

AMICUS BRIEF
IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 13469/06

D.D. Applicant

v.

Lithuania Respondent

WRITTEN COMMENTS
BY

THE EUROPEAN GROUP OF NATIONAL HUMAN RIGHTS INSTITUTIONS

**PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
AND RULE 44 § 2 OF THE RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS**

22 April 2008

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1 Introduction:

In February 2008, the Court granted liberty to the European Group of National Human Rights Institutions (“the European Group”) to intervene in the current proceedings as an *amicus curiae* in the form of written submissions in accordance with Articles 36 § 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) and Rule 44 § 2 of the Rules of the Court.

The European Group is a representative group of those national human rights institutions within the Council of Europe who are deemed to be fully compliant with the United Nations (“UN”) “Paris Principles”¹ governing independent national human rights institutions. The Group numbers sixteen (16) national institutions. A national human rights institution (“NHRI”) is a State-sponsored and State-funded organisation, with a constitutional or legal basis, with authority to promote and protect human rights at the national level as an independent agency. The competences and responsibilities of national human rights institutions are broadly set out in the “Paris Principles”. Four key criteria set out in these Paris Principles for the definition of an NHRI are the following:

1. Independence guaranteed by statute or constitution;
2. Autonomy from government;
3. Pluralism, including in membership;
4. A broad mandate based on universal human rights standards.

Since September 2006, the Irish Human Rights Commission (“IHRC”) has chaired the European Group and it makes these respectful submissions on behalf of the Group. This is the first time the European Group has submitted submissions to this Court although NHRIs have previously done so in their individual capacity.

These proceedings concern the placement of a Lithuanian national into a social care home for the mentally handicapped. She alleges that her confinement and forced treatment in the Kėdainiai Social Care Home is unlawful and in violation of Articles 3, 5, 6, 8 and 9 of the ECHR. The respondent Government denies these claims. Subject to admissibility and findings of fact the case thus raises issues of fundamental importance concerning legal capacity and human rights.

Legal capacity is fundamental to human 'personhood' and freedom. It protects the dignity of persons as well as their autonomy - their ability to take charge of their own lives and to make their own decisions. These decisions span a broad range including the development of personal relationships, medical treatment, finance and asset management, etc. The main difficulty with disability generally - and intellectual disability specifically - is the all-too-easy assumption that disability simply equates with a lack of capacity. In large part this assumption rests on stereotypes and exaggerates the effects of disability. That is, it fails to see the person behind the disability and treat the person as a rights-bearing “subject” rather than an “object” to be managed and cared for.

Commentators generally refer to three broad models describing the approach to persons with disabilities and those persons’ capacity in relation to decision-making:ⁱⁱ

Status approach: The Status approach to capacity entails making a decision regarding capacity on the basis of their disability rather than evaluating the person’s capacity to make a specific decision at a specific time.ⁱⁱⁱ Essentially under this approach the law presumes a person to be incapacitated based solely on the presence of a disability. This approach is now in retreat throughout the world.

Outcome approach: The Outcome approach is based on a person’s prior decision or pattern of decisions.^{iv} Hence, if a person makes a decision that is viewed as not conforming to “normal” or “societal values” then the person is regarded as lacking capacity.^v Because of the large scope for paternalism this approach too is in decline throughout the world.

Functional approach: This approach assesses capacity on an “issue-specific” basis.^{vi} The approach enables capacity to be determined on a particular matter. Therefore, a decision on one’s capacity in relation to a matter (for example, the capacity to make financial decisions) will not necessarily be

determined in the same way or with the same result in relation to another matter (for example, the capacity for human relations).^{vii} This approach is in the ascendant mainly because it is closer to human rights values and law, favouring a “tailor-made” approach to determining capacity. With this approach there is still a need to guard against paternalistic assumptions which may distort objective assessments of functional capacity.

The most widely accepted approach is the Functional approach as it maintains a person’s self-determination and autonomy by placing limits on a person’s rights to the minimum extent necessary.^{viii} This sharply contrasts with the “all-or-nothing” approach to capacity which is perpetuated by the Status approach.^{ix}

In a recent decision, this Court demonstrated the trend away from the Status approach. In *Shtukurov v Russia* (“*Shtukurov*”), this Court stated that,

“...the existence of a mental disorder, even a serious one cannot be the sole reason to justify full incapacitation.”^x

In effect, this Court has also endorsed the Functional approach in *Shtukurov* when it concluded that there was a lack of proportionality in the legal response to the person’s capacity in that case.^{xi}

Of relevance to the overall debate is the distinction sometimes drawn between the “medical model” of disability and the “social” or “human rights model” of disability. The “medical model” tends to view persons with disabilities as “objects” who are to be managed or cared for. The “social” or “human rights model” views persons with disabilities as subjects and not objects and places emphasis on respect for their equal human rights.

One effect of the “medical model” was that most legal capacity legislation throughout the world tended to be insensitive to the variations of capacities within the person. Such laws drew binary and mutually exclusive distinctions between either full capacity, on the one hand, and a complete absence of capacity on the other - with no nuances in between. However, this is also changing as there is a growing recognition that there are gradations of capacity.

Furthermore, the “medical model” tended to be reflexive with regards the process for deciding on whether incapacity existed and could rest entirely on assumption. Sometimes this led to a loss of capacity upon the automatic operation of law. This too is changing, with the shift towards the Functional approach and on the need for a reflective process for determining a person’s individual circumstances and needs.

Further, under the “medical model” where genuine incapacity was found, the first response of the law tended to be one of substituting the person’s decision-making capacity. Today, however, there is a clear trend toward acknowledging a level or residuum of capacity and in putting in place supports as well as an assisted-decision making process for the person.

This positive trend is best exemplified in the recently adopted United Nations Convention on the Rights of Persons with Disabilities (“CPRD”) which will come into force on 3 May 2008^{xii}. As of April 2008, 31 Member States of the Council of Europe have signed the CRPD, including Lithuania.^{xiii} This trend away from a Status based approach and towards a Functional approach is also reflected in the development of soft law at European level (including a number of Recommendations by the Committee of Ministers), as well as in the evolving jurisprudence of this Court. Furthermore, such positive law reform which reflects a clear trend towards a human-rights based Functional approach can be seen in a number of European States. It is noted that this law reform is not confined to Europe and is now truly global.

In the next part, these trends will be reviewed, with the aim of providing some assistance to this Court with regard to the international human rights dimension and in situating the current trends within Europe.

2. Human Rights, Capacity Law Reform and the United Nations Convention on the Rights of Persons with Disabilities:

The CRPD was adopted by the UN General Assembly on 13 December 2006,^{xiv} and, fittingly, was the first comprehensive human rights treaty of the 21st Century.^{xv} Its fundamental purpose is to:

promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.^{xvi}

The CRPD encompasses a range of rights that affect the everyday lives of persons with disabilities, such as, accessibility (Article 9), personal mobility (Article 20), health (Article 25), education (Article 24), work and employment (Article 27), habilitation and rehabilitation (Article 26), participation in political and public life (Article 29) and equality and non-discrimination (Article 5).^{xvii}

The CRPD was deemed necessary because of the near-invisibility of persons with disabilities as subjects of human rights law. Over the past fifty years, the international community has recognised that certain groups of people require specific protections from discrimination and abuse.^{xviii} As the provisions of other international human rights treaties did not explicitly focus on the rights of persons with disabilities, the UN developed a number of Declarations, Resolutions, and Principles that elaborated on the application of human rights of persons with mental illnesses and developmental disabilities.^{xix}

Although the UN had established standards relating to disability, primarily through the *Principles for the protection of persons with mental illness and for the improvement of mental health care* (“the MI Principles”)^{xx} and the *Standard Rules on the equalisation of opportunities for persons with Disabilities* (“the Standard Rules”)^{xxi} the CRPD creates binding international law that embraces the social or human-rights model.

Article 12 of the CRPD entitled “equal recognition before the law” guarantees that States must recognise the legal capacity of persons with disabilities “on an equal basis with all others in all aspects of life”.^{xxii} Capacity, as defined in the CRPD includes both the capacity for a right to recognition everywhere as persons before the law (“legal recognition”) and the capacity to “exercise” those rights.^{xxiii} Both of these elements are integral to the concept of legal capacity because they establish the rights and responsibilities of persons with disabilities to make their own decisions.

Article 12 also addresses situations where persons with disabilities may need support to express their will and preferences, for instance, support and concrete assistance to exercise their legal capacity. In such instances, there is an obligation on the State to provide access to such support and establish safeguards to prevent abuse and ensure its appropriateness to meet individual rights.^{xxiv} Support must “...respect the rights, will and preferences of the person...” and must be “... free of conflict of interest and undue influence.”^{xxv} Therefore, persons with disabilities must be provided with the support they need but can not be required to accept support against their will. Further, Article 12 explicitly protects the rights of a person with disabilities in relation to their property and their financial affairs.^{xxvi}

The CRPD model of capacity represents the current legal trend that persons with disabilities should be supported in their decision-making and that their judgments should not be substituted by others. Its treatment of capacity is in stark contrast to those jurisdictions which still utilise the “medical model” by placing persons with disabilities under overly broad guardianships that deprive and disempower them of the right to make decisions affecting their daily lives.^{xxvii}

It is also noted that without legal capacity it is not possible to obtain the rights guaranteed under the CRPD. For example, persons with disabilities may technically have the right to health, however, without the legal capacity to choose or consent to treatment the person’s rights are rendered practically non-existent. This connection can be found between virtually all other rights in the CRPD and the right to legal capacity. For instance, without

full legal capacity, the guarantee of free and informed consent in Article 25 is diminished; the right to marry in Article 23 and the right to political participation in Article 29 are hollow; and persons with disabilities will continue to experience discrimination and remain outside of the CRPD and its protections.

The right to legal capacity, whether it is full legal capacity^{xxx} or assisted decision-making, allows for persons with disabilities to live and participate in an inclusive society. With the recognition of universal capacity, there is recognition that, given the opportunity, all human beings can grow and develop. Article 12 guarantees that individuals with disabilities not only have equal rights as others but also that States will protect these rights.

3. European Commitment to Capacity Law Reform - Council of Europe:

This section reviews significant developments at European level within the Council of Europe machinery.

The ECHR and Legal Capacity:

The ECHR sets forth a number of fundamental rights and freedoms that must be protected, regardless of an individual's level of capacity. Specifically, Article 5, Article 6, Article 8, Article 13 and Article 14 are frequently invoked in cases which raise issues of capacity.

In several Judgments, this Court has held that Article 6 may be subject to limitations, but the limitations must be based on a legitimate aim, be proportionate to that aim, and cannot "justify impairing the very essence of the right"^{xxx} In *Winterwerp v. the Netherlands*, this Court held that

[w]hile . . . mental illness may render legitimate certain limitations upon the exercise of the 'right to a court,' it cannot warrant the total absence of that right as embodied in Article 6(1).^{xxxi}

Indeed, this Court has found violations of Article 6 in a number of cases which raised the issue of capacity, where individuals were refused adequate access to a court or experienced unreasonable delays in having their cases heard.^{xxxii} Most recently this Court has stated that in some cases it may be inappropriate for a court to make decisions on the basis of documentary evidence and that the person should be present during the proceedings.^{xxxiii}

Although Article 8 is a qualified right that is subject to certain restrictions "in accordance with law" and "necessary in a democratic society,"^{xxxiv} this Court has broadly interpreted "private life" to effectively parallel the social model's emphasis on fundamental rights. This Court has held that it is not enough to merely protect an individual, but rather, to truly guarantee private life a person's interactions with society must also be protected. In this regard, this Court's interpretation of Article 8 corresponds with the Functional approach. This Court has held:

also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.^{xxxv}

Furthermore, in the aforementioned *Shtukaturov* decision of 2008, this Court held that as the deprivation of legal capacity constitutes a "very serious" interference with a person's right to respect for private life, there must be sufficient reason and also a "tailor-made" and proportionate response for removing an individual's legal capacity.^{xxxvi} This position is fully congruent with the approach taken under Article 12 of the CRPD.

Moreover, the instant case may allow this Court to more fully explore the extent of positive obligations on a State in relation to Article 8 with regard putting in place a mechanism or mechanisms for assisting persons with limited capacity to make decisions that profoundly affect their own lives.

Committee of Ministers Recommendation:

The Recommendations from the Committee of Ministers of the Council of Europe illustrate a convergence on certain values, as well as a clear European level of convergence on relevant law and policy.

In 1999, the Committee of Ministers adopted a landmark Recommendation on the “*Principles concerning the legal protection of incapable adults*” (“the 1999 Recommendation”).^{xxxvii} The 1999 Recommendation was referred to extensively by this Court in *Shtukatur*, where it was stated that:

Although the principles have no force in law in the Court, they may define a common European Standard in this area.^{xxxviii}

The underlying principle of the 1999 Recommendation is “respect for the dignity of each person as a human being.” It specifically states that all practices put into place to assist incapable adults should be based on “respect for their human rights and fundamental freedoms.”^{xxxix} With that in place the 1999 Recommendation pursues the core objective of human dignity by recommending that States adopt procedures that allow persons with limited capacity to participate in decisions affecting their lives. These procedures should be put in place to promote the rights of persons with disabilities, not just to protect them. In particular, the 1999 Recommendation leans heavily against any automatic loss of capacity through the operation of law.

Principle 3 of the 1999 Recommendation, which relates to the maximum preservation of capacity, acknowledges the concept of gradations of capacity, and that gradation of capacity can change from person to person and within any one person at a given time.^{xl} While recognising that protections should be put into place for incapacitated adults it states that, “a measure of protection *should not result automatically* in a complete removal of legal capacity.”^{xli} Thus, capacity should be evaluated on an individual basis, and safeguards should be implemented for the individual while keeping in mind the necessity of the safeguard and the underlying principle of human dignity.^{xlii} Significantly, the 1999 Recommendation addresses the issue of consent to medical treatments.^{xliii}

Furthermore, the 1999 Recommendation calls for measures of protection to be established to support individuals and not to deprive the individual of his or her voice. Such protections are meant to be put in place to “the minimum extent necessary.”^{xliv} This is also true in the realm of medical treatment. The 1999 Recommendation states that a measure of protection should not automatically deprive the person concerned of the right to consent or refuse consent to any intervention in the health field.^{xlv} Thus even if an adult is subject to a measure of protection, but is still able to give free and informed consent, then an intervention in the health field may only be given with that consent.^{xlvi}

A further Recommendation “*Concerning the protection of the human rights and dignity of persons with mental disorders*” was adopted by the Committee of Ministers in 2004 (“2004 Recommendation”).^{xlvii} It updates a similar instrument dated back to 1983 in the field of legal protection of persons with a mental illness placed as involuntary patients.^{xlviii} Similar to the 1999 Recommendation, the 2004 Recommendation has the underlying objective of;

enhancing the dignity, human rights, and fundamental freedoms of persons with mental disorder, particularly those subject to involuntary placement or involuntary treatment.

The 2004 Recommendation insists that mechanisms must be established for those who do not have the capacity to consent and that those mechanisms should not unduly infringe on the person’s human rights.^{xlix} Similarly, in terms of treatment whenever it is possible the 2004 Recommendation requires that the person’s opinion should be taken into account as much as possible, and if the person has capacity to consent that the treatment is only provided with the person’s consent.^l

In 2006 the Committee of Ministers adopted an “*Action plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015*”

(“the 2006-2015 Action Plan”). This further re-emphasises that there should be no automatic loss of legal capacity simply on account of disability and connected this to the need to maintain social cohesion. Similar to the 1999 Recommendations the 2006-2015 Action Plan concedes that assistance may be necessary in order for some individuals to exercise their legal capacity, and therefore safeguards may need to be put in place.^{li}

Additionally, the 2006-2015 Action Plan strives to ensure that despite varying degrees of capacities all persons with disabilities are given equal access to justice.^{lii} It does this by evaluating the capacity of the individual and then assessing the appropriate safeguards to employ. One of the objectives of the 2006-2015 Action Plan is to, “provide appropriate assistance to those individuals who experience difficulty in exercising their legal capacity and assure that it is commensurate with the required level of support.”^{liiii}

The Convention on Human Rights and Biomedicine and Capacity:

The Convention for the Protection of Human Rights and Dignity of Human Beings with regard to the Application of Biology and Medicine (“the Convention on Human Rights and Biomedicine”) was adopted in 1997.^{liv} While it does not directly reject the automatic loss of capacity through the operation of law, it does broach the issue of capacity specifically in the context of consent to medical treatment. Generally, an intervention in the health field may only be given with the free and informed consent of the patient.^{lv} If a person does not have capacity to consent, the treatment may only be carried out for the person’s direct benefit and with the consent of the individual’s representative.^{lvi} However, the person should be permitted to participate “as far as possible in the authorisation procedure.”^{lvii}

The Convention on Human Rights and Biomedicine makes a special provision for persons with mental disorders, which states that:

a person may be subject to an intervention for the purpose of treating his [or her] disorder without consent *only where*, without such treatment *serious harm* is likely to result to his or her health.^{lviii}

The language in terms of mental disorder is strong, and should be given great consideration when determining whether or not to provide treatment without the full consent of the person.

In sum, the case law of this Court, and the weight of the recommendations of the Council of Europe, point toward a rejection of a Status-based approach to capacity. In particular any automatic loss of capacity through an operation of law is now widely acknowledged to be a breach of human rights.

4. Comparative European Capacity Law - a Clear Law Reform Trend:

Numerous jurisdictions throughout the Council of Europe have made significant changes to their capacity laws, reflecting the international progression towards the “social” or “human rights model” of disability. This generally entails a shift to the Functional approach to capacity. The United Kingdom (Scotland and England & Wales), Germany, Spain, Ireland, Sweden, the Czech Republic, Denmark and Greece are examples of such jurisdictions. All of these jurisdictions bring important perspectives to this international shift, and advance the concepts of self-determination and autonomy for persons with limited capacity.

The United Kingdom

The Adults with Incapacity Act of 2000 (“Incapacity Act”)^{lix} was adopted by Scotland shortly before England & Wales implemented the Mental Capacity Act of 2005 (“Mental Capacity Act”). It is interesting to note that the change in perspectives towards persons with disabilities can be observed merely within the titles of these two Acts. Incapacity, as it is called within the Incapacity Act of 2000, represents the older notion of the “medical model”; whereas in 2005 England chose to use the word “capacity”. This choice represents the shift to a social or human rights-based model, which focuses on a person’s ability rather than disability, and displays respect for the human dignity and integrity of persons with disabilities.^{lx}

Scotland

The Scottish Parliament's passage of the Incapacity Act of 2000 demonstrates a more human rights based approach to safeguarding the welfare and property of individuals who lack capacity to make some or all decisions for themselves. The Incapacity Act is based on several core foundational principles that advance the philosophies of self-determination and autonomy, which are integral to the goal of social inclusion for persons with disabilities. Sections 2-4 lay out the foundational principles of the Incapacity Act. Generally, they state that all decisions made on behalf of an adult with impaired capacity must: benefit the adult, be the least restrictive intervention possible, consider the past or present wishes or feelings of the person, consider the opinion of close family members, and encourage the person to use current skills or develop new skills to enhance decision-making power.^{lxi}

In order to attain these principles maximising both ability and capacity are critical. Thus, incapacity is defined within the Act as, “incapable of: acting; or making decisions; or communicating decisions; or understanding decisions; or retaining the memory of decisions...by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid [.]”^{lxii} This is in line with the Functional approach. However, if one does fit into the definition of incapacity a decision may be made on that person's behalf, but in keeping with the idea of autonomy, this intervention should be the least restrictive intervention possible.^{lxiii} Favouring the least restrictive alternative is part of the balancing test to determine one's capacity in order to comply with the Act's overarching requirements to act in a person's interests while respecting personal autonomy.^{lxiv}

Moreover, this Act deemed it inappropriate to apply a general “best interests” standard for potentially incapacitated adults because this standard was originated for and applied to children.^{lxv} The term is considered to be more protective than supportive and would hark back to the “medical model” of disability instead of placing the focus on autonomy as the Act intends.^{lxvi} Additionally, “best interests” would not be the appropriate standard as one must consider the person's previously expressed wishes. Strictly applying the standard of “best interests” could effectively take complete control away from the individual.^{lxvii} Thus, the principles listed above should be applied when determining whether an intervention is suitable, and not a general “best interests” standard.^{lxviii}

The purpose of the Incapacity Act is to allow for decisions to be made on behalf of adults who lack legal capacity to do so themselves because of mental disorder or inability to communicate.^{lxix} While this Act was one of the first to acknowledge the rights of persons with disabilities by maximising capacity, England's Mental Capacity Act went further and attempted to reach a truly Functional approach to capacity law.

England & Wales

The Mental Capacity Act entered into force on 2 April 2007^{lxx} and reflects an approach toward the empowerment as well as the protection of vulnerable adults. Section 1 of the Act lays out the five principles which form the backbone of the Mental Capacity Act: (1) A person is presumed to have capacity unless proven otherwise; (2) A person must be supported to make their own decisions, and given all practicable help before being treated as not having the ability to make decisions; (3) A person should not be treated as lacking capacity because they made an unwise decision or a decision that goes against societal “norms”; (4) If a decision is made on behalf of a person lacking capacity it must be in their best interests; (5) Anything done on behalf of a person with limited capacity should be the least restrictive of their basic rights and freedoms.^{lxxi}

These principles essentially reject the Outcome approach and exemplify the Functional approach, which emphasises a supportive decision-making approach. Supporting individuals in their decision-making acknowledges that there can be varying degrees of capacity. Sections 2 and 3 of the Mental Capacity Act illustrate this in the definition of capacity. Capacity is both time-specific and decision-specific.^{lxxii} The Act states, “A person lacks capacity in relation to a *matter* if at the material *time* he is unable to make a decision for himself [or herself] in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain.”^{lxxiii} Thus, a person may be found to lack capacity only during a particular time, and not

permanently.^{lxxiv} Likewise, a person may be found to lack capacity for a specific matter and not for all things in general.^{lxxv} Therefore, there is not a complete and automatic loss of capacity through the operation of law.

However, if someone is found to be incapacitated there are procedural safeguards in place so that decisions can be made on that person's behalf. Section 4 of the Act provides that any act or decision made on someone's behalf must be in their best interests.^{lxxvi} In order to determine what is in a person's best interests it must be considered: (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and (b) if it appears likely that he will, when that is likely to be.^{lxxvii} Additionally, if the situation permits, one should also consider: the need to allow and encourage a person to participate or to improve the ability to participate in decision-making^{lxxviii}, the persons past and present wishes^{lxxix}, the views of family members, caregivers, and those interested in the person's welfare^{lxxx}; or whether the action or decision can be performed in a less restrictive way to the person's freedoms.^{lxxxi}

Both Scotland and England have attempted to demonstrate the Functional approach to capacity through their legislation by recognising that there can be varying degrees of capacity.

Germany

In 1992 Germany replaced its guardianship laws.^{lxxxii} Germany now endorses the notion that persons with disabilities have the absolute right, "...in line with his [or her] abilities" to form his or her life according to his or her wishes and ideas.^{lxxxiii} A proxy may be appointed for several reasons: if a person is not able to manage their affairs completely or partially due to a psychological disease, or physical, mental, or psychological disability.^{lxxxiv} The proxy is limited to those duties that consist of things that are deemed necessary. Additionally, a proxy cannot be appointed against a person's free will.^{lxxxv}

Unlike the guardianship models the proxy model does not deprive the person of complete legal capacity. A person under the proxy model still has the capacity to act on all things unless the Guardianship Court has clearly stated that the proxy's approval is needed for the matter in question.^{lxxxvi} The proxy's powers of approval are limited to cases which are not personal declarations such as marriages, registered partnerships or the execution of a will.^{lxxxvii}

Spain

Incapacity, in Spain's Civil Code focuses on the effects of the disability and not the disability itself.^{lxxxviii} Thus, having a disability does not automatically regard one as incapacitated. The causes of incapacity have been stated as "the physical or mental persistent illness or impairment which prevents self-government of the person."^{lxxxix} Spain has two systems in place: the first is a guardianship model meant for persons declared completely incapacitated.^{xc} The second focuses on supported guardianship. A person will be placed in a supported guardianship after a judicial proceeding where a person has been declared incapable of certain acts or decisions but not entirely incapable.^{xc1} Additionally, under both systems' proceedings if there is a conflict, the person whose capacity is being questioned will be provided with an attorney.^{xcii} In providing adequate safeguards Spain attempts to support the rights and freedoms of persons with limited or no capacity.

Ireland

The Irish Government has been considering the need to reform its law on capacity. Presently, Ireland has no definition of capacity at common law or statute. There is a legal presumption of capacity until proven otherwise.^{xciii} However, there are no procedures in place to determine a person's level of capacity and the support needed.^{xciv} Ireland's Law Reform Commission ("LRC": an advisory body to Government) has published two papers emphasising ability and support rather than restricting those persons with limited capacity.^{xcv}

The LRC has recommended that a person with a disability should be provided support to make decisions. It has recommended against any automatic loss of capacity (hence rejecting the Status approach).^{xcvi} The LRC promotes the Functional approach with strong procedural safeguards.^{xcvii} Similar to England & Wales, the LRC recommends interventions to the minimum extent necessary considering the individual circumstances.^{xcviii}

Like the United Kingdom, the LRC recommends giving consideration to the person's past and present wishes as well as the wishes of those closest to that person before initiating any intervention.

Sweden

Sweden has developed policies that reinforce rather than disregard a person's capacity for self-determination and by doing so it embraced the essence of the trend towards capacity law movement.^{xcix} Concern regarding the continued marginalisation of persons with disabilities in addition to the fear of their further stigmatisation has led Sweden to completely abolish the guardianship system for adults.^c It has replaced guardianships with two systems focusing on support: the "god man" or "mentor" system and the "forvaltare" or "trustee" system.^{ci} The mentor system is the preferred and predominant system as well as the less restrictive of the two systems^{cii}. This system has numerous procedures in place to ensure that the mentor is supportive. A mentor can only act with the consent of the person and while a mentor can be appointed by the court, the court tailors the relationship in order to meet the individual needs of the person.^{ciii} Additionally under this system an individual has the option of pursuing legal remedies should their mentor act outside of their authority or attempt a transaction that the person would have been capable of making but did not do so.^{civ}

The Forvaltare system is more similar to an administrator or trustee system.^{cv} This is a system of last resort that is only applied when all other forms of assistance have been exhausted.^{cvi} Unlike the more popular mentor system this system allows for substituted decision-making.^{cvi} While this system resembles a guardianship model it is scarcely applied and an individual still retains some civil rights such as the right to vote.^{cviii}

Sweden is working to improve its disability policy as it has undertaken "A Society for All" that aims to provide all with the opportunity to live a full life.^{cix}

Czech Republic

The Czech Constitutional Court made an important decision in January 2007 concerning capacity.^{cx} The individual in question had been living independently but was deprived of her capacity and placed under guardianship as a result of having difficulties in managing her finance. The Constitutional Court criticised the deprivation of her capacity on two main grounds. First, it held that the lower court rulings failed to consider the individual and specific abilities of persons with disabilities. Secondly, it held that the lower courts relied too much on unquestioned acceptance of expert opinion. This is an important judgment and clearly demonstrates a growing appreciation of a more objective Functional approach.

Denmark

The 1995 Act on Guardianship (Værgemålsloven) ensured that the appointment of a guardian or representative no longer automatically implied the adult's loss of legal capacity.^{cx} The basic concept is that a person with limited legal capacity should retain as much of the right of self-determination as possible. If a person is of unsound mind, for example, because of intellectual disabilities or mental illness, the person concerned may be deprived of the right to self-determination in designated areas.^{cxii} Guardianship can only be used for legal obligations such as the management of financial funds or the making of contracts.^{cxiii} The right to self-determination in personal affairs such as the question of what kind of dwelling, assistance or activities available is subject to special rules and cannot be excluded through the exercise of guardianship.^{cxiv}

Greece

A fundamental principle of the Greek Constitution of 1975/76 (last reformed on 6 April 2001) is respect and protection for the "value of the human being". This is a "primary obligation" of the Greek State.^{cxv} The Constitution specifically states that persons with disabilities "are entitled to special care provided by the State"^{cxvi} and "have the right to enjoy measures that guarantee their autonomy, their professional inclusion and their participation in the social, financial and political life of the country."^{cxvii}

Greece's Constitution establishes a standard for social inclusion and autonomy that its laws on guardianship and legal representation should emulate.^{cxviii} At the moment, the Civil Code and Code for the Civil Law Proceedings allow for partial and total privative guardianship when:

- 1) a person, due to a mental health problem or intellectual disability or due to physical disability is no longer able, fully or partially, to take care of his or her personal affairs;
- 2) a person, due to alcohol or drug addiction, puts himself or herself in danger, or his or her spouse, children, or parents.^{cxix}

However, the court does institute procedural safeguards when making determinations of capacity. It may only make a decision regarding guardianship or legal representation after taking into account a report drafted from the relevant social authority concerning the necessity of the measure and the suitability of the potential guardian or legal representative.^{cxx} Based on each individual case, the Court decides to what extent guardianship or legal representation can negate the person's right to assert legal rights.^{cxxi} Although Greece has instituted procedural protections against the automatic stripping of rights via incapacity, the country's stated commitment to independence and the value of the human being indicate that more will be done to protect persons with disabilities.

5. Conclusions:

The move to the Functional approach to capacity is being informed by the human rights values of dignity and autonomy and is given clear expression in Article 12 of the CRPD. That is arguably a core provision of the newest human rights convention of the 21st century. The weight of European level pronouncements on the issue combined with relevant European comparative law trends lead to the following conclusions with respect to legal capacity:

- There should be a strong legal presumption of capacity;
- There should be an acknowledgement of gradations of capacity and incapacities;
- There should be a strong policy posture of assisting persons in their remaining decision-making capacities and maintaining/enhancing them for as long as possible;
- There should be a legal and policy shift to assisted-decision making as opposed to substituted decision making;
- Interventions should be with measures that are least restrictive on capacity and that are proportionately tailored to the individual's actual circumstances;
- Ensuring that the process for determining the existence of incapacity is objective; reflective, independent and genuinely free from presumptions, myths and stereotypes;
- Ensuring that any intervention is accompanied by robust safeguards to ensure that there is no conflict of interests or exploitation of vulnerability;
- Ensuring that the previously expressed wishes of the person are fully factored into any supports put in place in favour of the person.

Appendix 1

United Nations Conventions on the Rights of Persons with Disabilities

Article 12 Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. 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.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

ⁱ UN General Assembly Resolution 48/134, 1993.

ⁱⁱ Amita Dhanda, "Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?", 431, *Syr. J.Int'l Law & Commerce*, vol. 34, no.2, pp. 429 – 462, Spring 2007 ("Dhanda"); *see also* John Bellhouse, Anthony Holland, Isobel Clare, Michael Guinn, "Decision-making Capacity in Adults: its assessment in clinical practice", *Advances in Psychiatric Treatment*, vol. 7, pp. 294 -301, 2001 ("Bellhouse").

ⁱⁱⁱ Bellhouse, 295.

^{iv} *Id.*

^v *Id.*

^{vi} *Id.*

^{vii} *Id.*

^{viii} The Irish Law Reform Commission, Report on Vulnerable Adults and the Law (LRC 83-2006,) p 26, para 1.68 ("LRC").

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- ^{ix} Dhanda, 431, *see supra* note 2.
- ^x *Shtukaturov v. Russia*, EHRR, 44009/05, 27 March 2008, at pp. 18-19, para. 94
- ^{xi} *Id.* at p. 16, para. 82.
- ^{xii} The CRPD was adopted at the 61st Session of the General Assembly on 13 December 2006, and was opened for signature on 30 March 2007. On 3 April 2008 the CRPD received its 20 signatory triggering the entry into force of the Convention and its optional protocol 30 days later.
- ^{xiii} A full list of signatories available at: <http://www.un.org/disabilities/>
- ^{xiv} *Supra* note 12.
- ^{xv} Ambassador Don MacKay, *The Convention on the Rights of Persons with Disabilities, A Benchmark for Action*, 56 Int. Rehabilitation R. 1, 2 (2007) (“MacKay”).
- ^{xvi} CRPD, Article 1 *see* Appendix 1.
- ^{xvii} *Supra* note 12; *see also* MacKay *supra* note 15, at 2.
- ^{xviii} *See* International Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* 7 March, 1966. 660 U.N.T.S. 211; International Convention on the Elimination of all Forms of Discrimination against Women, 13 December, 1979, 1249 U.N.T.S. 13; and Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 43.
- ^{xix} *See* Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, U.N. GAOR, 26th Session, at 93, U.N. Doc. A/8429 (1971); Declaration on the Rights of Disabled Persons, G.A. Res. 3447, U.N. GAOR, 30th Session, at 88, U.N. Doc. A/10034 (1975); Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, G.A. Res. 119, U.N. GAOR, 46th Session, 3d Comm., 75th plen. mtg., *reprinted in* [1991] 45 U.N.Y.B. 620, U.N. Sales No. E.92.I.1 (“*MI Principles*”); and Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, G.A. Res. 96, 48th Session, at 202, U.N. Doc. A/48/627 (1993) (“*the Standard Rules*”).
- ^{xx} *MI Principles*, principle 1 “fundamental freedoms and basic rights” such as, the right to the “best available” mental health care; to be treated with humanity and respect for the inherent dignity of the human person; to have the right to protection from all forms of exploitation, physical or other abuse and degrading treatment, non-discrimination; natural justice prior to finding incapacity and more generally the right to exercise all rights found in the relevant international human rights instruments.
- ^{xxi} Standard Rules, Rule 5-12 relate to rights regarding the accessibility, education, employment, income, maintenance and social security, family life and personal integrity, culture, recreation and sports and religion.
- ^{xxii} CRPD Art. 12.2, *see* Appendix 1.
- ^{xxiii} CRPD, Articles 12.1, 12.3, *see* Appendix 1; *see also* Tina Minkowitz, *Legal Capacity: Fundamental to the Rights of Persons with Disabilities*, 56 Int. Rehab. R. 25, 25 (2007) (“Minkowitz”).
- ^{xxiv} CRPD, Articles 12.3, 12.4, and 12.5, *see* Appendix 1.
- ^{xxv} CRPD, Article 12.4, *see* Appendix 1.
- ^{xxvi} CRPD, Article 12.5, *see* Appendix 1.
- ^{xxvii} Minkowitz, at p 26, *see supra* note 23.
- ^{xxviii} *Id.*
- ^{xxix} *Id.*
- ^{xxx} *Cf Winterwerp v. the Netherlands*, 6301/73 ECHR 4 24 October 1979, at para 60.
- ^{xxxi} *Id.* at para 75.
- ^{xxxii} *See H.F. v. Slovakia*, ECHR, 54797/00, 8 November 2005, it was held that by failing to appoint a guardianship to act on behalf of the applicant, whose legal capacity was at issue, the Slovakian courts failed to act with the necessary diligence or appropriate safeguards; *see also Bock v. Germany*, 150 ECHR. (ser. A) 1118/84, 29 March 1989, where it was held that courts must proceed on the basis that an applicant has legal capacity and, should any reasonable doubt arise, it must clarify as soon as possible the extent to which the person is competent to conduct legal proceedings: the excessive amount of activity [nine years] which focused on applicant’s mental state was not proportionally based.
- ^{xxxiii} *Shtukaturov*, para. 73.
- ^{xxxiv} ECHR, Article 8.1 – 8.2, *see supra* note 29.
- ^{xxxv} *Pretty v. United Kingdom*, 35 EHRR 1, 29 July 2002, at para 61.
- ^{xxxvi} *Shtukaturov*, at para. 95.
- ^{xxxvii} Council of Europe (1999) *Recommendation No R (99) 4*, Adopted 23 February 1999, Part 2, Principle 1.
- ^{xxxviii} *Shtukaturov*, p 19, para 95.
- ^{xxxix} Council of Europe (1999) *Recommendation No R (99)4*, Adopted 23 February 1999, Part 2, Principle 1.
- ^{xl} *Id.* at Part 2, Principle 3(1).
- ^{xli} *Id.* Italics added.
- ^{xlii} *Id.* at Part 2, Principle 5(1).

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- ^{xliii} *Recommendation No R (1999)4*, Part V, Principle 22(1) – (4).
- ^{xliv} *Id.* at Part 2, Principle 6(2).
- ^{xlvi} *Id.* at Part 2, Principle 5(1).
- ^{xlvi} *Id.* at Part 5, Principle 22(1).
- ^{xlvii} Council of Europe (2004) *Recommendation No R (2004)10*. Strasbourg. Adopted 22 September 2004, at Ch. 2, Art. 1(1).
- ^{xlviii} Council of Europe (1983) *Recommendation No R (83)2*, Concerning the legal protection of persons suffering from mental disorder placed as involuntary patients. Strasbourg. Adopted 22 February 1983.
- ^{xlix} *Recommendation No R (2004)10*, at Chapter. 2, Art. 7(1).
- ^l *Id.* at Chapter 2, Art. 12(1)(2).
- ^{li} Council of Europe (2006) *Recommendation No R (2006)5*. Council of Europe, Strasbourg, adopted 5 April 2006, at 3.12(1).
- ^{lii} *Id.* at paragraph 3.12(3) (v).
- ^{liii} *Id.* at 3.12(3)(vi).
- ^{liv} Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: (“*Convention on Human Rights and Biomedicine*”) 4 April 1997, E.T.S. No. 164.
- ^{lv} *Id.*, Chapter 2, Article 5.
- ^{lvi} *Id.* at Chapter. 2, Article 6(1), 6(3).
- ^{lvii} *Id.*
- ^{lviii} *Id.* at Chapter. 2, Article 7. Italics added.
- ^{lix} Adults with Incapacity (Scotland) Act (2000) asp 4 (“Incapacity Act”).
- ^{lx} LRC, at p. 35, para. 1.59 *see supra* note 8.
- ^{lxi} Incapacity Act, section 2 – 4, *see supra* note 59.
- ^{lxii} *Id.* at, 1(6).
- ^{lxiii} *Id.* at s. 1(2), 1(3)
- ^{lxiv} *Id.*
- ^{lxv} Incapacity Act, Explanatory Notes, paragraph 6, p. 2.
- ^{lxvi} *Id.*
- ^{lxvii} *Id.*
- ^{lxviii} *Id.*
- ^{lxix} *Id.* at para. 3, p. 1.
- ^{lxx} Mental Capacity Act 2005 (Commencement No. 1) (England and Wales) Order 2007 [SI 2007/563. *See also* Denzil Lush, Master of the Court of Protection, England & Wales – *Mental Capacity Act 2005*, LRC Annual Conference, paper 3, p. 48 (2005).
- ^{lxxi} *Id.*; Mental Capacity Act (2005) Pt. 1.1, Principles 1-6, *see supra* note 70.
- ^{lxxii} Mental Capacity Act, Sections 2 – 3, *see supra* note 70. Italics added.
- ^{lxxiii} Mental Capacity Act (2005), Section 2(1), *see supra* note 70.
- ^{lxxiv} Lush, *see supra* note 70.
- ^{lxxv} *Id.*
- ^{lxxvi} Mental Capacity Act, Section 4, *see supra* note 70; *see also* Lush at 50.
- ^{lxxvii} Mental Capacity Act 2005, Sec. 4 (3) (a)(b), *see supra* note 70.
- ^{lxxviii} *Id.* at Section 4(4).
- ^{lxxix} *Id.* at Section 24, 26 (allowing people to make advanced decisions should they become incapacitated in the future).
- ^{lxxx} *Id.* at 4(7)(a)-(d); Lush, at 51, *see supra* note 70.
- ^{lxxxi} Lush, at 51, *see supra* note 70.
- ^{lxxxii} *Civil Code (BGB)* sections 1896 – 1908k, <http://bundesrecht.juris.de/bgb/index.html> (last visited April 15, 2008). *See also* International Disability Rights Monitor Regional Report of Europe (2007) at 183, available at: http://www.idrmnet.org/pdfs/IDRM_Europe_2007.pdf (last visited April 2, 2008) (“IDRM”).
- ^{lxxxiii} *Civil Code* at Section 1901(2).,
- ^{lxxxiv} *Civil Code* at Section 1896 (1).
- ^{lxxxv} *Civil Code* at Section 1896(1) (a).
- ^{lxxxvi} *Civil Code* at Section 1903 (1).
- ^{lxxxvii} *Civil Code* at Section 1903 (2).
- ^{lxxxviii} *Civil Code*. Royal Decree of 24 July 1889, Journal of the Official Gazette, 25 July 1889, Article 200, http://www.060.es/te_ayudamos_a/legislacion/disposiciones/25299-ides-idweb.html (last visited April 15, 2008).
- ^{lxxxix} *Id.*

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- ^{xc} *Id.* at First Book, Titles IX; X.
- ^{xcⁱ} *Id.*
- ^{xcⁱⁱ} *Id.*
- ^{xcⁱⁱⁱ} LRC, p. 25, para. 1.61, *see supra* note 8.
- ^{xc^{iv}} IDRМ, at 265, *see supra* note 82.
- ^{xc^v} LRC, p. 40, para. 2.1, *see supra* note 8.
- ^{xc^{vi}} LRC, p. 43, para. 2.11, *see supra* note 8.
- ^{xc^{vii}} LRC, p. 43, para. 2.20, *see supra* note 8.
- ^{xc^{viii}} LRC, p. 74, para. 2.106, *see supra* note 8.
- ^{xc^{ix}} Stanley S. Herr, *Self-Determination, Autonomy, and Alternatives for Guardianship*, *The Human Rights of Persons with Intellectual Disabilities*, 432 (2003) (“Herr”).
- ^c *Id.* at 432-433.
- ^{ci} Föräldrabalk (Children and Parents Code) Swedish Code of Statutes SFS 1949:381, Chapter 11, sections 4 and 7.
- ^{cⁱⁱ} Herr at 433.
- ^{cⁱⁱⁱ} *see supra* note 106.
- ^{c^{iv}} Herr at 433.
- ^{c^v} *Id.* at 435.
- ^{c^{vi}} *Id.*
- ^{c^{vii}} *see supra* note 106.
- ^{c^{viii}} Herr at 435.
- ^{c^{ix}} *Id.* at 441.
- ^{c^x} *MF v Czech Republic* [January 2007] US 2630/07 #2.
- ^{c^{xi}} Værgemålsloven (Danish Act on Guardianship), 14 June 1995.
- ^{c^{xii}} Værgemålsloven (Danish Act on Guardianship), Section 6 (legal incompetence), 14 June 1995.
- ^{c^{xiii}} Værgemålsloven (Danish Act on Guardianship), Section.5 (placement under guardianship), 14 June 1995.
- ^{c^{xiv}} *Rehabilitation and Integration of People with Disabilities: Policy and Legislation*, 7th Edition, Report drawn up by the Committee on the Rehabilitation and Integration of People with Disabilities, Council of Europe Publishing (April 2003).
- ^{c^{xv}} *Constitution of Greece*, Article 2, para. 1, 85/18.4.2001, NOMOS Forum, <http://lawdb.intrasoftnet.com> (last visited April 16, 2008).
- ^{c^{xvi}} *Constitution of Greece*, Article 21, para. 2, 85/18.4.2001.
- ^{c^{xvii}} *Constitution of Greece*, Article 21, para. 6, 85/18.4.2001.
- ^{c^{xviii}} *See The Civil Code*, Articles 8, 128-132, 1666-1688; *see also Code for the Civil Court Proceedings*, Articles 62-64, 253, 598, 681, 801-805, available at: <http://www.lawdb.intrasoftnet.com> (last visited April 16, 2008).
- ^{c^{xix}} *The Civil Code*, Article 1666, para. 2, NOMOS Forum, <http://www.lawdb.intrasoftnet.com> (last visited April 16, 2008).
- ^{c^{xx}} *The Civil Code*, Article 1674, NOMOS Forum, <http://www.intrasoftnet.com> (last visited April 16, 2008).
- ^{c^{xxi}} *The Civil Code*, Article 1674, 1676.