



Guardianship litigation: resisting casual positivism

Presentation to the 2nd World Congress on Adult Guardianship, Melbourne, Australia, 15 October 2012

Abstract

In his presentation, Oliver will outline how many Europe guardianship systems continue to operate systems which flagrantly breach commitments which those countries have made under international human rights law. Using a formula developed by lawyer and philosopher Jeremy Waldron, Oliver will suggest that plenary guardianship schemes do not meet criteria which must be met independently for a law's application to be valid: "To describe an exercise of power as an instance of law-making or law-application is already to dignify it with a certain character," says Waldron (2008). Binary guardianship laws which allow only for the total removal of personhood, Oliver will suggest, do not meet basic criteria of lawfulness, and should be publically resisted.

Oliver will outline the litigation and advocacy work of the Mental Disability Advocacy Center has carried out over the last ten years, highlighting mountains climbed and rivers traversed. He will set out some conceptual and policy challenges and opportunities posed by the UN Convention on the Rights of Persons with Disabilities (2006). He will invite congress participants to step up and join MDAC in the pursuit of human rights around the world.

Oliver Lewis
Executive Director, Mental Disability Advocacy Center
www.mdac.info, olewis@mdac.info
Twitter @olewis75

CHECK AGAINST DELIVERY

Ladies and Gentlemen –

An outrage of the wrongs administered by the majority onto a minority, a conviction in the universality of human rights to promote freedom and justice for all, and a belief that each person in this room can take actions to reverse centuries of discrimination. These motivate me to address you today, and these prompt me to acknowledge the traditional owners of this land and pay my respects to their elders past and present.



I would like to thank Anita Smith, Colleen Pearce and colleagues and the International Guardianship Network for organising the congress, and for giving me the opportunity to address you.

In my presentation, I suggest that litigating abusive guardianship regimes is a vital method of taking us a few steps along the path towards freedom.

I am going to share with you some information about what is going on in Europe, and in many other parts of the world. I know many of you are Australian, and I am learning that the system here is far from perfect. There is work to do everywhere. What you have here some professionals who care, activists whose so-called 'radical' voices are heard and taken on board, a robust media, an engaged academia, and a government which is willing – at least – to listen, if not to act. Yes, things can be improved in Australia and I am sure they will. Engagement in debate is one of the things which a human rights culture is supposed to encourage.

I will argue that guardianship regimes which strip people of decision-making rights lack vital elements of the rule of law that we should not grace this system of commands as law. As such, we should resist and challenge such laws. I will finish by outlining a menu of options for you to get involved in MDAC's work to encourage progressive jurisprudence, initiate law reform, and empower people with disabilities to become the agents of their own change. MDAC fights physical and legal segregation in many countries of central and eastern Europe, and also three African countries and India.

Rusi Stanev

I want to take you many miles away from here, to the sharp end of human rights. This is a story of segregation, tenacity and freedom. It's the story of a hero of mine, Rusi Stanev, of Bulgaria.

10 December is international human rights day. On this day in 2002, when he was 46-years old, an ambulance picked up Rusi Stanev at his home where he lived alone. He was bundled inside and driven 400km to the village of Pastra to an institution for "adults with mental disorders." His transfer into the institution was arranged through an agreement by the institution's director and a municipal official acting as Mr Stanev's guardian. The guardian had never met Mr. Stanev and signed off on the institutional placement a mere six days after becoming his guardian.

His placement was arranged on the basis that Mr. Stanev had a diagnosis of schizophrenia and that his relatives did not want to care for him. Mr. Stanev knew nothing about this agreement and did not want to leave his home. No one told him how long he would stay in the institution, or why he was being taken there. Two years earlier, the Ruse Regional Court had restricted his legal capacity. He was not notified about or allowed to participate in the proceedings that led to this determination. Once under guardianship, Mr. Stanev was



prohibited by law from making any decisions about his own life. He had unsuccessfully appealed the court decision a year later. In 2005, the director of the institution was appointed Mr. Stanev's guardian.

A BBC journalist had visited the Pastra institution in December 2002 and found that some of the residents "had no shoes and socks although it's minus ten degrees [Celsius] outside." The journalist reported that "[o]ne in ten residents did not survive the past year – and there is no reason to expect it to be any different this year." The residents' clothes were bundled together and handed out randomly to the residents, a situation about which when they had opportunity to comment, that the European Court of Human Rights found "was likely to arouse a feeling of inferiority in the residents." Only judges could formulate such a wonderful understatement.

The European Committee for the Prevention of Torture also visited during that time and found that there was one TV set owned by one of the residents, but generally that, "[n]o therapeutic activities whatsoever were organised for the residents, whose lives were characterised by passivity and monotony." The institution's daily budget for food per person was the equivalent of 0.89 USD. The Prevention of Torture Committee delegation was so appalled with the situation that at the end of its mission to Bulgaria it made an immediate observation, finding that "the conditions witnessed at this establishment could be said to amount to inhuman and degrading treatment."

They urged the Bulgarian government to urgently replace the institution with a facility in conformity with modern standards. Responding to this in February 2004, the Bulgarian government promised that the Pastra institution "would be closed as a matter of priority." This turned out to be entirely vacuous: the Pastra institution remains operational to this day.

In February 2010 and again in 2011 there were hearings in Strasbourg at the European Court, represented among others, by my organisation, the Mental Disability Advocacy Center. Mr Stanev became the first ever applicant from a social care institution, and – as far as I know – the first person under guardianship ever to attend his own hearing in this Court.

The Court handed down its judgment in January 2012. Importantly for this conference, it found that "if the applicant had not been deprived of legal capacity on account of his mental disorder, he would not have been deprived of his liberty".

Why have I told you about this case in some detail? Because guardianship very often facilitates life-long segregation of people with disabilities into institutions. Guardianship very often increases the risk of exploitation, violence and abuse instead of preventing it, and guardianship rips apart families. And because this case is emblematic of thousands of other people's cases.

Let's look at some of the features of guardianship laws.



Features of guardianship regimes

MDAC works in around 12 countries in Europe and Africa on legal capacity law reform. We have studied guardianship regimes in these countries and what we've found out is shocking. If you work in Australia, Germany, UK, Canada etc – you may be shocked. What I am going to say is not a criticism to all guardianship, just to the binary form of capacity which is found in the vast majority of the 47 Council of Europe Member States.

Generalisations are always risky but here goes. The process of placing someone under guardianship in many jurisdictions is deeply flawed. One doctor's opinion is needed. The person in question is not invited to attend court. No counter evidence is presented, and the medical evidence is not probed. The person need not be informed of the proceedings or the court's decision.

As a result of being placed under guardianship, the law assumes that the person is completely incompetent in all areas, and that the guardian will take all decisions in the person's best interests, so the guardian can decide to place the person in a far-away institution, can block court proceedings if the person wants to review their guardianship status, can block a complaint against himself. It's like a Kafka novel.

We have cases where this has happened. We have cases where children have arbitrarily been removed from a parent who has been placed under guardianship, even within any review of the person's parenting skills or the child's best interests. People under guardianship are prohibited from working – their signatures are *invalid*. They are, after all, *invalids*. Even the right to vote is removed, plunging the person under guardianship into political invisibility. It is difficult to imagine progress in substantive areas of human rights if a politician can look at you and say, 'you are a political nothing'.

In sum, plenary guardianship strips people of their autonomy and rights, without any legal or moral justification, in a process lacking fair trial rights or other safeguards, with the result that a person is at elevated risk of exploitation, violence and abuse, with all routes to access justice blocked.

Let me put my argument somewhat formally.

Evidence suggests that plenary guardianship

1. affects many thousands of people.
2. restricts rights, rather than prevents abuses and
3. is never needed, as there are always alternatives.

My contention is that

4. These regimes are so arbitrary that they lack the character of law.

Therefore



5. We should use all legal means to fight against plenary guardianship, and propose feasible policy alternatives.

What does the Convention tell us?

Article 12 of the UN Convention on the Rights of Persons with Disabilities is based on two propositions. First, that everyone has legal capacity in all areas of life. This is not linked to type or severity of disability. Second, that the State has an obligation to provide supports to people who may need those to exercise their legal capacity. Other provisions set out the state obligations to guard against torture and other forms of ill-treatment, exploitation, violence and abuse.

The UN Committee on the Rights of Persons with Disabilities has said (in this case, with regard to Spain) that States must, “take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences.”

This over-simplistic formulation belies some real and rough edges. As well as engaging with the disability and human rights communities, we are drawing in the perspectives of moral and political philosophers, people from public policy, medical humanities and empirical and neurological science. Not one person, not one field has the answers. We are creating the space for everyone interested to converse, provide counter-examples and test assumptions.

Plenary guardianship as non-law

I want to adapt and apply a formulation about the rule of law proposed by philosopher and lawyer Jeremy Waldron set out in his paper “The Concept and the Rule of Law” in 2008. Waldron points out that there are many conceptions of the rule of law. The positivist legal scholar Lon Fuller has emphasized the importance of clarity, publicity, stability, consistency, and prospectivity of norms, and congruence between law on the books and the way in which public order is actually administered. In general, positivists favour the role of rules over standards, literal meanings over systemic inferences, direct applications over arguments, and ex ante clarity over labored interpretation.

Waldron posits five elementary requirements for something to count as a legal system, for “to describe an exercise of power as an instance of law-making or law-application is already to dignify it with a certain character” (p. 12). I will hone down on two of these requirements to provide a reason form political philosophy to justify why MDAC chips away abusive guardianship systems in the courts.

1 – Courts



Waldron suggests we should not regard something as a legal system absent the existence and operation of courts, by which he means institutions which, through the medium of formal hearings, impartial weighing of evidence from both sides in proceedings which apply norms and directives established in the name of the whole society to individual cases and which settle disputes about the application of those norms. These are essential features of the institutional arrangements we call legal systems.

As noted, guardianship proceedings in many countries happen on papers, without notifying or including the person in question and judicial rubber-stamping a medical opinion.

In this sense, guardianship laws are roughly 200 years behind criminal law. In 18th century Britain, criminal trials were 15 minute hearings where there was no genuine investigation and proving of evidence. It was only until 1836 that felony defendants were given the right to be legally represented. There was no law reporting and no hierarchy of appeals. These characterise guardianship hearings today. So what I am saying here, is that process is important, and we need to name

2 – Orientation to the Public Good

Waldron makes the point that we recognize as law not just any commands that happen to be issued by the powerful, but laws should be “norms that purport to stand in the name of the whole society and to address matters of concern to the society as such.” Guardianship laws have generally been imposed onto people with disabilities without their consultation or consent. They have not been made to benefit the individuals who control the laws: the family members who want their relative under guardianship, the local government official who wants a light touch regulation, the institution director who wants their newly admitted resident not to have the right to take any decisions himself, and the judge who wants a convenient and quick solution.

These guardianship laws cannot reasonably be said to purport to promote the public good.

Of relevance to guardianship regimes, Waldron argues that our understanding of the rule of law should emphasize not just the value of settled, determinate rules and the predictability that they make possible, but also the importance of the procedural and argumentative aspects of legal practice. The content of the law: what is acceptable and what is unacceptable.

The reason we are fighting against plenary guardianship, is if you look at the texture of the law, there is more at play than just protecting people with disabilities – that is the stated aim of guardianship. There are local interests involved, family disputes, corruption in the medical profession, inadequacy of social benefits systems, laziness of lawyers, disablism, sanism: prejudices of families as well as professionals.



No-one is so disabled to need plenary guardianship. This regime takes away people's personhood, and also removes their humanness: their own authority to take decisions and forge their own way through life, their right to participate in their own lives but also in our own democracies. There are alternatives to this brutal system, and many of these alternatives are usefully being explored during this conference.

My contention is that a system of commands which is so top down, so disproportionate and so brutal cannot reasonably be said to be oriented to the public good. As such, we should reject such a system as law, we should not grace it with the respect we show to laws which serve some legitimate purpose. What I'm saying here, is that we need to challenge the substantive law, as well as faulty processes.

Why does MDAC challenge these laws in the courtroom?

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 with judges rubber-stamping medical hunches without probing the evidence. Judges' hands are further tied in jurisdictions where there is a binary legal capacity system of plenary guardianship and little else. The judiciary has its own cognitive biases against people with disabilities. They adjudicate in systems with embedded concepts such as deficit, best interests, and protectionism where the theoretical 'least restrictive alternative' may actually be the most restrictive that one could imagine. And the time it takes is a hurdle: it took six years for Rusi Stanev's case to be adjudicated at the European Court of Human Rights.

His case demonstrate that challenges can be overcome by tenacious litigants and – dare I say it – smart litigators. Strategic litigation can yield significant benefits for individual applicants such as him, but the utilitarian in me says that that misses the point, because strategic litigation is a process which enables courts to articulate progressive jurisprudence. 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 national human rights institutions. In democracies, courts are seen as fair and balanced, and what they say matters: after all, they have to take into consideration competing factors and weigh evidence presented by at least two sides.

Cases challenging guardianship systems are often framed in civil and political rights terms such as fair trial rights and privacy rights, using concepts such as arbitrariness, proportionality and discrimination. These claims help challenge



the erroneous view held by many policy-makers and lawyers that disability is inherently a social issue or at best, a social rights issue.

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 the name of therapy, care, or 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 on others similarly situated to the applicant, and can shore up the interest of other potential litigants. It can make a seat at the policy table available, creating an opportunity for the disabilities community to engage in law reform efforts.⁹⁹ 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 rights. 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.

As Martin Luther King said, “Injustice anywhere is a threat to justice everywhere.” You can make a difference to people like Rusi Stanev. Use the CRPD in your advocacy. Get involved in our advocacy! Look at our website mdac.info. Find us on Facebook and follow us on Twitter (@mdachungary, @olewis75). Make a donation so that we can continue to challenge injustices. Pick up a leaflet about MDAC from the back of the room.

I'd like to finish with a quotation. Before his February 2011 hearing at the European Court of Human Rights, Rusi Stanev told his lawyer Aneta Genova,



I'm not an object, I'm a person. I need my freedom.

Franz Kafka once wrote that, "paths are made by walking." Mr. Stanev's case, and others, clear the path towards freedom, and towards a time when people with disabilities are not objectified by the law, but treated as full and equal subjects of human rights and fundamental freedoms. It is now for you to take action, by advocating for change, raising awareness of human rights, empowering victims of human rights violations to seek justice through the courts, and ensuring the viability of organisations that enable this to happen. I invite you to join us in creating the change which is so desperately needed.