Rights and the Deprivation of Liberty

Legal capacity is an important right in itself. It is not always clear however where legal capacity ends and where lack of legal capacity begins to affect other substantive rights. As we have seen above, the European Court does not even consider the issue of legal capacity in itself unless it begins to infringe on the right to respect for private life. This distinction is important for patients at Federico Mora, who may claim a violation of the right to legal capacity itself based on article 308 of the Guatemalan Civil Code, which automatically deprives them of juridical personality.⁶⁷ The loss of legal capacity is also essential to understanding the subsequent loss of rights and inability to challenge the conditions within the hospital. While the right legal capacity overlaps with all substantive rights, the right to liberty is particularly important with respect to persons with disabilities who are especially vulnerable to forced institutionalization. Throughout the world, there is systemic and ongoing involuntary placement of persons with psychosocial disabilities in institutions, a practice closely linked to the guardianship system.⁶⁸ In determining whether a violation of the right to liberty has occurred, courts must therefore distinguish between the consent of the person with a disability and the consent of the guardian.

The European Convention guarantees the right to liberty and security of the person, except in exceptional circumstances, such as (5)(1)(e), “the lawful detention of [...] persons of unsound mind.” The provision’s archaic language is at odds with the social model of disability, which rejects stigma-laden wording. To determine whether a deprivation of liberty

⁶⁷ *ACHR*, *Supra* note 30, article 3; *CRPD*, *supra* note 9, article 12.

⁶⁸ Lycette Nelson, “Stanev v. Bulgaria: The Grand Chamber’s Cautionary Approach to Expanding Protection of the Rights of Persons with Psycho-social Disabilities” *Strasbourg Observers* (February 29, 2012) online: <<http://strasbourgobservers.com/2012/02/29/stanev-v-bulgaria-the-grand-chambers-cautionary-approach-to-expanding-protection-of-the-rights-of-persons-with-psycho-social-disabilities/>> [Nelson].

is lawful under 5(1)(e), the Court applies the Winterwerp criteria: “firstly, [the person] must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder.”⁶⁹ In *Stanev*, the Court determined that the deprivation of the applicant’s right to liberty and freedom did not meet this test and was therefore unlawful. Of concern however is the fact that the ECtHR initially formulated the Winterwerp test to establish the criteria necessary for emergency hospitalization, not a long-term deprivation of liberty in a social care home. In *Stanev*, the Court stretches the test to justify deprivation of liberty despite the fact that “the establishment of mental disability as a criterion for deprivation of liberty is inconsistent with current international standards.”⁷⁰ Indeed, the CRPD does not provide for any derogation from the principle that mental disability should never form the basis for institutionalization.

More problematically, the Court signaled that “special procedural safeguards” are necessary to protect the interest of persons who are not fully capable of acting for themselves.⁷¹ The Court’s reliance on safeguards remains incompatible with the CRPD, article 14 of which states that, “the existence of a disability *shall in no case* justify a deprivation of liberty” (emphasis added). The existence of safeguards allows for a deprivation of liberty to be lawful under the European Convention. The Court has emphasized that detained persons should “have the right to bring proceedings by which the lawfulness of their placement could be decided speedily by a Court.”⁷² There must be a recent psychiatric assessment and consideration of whether the person actually needs to be confined, as well as independent judicial scrutiny. Further, “a person detained for an indefinite or lengthy period is in principle entitled [...] to take proceedings ‘at reasonable intervals’ before a Court to put in issue the

⁶⁹ *Winterwerp v the Netherlands*, (1979), 6301/73 ECHR 4, 2 EHRR 387 at 39 [*Winterwerp*]. Available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57597>; *Stanev*, *supra* note 46 at para 145.

⁷⁰ *Nelson*, *supra* note 68.

⁷¹ *Ibid* at para 170; See also *Winterwerp* *supra* note 69 at para 60.

⁷² *Stanev*, *supra* note 46 at para 83.

'lawfulness' – within the meaning of the Convention – of his detention."⁷³ Unlike article 12 of the CRPD, which permits guardianship and a deprivation of legal capacity as long as certain safeguards are in place, article 14 bars under all circumstances a deprivation of liberty for reason of mental illness. Article 14's unequivocal language is a response to the systemic institutionalization to which persons with disabilities continue to be subjected. A focus on safeguards, while appearing to protect persons with disabilities from arbitrariness, actually fails to consider their greater interest of living in the community.

Article 19 of the CRPD creates a previously unknown human right: the right to live in the community. Along with legal capacity, the Court in *Stanev* failed to consider article 19 of the CRPD. Undeniably, the CRPD creates "an interrelated basket of rights, with article 14 entering into effect in tandem with the community services required in Article 19 and elsewhere in the Convention."⁷⁴ Approaching issues of legal capacity and liberty as connected to the right to live in the community, would be a positive move away from the forced deprivation of liberty currently experienced by many persons with disabilities. While the Court rightly found a violation of Mr. Stanev's right to liberty due to insufficient safeguards against arbitrariness, it failed to consider the systemic nature of the problem and whether depriving a person with a mental disability of the right to live in the community is *always* a violation of right to liberty. Further, it did not consider whether the State had any positive obligation to provide services less intrusive to Mr. Stanev's personal liberty, services that would allow him to live in the community.

The Court's cautious approach to these issues in *Stanev* may be because, while Bulgaria signed on to the CRPD in September of 2007, it has yet to ratify the Convention.⁷⁵ *Sýkora v. the Czech Republic* goes much further in its analysis of the subsequent losses of

⁷³ *Ibid*, para 171.

⁷⁴ *Bartlett*, *supra* note 5 at 23.

⁷⁵ *Stanev*, *supra* note 46 at para 72.

rights occasioned by a loss of legal capacity. Notably, the Czech Republic has both signed and ratified the CRPD.⁷⁶ Like *Stanev, Sýkora* considered whether the detention of a person with a mental disability was a deprivation of liberty, focusing on the issue of consent and substituted decision making. *Sýkora* asked whether a guardian's consent makes the deprivation of liberty of a "person of unsound mind" lawful under 5(1)(e). The Court's answer was, however, ambiguous. On the one hand, the Court applied the Winterwerp criteria, finding that the deprivation of liberty was unlawful because there were insufficient safeguards against arbitrariness. Under domestic Czech law, Mr. *Sýkora's* confinement was legal because his guardian consented to it. However, the Court found that this was an insufficient safeguard because the guardian had never met or consulted Mr. *Sýkora* and, further, he was unable to explain why he had not done so.⁷⁷ While the Court rightly found that a deprivation of liberty occurred, the application of the Winterwerp criteria is again problematic. The Court leaves open the possibility that a guardian, even one as indifferent as Mr. *Sýkora's*, may validly consent to institutionalization on behalf of another as long as sufficient safeguards are in place. Again, while article 12 of the CRPD permits limitations to legal capacity where safeguards are in place, no such safeguards are included as a limitation on article 14, which prohibits the deprivation of liberty for reasons of mental disability under all circumstances. Considering deprivations of liberty based on the CRPD would allow the ECtHR to evaluate whether the State party provided or was legally bound to provide alternative forms of residential care less restrictive to the person's liberty. Unfortunately in these cases:

The Court seemed to accept without question that if institutional care is all that is available, there is no need to consider whether the person could, or has the right to, live in a more independent, community setting with appropriate supports.⁷⁸

⁷⁶ *Sýkora*, *supra* note 56 at para 41.

⁷⁷ *Ibid* at para 68.

⁷⁸ *Ibid*; See also *Nelson*, *supra* note 68.

In the past, international regulations assumed that control over persons with disabilities was in many cases justified. The issue was merely determining the boundaries of permitted state compulsion.⁷⁹ Unlike previous human rights instruments and provisions (like article 5(1)(e) of the European Convention), “the CRPD proceeds on the basis that disability cannot be used as a factor in determining whether compulsion may be imposed.”⁸⁰ Considering a deprivation of liberty from the starting point that it may be justified within certain boundaries fails to bring in the “new era” of disability rights promised by the CRPD. This disconnect between article 14 of the CRPD and the ECtHR’s interpretation of 5(1)(e) reveals the difficulties inherent in applying the CRPD to previous human rights legislation within the framework of its existing jurisprudence. This discord reveals the extent to which the CRPD does not simply aim to reformulate existing international norms, but to create new ones.

Access to Justice

The question of legal capacity affects a number of substantive law issues; it is a crucial consideration in analyzing the right to juridical personality, freedom from arbitrary detention, the right to live in the community, and right to a fair hearing. I briefly touched on access to justice earlier in discussing Judge Kalaydjieva’s dissent in *Stanev*, which highlighted the difficult task of disentangling legal capacity from other substantive rights. Legal capacity goes beyond substantive law considerations however, affecting procedural issues and access to justice as well.

Each of the three regional human rights systems requires applicants to exhaust domestic remedies in order for their case to be declared admissible.⁸¹ The rule requiring

⁷⁹ *Who Gets to Decide?*, *supra* note 41.

⁸⁰ *Bartlett*, *supra* note 5 at 2.

⁸¹ *ACHR*, *supra* note 30, article 46; *ECHR*, *supra* note 48, article 35; Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), article 56(5) [*Banjul Charter*]. Available at: <http://www.refworld.org/docid/3ae6b3630.htm>.

exhaustion of local remedies is a necessary condition of the presentation of a complaint. It is premised on the principle that a state should receive an opportunity to respond to rights violations within its own legal framework before international mechanisms are activated.⁸² Given that many persons with disabilities are unable to access domestic remedies due to their lack legal capacity, this procedural rule effectively blocks access to regional human rights courts – the courts currently most likely to apply the CRPD.

Conversely, Guatemala’s Civil Code leaves the patients at Federico Mora with no ability to access the justice system to protest their treatment within the hospital. Instead, the Code makes the hospital’s director their legal guardian, without the need for any judicial process or review.⁸³ At Federico Mora, the capacity of every patient to engage in legal proceedings rests with the Director. As such, patients “have no direct access to judicial recourses to challenge their internment or complain of the abuse perpetrated against them.”⁸⁴ The case of Federico Mora is a situation where “the person who would have to act in [the patients’] interest – that is to say their tutor – is the same person who has been negligent in protecting their rights and interests.”⁸⁵

Cases that consider these procedural issues and disability are rare. The most progressive ruling on legal capacity and disability to emerge from a regional human rights body is the pre-CRPD case of *Purohit and Moore v. The Gambia*. The facts of this case, decided by the African Commission of Human and People’s Rights, resemble those of Federico Mora. Two human rights activists brought a claim on behalf of persons arbitrarily detained in a psychiatric hospital. The Gambia argued that the claim was inadmissible

⁸² *Case of Velásquez Rodríguez v. Honduras* (1988), Inter-Am. Ct. (Ser. C.) No. 4, at para 61. Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf>; See also *Purohit and Moore (The Gambia)*, (2003). ACHPR, Comm. No 241/2001, AHRLR 96 at 25 [*Purohit and Moore*]. Available at: http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf

⁸³ *DRI Application*, *supra* note 1 at 5.

⁸⁴ *Ibid.*

⁸⁵ *DRI Report*, *supra* note 1 at 38-39.

because the applicants had not attempted to exhaust domestic remedies. However, the applicants argued that they could not exhaust domestic remedies “because there [we]re no provisions in the national laws of The Gambia allowing for the complainants to seek remedies” for the violations that had occurred.”⁸⁶ The African Commission accepted the premise that the practical accessibility of remedies is relevant in deciding whether domestic remedies have been exhausted:

the real question [...] is whether looking at this particular category of persons the existent remedies are realistic. The category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the [Gambian] Constitution are realistic remedies for them in the absence of legal aid services.⁸⁷

The African Commission rejected the literal interpretation of the domestic remedies rule that would have made the applicants’ claim inadmissible, concluding that domestic remedies were not realistic for the applicants and therefore not effective.⁸⁸ *Purohit and Moore* therefore suggests that when looking at claims from persons with mental disabilities, the analysis should not focus on whether domestic remedies exist, but rather on whether they are actually available to the applicants given their circumstances. This straightforward approach addresses the reality that many persons with disabilities lack the legal capacity necessary to access domestic remedies. *Purohit and Moore* is however not binding on the Inter-American Court. Further, while the African Commission’s result is hopeful, the case itself is short and the reasoning provided is not fully developed. It is therefore unlikely that that such an exceptional norm will gain traction under international human rights law.

While the Inter-American Court and Commission have decided few cases regarding persons with disabilities, they have repeatedly examined the domestic remedies rule and exceptions to it. Article 46 of the American Convention on Human Rights requires that, for

⁸⁶ *Ibid* at para 26.

⁸⁷ *Ibid* at para 37.

⁸⁸ *Ibid* at para 38.

petitions to be admitted: “remedies under domestic law [must] have been pursued and exhausted.” Section 2 of article 46 provides for two exceptions to this rule, when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them.⁸⁹

For every alleged violation of a right, the applicant must establish that domestic remedies have been exhausted or that one of these two exceptions applies. As in *Purohit and Moore*, the applicants at Federico Mora could argue that they meet the exception under 46(2)(a) because no remedies exist or were available to them due to their poverty and lack of legal capacity. Alternatively, they could argue 46(2)(b) applies; the remedies that do exist were denied to them as incapacitated persons. However, these arguments seem unlikely to succeed given they imply incapacitated persons automatically come under the purview of international courts simply by reason of their incapacitation. Further, they perhaps ought not succeed, given domestic remedies should ideally be available to persons with mental disabilities. Indeed, the very justification for the admissibility rule is to ensure that domestic remedies are either provided or created so that applicants need not pursue remedies at regional human rights systems, which is often a long and costly process.

Exceptions to exhausting domestic remedies may however be possible under the Inter-American Court’s current jurisprudence. For example, non-existence of a remedy under 46(2)(a) may be established in circumstances where a criminal investigation is the only adequate remedy. Exceptions have also been provided under 46(2)(b) in cases where the state knows of criminal activity but fails to investigate and prosecute. The criterion regarding a criminal investigation is particularly relevant. Guatemala has known of serious human rights violations against the patients at Federico Mora since at least 2002, through national

⁸⁹ *ACHR*, *supra* note 30.

decisions and international recommendations contained in various reports, including one by the Guatemalan Human Rights ombudsman.⁹⁰ In 2010, the former sub-director of the hospital filed a complaint before the Chief of Police, alleging that acute female patients were performing oral sex on the guards at night. The police filed a single report in response to the complaint. No other actions - prevention, investigation or sanction – were taken to stop these abuses.⁹¹

With respect to many of the rights violations occurring at Federico Mora, particularly with respect to the allegations of physical and sexual abuse, the only adequate domestic remedy would be a criminal investigation. The Inter-American Court has reiterated this principle in the cases of serious criminal allegations such as forced disappearances,⁹² torture or beatings by police,⁹³ or death in a state-run institution.⁹⁴ In terms of allegations of physical and sexual abuse, as well as human trafficking, the only appropriate remedy would be a criminal investigation. Given that the Guatemalan state has been aware of these violations since 2002, and has launched no formal criminal investigation, the Court may find that the State has not provided due process of law and therefore allow for an exception of the rule requiring exhaustion of domestic remedies.

Unfortunately, these exceptions only apply to human rights violations that are subject to criminal sanction, where the state is under an obligation to investigate and prosecute. They do not apply to violations where the applicant must challenge the violation, such as is the case for a deprivation of liberty or legal capacity. Further, neither the Court nor the Commission has ever found an exception to domestic remedies based on a lack of legal

⁹⁰ *DRI Application*, *supra* note 1 at 5-6.

⁹¹ *Ibid* at 6.

⁹² *Diana Maidanic et al.* (Uruguay) (8 November 2012), Inter-Am Ct HR, Admissibility Report 1056-07.

⁹³ *Alex Edmundo Lemún Saavedra and Others* (Chile) (8 November 2012), Inter-Am Ct HR, Admissibility Report, 404-06.

⁹⁴ *Luis Fernando García García and Family* (Ecuador) (8 November 2012), Inter-Am Ct HR, Admissibility Report, 677-04.

standing. In one recent case, the Court considered a lack of legal standing as a factor among many for finding that an exception to domestic remedies should be granted.⁹⁵ However, the facts in *The Girls Yean and Bosico* were significantly different and centered around statelessness rather than incapacitation on the grounds of mental disability.⁹⁶ Other than this case, little jurisprudence exists as to the relationship between legal standing and the requirement that applicants exhaust domestic remedies. Indeed, in most cases of abuse in a state institution, it seems that the Court is willing to find that remedies have been exhausted under article 46(1), as long as the applicant has made some attempt to complain about the situation at the institution.⁹⁷

Conclusion

A New Beginning

This paper has argued that legal capacity is the most important right protected by the CRPD. Without it, persons with disabilities have no ability to protect any other rights. They are stripped of both personal and legal autonomy and are therefore unable to make basic decisions about their own lives. At the same time, Article 12 of the CRPD is not easily integrated into existing human rights legislation. A focus on legal capacity exposes the gap between the way the European and Inter-American Courts currently protect persons with disabilities, and the “paradigm shift” the CRPD seeks to advance within international human rights law.

In the first draft of this paper I spoke not only of a subsequent loss of rights, but an inevitable loss of rights. Looking at the lives of the patients at Federico Mora, Rusi Stanev

⁹⁵ *The Girls Yean and Bosico*, (Dominican Republic) (22 February 2001), Inter-Am Ct HR, Admissibility Report, 28-01. The case dealt with two young girls of Haitian decent born in the Dominican Republic, who were refused citizenship by the Dominican Republic.

⁹⁶ *Ibid.*

⁹⁷ Emily Hazlett, “Jurisprudence of the Inter-American Commission on Exceptions to the Exhaustion of Domestic Remedies (rules 46.2.a and 46.2.b) 2010-2013” (August 2013) Report prepared for Disability Rights International.

and others at his social care home, Milan Sýkora, or the countless other stories immortalized in the jurisprudence of the European Court, there is a sense that without legal capacity persons with disabilities, already vulnerable, inevitably become victims of other abuses.⁹⁸ While revising my work I decided to remove the word “inevitable.” As the *New York Times* recently wrote in an exposé on Federico Mora: “Recent developments suggest that a turning point on institutionalization may be at hand.”⁹⁹ Since 2008, over 130 countries have ratified the CRPD, a convention that protects persons with disabilities by affirming that they have rights to live in the community, make decisions for themselves, and be free from arbitrary detention.

In protecting these rights, the CRPD has sparked a wave of successful strategic litigation in Europe. While admitting that ‘litigation as law reform’ has its limits, Oliver Lewis, Executive Director of Mental Disability and Advocacy Centre (who represented both Mr. Stanev and Mr. Sýkora), is quick to point out the benefits of strategic litigation. Strategic cases often reach the media and the public. Not only does it document the human rights abuse against persons with disabilities, strategic litigation “frames personal misery as matters of judicial and public concern.”¹⁰⁰ Despite these benefits and many recent victories, the limits of the ECtHR are clear. The European Convention and the Court’s current jurisprudence fail to recognize legal capacity as a central issue for persons with disabilities. Rather than move toward a paradigm shift, the Court has continued to apply limitations, safeguards and proportionality to allow for restrictions of both legal capacity and liberty.

At the same time, legal capacity may well be an issue more complex than finding an effective remedy to a legal wrong.¹⁰¹ Lobbying for statutory change may allow for a more

⁹⁸ *Shtukaturov*, *supra* note 44, para 10.

⁹⁹ *Rudolph*, *supra* note 1.

¹⁰⁰ *Lewis*, *Utopia*, *supra* note 45 at 5.

¹⁰¹ *Ibid* at 4.

nuanced discussion of the complexities of decision-making mechanisms than the highly contentious courtroom setting.¹⁰² Unfortunately, in many countries the creation of supported decision-making systems is eclipsed by violations of the rights to liberty and freedom from inhumane treatment. The ability to make decisions, live autonomously and protect oneself from gross rights violations all hinge on legal capacity. While strategic litigation in the post-CRPD era presents a powerful tool to affect legislative change, disability rights organizations must nevertheless continue working directly with governments, training persons with disabilities as advocates, and lobbying directly for change. For Donaldo Rodas and the other patients at Federico Mora, the CRPD remains meaningless without human rights actors able to defend it, courts willing to apply it, and state parties ready to listen.

¹⁰² *Ibid* at 5.

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