

Litigating legal capacity

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Conference on legal capacity and community living,

Thank you to the European Commission (and us taxpayers) for funding this conference, to the organisers for organising it and to the participants for participating. Other speakers have spoken about the UN Convention on the Rights of Persons with Disabilities (CRPD) and the new paradigm, and the previous speaker has outlined some of the cases at the European Court of Human Rights, some which could be critiqued through the lens of the UN Convention on the Rights of Persons with Disabilities. What I want to do is follow on and speak directly to the judges in the room and offer some suggestions about what you can do, right here and right now in Serbia.

My remarks are also directed to the NGO activists and lawyers in the room and encourage you to bring cases, and to offer MDAC's technical support in framing and bringing these cases. I will not attempt to give a comprehensive overview of the jurisprudence at the European level, but rather to tease out some stories and themes, and offer some guiding court-room questions.

Judges have an enormously valuable role to play in the administration of justice. But not all judges fully realize that justice does actually apply to people with disabilities. I will submit to you that judges can apply the Constitution, as well as the European Convention on Human Rights (ECHR) and the CRPD in their courtrooms.

“I think that the person's participation is neither necessary nor useful because we speak about people who are mentally inadequate. They just would hinder the proper conduct of the trial. Do you think they might behave in a civilized manner in the courtroom? Their presence in the courtroom is not necessary; the

relatives talk for them, while the conclusion is based on the report of the psychiatric expertise.”

Judge from Moldova

So just as Eric Rosenthal rightly linked legal capacity to matters of life and death, I want to underline that legal capacity is grounded in the rule of law. We need to focus those who are at risk of being excluded from the rule of law. And while I echo Amita’s point that one cannot make a circle from a square, I do think litigation can act like a chisel to chip off some of the sharp corners of the square, not to create a smooth circle, but to demonstrate that the square is not fit for purpose.

I also encourage you in the strongest of terms to pursue litigation in parallel to law reform, because (a) it documents human rights violations, and (b) it gives you a different strategy if or when the Serbian government fails to revise the law. This is what has happened in Hungary: we have spent the last five years advocating rather than litigating, only to get a new law which is a square rather than a circle.

I suggest three distinct clusters of cases which lawyers can bring, and which judges can adjudicate. The first cluster of cases chip away at the guardianship edifice, the square. The second decouples legal capacity from subsequent losses of human rights, and the third encourages the State to set up alternatives to guardianship, the circle.

I want to tell you about two cases from other jurisdictions – Bulgaria and Russia – both of which have similar legislation to Serbia. First, Bulgaria. Let me introduce you to one of my heroes, Rusi Stanev.

In 2002, when he was 46, Rusi was taken by ambulance from his home. He was driven 400km away to the Social Care Institution for Adults with Mental Disorders, near a village called Pastra. The reason he was taken there is because two years previously he had been placed under guardianship, in proceedings in which he was not informed or involved. His guardian was initially a local government employee who had never met him. The guardian arranged the social care institution placement in a contract with the director of the social care institution who then became the guardian. Rusi had no knowledge of this. Rusi spent the next eight years there.

On a monitoring visit to the Pastra Home in 2003, the European Committee for the Prevention of Torture found that the sanitary conditions, lack of heating and inadequate food in the institution amounted to inhuman and degrading treatment. Although the Committee called for the immediate closure of the institution, repairs were only made in 2009 and the institution remains open today.

Rusi attempted several times to initiate a review of the restriction on his legal capacity, but was barred from bringing a proceeding without the consent of his guardian (who, once he was at the institution, was replaced by the director of the institution) and so never had the restrictions on his legal capacity reviewed by a court. Talk about excluded from the rule of law!

The Bulgarian justice system provided him with no remedies, so the Bulgarian Helsinki Committee and MDAC assisted him to take his case to the European Court of Human Rights. He became the first ever person from a social care institution to appear before the Court. Twice.

In its January 2012 ruling, the Court found:

1. The living conditions to which Rusi was exposed during a period of approximately seven years amounted to degrading treatment (violation of Article 3 ECHR). This is the first ever such finding in a disability case!
2. In the particular circumstances of the case, which include the involvement of government authorities in the placement, the restrictive rules regarding absences from the institution, the duration of the placement and Rusi's lack of consent to the measure, that there was a deprivation of liberty (violation of Article 5(1) ECHR). This is the first ever such finding of detention in a social care setting!
3. There was no review of the lawfulness of Rusi's placement in the Pastra institution (violation of Article 5(4) ECHR).
4. Rusi was unable to avail himself prior to the Court's judgment in the present case, or will be able to do so after its delivery, of a right to compensation for the violation of Article 5(1) and (4) ECHR (violation of Article 5(5) ECHR)

5. The remedies in question were not effective and, even assuming that, as a result of the procedure for restoration of legal capacity, Rusi had been able to have his legal capacity restored and to leave the home, he would not have been awarded any compensation for his treatment during his placement there (violation of Article 13 ECHR, taken in conjunction with Article 3 ECHR).
6. Rusi had no direct access to a court to seek restoration of his legal capacity (violation of Article 6(1) ECHR).

So you can see how a case about disability can be argued in a mainstream human rights way. So judges, you can also invoke constitutional law and the ECHR in your court-rooms here in Serbia, as well as the specific UN disability treaty.

Strangely, the Court failed to address Rusi's arguments about his right to live in the community, and about deprivation of legal capacity, both brought under Article 8 of the ECHR. A partly-dissenting judgment by Judges Tulkens, Spiemann and Laffranque criticised the majority view, saying that placing Rusi in the Pastra institution "had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed 'institutionalisation syndrome', that is, the loss of social skills and individual personality traits."

Judge Kalaydjeiva, the Bulgarian judge, wrote a separate partly-dissenting judgment, asserting that "the majority's preference not to consider separately the applicant's complaints under Article 8 resulted in a failure to subject to separate scrutiny the absence of safeguards for the exercise of these rights in the face of a potential or even evident conflict of interests, a factor which appears to be of central importance for the requisite protection of vulnerable individuals against possible abuse and is equally pertinent to the applicant's complaints under Article 8 and Article 6."

So to emphasise – the only reason he had to spend eight years in this institution was because his legal capacity was deprived. As we know, institutionalisation and legal capacity are intimate lovers.

Decoupling subsequent losses of human rights

Placing someone under guardianship means that they will automatically lose many fundamental rights. As we have seen, people lose the right to decide where and with whom to live – they lose their right to live in the community. You lose your right to work, which is curious when you consider the bidirectional link between disability and poverty and that by denying someone the opportunity to work you deny them the opportunity for a livelihood. Losing your legal capacity means that the guardian controls your money, and sadly this is often the reason why people are placed under guardianship. Your children may be taken away from you if you are placed under guardianship. And you will lose your right to vote, that single most simple thing we can do in democracies. I am looking forward to hearing from Kristijan about the fantastic work he and colleagues have done in Croatia to get law changed to enable people under guardianship there to vote. Finally, under guardianship you are denied the right to join advocacy NGOs, trade unions and political parties – the very bodies which could help you. You are also denied

Let me tell you about another case.

Shtukaturv v. Russia

Pavel Shtukaturv was in his mid 20s when he found out that his mum had placed him under plenary guardianship a year ago. He engaged an attorney, Dmitri Bartenev in St. Petersburg to retain his legal capacity. A few days later Pavel called Dmitri from a psychiatric hospital asking him to help get him out of there! His mother had placed him in the psychiatric hospital where under Russian law he was classed as a “voluntary” patient, even though he made it very clear he did not want to be there. He was detained there for seven months, and received high doses of psychotropic medication against his will. The hospital did not allow Dmitri to visit Pavel. I happened to be there at the time, and went to the hospital with Dmitri. I don’t know what was more frightening: the

head nurse of the ward who refused access or the Alsatian dog growling in the corridor.

The case went on and you can read about the loops which we had to go through. Eventually in 2008 the Strasbourg Court found:

1. Deprivation of legal capacity constitutes a "very serious" interference of a person's private life, it is applied indefinitely, and cannot be challenged by the person under guardianship (violation of Article 8 ECHR).
2. A mental illness cannot be the sole reason to justify stripping someone of legal capacity and Russian law is disproportionate in allowing this to happen without making provision for a tailor-made response (violation of Article 8 ECHR).
3. The guardianship proceedings were unfair because they wholly excluded Pavel (violation of Article 6 ECHR).
4. Deprivation of legal capacity is not a ground to deprive a person of their liberty (violation of Article 5(1) ECHR).
5. Every person who is detained - including those who have been deprived of their legal capacity - should have the right to pursue independently a legal review to challenge their detention (violation of Article 5(4) ECHR).
6. The Russian Government failed to comply with an "interim measure" of the European Court ordering it to allow Dmitri to have access to Pavel (violation of Article 34 ECHR).

Judgment on just satisfaction came two years later, and criticized the Russian government for failing to restore Mr Shtukaturov's legal capacity or provide him any access to justice. The Court ordered 25,000 EUR compensation, the largest amount in a disability case. So in this case you can see that other rights were effected, most notably the right to refuse medical treatment and the right to liberty.

You may think it is quite odd that the law removes a person's right to take decisions just because someone may need some support. Proportionality is a key concept in human rights, and guardianship regimes are rather like taking a sledge-hammer to crack a nut. There is another way to deal with this.

CRPD

So much for European law. What does UN law say? Essentially Article 12 of the UN Disability Rights Convention is based on two normative premises. First, that everyone has legal capacity (paragraph 2). And second, that the State has an obligation to provide access to supports if a person needs such supports to exercise her/his legal capacity (paragraph 3). This needs to happen with safeguards, so that a person is not exploited or placed in an abusive situation in any way.

The UN Committee on the Rights of Persons with Disabilities has said 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.” (Concluding Observations on Spain, 2011. CRPD/C/ESP/CO/1, Para 34.) And that people including judges need training on the new support model.

What can judges do?

Here are some questions which judges could ask themselves here and now, under the existing law:

- How can I maximize autonomy for this person?
- How can I remedy exploitation, violence and abuse, and try and prevent these things from occurring in the future?
- How can I deal with the huge conflict between the CRPD and Serbian law?
- How can I order the local government to put in place supports so a person doesn’t need to be placed under guardianship?
- How can I create jurisprudence to abolish blanket forms of control?
- How can I abide or (at least) cite the CRPD in my judgment?

Conclusion

As he was going into the European Court of Human Rights for the hearing in his own case in February 2011, Rusi Stanev said to his lawyer, “I’m not an object, I’m a person. I need my freedom.”

Litigating legal capacity cases can contribute to creating a space for a positive reframing of issues which in time will lead to better laws and better individual outcomes. Litigation can force parties to fundamentally re-evaluate positions, and can challenge communities to come up with creative solutions. Adjudicating cases which chip away at the guardianship monolith in Serbia is likely to yield several specific outcomes which trickle out into law, policy and service provision.

Deciding individual cases in a CRPD-compliant manner may not by itself erode the devaluation of particular differences which people with disabilities face on an everyday basis. But progressive judging 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. Like this conference itself, legal capacity litigation may even spark a more constructive conversation about personhood and the kind of society in which all of us can participate with pride.

For more information see

- [“Stanev v. Bulgaria: On the Pathway to Freedom”](#), Human Rights Brief, Vol. 19, Issue 2, 2012
- “Advancing legal capacity jurisprudence”, (2011) *European Human Rights Law Review*, 6, 700-714
- www.mdac.info