SOUTHERN AFRICA LITIGATION CENTRE

DISABILITY RIGHTS STRATEGIC LITIGATION TRAINING WORKSHOP

2 – 3 OCTOBER 2013

WINDHOEK, NAMIBIA

TRAINING MATERIALS

Second Floor, President Place, 1 Hood Avenue/148 Jan Smuts Avenue (corner Bolton Road), Rosebank, 2196, Johannesburg,
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an initiative of the International Bar Association and the Open Society Initiative of Southern Africa

SOUTHERN AFRICA LITIGATION CENTRE

AGENDA FOR DISABILITY RIGHTS STRATEGIC LITIGATION TRAINING WORKSHOP

2 – 3 OCTOBER 2013, WINDHOEK, NAMIBIA

Objectives of the Workshop

1. To capacitate and provide the necessary skills to participants to identify legal cases that constitute strategic litigation.
2. To provide an overview of the state of disability legislation in Namibia.
3. To enable participants to understand and apply basic legal processes that are part of strategic litigation.

DAY 1

09h00 – 09h30: Welcome, purpose of the workshop and introductions and expectations from the participants

09h30 – 11h00: Sections of the CRPD that are relevant to identifying cases for strategic litigation

11h00- 11h15: **Tea**

11h30 – 13h00: Sections of the CRPD that are relevant to identifying cases for strategic litigation (continued)

13h00 – 14h00: **Lunch**

13h00 – 14h00: Overview of Namibian disability legislation and research (Ms Yvonne Dausab)

14h00 – 15h00: Strategic litigation in general and lessons that SALC has learnt in other sectors and advice for disability rights strategic litigation.

15h00 – 15h30: **Tea**

15h30 - 16h30 Introduction to cases brought before international courts and explanation of the group work assignment.

16h30: Closure

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DAY 2

09h00 – 10h00: Group work assignment (continued)

10h00 - 11h00 Group feedback and reporting on assignment

11h 00 - 11- 30 **Tea**

11h30 – 12h00: Challenges to strategic litigation in general, and with specific reference to disability rights

12h00 – 13h00: Discussion on access to information concerns, potential cases and networking

13h00 – 14h00: **Lunch**

14h00 - 15h00 Way forward on a local level. Closure.

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SOUTHERN AFRICA LITIGATION CENTRE

SECTION 1

INTRODUCTION

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SOUTHERN AFRICA LITIGATION CENTRE

AN INTRODUCTION TO SALC'S DISABILITY RIGHTS PROJECT

The Southern Africa Litigation Centre (SALC), established in 2005 by the International Bar Association (IBA) and the Open Society Initiation for Southern Africa (OSISA), aims to provide support, both technical and financial, to human rights and public interest initiatives undertaken by domestic lawyers within the southern Africa region, specifically: Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. SALC's model is to work in conjunction with domestic lawyers in each jurisdiction who are interested in litigating important cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, including, as appropriate, providing legal research and drafting, training and mentoring, and monetary support. While SALC aims primarily to provide support on a specific case-by-case basis, its objectives also include the provision of training and the facilitation of legal networks within the region.

SALC works on specific issue areas and at the moment some of our core project areas are: HIV/AIDS, LGBT, sexual and reproductive health rights, international criminal justice, media defence, pre-trial justice, and working with the African Commission and African Court. We have recently started a new project focusing on disability rights in southern Africa.

SALC has received a small grant from OSISA to support litigation on disability rights issues in the region. The aim of this project is to support precedent setting cases that promote social inclusion for persons with disabilities. We have attached a list of some of the issues we have identified as potential litigation areas.

These are some of the issues we would like to intervene on but we are not limiting the scope of the project to these alone. If you have a case you think we can assist on please let us know. We can offer assistance with conceptualisation, drafting, research, and supporting the costs of litigation.

We are currently exploring Malawi, Lesotho, and Namibia as potential countries where we want to intervene in. Again there is nothing precluding us from assisting in a case from Zimbabwe or Swaziland.

Please do not hesitate to contact me to chat on the above or more generally on your work and possible future partnerships in this area.

Thank you

Caroline James
carolinej@salc.org.za

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Types of Cases that May Be Ripe for Litigation

Discrimination in the Workplace

- If someone is not hired because of a disability.
- If someone is fired if they become disabled.
- If someone is discriminated against in terms of remuneration or promotion opportunities because of disability.
- If an employer fails to provide reasonable accommodations[1] in the workplace, making a PWD[2] feel so uncomfortable that they are forced to resign, this could amount to constructive dismissal.
- If an employer uses offensive or discriminatory language that creates a hostile work environment (e.g. in the US, many people use the term "retarded" to mean "stupid" or "wrong" – this type of thing).

Discrimination in Schools and Access to Educations

- If a child with a disability is coerced to go to a special school.
- If a child with a disability is turned away from mainstream schools because there are no teachers to effectively communicate with him/her.[3]
- If a child with a physical disability is turned away from a school because the school does not have ramps etc. to enable him to access the school.
- If a child with a disability is prevented from accessing a school because there is no infrastructure or service (road, transport etc) to enable him to get to school.
- If state subsidies for schools that cater for children with disabilities are less than state subsidies for mainstream schools.
- If children with severe cognitive[4] disabilities are institutionalised and not provided with appropriate learning and stimulation.
- Remember that the current discourse and movement is towards inclusive education and we need to find what barriers there are to this and litigate to change them.
- If a child with a physical disability is inappropriately placed in remedial classes because of assumed cognitive disability as well.
- If a child with a disability is turned away from school enrolment because of lack of teaching or curriculum support.

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[1]Reasonable accommodations typically include flexibility in work hours, modifications to workspace if necessary, provision of required assistive devices, etc.,

[2] "Person(s) with disabilities"

[3]E.g. does the school provide aides, interpreters, etc. Also accommodations such as extended time on tests, note takers, etc. The question is whether the school is providing the necessary support to allow equal access.

[4] A person with a cognitive disability has greater difficulty with one or more types of mental tasks than the average person. Examples include autism, Down Syndrome, dyslexia, and Attention Deficit Hyperactive Disorder.

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Elections

- If government does not provide appropriate access to voting stations for persons with disabilities in both municipal and national elections.
- If there is not a special vote to cater for PWD who cannot come to voting stations.
- If at the voting station persons with physical disabilities are not catered for (e.g. a person in a wheelchair will need a lower polling booth).
- If the right to confidentiality and a secret ballot is breached because the country only caters for assisted voting for persons with visual impairments.
- If categories of PWD are disenfranchised based on their disability.

Imprisonment and Institutionalisation of Persons with cognitive Disabilities

- If your national laws around this are still old colonial laws e.g. a " Lunatics Act" etc. that has discriminatory provisions and is denigrating.
- If your country enforces the death penalty against persons with cognitive/psychosocial disabilities/who are criminally insane.
- If people with a cognitive or psychosocial disability are sent to prison as a matter of course.
- If such imprisonment is not reviewed, leading to indefinite or prolonged detention.
- If persons with cognitive/psychosocial disabilities are institutionalised without consent.
- If there is no review of involuntary institutionalisation; i.e. if no committee or board or psychiatrist periodically reviews involuntary institutionalisation in prisons or other places.
- If treatment in such institutions amounts to torture, cruel, inhumane and degrading treatment.
- If the special need for access to counsel for this type of prisoner is not recognised and/or barriers are in place that these prisoners cannot overcome.

A Lack of Prosecution

- If a PWD has been the victim of violent crime or a sexual crime such as rape, often the police won't investigate and prosecuting authorities will not prosecute because they feel the person will not be able to give evidence.
- If there are actually laws limiting who can give competent testimony, excluding PWDs.
- If a PWD is stereotyped and chained to a tree etc. by caregivers the police and prosecutors may feel it is a domestic issue and may not want to remove and protect the PWD or prosecute parents.

A violation to the right to dignity, the right to equality etc

- If PWD are deliberately starved in institutions to hasten death.
- If PWD are forcibly sterilized/sterilised without their own consent.

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- If PWD are not able to access government buildings etc because of a lack of ramps etc.
- If PWD are refused information on HIV/AIDS or refused sexual and reproductive health care because it is assumed that they are sexually inactive.
- If PWD are prohibited from marrying or having legal guardianship of their children.

Health

- If PWD are forcibly sterilized/sterilised without their own consent.
- If PWD are refused information on HIV/AIDS or refused sexual and reproductive health care because it is assumed that they are sexually inactive.
- If access to vaccinations and primary health care is not widespread, not extended to people at risk of contracting a disability-causing illness or someone who is ill is refused, or cannot access, treatment.
- If inoculations (e.g. polio[5]) are denied.
- If an area has landmines on it and the communities are at risk we could litigate to compel government to de-mine the areas.

Denial of Legal Capacity

- If PWD are legally barred from inheriting.
- If PWD are barred from signing contracts, serving as affiants or carrying out financial transactions.
- If PWD are prohibited from marrying or having legal guardianship of their children.
- If PWD are disenfranchised on the basis of their disability.

Miscellaneous

- If free/subsidized health or other services are only provided to citizens, disabled refugees or asylum-seekers may be unable to access care in their host country (but obviously can't go home).
- If a PWD is prohibited from travelling on an aircraft or ship because the travel company/carrier fails to make provision for the assistive devices needed to enable travel, e.g. oxygen tanks etc.

[5]There are different types of polio vaccines. The oral polio vaccine, used widely in the developing world and in areas where wild virus still exists, is very inexpensive and effective. However, it also can actually cause polio disease, including disability, in rare cases (approximately 1 in every 2.7 million first doses of the vaccine). The inactivated polio vaccine, given as an injection, cannot cause polio disease but is not recommended for use in parts of the world where polio has not been eradicated. This is because the inactivated vaccine only protects the person who gets the vaccine from becoming sick, but does not prevent the transmission of polio from a vaccinated individual to others. The oral polio vaccine can do this. Most developed countries have stopped using the oral polio vaccine.

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SECTION 2

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES AND THE OPTIONAL PROTOCOL

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Convention on the Rights of Persons with Disabilities and Optional Protocol

UNITED NATIONS

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Preamble

The States Parties to the present Convention,

(*a*) *Recalling* the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world,

(*b*) *Recognizing* that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, has proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind,

(*c*) *Reaffirming* the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

(*d*) *Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

(*e*) *Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,

(*f*) *Recognizing* the importance of the principles and policy guidelines contained in the World Programme of Action concerning Disabled Persons and in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in influencing the promotion, formulation and evaluation of the policies, plans, programmes and actions at the national, regional and international levels to further equalize opportunities for persons with disabilities,

(*g*) *Emphasizing* the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development,

(*h*) *Recognizing also* that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

(*i*) *Recognizing further* the diversity of persons with disabilities,

(*j*) *Recognizing* the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

(*k*) *Concerned* that, despite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world,

(*l*) *Recognizing* the importance of international cooperation for improving the living conditions of persons with disabilities in every country, particularly in developing countries,

(*m*) *Recognizing* the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty,

(*n*) *Recognizing* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

(*o*) *Considering* that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them,

(*p*) *Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status,

(*q*) *Recognizing* that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation,

(*r*) *Recognizing* that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis

with other children, and recalling obligations to that end undertaken by States Parties to the Convention on the Rights of the Child,

(*s*) *Emphasizing* the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities,

(*t*) *Highlighting* the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognizing the critical need to address the negative impact of poverty on persons with disabilities,

(*u*) *Bearing in mind* that conditions of peace and security based on full respect for the purposes and principles contained in the Charter of the United Nations and observance of applicable human rights instruments are indispensable for the full protection of persons with disabilities, in particular during armed conflicts and foreign occupation,

(*v*) *Recognizing* the importance of accessibility to the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms,

(*w*) *Realizing* that the individual, having duties to other individuals and to the community to which he or she belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights,

(*x*) *Convinced* that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities,

(*y*) *Convinced* that a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities will make a significant contribution to redressing the profound social disadvantage of persons with disabilities and promote their participation in the civil, political, economic, social and cultural spheres with equal opportunities, in both developing and developed countries,

Have agreed as follows:

Article 1
Purpose

The purpose of the present Convention 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.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Article 2
Definitions

For the purposes of the present Convention:

"Communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology;

"Language" includes spoken and signed languages and other forms of non spoken languages;

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

"Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 3
General principles

The principles of the present Convention shall be:

(*a*) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(*b*) Non-discrimination;

(*c*) Full and effective participation and inclusion in society;

(*d*) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(*e*) Equality of opportunity;

(*f*) Accessibility;

(*g*) Equality between men and women;

(*h*) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 4
General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(*a*) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(*b*) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

(*c*) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;

(*d*) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

(*e*) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(*f*) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;

(*g*) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(*h*) To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

(*i*) To promote the training of professionals and staff working with persons with disabilities in the rights recognized in the present Convention so as to better provide the assistance and services guaranteed by those rights.

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the

human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

5. The provisions of the present Convention shall extend to all parts of federal States without any limitations or exceptions.

Article 5
Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 6
Women with disabilities

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

Article 7
Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 8
Awareness-raising

1. States Parties undertake to adopt immediate, effective and appropriate measures:

(*a*) To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities;

(*b*) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;

(*c*) To promote awareness of the capabilities and contributions of persons with disabilities.

2. Measures to this end include:

(*a*) Initiating and maintaining effective public awareness campaigns designed:

(i) To nurture receptiveness to the rights of persons with disabilities;

(ii) To promote positive perceptions and greater social awareness towards persons with disabilities;

(iii) To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

(*b*) Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities;

(*c*) Encouraging all organs of the media to portray persons with disabilities in a manner consistent with the purpose of the present Convention;

(*d*) Promoting awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities.

Article 9
Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

(*a*) Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;

(*b*) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

(*a*) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

(*b*) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

(*c*) To provide training for stakeholders on accessibility issues facing persons with disabilities;

(*d*) To provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;

(*e*) To provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;

(*f*) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

(*g*) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

(*h*) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 10
Right to life

States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

Article 11
Situations of risk and humanitarian emergencies

States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.

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.

Article 13
Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14
Liberty and security of person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(*a*) Enjoy the right to liberty and security of person;

(*b*) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Article 15
Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16
Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17
Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 18
Liberty of movement and nationality

1. States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

(*a*) Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;

(*b*) Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;

(*c*) Are free to leave any country, including their own;

(*d*) Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

2. Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents.

Article 19
Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

(*a*) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

(*b*) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

(*c*) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 20
Personal mobility

States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by:

(*a*) Facilitating the personal mobility of persons with disabilities in the manner and at the time of their choice, and at affordable cost;

(*b*) Facilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost;

(*c*) Providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities;

(*d*) Encouraging entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities.

Article 21
Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

(*a*) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;

(*b*) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means,

modes and formats of communication of their choice by persons with disabilities in official interactions;

(*c*) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

(*d*) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;

(*e*) Recognizing and promoting the use of sign languages.

Article 22
Respect for privacy

1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honour and reputation. Persons with disabilities have the right to the protection of the law against such interference or attacks.

2. States Parties shall protect the privacy of personal, health and rehabilitation information of persons with disabilities on an equal basis with others.

Article 23
Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(*a*) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

(*b*) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

(*c*) Persons with disabilities, including children, retain their fertility on an equal basis with others.

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

3. States Parties shall ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

5. States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.

Article 24
Education

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to:

(*a*) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;

(*b*) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;

(*c*) Enabling persons with disabilities to participate effectively in a free society.

2. In realizing this right, States Parties shall ensure that:

(*a*) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;

(*b*) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

(*c*) Reasonable accommodation of the individual's requirements is provided;

(*d*) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;

(*e*) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:

(*a*) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

(*b*) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;

(*c*) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.

4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.

5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

Article 25
Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:

(*a*) Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes;

(*b*) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

(*c*) Provide these health services as close as possible to people's own communities, including in rural areas;

(*d*) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

(*e*) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner;

(*f*) Prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Article 26
Habilitation and rehabilitation

1. States Parties shall take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes:

(*a*) Begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths;

(*b*) Support participation and inclusion in the community and all aspects of society, are voluntary, and are available to persons with disabilities as close as possible to their own communities, including in rural areas.

2. States Parties shall promote the development of initial and continuing training for professionals and staff working in habilitation and rehabilitation services.

3. States Parties shall promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.

Article 27
Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(*a*) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(*b*) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy

working conditions, including protection from harassment, and the redress of grievances;

(*c*) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(*d*) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(*e*) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(*f*) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(*g*) Employ persons with disabilities in the public sector;

(*h*) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(*i*) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(*j*) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(*k*) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

Article 28
Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

(*a*) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

(*b*) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

(*c*) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

(*d*) To ensure access by persons with disabilities to public housing programmes;

(*e*) To ensure equal access by persons with disabilities to retirement benefits and programmes.

Article 29
Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

(*a*) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

(i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

(iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

(*b*) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

(i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

(ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Article 30
Participation in cultural life, recreation, leisure and sport

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

(*a*) Enjoy access to cultural materials in accessible formats;

(*b*) Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;

(*c*) Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

2. States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.

3. States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.

4. Persons with disabilities shall be entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture.

5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(*a*) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels;

(*b*) To ensure that persons with disabilities have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

(*c*) To ensure that persons with disabilities have access to sporting, recreational and tourism venues;

(*d*) To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

(*e*) To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

Article 31
Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention. The process of collecting and maintaining this information shall:

(*a*) Comply with legally established safeguards, including legislation on data protection, to ensure confidentiality and respect for the privacy of persons with disabilities;

(*b*) Comply with internationally accepted norms to protect human rights and fundamental freedoms and ethical principles in the collection and use of statistics.

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of

States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

Article 32
International cooperation

1. States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society, in particular organizations of persons with disabilities. Such measures could include, inter alia:

(*a*) Ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities;

(*b*) Facilitating and supporting capacity-building, including through the exchange and sharing of information, experiences, training programmes and best practices;

(*c*) Facilitating cooperation in research and access to scientific and technical knowledge;

(*d*) Providing, as appropriate, technical and economic assistance, including by facilitating access to and sharing of accessible and assistive technologies, and through the transfer of technologies.

2. The provisions of this article are without prejudice to the obligations of each State Party to fulfil its obligations under the present Convention.

Article 33
National implementation and monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Article 34
Committee on the Rights of Persons with Disabilities

1. There shall be established a Committee on the Rights of Persons with Disabilities (hereafter referred to as "the Committee"), which shall carry out the functions hereinafter provided.

2. The Committee shall consist, at the time of entry into force of the present Convention, of twelve experts. After an additional sixty ratifications or accessions to the Convention, the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members.

3. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence and experience in the field covered by the present Convention. When nominating their candidates, States Parties are invited to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

4. The members of the Committee shall be elected by States Parties, consideration being given to equitable geographical distribution, representation of the different forms of civilization and of the principal legal systems, balanced gender representation and participation of experts with disabilities.

5. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals at meetings of the Conference of States Parties. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The initial election shall be held no later than six months after the date of entry into force of the present Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall

address a letter to the States Parties inviting them to submit the nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

7. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in paragraph 5 of this article.

8. The election of the six additional members of the Committee shall be held on the occasion of regular elections, in accordance with the relevant provisions of this article.

9. If a member of the Committee dies or resigns or declares that for any other cause she or he can no longer perform her or his duties, the State Party which nominated the member shall appoint another expert possessing the qualifications and meeting the requirements set out in the relevant provisions of this article, to serve for the remainder of the term.

10. The Committee shall establish its own rules of procedure.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention, and shall convene its initial meeting.

12. With the approval of the General Assembly of the United Nations, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

13. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 35
Reports by States Parties

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a comprehensive report on measures taken to give effect to its obligations under the present Convention and on the progress

made in that regard, within two years after the entry into force of the present Convention for the State Party concerned.

2. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests.

3. The Committee shall decide any guidelines applicable to the content of the reports.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided. When preparing reports to the Committee, States Parties are invited to consider doing so in an open and transparent process and to give due consideration to the provision set out in article 4, paragraph 3, of the present Convention.

5. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

Article 36
Consideration of reports

1. Each report shall be considered by the Committee, which shall make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned. The State Party may respond with any information it chooses to the Committee. The Committee may request further information from States Parties relevant to the implementation of the present Convention.

2. If a State Party is significantly overdue in the submission of a report, the Committee may notify the State Party concerned of the need to examine the implementation of the present Convention in that State Party, on the basis of reliable information available to the Committee, if the relevant report is not submitted within three months following the notification. The Committee shall invite the State Party concerned to participate in such examination. Should the State Party respond by submitting the relevant report, the provisions of paragraph 1 of this article will apply.

3. The Secretary-General of the United Nations shall make available the reports to all States Parties.

4. States Parties shall make their reports widely available to the public in their own countries and facilitate access to the suggestions and general recommendations relating to these reports.

5. The Committee shall transmit, as it may consider appropriate, to the specialized agencies, funds and programmes of the United Nations, and other competent bodies, reports from States Parties in order to address a request or indication of a need for technical advice or assistance contained therein, along with the Committee's observations and recommendations, if any, on these requests or indications.

Article 37
Cooperation between States Parties and the Committee

1. Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate.

2. In its relationship with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation.

Article 38
Relationship of the Committee with other bodies

In order to foster the effective implementation of the present Convention and to encourage international cooperation in the field covered by the present Convention:

(*a*) The specialized agencies and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(*b*) The Committee, as it discharges its mandate, shall consult, as appropriate, other relevant bodies instituted by international human rights treaties, with a view to ensuring the consistency of their respective reporting guidelines, suggestions and general recommendations, and avoiding duplication and overlap in the performance of their functions.

Article 39
Report of the Committee

The Committee shall report every two years to the General Assembly and to the Economic and Social Council on its activities, and may make

suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.

Article 40
Conference of States Parties

1. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.

2. No later than six months after the entry into force of the present Convention, the Conference of States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General biennially or upon the decision of the Conference of States Parties.

Article 41
Depositary

The Secretary-General of the United Nations shall be the depositary of the present Convention.

Article 42
Signature

The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.

Article 43
Consent to be bound

The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the Convention.

Article 44
Regional integration organizations

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organizations shall declare, in their instruments of formal

confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to "States Parties" in the present Convention shall apply to such organizations within the limits of their competence.

3. For the purposes of article 45, paragraph 1, and article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 45
Entry into force

1. The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 46
Reservations

1. Reservations incompatible with the object and purpose of the present Convention shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 47
Amendments

1. Any State Party may propose an amendment to the present Convention and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of

the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with paragraph 1 of this article which relates exclusively to articles 34, 38, 39 and 40 shall enter into force for all States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment.

Article 48
Denunciation

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 49
Accessible format

The text of the present Convention shall be made available in accessible formats.

Article 50
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The States Parties to the present Protocol have agreed as follows:

Article 1

1. A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

2. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

Article 2

The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;
(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;
(c) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
(d) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;
(e) It is manifestly ill-founded or not sufficiently substantiated; or when
(f) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

Article 3

Subject to the provisions of article 2 of the present Protocol, the Committee shall bring any communications submitted to it confidentially to the attention of the State Party. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 4

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of this article, this does not imply a determination on admissibility or on the merits of the communication.

Article 5

The Committee shall hold closed meetings when examining communications under the present Protocol. After examining a communication, the Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

Article 6

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee. Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

Article 7

1. The Committee may invite the State Party concerned to include in its report under article 35 of the Convention details of any measures taken in response to an inquiry conducted under article 6 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 6, paragraph 4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

Article 8

Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 6 and 7.

Article 9

The Secretary-General of the United Nations shall be the depositary of the present Protocol.

Article 10

The present Protocol shall be open for signature by signatory States and regional integration organizations of the Convention at United Nations Headquarters in New York as of 30 March 2007.

Article 11

The present Protocol shall be subject to ratification by signatory States of the present Protocol which have ratified or acceded to the Convention. It shall be subject to formal confirmation by signatory regional integration organizations of the present Protocol which have formally confirmed or acceded to the Convention. It shall be open for accession by any State or regional integration organization which has ratified, formally confirmed or acceded to the Convention and which has not signed the Protocol.

Article 12

1. "Regional integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and the present Protocol. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the Convention and the present Protocol.

Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to "States Parties" in the present Protocol shall apply to such organizations within the limits of their competence.

3. For the purposes of article 13, paragraph 1, and article 15, paragraph 2, of the present Protocol, any instrument deposited by a regional integration organization shall not be counted.

4. Regional integration organizations, in matters within their competence, may exercise their right to vote in the meeting of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 13

1. Subject to the entry into force of the Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.

2. For each State or regional integration organization ratifying, formally confirming or acceding to the present Protocol after the deposit of the tenth such instrument, the Protocol shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 14

1. Reservations incompatible with the object and purpose of the present Protocol shall not be permitted.

2. Reservations may be withdrawn at any time.

Article 15

1. Any State Party may propose an amendment to the present Protocol and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a meeting of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a meeting, the Secretary-General shall convene the meeting under the auspices of the United Nations. Any amendment adopted by a majority of two thirds of the States Parties present and voting shall be

submitted by the Secretary-General to the General Assembly of the United Nations for approval and thereafter to all States Parties for acceptance.

2. An amendment adopted and approved in accordance with paragraph 1 of this article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two thirds of the number of States Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those States Parties which have accepted it.

Article 16

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 17

The text of the present Protocol shall be made available in accessible formats.

Article 18

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Protocol shall be equally authentic.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

SOUTHERN AFRICA LITIGATION CENTRE

SECTION 3

STRATEGIC LITIGATION

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an initiative of the International Bar Association and the Open Society Initiative of Southern Africa

Strategic Litigation – Guiding Questions

1. What is the goal of bringing this case?
    a. Examples: rule of law (enforce, clarify, challenge or build laws); advocacy, awareness, education or reform.
    b. Are there other methods available to accomplish this goal?
    c. If so, how effective would they be compared with a litigation approach?

2. Who are the applicants?
    a. Do the applicants have standing to bring the case?
    b. If not, can an NGO bring the case in the public interest?

3. What are the legally relevant facts of the case?

4. What is the central legal issue in the case?
    a. What law or part of a law is being challenged? On what basis?
    b. Does the legal issue relate to a broader social/societal problem?
    c. Does the legal issue support the goal you want to achieve?

5. Are the cause/goal and the key legal issue easy to understand for the media and the general public? How great is the potential for media coverage of the case?

6. What relief are you seeking? Is it clear, simple and easy to implement?
    a. Does the court you will file in have the power to grant the remedy you are seeking?
    b. How would that relief address or rectify the legal issue of the case?

7. Who will benefit from the relief being sought? Who will be excluded?

8. What is the scope of the benefit that would accrue to the defined class of beneficiaries? What does the benefit *not* include?

9. Does it make sense to bring the case now?
    a. Is there a statute of limitations that will expire without immediate action?
    b. Is there a discrete event to which the facts of the case are related? If so, is there sufficient time for litigation to unfold before that event occurs? For the remedy to be fully implemented, in case of a favourable judgment?

10. What are the risks of litigating this case?
    a. What will happen if you lose the case? What will happen if you win the case (e.g. could there be community or political backlash)?
    b. What could happen to the applicants if the case draws on for an extended period of time?

The ATLANTIC Philanthropies

What We're Learning

Evaluation: Public Interest Litigation in South Africa Offers Lessons for Advocates

The Atlantic Philanthropies

13 November 2009

Public interest litigation in South Africa faces several challenges but advocates can undertake four key strategies to enhance its success, according to this report by The Atlantic Philanthropies.

Atlantic this week publishes its report on strategic evaluation of public interest litigation in South Africa. This report will be of relevance to anyone interested in human rights, advocacy and the law generally. The full report can be downloaded below. It is a public document, so please feel free to distribute it widely.

Key findings in this report may be divided into three parts.

Challenges

We identified the key challenges facing the public interest litigation environment in South Africa:

> The major challenge facing the public interest litigation environment in South Africa is a lack of funding and resources. This challenge is also substantially responsible for the second major challenge, that is the inability of public interest organisations to attract and retain sufficient numbers of quality personnel.
>
> These challenges are matters of significant concern. As we have indicated, international research suggests that progressive constitutions and progressive judges – both of which South Africa undoubtedly possesses – are insufficient to achieve substantial progress on human rights unless there are sufficient resources to sustain "support structures" – in the form of rights advocacy organisations and rights-advocacy lawyers – for legal mobilisation.
>
> Given the massive inequality and poverty continuing to face South Africa, we are concerned that if organisations engaged in this work do not receive sufficient support, there is a danger that the gains of the last few years will be undermined.

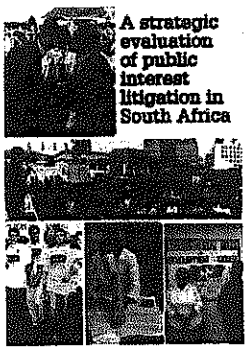
Strategies

To achieve maximum impact, we have identified four strategies that should be used in combination in order to achieve social change:

> public information campaigns that inform ordinary people of their rights
>
> advice and assistance in order to enable people to claim their rights
>
> social mobilisation and advocacy, to assert rights both inside and outside the courts
>
> public interest litigation to enable poor or marginalised groups to achieve impact and success that would not otherwise be available to them

Success Factors

We concluded that in order to achieve social change via litigation, it is critical that the litigation be properly conceptualised, run and followed up. In this regard we identified seven factors that are essential to



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ensuring that public interest litigation succeeds and achieves maximum social change, including:

- proper organisations of clients
- overall long-term strategy through a series of cases, brought on different but related issues over a substantial period
- co-ordination and information sharing between multiple organisations with similar aims
- timing when the climate is right and until the relevant evidence is in place
- detailed research in advance of, and during, the litigation including using foreign law and international law
- the "characterisation debate" – ensuring that the case is brought under the appropriate right and is correctly pitched to the court
- proper follow-up and enforcement after the litigation ensuring practical benefits for those not directly involved in the litigation at all

South Africa's Constitution is one of the most progressive in the world. It includes powerful and far-reaching provisions, including those related to socio-economic rights. Yet South Africa also continues to face massive inequality and poverty. It is therefore essential that the Constitution is used in a manner that produces tangible and lasting social change.

Tags: advocacy, evaluation, human rights, law, litigation, reconciliation & human rights, report, South Africa, strategy

Summary of findings

294. Our key findings in this report may be divided into three parts.

295. In Section 1 of this report we identified the key challenges facing the public interest litigation environment in South Africa.

295.1 We have concluded that the major challenge facing the public interest litigation environment in South Africa is a lack of funding and resources. This challenge is also substantially responsible for the second major challenge, that is the inability of public interest organisations to attract and retain sufficient numbers of quality personnel.

295.2 These challenges are matters of significant concern. As we have indicated, international research suggests that progressive constitutions and progressive judges – both of which South Africa undoubtedly possesses – are insufficient to achieve substantial progress on human rights unless there are sufficient resources to sustain "support structures" – in the form of rights-advocacy organisations and rights-advocacy lawyers – for legal mobilisation.

295.3 Given the massive inequality and poverty continuing to face South Africa, we are concerned that if organisations engaged in this work do not receive sufficient support, there is a danger that the gains of the last few years will be undermined.

296. In Section 3 of this report, we identified four strategies that should be used in combination in order to achieve social change.

296.1. **The first is public information.** Public information campaigns that inform ordinary people of their rights are an essential component of any effort to achieve social mobilisation on rights issues. They

are critical if people are to understand the role that law and legal rights can play in achieving social justice. Moreover, without such campaigns, those conducting the public interest litigation are unlikely to be able to obtain the required information to launch the successful litigation, to generate substantial support from ordinary persons which plays an important role in perceptions of the litigation by courts, the public and the government, or to transform any litigation victory into concrete progress on the ground.

296.2 **The second is advice and assistance in order to enable people to claim their rights.** It is essential that there are intermediary organisations which enable people to claim their rights, through giving advice, directing them to the appropriate institutions, assisting them with the formulation of their claims, and taking matters up on their behalf – all of which can occur successfully without necessarily engaging in litigation. This strategy too has substantial benefits for litigation, particularly because it provides an efficient means of identifying the core issues that are affecting large numbers of ordinary persons most seriously. It thus allows public interest litigation to be designed effectively and targeted to achieve maximum impact, while also improving the prospects that a victory in a landmark case actually translates into tangible benefits for people far beyond those directly involved in the case.

296.3 **The third is social mobilisation and advocacy.** It is clear from our evaluation that rights generally are most effective when they are linked to social movements. Rights have to be asserted both outside and inside the courts. Some form of social

movement is necessary to identify issues, mobilise support around them, make use of political pressure, engage in litigation where necessary, and monitor and enforce favourable laws and orders by the courts.

296.4 **The fourth is public interest litigation.** While successful litigation must not be seen as an end in itself, it can play a pivotal role when combined with the three strategies set out above. Properly used, it enables poor or marginalised groups to achieve impact and success that would not be available to them if they were limited only to the strategies set out above.

296.5 We do not suggest that it is essential that a single organisation is itself integrally involved in each of these four strategies. Indeed, often this is not possible and we readily accept that there is a vital role to be played by organisations consisting of litigation specialists. However, it is critical that if such organisations do not themselves engage in the three other strategies mentioned, they must at least operate with other organisations that do engage in these other strategies.

297. In Section 4 of this report, we concluded that in order to achieve social change via litigation, it is critical that the litigation be properly conceptualised, run and followed up. In this regard we identified seven factors that are essential to ensuring that public interest litigation succeeds and achieves maximum social change.

297.1 **Proper organisations of clients.** While public interest litigation can be run on behalf of a few disparate individual clients, we conclude that this is generally not an effective way of achieving social impact. Generally speaking, public interest

litigation is likely to achieve greater social change when the client is an organisation with a direct interest in the matters being litigated, rather than, for example, a few disparate individuals. Moreover, public interest litigation is likely to achieve greater social change when the client plays an active and engaged role – rather than allowing legal representatives to make key decisions without proper client input.

297.2 **Overall long-term strategy.** Where public interest litigation achieves maximum social impact, this is invariably not by virtue of a single case. Rather it tends to require a series of cases, brought on different but related issues over a substantial period. It is therefore critical that organisations seeking to utilise public interest litigation to achieve social impact do not attempt to rely on "one shot" success. Rather, they must develop a coherent long-term strategy that allows them to benefit from the substantial advantage that derives from being a repeat player in the courts.

297.3 **Co-ordination and information sharing.** In virtually any given area of public interest litigation, there are multiple organisations with similar aims, all seeking to achieve success via litigation. If there is insufficient co-ordination and information sharing between these organisations, there is a real danger that resources will not be used effectively and, even more damagingly, viable cases will be undermined by other conflicting cases being brought by other organisations simultaneously or beforehand. Successful public interest litigation therefore requires co-ordination and information sharing among the organisations involved so that they can build on each other's successes.

297.4 **Timing.** Timing is an essential element in any public interest litigation that is to have meaningful impact. The litigation should not commence until and unless the climate is right and until the relevant evidence is in place. The effects of running litigation too soon can be disastrous – particularly as an unsuccessful piece of public interest litigation could, in practice, permanently foreclose the issue from being re-litigated. It is also helpful to be able to demonstrate that court action has not been the first port of call for the persons involved – courts will tend to be far more receptive and sympathetic where it can be demonstrated that the organisation has repeatedly sought to engage with the government to achieve a solution but that none has been achieved.

297.5 **Research.** A critical, and often neglected, facet of successful public interest litigation is the need for detailed research in advance of, and during, the litigation. Legal research, including using foreign law and international law, is essential if public interest litigation is to be given a proper theoretical foundation. The need for access to proper factual research, particularly in socio-economic rights cases, is just as acute. Those involved in running such litigation must have access to such research capabilities – either within their own organisation or via alliances with other organisations.

297.6 **Characterisation.** A substantial component of any successful case is the "characterisation debate" – ensuring that the case is brought under the appropriate right and is correctly pitched to the court. Any given case can be viewed and perceived in multiple ways by courts and the public. It is thus critical for those involved in public interest

litigation to demonstrate that the issues at stake are critical, that the assertion of fundamental rights is being used to redress unfairness and inequality rather than perpetuate it and that there are countless real people being affected on a daily basis.

297.7 **Follow-up.** Perhaps the most critical factor of all in ensuring that public interest litigation has the maximum social impact is the need for proper follow-up after the litigation. This mainly involves ensuring that the victory in the litigation can be translated into practical benefits for a large number of people on the ground, including those who were not directly involved in the litigation at all. This is ideally done by a combination of legal and political pressure. While the use of innovative and wide-ranging remedial powers by the courts is important for achieving social impact, it is arguably less important than the capacity and willingness of the organisations involved to properly follow up and enforce whatever order is granted.

298. South Africa's Constitution is one of the most progressive in the world. It includes powerful and far-reaching provisions, including those related to socio-economic rights. Yet South Africa also continues to face massive inequality and poverty. It is therefore essential that the Constitution is used in a manner that produces tangible and lasting social change. As Dennis Davis points out:

"A failure by successful litigants to benefit from constitutional litigation of this kind can only contribute to the long-term illegitimacy of the very constitutional enterprise with which South Africa engaged in 1994. A right asserted successfully by litigants who then wait in vain for any tangible benefit to flow from the costly process of litigation, is rapidly transformed into an illusory right and hardly represents the kind of conclusion

designed to construct a practice of constitutional rights so essential to the long-term success of the constitutional project."

Dennis Davis, "Adjudicating the Socio-economic Rights in the South African Constitution: Towards 'Deference Lite"'? (2006) 22 SAJHR 301 at 314

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Dennis Davis, "Adjudicating the Socio-economic Rights in the South African Constitution: Towards 'Deference Lite"'? (2006) 22 SAJHR 301 at 314

SOUTHERN AFRICA LITIGATION CENTRE

SECTION 4

CASE STUDIES: FACTS

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an initiative of the International Bar Association and the Open Society Initiative of Southern Africa

From SALC.

Case Study #1 — Stanev v. Bulgaria

The applicant is S, a man who is believed to suffer from schizophrenia. His diagnosis is complicated by the fact that he abuses alcohol and exhibits aggressive behaviour when drunk. S does not have many family members and is not close with his living relatives. Because of his disorder, S does not work. Instead he begs for a living.

Without his knowledge, S's relatives lodged a petition and had him declared to be partially legally incapacitated due to his schizophrenic behaviour and his inability to provide for himself. Because his relatives refused to accept guardianship responsibilities for him, S was appointed a guardian by the state. Without informing S beforehand, S's state-appointed guardian arranged for him to enter a social care home for men. S was transferred to the home by ambulance and placed there for "permanent supervision." The social care home was accessible only by dirt road and was located in a remote mountain village nearly 400 kilometres from S's home.

Living standards in the social care home were poor—S was only allowed access to a bathroom once a week, there was no heating, inhabitants' clothes were often stolen, and the food was insufficient and of poor quality. Although S had a disability pension that covered the cost of his stay in the social care home, S was unable to access these funds directly. Instead, S's disability pension was distributed directly to the home. He was also not permitted to leave the home without prior permission from the staff. After staying in the home for a few years, S was placed under the guardianship of the director of the home.

When S had lived in the home for three years, he sought to begin reintegration into society. At the request of his lawyer, S was examined both by an independent psychiatrist and by an independent psychologist who determined that he did not display all the symptoms of schizophrenia and that his alcohol abuse could be to blame for the misdiagnosis. Following this assessment, S received a small increase in his pension to support his reintegration efforts.

After living in the home for two years, S also petitioned through his lawyer to have his full legal capacity restored. S was subjected to psychological evaluation, but the report offered no opinion on whether he should be released from the home or not. Local officials and courts declined to grant S's requests on the grounds that his guardian had not approved his departure from the home. S's lawyer argued that persons with partial legal capacity were allowed to choose their place of residence and that forcing S to remain in the home amounted to a deprivation of his liberty. However, the local court ruled that S's lawyer did not have the authority to act on his behalf without the approval of S's guardian. S stated that over the years he had sought to have his guardian release him from partial legal capacity but his guardian had always refused.

Case Study #2 — Dordevic v. Croatia

The applicants are D, a man in his 30s who suffers from mental and physical disabilities, and his mother, who serves as his legal guardian. Both D and his mother belong to a minority nationality group. D has poor eyesight, reduced mobility in his spine, and severe deformities in his feet that make it difficult for him to walk. D depends on his mother to dress, feed, and provide for him. Emotionally, D is distant, fearful, and anxious.

Over a period of about four years, both D and his mother have been harassed by children that attend the primary school down the street from their home. D is often tormented by children who scream at him, push and hit him, burn his hands with cigarettes, and throw things at him. In one attack, D was thrown into an iron fence and he suffered abrasions to his head and leg which required him to use a wheelchair for several days. D's mother is also harassed by the children, who congregate outside the house and make lots of noise, destroy property, vandalize the house, leave insulting messages outside the home, and make derogatory statements based on D and his mother's national origin.

Although D's mother has repeatedly complained to the school which the children attend and often calls the police, the harassment has not abated. The school has sought to give the children sensitivity training but the children persist in their offensive behaviour. Whenever D's mother calls the police, the responding police officers tell her that the children are too young to be held criminally responsible for their actions. A review of the reports that the police have written about the incidents suggests that the police have recorded an edited version of the events to make it seem as though the offenders are never present when they arrive on the scene. However D's mother claims that the children are often still present when the police arrive, but that rather than trying to identify the children, the police merely tell them to go home.

D suffers from extreme anxiety and fear due to the treatment of the children. After D had been the victim of a number of attacks from the children, it was recommended that he undergo psychotherapy. Due to stress related to the harassment, D bites his lips and hands, has developed a twitch in his left eye, and has begun to exhibit symptoms of psoriasis.

Case Study #3 — Shtukaturov v. Russia

The applicant is S, a young man who does not work and lives at home with his mother, his legal guardian. S is legally classified as a disabled person and receives a disability pension. Despite once leading a normal social life, in the past few years S has been hospitalized for anorexia, has become withdrawn and has become estranged from most of his friends. At times he also becomes aggressive with his mother. At least once, S's mother has gone to spend the night at a friend's home because she was so frightened by her son's threatening behavior.

About a year after his disabled status was granted, S's mother lodged an application to remove her son's legal capacity, citing that he was aggressive, inactive, and rarely left the house. S's mother also pointed out that S had inherited property from a relative, but after more than a year had passed, S had still failed to register the property to assert his legal rights. S's mother argued that this showed S was incapable of leading a normal life. Before announcing its decision, the court ordered S to undergo psychological testing. S was not told of the reason for the tests. Doctors concluded that S suffered from "simple schizophrenia with a manifest emotional and volitional defect" and that he was not aware of or able to control his actions.

Although S was unaware of the proceedings against him and although neither he nor his mother were in attendance at the proceedings (which lasted only ten minutes), the court ruled that the application could succeed and deprived S of his legal capacity. S's mother was named his legal guardian.

S learned of the judgment by chance only after looking through some of his mother's papers. He immediately contacted a lawyer for assistance. S's lawyer claims that during their initial meeting S was adequately lucid and fully able to understand the legal issues in his case. Yet two days later, at the request of his mother, S was hospitalized in a psychiatric facility. S claimed that the placement was against his will and sought to contact his lawyer again but was denied. S's subsequent attempts to be released from the hospital were barred on the grounds that all decisions pertaining to his legal rights must be decided by his guardian.

S's lawyer brought several court actions to try to assert his right to see his client. Despite receiving a favourable judgment in district court, S and his lawyer were still denied access to each other by the psychiatric hospital. When S's lawyer instituted a second legal action to enforce the right of access, the original judgment was reversed. S has been in and out of the psychiatric hospital since that time, always readmitted at the request of his mother. Currently, S is still under his mother's guardianship and is still denied access to his lawyer.

Case Study #4—HM v. Sweden

HM is a woman who suffers from Ehlers-Danlos Syndrome, which causes extensive problems in her joints, weak muscles, and weak blood vessels. These severe physical disabilities prevent HM from standing or walking and make it difficult for her to sit or lie down. She has been bed-ridden for the last two years and is unable to take medicine to ease her pain due to an acute sensitivity to medicines.

Because HM is at such a heightened risk for injury, she is unable to leave her home for treatment in a hospital or other facility. Instead, her doctors have determined that her only hope for rehabilitation is through hydrotherapy, a program that would allow her to exercise in water and thereby increase her muscle and joint strength.

Due to her inability to leave her home, HM's only means of undertaking a hydrotherapy program is to complete the therapy program in an indoor pool at her home. HM therefore applied for permission to extend the structure of her home an additional 63 meters onto property that she already owned for the purposes of installing an exercise pool. Approximately 45 square meters of this expansion would be on land where building is not permitted.

HM's application for permission to build the pool was denied by the local housing committee on the grounds that the proposed land had been designated as property where building was not permitted. The committee did not believe that HM's special circumstances warranted an exception to this restriction.

HM appealed the decision and an administrative court determined that given the particularly unique circumstances of HM's case, granting permission to build would not lead to similar applications for exceptions to the rule. Additionally, the administrative court noted that the extension would provide great benefit to HM with little to no cost to the community. However, on appeal, this favourable ruling was struck down by both the administrative appellate and supreme courts.

SOUTHERN AFRICA LITIGATION CENTRE

SECTION 5

CASE STUDIES: RIGHTS IMPLICATED

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an initiative of the International Bar Association and the Open Society Initiative of Southern Africa

Case Study #1—Stanev v. Bulgaria

Right to Liberty and Security of the Person

S asserted that his placement in the social care home had been a deprivation of his right to liberty. He claimed that the remote location of the home coupled with the fact that he was not permitted to leave without permission, meant that his freedom was severely restricted. He noted that he had never consented to the placement since he was unaware of plans for the placement until they had already been implemented. S also argued that it was impossible for him to leave the home because he was unable to do so without his guardian's consent. S further argued that there was no justification for the deprivation of his liberty because it was not undertaken to ensure public safety, less restrictive means were not considered, and there was no evidence that S would be unable to cope with society while living on his own.

Right to Speedy Trial and Release upon Finding of Unlawful Detention

S maintained that there were no effective remedies for him to contest his detention because of his partially incapacitated status. He also alleged that there was a conflict of interest in being subjected to the will of his guardian when his guardian was also the director of the social care home that he sought to leave.

Prohibition on Torture and Inhuman or Degrading Treatment

S claimed that the poor living conditions of the social care home violated his rights to be free from inhuman and degrading treatment, pointing to the poor quality of food, the unsanitary facilities, the lack of heating, and the forced medical treatment.

Right to Fair Hearing

S maintained that the courts had been closed to him such that he was unable to have his partial legal capacity status reviewed. S pointed to the numerous attempts he had made at instituting legal proceedings, all of which failed because his guardian did not consent to the proceedings.

Right to Respect for Private and Family Life

S argued that his detention in the social care home had prevented him from developing relationships with persons of his choosing and that the restrictions of the home meant that he was unable to take part in community life. He claimed that these circumstances amounted to unlawful intrusions into his private life.

Case Study #2—Dordevic v. Croatia

Prohibition on Torture and Inhuman or Degrading Treatment

The applicants claimed that the ongoing and continuous nature of the harassment by the schoolchildren amounted to inhuman or degrading treatment. The applicants noted that they had been subjected to insults and verbal abuse, the vandalization of their property, physical violence, and psychological harm over the course of several years. Their position was that the State had a responsibility to protect them from such treatment and had failed to do so.

Right to Respect for Private Life

The applicants claimed that the ongoing and continuous nature of the harassment by the schoolchildren amounted to a violation of respect for their private lives. The applicants noted that they had been forced to change their daily routines in order to avoid the children. This disruption caused further harm to D because he was not able to socialize and enjoy the outdoors as was necessary for his mental health and well-being. Their position was that the State had a responsibility to protect them from such circumstances and had failed to do so.

Right to Life

The applicants argued that the escalating violence and severity of the harassment by the children (verbal attacks grew into physical violence) led to an implication of the right to life. They maintained that this right could be violated in the absence of proper protection from the government to ensure that the escalating attacks did not go any further. Specifically, the applicants pointed out that responding authorities failed to try to identify the offenders and did not take the numerous incidents into account as an ongoing situation, but rather tried to treat each incident as a separate disturbance. The applicants believed that this approach led to a trivialization of the events at hand and was evidence of the lack of government protection for the right to life.

Prohibition on Discrimination—Disability and National Origin

The applicants asserted that even though there was legislation under which they could bring suit for discrimination, the legislation did not fully address their complaints because there were not sufficient safeguards to provide for discrimination on the grounds of disability. They also argued that the relevant legislation had never been effectively invoked or invoked in a timely manner.

Case Study #3— Shtukaturov v. Russia

Right to Fair Hearing

S argued that the trial in which he had been deprived of his legal capacity had been unfair. He noted that the Court had reached its decision without hearing or seeing him; that the prosecutor who led the case had never met him to determine his mental status; that the Court had failed to question his mother who lodged the appeal; and that it was manifestly unfair that he was unable to challenge the decision because the judgment deprived him of his legal ability to do so.

Right to Respect for Private and Family Life

The applicant asserted that the legislation allowing for his deprivation of legal capacity was vague because it did not define what actions a person was required to be aware and in control of before legal capacity could be removed. S argued that because there were no clear grounds for depriving him of legal capacity, the deprivation had been an unlawful intrusion into his private life. He further argued that the deprivation had been unnecessary and unjustified because it did not protect public safety or prevent crime, there was no benefit for S's health, and S's failure to assert his property rights was not a sufficient justification for removing his legal capacity. S finally claimed that the deprivation of full legal capacity was unwarranted because less restrictive measures could have been taken.

Right to Liberty and Security of the Person

S claimed that his confinement in the hospital amounted to a deprivation of his liberty. He argued that the detention had been without his consent and that he had been unable to communicate with those outside of the facility. S also noted that his opinion was deemed irrelevant and that there were no safeguards in place to protect persons confined solely at the request of their guardians, without personal consent. S maintained that a review process was missing and that therefore the State refused to take into account the fact that a person's ability to hold legal capacity could change over time. S argued that the lack of these legal safeguards meant that the right to liberty and security was violated.

Right to Speedy Trial and Release upon Finding of Unlawful Detention

The applicant claimed that he was denied review of his detention because he was deemed legally incapable and could not open court proceedings without the consent of his guardian. This denied him access to the court because his guardian was opposed to his release.

Prohibition on Torture and Inhuman or Degrading Treatment (deemed inadmissible by the Court)

S argued that his subjection to medical treatments without his consent was a violation of the prohibition against torture and inhuman or degrading treatment. He also claimed that this prohibition was violated when he was tied to a bed after trying to escape the hospital.

Case Study #4—HM v. Sweden

Right to Equality and Non-Discrimination

HM argued that there was an indirect effect of discrimination against her on the basis of her disability through the State's refusal to approve her building plan. Although the laws were neutral, their application in this case would amount to discrimination by depriving her of her equal rights as a disabled person. HM maintained that application of the law must be made so as not to inflict harm upon her as a disabled person.

Right to Live Independently and Be Included in the Community

HM claimed that without the ability to rehabilitate at home, she would likely be forced to enter an assisted care institution. This would violate her right to live independently.

Right to Health

HM claimed that the rejection of her building proposal directly affected her right to health because only approval of the proposal would allow her to enjoy the sole remaining option open to her for the preservation of her health. HM emphasised that this treatment was absolutely necessary for her health and that the public benefit to be gained through strict adherence to the no-building policy was inadequate when compared to her special circumstances. HM also argued that because there was no exception in the building restriction for the purposes of preserving the health of disabled persons, there was a further violation of her right to health.

Right to Habilitation and Rehabilitation

HM stated that the refusal to accept her building proposal would violate her right to rehabilitation. She emphasised documentation provided by her doctor stating that hydrotherapy was her only means of rehabilitation and that the treatment must be conducted at home to avoid further injury.

SOUTHERN AFRICA LITIGATION CENTRE

SECTION 6

CASE STUDIES: JUDGMENTS

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CASE SUMMARY: SELA BROTHERTON V ELECTORAL COMMISSION OF ZAMBIA, HIGH COURT OF ZAMBIA, 2011/HP/0818,

FACTS

The case was brought by Sela Brotherton in her capacity as secretary of the Zambia Federation of Disability Organizations (ZAFOD). ZAFOD consists of a number of member organisations who represent Zambians with disabilities – and many of these individuals had registered to vote in the forthcoming elections.

The case was brought against the Zambian Electoral Commission (the Commission) which is responsible for supervising the registration of voters, conducting elections and ensuring the electoral code of conduct is adhered to.

ZAFOD complained that because the present polling stations in Zambia were not accessible to people with disabilities and the services did not adequately cater for their needs there was a statutory obligation on the Commission to initiate legislation to ensure people with disabilities were able to participate equally in the elections. ZAFOD argued that this amounted to unlawful discrimination against persons with disabilities in violation of article 23 of the Constitution, and a limitation of the right of people with disability to exercise their franchise freely, fairly, in secret and with dignity as protected by article 75. The Commission therefore violated its legislative duties to ensure equal participation of all persons, to make provision for a special vote for persons who are unable to vote at the designated polling stations and to relocate inaccessible polling stations to ensure that all people are able to access the stations on election day.

ZAFOD applied for an order declaring the Commission's action unlawful and directing them to make provision for people with disabilities to vote.

This case arose because, in an attempt to engage with the Commission, ZAFOD had approached the Commission in 2006 and requested that they implement policy reform to ensure accessibility for people with disabilities however the Commission had indicated that it was not willing to work with ZAFOD in this respect. In 2008 the Commission had formulated an accessibility audit check list and trained its employees in ascertaining accessibility to buildings and services, and researched the extent to which its current services aided accessibility to the voting to process for persons with disabilities.

In August 2010 ZAPOD visited stations that were registering voters in an attempt to determine the accessibility to these stations for persons with disabilities. The organisation found that the stations were not accessible to people in wheelchairs, the visually impaired or those with hearing disabilities: registration tables were too high or placed in positions that were inaccessible to people in wheelchairs; many of the buildings used for the registration had very narrow corridors and no disabled toilets; the officials were unable to speak sign language and there were no facilities for the visually impaired. ZAFOD conceded that the buildings used were not owned by the Commission, but that the Commission should select only those buildings that were accessible to people with disabilities for registration of voters and elections. ZAFOD also conceded that a tactile ballot for people with visual impairments was available for Presidential elections, but that it should also be available for local and parliamentary elections.

The Commission contended that it had taken steps to ensure that people with disabilities were able to register and to vote. That included the provision of tactile templates and enabling assistance by relatives for visually impaired voters as well as ensuring the buildings were physically accessible. However, the Commission did concede that no ramps had been placed in buildings where there were steps and that it had not provided special, low tables, but that this had not been done intentionally. It also conceded that the officials did not have knowledge of sign language.

In response to the communication received from ZAFOD the Commission said that they had not been able to act on the recommendations as the election budget had already been prepared. Although tactile ballot papers had not been prepared for the local and parliamentary elections provision had been made for visually impaired voters to be assisted by relatives.

JUDGMENT

Discrimination

The Court confirmed that people with disabilities have a right to vote under Article 75 of the Constitution. The Court characterised the question as being: whether or not members of ZAFOD have been discriminated against by the Commission in the pursuit of the exercise of the right to vote.

The Court confirmed that accessibility for people with disabilities was not provided for by the Commission at the registration stations. The question was whether this constituted discrimination in terms of article 23 of the Constitution, read with section 19 of the Persons with Disabilities Act which holds that "discrimination" means:

> *"(a) treating a person with a disability less favourably from a person without a disability;*
> *(b) treating a person with a disability less favourably from another person with a disability*
> *(c) requiring a person with a disability to comply with a requirement or condition which persons without a disability may have an advantage over; or*
> *(d) not providing different services or conditions required for that disability."*

The Court held that the Commission was bound by these anti-discrimination clauses as it was performing functions of a public office. People *without* disabilities were able to easily access the registration process whereas people *with* disabilities had difficulties. Because people with disabilities were treated less favourably than people without, there was discrimination.

Statutory Duties to Ensure Equal Participation of All Stakeholders

Regulation 7 of the Electoral (Code of Conduct) Regulations states:

> *"(1) The Commission shall where reasonable and practicable to do so –*
> *(a) meet political party representatives on a regular basis to discuss all matters of concern related to the election campaign and election itself;*
> *(b) ensure that political parties do no use State resources to campaign for the benefit of any political party or candidate;*
> *(c) avail political parties with the election timeable and election notices in accordance with the Act;*
> *(d) censure all acts done by leaders of political parties, candidates, supporters, Government and its organs, which are aimed at jeopardizing elections or done in contravention of this Code;*
> *(e) declare election results expeditiously from the close of the election day;*
> *(f) ensure that a campaign rally or meeting which is legally organised by any political party is not disrupted or arbitrarily prohibited;*
> *(g) ensure that no election officer, police officer, monitor, observer or media person is victimised in the course of their election duties;*
> *(h) ensure that police officers act professionally and impartially during the discharge of electoral duties*
> *(i) ensure that traditional leaders, do not exert undue influence on their subjects to support a particular political party or candidate;*
> *(j) ensure that equal opportunity is given to all stakeholders, particularly political parties and independent candidates to participate in and conduct their political activities in accordance with the law; and*
> *(k) condemn acts of media organizations and personnel aimed at victimization, punishment or intimidation of media practitioners implementing any of the provisions of this Code."*

The Court held that ZAFOD had not clearly stipulated which provision in the Code they were bringing the action, and assumed it was section 7(1)(j). However, the Court held that because this section does not grant

rights to any stakeholders in the electoral process, and because it is not intended to privilege any voter the Commission had not violated any obligation under section 7.

Limitation of the Right to Vote

Article 75 of the Constitution, and sections 18 and 60 of the Electoral Act, address the right to vote in Zambia. The Constitutional provision grants the right to vote and section 18 of the Electoral Act stipulates that all votes should be by secret ballot. Section 60 sets out the procedure to be followed if a voter requests assistance:

> *"(1) The presiding officer or another election officer, at the request of a voter who is unable to read, shall assist that voter in voting in the presence of –*
>
> *(a) a person appointed by or as an accredited observer or monitor, if available; or*
>
> *(b) two election agents of different candidates, if available; or*
>
> *(2) A person may assist a voter in voting if –*
>
> *(a) the voter requires assistance due to a physical disability;*
>
> *(b) the voter has requested to be assisted by that person; and*
>
> *(c) the presiding officer is satisfied that, that person has attained the age of 18 years.*
>
> *(3) The secrecy of voting as stipulated in the Constitution shall be preserved in the application of this section."*

The Court emphasised that the issues of importance in respect of these sections are the secrecy of the ballot and the need to be enabled to vote with dignity. The Court said that it is clear that without the tactile ballot for local and parliamentary elections voters with visual impairments will not have their right to vote in secret respected. Additionally the Court held that there had been no information provided regarding the tactile ballot for the Presidential election, and so many voters with visual impairments may not even be aware of its existence and its potential to enable them to vote in secret.

The Court demonstrated that the Commission was under the false impression that it was mandatory to offer assistance to voters with disabilities. However, the provision is phrased in such a way that it is *not* mandatory but rather the voter can request assistance. It is therefore the voter's choice. The Court held that the Commission's misapprehension amounted to an infringement of the voters' rights to exercise their franchise in accordance with the law.

Statutory Obligation to Make Provision for People with Disabilities who are Unable to Vote at the Designated Stations

Section 24 of the Electoral Act states:

> *"(1) The Commission shall allow a person to apply for a special vote if that person cannot vote at a polling station in thepolling district in which the person is registered as a voter, due to that person's –*
>
> *(a) physical infirmity or disability or pregnancy; or*
>
> *(b) absence from that polling district while serving as an officer or monitor in the election concerned, or while on duty as a member of the security services in connection with the election.*
>
> *(2) The Commission may declare and prescribe circumstances in, and conditions under, which a person who is unavoidably and unforeseeably unable to vote in the polling district in which that person is registered as a voter may apply to vote elsewhere.*
>
> *(3) The Commission shall prescribe –*
>
> *(a) the procedure for applying for special voters; and*
>
> *(b) the procedure, consistent in principle with Part VI, for the casting and counting of special votes."*

The Court highlighted that subsection 3 requires the Commission to make arrangements for people in these circumstances, and confirmed that no such arrangements had been made. However, the Court also held that there was an obligation on ZAFOD to request a special vote in these circumstances, and as they had not made a request held that ZAFOD had failed to establish that there was a statutory obligation on the Commission in this regard.

Statutory Obligation to Relocate Inaccessible Stations

ZAFOD relied on a number of sections in the Electoral Act. Section 28 permits a postponement of the elections

if required to ensure free and fair elections. Section 40 provides a number of factors the Commission should consider when determining the location of voting stations, including "access routes to those venues" and "general facilities at those venues". Section 41 permits the relocation of a voting station if doing so would ensure free and fair elections. The Court confirmed that according to these provisions the Commission has the discretion to postpone the elections if they deem it would be necessary. In order for the election to be "free" the Court held that "all eligible citizens must be free to cast their vote. They must thus, not be hindered in any way."

The Court held that the evidence presented demonstrated that people with disabilities were hindered by the physical inaccessibility of the voting stations, and that this would discourage them from voting. The Commission was therefore in breach of its obligations under section 41 of the Electoral Act as it did not relocate these stations.

CONCLUSION

The Court therefore held that ZAFOD had demonstrated that the Commission had unlawfully discriminated against people with disabilities, and had unlawfully limited the rights of people with disabilities to exercise their franchise by not providing premises and services that are accessible to people with disabilities.

However, although finding that the Commission had violated rights the Court stated that it was reluctant to grant the relief sought by ZAFOD which would require the Court to postpone the forthcoming election. The Court held that because the election was less than a month after the proceedings were initiated, postponing it would negatively impact on all the other stakeholders in the election. The evidence showed that although there were difficulties many voters with disabilities had registered to vote, and so would be able to cast their vote "albeit under unfavourable circumstances." Additionally it would entail the Court making the decision to postpone the election, which it felt was a decision that was solely within the discretion of the Commission.

In light of the timing of the action the Court ordered that the Commission put in place procedures to ensure that voters with disabilities are not disadvantaged in registering to vote and voting – however the Court ordered that this be done before the next election, and not the one immediately after the judgment. The Commission would be required to install temporary ramps at the stations, ensure that polling booths are located on the ground floor of the buildings used as stations and provide a tactile ballot for all elections. The Commission would be required to "formulate and issue a detailed plan and budget aimed at providing services and amenities aimed at ensuring equal participation by persons with disabilities in the electoral process."

Case Summary: Western Cape Forum for Intellectual Disabilities v Government of the Republic of South Africa , 2001 (5) SA 87 (WCC)

Facts

The Western Cape Forum for Intellectual Disabilities ("the Forum") is a body whose members are NGOs that care for children with severe and profound intellectual disabilities in the Western Cape. The members of the forum provide care for approximately 1,000 children. The Forum brought suit against the provincial and national governments based on their failure to provide education for children with severe or profound intellectual disabilities in the Western Cape.

The government establishes and funds schools in South Africa, including so-called "special schools" that accommodate the needs of children who are classified as having moderate to mild intellectual disabilities (measured by IQ levels between 30 and 70). Children with an IQ of 20-35[1] ("severely intellectually disabled") or less than 20 ("profoundly intellectually disabled") are not admitted to special schools or any other state schools. The state does not provide schools in the Western Cape for these children.

In the Western Cape, the only education available to children with severe or profound intellectual disabilities is at special care centres which are run by NGOs, including members of the Forum. Children who cannot obtain access to special care centres receive no education. There are not enough centres to cater for all children with severe or profound intellectual disabilities.

The only contribution made by the state to the education of these children is a subsidy paid by the Department of Health to the organisations that run the special care centres. The financial support is less than the state provides for the education of children who are not disabled.

Claims

The Forum objected to the fact that state provision for children with severe or profound intellectual disabilities was less than what was provided for other children, inadequate to cater for the education of the children and only made available where an NGO provided the facilities.

On these grounds, the Forum alleged that that the policy/practice of the respondents infringed on the constitutional rights to education, equality, human dignity and protection from neglect and degradation of children with profound and severe intellectual disabilities in the Western Cape.

Court's analysis

Right to education

[1] This seems to be either an error by the judge or an inconsistency in the IQ scheme, as an IQ between 30 and 35 is considered both a moderate/mild intellectual disability and a severe intellectual disability as described in paragraph 3 of the case.

The respondents argued that their actions must be interpreted in the context of the socio-economic history of the country, and that their limited resources forced them to make difficult policy choices about how to distribute those resources in the face of competing demands.

The respondents described different policies and a White Paper outlining how the government was planning to deal with the category of children, but even after these programmes were implemented, there would be children who did not qualify for public education. The respondents claimed that no amount of education would be beneficial for those children and they would need to depend on their parents to teach them life skills. (Despite this argument, the respondents and the applicant agreed that children with severe or profound intellectual disabilities are able to benefit from education.)

The court rejected these arguments. It pointed out that the White Paper and government policy makes no provision for children with severe or profound intellectual disabilities to be catered for by special schools; the respondents only vaguely aim to ensure that children "may be able to access support" at some point in the future.

The judge rejected the respondents' claim that its failure to spend more on education for the affected children was justified because it was rationally connected to a legitimate government purpose. This claim did not address why the affected children were singled out for complete denial of education, rather than spreading the limited funds evenly among all children.

The judge held that the rights of the children to a basic education had been infringed.

Right to equality

The respondents claimed they did not infringe the rights of the affected children to equality because the differentiation between the affected children and other children bore a rational connection to a government purpose. The court rejected this argument for the same reasons it did the respondents' argument with regard to the right to education.

While recognising that the Constitutional Court of South Africa may hesitate to implement the equality provisions of the constitution in an unqualified way, the judge found that the respondents should have at least explained why it was reasonable and justifiable that the most vulnerable children should pay the price of limited resources, instead of the shortfall being shared by all students.

Section 36 argument

The respondents' last argument was that the failure to provide education to the affected children and their unequal treatment was justified in terms of s 36 of the Constitution, which sets out the requirements for a justified limitation of the Bill of Rights. They argued that the benefits they sought to achieve outweigh the immediate needs of the affected children.

The judge found that s 36 was inapplicable because the legislation the respondents referred to did not authorise any limitation on the rights of the affected children. However, he added that the respondents in any event had failed to establish that the limitation was reasonable and justifiable in an open and democratic society. He pointed to the Constitutional Court's explanation of the

concept of reasonableness in *Grootboom*, where Jacob J held that a program that fails to respond to the needs of the "most desperate" cannot be considered reasonable.[2] The judge also pointed out that rights may not be limited under s 36 in a way that is inconsistent with the Bill of Rights.[3]

The judge found that there was no valid justification for the infringement of the rights of the affected children to a basic education and to equality.

Other rights (dignity, protection from neglect)

Without adding much additional analysis, the court also found that the respondents' policy had infringed the children's rights to dignity and to protection from neglect and degradation.

Holding and remedy

The court held that the respondents had failed to take reasonable measures to make provision for the educational needs of severely and profoundly intellectually disabled children in the Western Cape, in breach of the rights of those children to a basic education, protection from neglect or degradation, equality and human dignity.

The Forum accepted that the breach of the rights of the affected children could not be cured overnight, and that it was both impossible and inappropriate for the court to determine in detail what program should be established to meet the needs of the children.

Instead, the court directed the respondents to take reasonable measures, including interim steps, to give effect to the rights of severely and profoundly intellectually disabled children in the Western Cape. These steps included:

1. ensuring that every child in the Western Cape who is severely and profoundly intellectually disabled has affordable access to a basic education of an adequate quality;
2. providing adequate funds to organizations which provide education for severely and profoundly intellectually disabled children in the Western Cape at special care centres;
3. providing appropriate transport for the children to and from such special care centres;
4. enabling the staff of such special care centres to receive proper accreditation, training and remuneration; and
5. making provision for the training of persons to provide education for children who are severely and profoundly intellectually disabled.

The court granted a structural interdict ordering the respondents to submit a program to the court detailing how they intended to remedy the breaches of the children's rights. The respondents were also ordered to report on a periodic basis on the progress made and what further progress was planned.

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[2] *Government of the Republic of South Africa and Others v Grootboom and Others*, 2001 (1) SA 46 (CC) at paras. 43-44, *available at* http://www.saflii.org/za/cases/ZACC/2000/19.html.

[3] *Khosa and Others v Minister of Social Development and Others*, 2004 (6) SA 505 (CC) at para. 45, *available at* http://www.saflii.org/za/cases/ZACC/2004/11.html.

Case Summary: H.M. v. Sweden (CRPD)
CRPD/C/7/D/3/2011

Facts

The author of the communication was a Swedish woman who had a chronic connective tissue disorder called Ehlers-Danlos Syndrome (EDS). Her EDS had caused excessive over-flexibility and severe dislocation of her joints, as well as fragile and easily damaged blood vessels, weak muscles and severe chronic neuralgia (unstimulated nerve pain). She had been unable to walk or stand for eight years at the time of the communication, and she had been bedridden for two years. She was unable to take medication due to a hypersensitivity to medicines.

Unable to leave her house because of an increased risk of injuries, the author's only option for rehabilitation that could stop the progress of the EDS was hydrotherapy. In the author's unique circumstances, hydrotherapy would only be practicable in an indoor pool in her own home. In the absence of hydrotherapy rehabilitation, the author was at risk of eventually having to leave her home and enter a care institution.

Procedural history

The author applied for permission for an extension to the house of her privately owned piece of land, which would have included land where building was not permitted (by approximately 45 square metres).

Her request for building permission was rejected by the Local Housing Committee. Permission could only be given for "minor" departures from the development plan, and it considered that 45 square metres was not minor. The author appealed the decision to the County Council, where the appeal was rejected. She appealed again to the Karlstad Administrative Court, which granted her appeal and referred the author's application for permission back to the Local Housing Committee for a new hearing, where her request was again rejected. Her petition to appeal further decisions was ultimately refused, exhausting her domestic remedies.

Claims

The author claims to be a victim of a violation by Sweden of her rights under articles 1, 2, 3, 4, 5, 9, 10, 14, 19, 20, 25, 26 and 28 of the Convention on the Rights for Persons with Disabilities. However, the Committee found that her claims regarding articles 9 (accessibility), 10 (right to life), 14 (liberty and security of the person), and 20 (personal mobility) were insufficiently substantiated and therefore inadmissible under the Optional Protocol. The Committee examined the author's allegations under articles 3, 4, 5, 19, 25, 26 and 28 on the merits.

The author essentially claimed that she had been discriminated against by Sweden because its administrative bodies and courts failed to take into account her rights to equal opportunity for rehabilitation and improved health when deciding whether to grant her building permission. The refusals were based on the public interest to preserve the development plan, but the author argued that the health, interest and well-being of a person with a disability should come above the public interest of not allowing construction on certain demarcated land.

Sweden claimed that it had not discriminated because its policy to not allow extensions was applied equally to all persons with or without disabilities.

Committee's analysis

The Committee noted that the Convention's definition of discrimination includes both direct and indirect discrimination, and that a law applied in a neutral manner may nevertheless have a discriminatory effect when the particular circumstances of an individual are not taken into consideration. It concluded that the "right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different."[1]

Failure to provide reasonable accommodation is also part of the definition of discrimination on the basis of disability. Reasonable accommodation must be provided unless it imposes a "disproportionate or undue burden." The Committee concluded that the approval of a departure from the development plan for the author would not impose such a burden on Sweden.

The Committee found that Sweden did not address the specific circumstances of the author's case and her particular disability-related needs when rejecting her application for a building permit. It concluded that the decisions of the domestic authorities were therefore disproportionate and produced a discriminatory effect that adversely affected the author's access, as a person with a disability, to the health care and rehabilitation required for her specific health condition. It according concluded that the author's rights under Convention articles 5(1), 5(3) and 25 and Sweden's obligations under article 26, read alone and in conjunction with articles 3(b), (d) and (3) and 4(1)(d) were violated.

The Committee also noted the author's claim that, without access to an indoor hydrotherapy pool at home, she would eventually have to leave her home and enter a specialised institution to receive the necessary care. The Committee concluded that the denial of a building permit thereby also denied her of the only option that could support her continued inclusion in the community, in violation of Convention article 19(b).

The Committee did not think it was necessary to consider the author's claims under article 28.

Findings and recommendations

The Committee found that Sweden had failed to fulfil its obligations under articles 5(1), 5(3), 19(b), 25 and 26, read alone and in conjunction with articles 3 (b), (d) and (e), and 4(1) (d), of the Convention.

It recommended that Sweden was under an obligation to remedy the violation of the author's rights, including by reconsidering her application for a building permit for a hydrotherapy pool and adequately compensating her for the costs of filing the communication to the CRPD.

[1] H.M. v Sweden, CRPD/C/7/D/3/2011, para 8.3.

Human Rights Brief, Vol 19, Issue 2, 2012

Stanev v. Bulgaria: On the Pathway to Freedom

*By Oliver Lewis**

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

— Rusi Stanev, to his attorney Aneta Genova, before the European Court of Human Rights Grand Chamber hearing in his case, February 2011

Rusi Stanev. © Yana Buhrer Tavanier, 2009

Introduction

In this article, I suggest that the January 2012 judgment of the European Court of Human Rights (ECtHR) in *Stanev v. Bulgaria*[1] takes us a few steps along the path towards freedom. Rather like a Franz Kafka novel, the judgment is a story about an ordinary person who became entangled in a web of antiquated laws and perverse processes, and who ended up in a grotesque situation from which he found it impossible to extricate himself. Rusi Stanev, the applicant, is an extraordinarily tenacious man who faced State absurdity and abuse, and who risked retribution by putting Bulgaria in the dock at the ECtHR in Strasbourg, and won. His life and his case are unique, but his is the voice of millions of others' that we will never hear. They are — like he was — locked away and silenced.

On December 10, 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 an institution for "adults with mental disorders." His transfer into the institution was arranged through an agreement by 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) and the institution's director. It 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.[2] He had unsuccessfully appealed the court decision a year later. In 2005, the director of the institution was appointed Mr. Stanev's guardian.[3]

Mr. Stanev filed his application to the ECtHR with the assistance of the Bulgarian Helsinki Committee and the Mental Disability Advocacy Center, two non-governmental organizations, on September 8, 2006. There was an oral hearing before a seven-judge Chamber on November 10, 2009, and the Chamber issued its admissibility decision on June 29, 2010. On September 14, 2010 the Chamber relinquished the case to the Grand Chamber, which is the ECtHR's highest body comprised of seventeen judges. On February 9, 2011, an oral hearing took place before the Grand Chamber, and the judgement was issued on January 17, 2012, some six years and four months after Mr Stanev filed his case.

The Grand Chamber held that Mr. Stanev had been deprived of his liberty under Article 5 of the European Convention on Human Rights (ECHR) because he was under constant supervision in the institution and was not free to leave without permission. The Court found a violation of Article 5(1) of the ECHR because his detention was not based on his mental health status (which remained largely irrelevant to his placement) and

"Rusi Stanev, the applicant, is an extraordinarily tenacious man who faced State absurdity and abuse, and who risked retribution by putting Bulgaria in the dock at the ECtHR in Strasbourg, and won."

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that there was no need to detain him. The Court also found a violation of Article 5(4) of the ECHR (which sets out the right to a court review of detention) because the Bulgarian law allowed Mr. Stanev no opportunity to have the lawfulness of his detention assessed by an independent judicial body; as a person whose legal capacity had been stripped, he had no legal standing to litigate. The Court also found a violation of Article 5(5) of the ECHR (which sets out a right to domestic compensation for a violation of Article 5). Of global jurisprudential significance, the Court found that the conditions of the detention were "degrading," in violation of Article 3 of the ECHR. Although the Court found a violation of the right to a fair trial under Article 6 of the ECHR because Bulgarian law provided no mechanism for Mr. Stanev to seek restoration of his legal capacity, the Court, by thirteen votes to four, declined to look into the substance of the complaints about the deprivation of legal capacity, argued by the applicant under Article 8 of the ECHR (which sets out the right to respect for private and family life, home and correspondence). The judgment contains two partly dissenting judgments, both of which depart from the majority on the Article 8 point. The Court awarded Mr. Stanev compensation of 15,000.

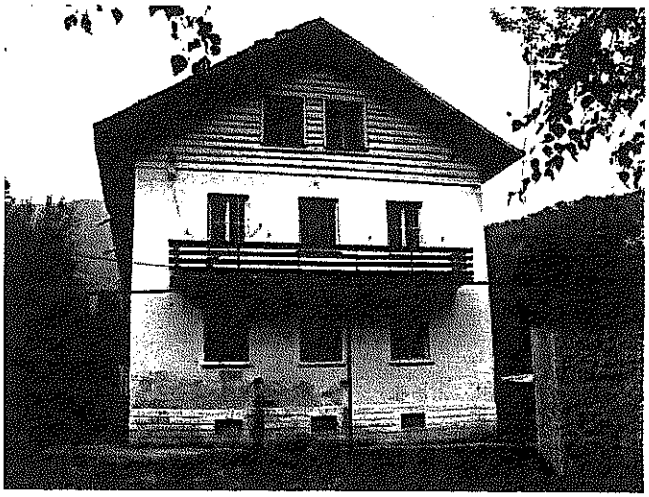
This article does not address each of these findings in turn, as it is impossible to do justice to the entirety of the 65-page judgment and partly dissenting opinions. Instead, the rest of this article highlights three substantive issues. The first section looks at the Court's treatment of the living conditions in the institution, the second section examines the Court's discussion of whether Mr. Stanev was deprived of his liberty, and the third section looks at the Court's (mis)handling of Mr. Stanev's legal capacity complaints. I then offer some conclusions.

Living conditions were degrading

The social care institution in which Mr. Stanev found himself was "accessible via a dirt track from the village of Pastra, the nearest locality 8km away,"[4] in a village located in a "secluded mountainous area (some 800 m above sea level), near a hydro-electric power station,"[5] in southwest Bulgaria. Mr. Stanev was placed in Block 3 of the home, which was "reserved for residents with the least serious health problems, who were able to move around the premises."[6]

A BBC journalist had visited Pastra 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."[7]

It was not just the BBC that visited the institution. Of huge significance for Mr. Stanev's international litigation given its documentary credibility, a delegation of the European Committee for the Prevention of Torture (CPT) carried out a periodic visit to Bulgaria in December 2003. Their mission included a trip to the Pastra institution. The CPT found that in Blocks 1 and 2 the temperature at midday at the time of the visit in December was twelve degrees Celsius. In Block 3, where Mr. Stanev was held, the CPT found "somewhat better heating," although "residents indicated that it had been on all the time since the delegation's arrival."[8]



Pastra. © Yana Buhrer Tavanier, 2009

The residents' clothes were bundled together and handed out randomly to the residents, a situation about which the ECtHR commented "was likely to arouse a feeling of inferiority in the residents."[9] The CPT documented that residents had access to the bathroom once a week, and that the bathroom to which Mr. Stanev had access was "rudimentary and dilapidated."[10] The CPT also found that:

> The so-called "toilets", also located in the yards, represented decrepit shelters with holes dug in the ground. The state of these facilities was execrable; further, walking to them on the frozen, slippery ground was potentially dangerous, especially at night. Residents visibly used the surrounding outside area as a toilet.[11]

As well as the BBC and the CPT, Amnesty International also visited the Pastra institution one year earlier. Amnesty's report is more graphic than the CPT's. They found that the toilet:

> [...] was some 30 metres away along a snow-covered path in an outhouse. Faeces blocked the hole in the ground and covered the snow around the outhouse. In block number two there were three rooms on the first floor, with one, four and seven beds respectively. Some beds had no mattresses and a few did not even have spring frames but only flat metal bars. When asked how the residents sleep in such beds the orderly replied to an Amnesty International representative that they put their coats across the metal bars and then lie on top. The orderly also explained that lights are centrally controlled and switched off at midnight. The residents were ordered to rise at 4am. When questioned about the rationale for such early awakening he stated: "Just so! Sometimes it can vary. It depends!" This was a clear admission of abuse of power by the staff.[12]

The CPT 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."[13] The institution's daily budget for food per person was the equivalent of $0.89.[14] The CPT delegation was so appalled with the situation that at the end of its mission to Bulgaria it made an immediate observation,[15] finding that "the conditions witnessed at this

establishment could be said to amount to inhuman and degrading treatment." The CPT 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."[16] This turned out to be entirely vacuous: the Pastra institution remains operational to this day. To highlight the situation, the CPT went back in October 2010, but its report on this mission is not yet public.[17]

In its judgment, the ECtHR relied extensively on the CPT's documentation in finding that the living conditions in which Mr. Stanev was forced to spend approximately seven years amounted to "degrading treatment,"[18] in violation of Article 3 of the ECHR, which sets out the absolute prohibition against torture, inhuman or degrading treatment or punishment. In the international litigation, the Bulgarian government pleaded a lack of financial resources in justifying its inaction in closing the Pastra institution, an argument that the ECtHR found irrelevant as justification for keeping Mr. Stanev in such conditions.[19] *Stanev* is the first case in which the ECtHR has found a violation of Article 3 of the ECHR in any sort of institution for people with disabilities.

Liberty was denied

Mr. Stanev alleged that he had been detained for the purposes of Article 5(1)(e) of the ECHR, which sets out an exhaustive set of circumstances when in which the State can legally deprive an individual of their liberty, including for people of "unsound mind." Case-law has fleshed out what this antiquated phrase means, but the ECtHR has never been asked to decide whether a resident of a social care institution was detained for the purposes of Article 5 of the ECHR. Its previous case-law has largely concerned compulsory detention under mental health legislation in psychiatric wards/hospitals, which the Court has generally found acceptable as long as there are safeguards.[20] If Mr. Stanev was detained for the purposes of Article 5(1) of the ECHR, then (according to Article 5(4)) he should have been entitled to have the lawfulness of the detention reviewed by an independent court.

The seventeen judges of the Grand Chamber saw the public policy implications clearly. No one knows how many people with disabilities are in social care institutions, but my estimation is that the figure is upwards of 2.5 million in the Council of Europe region.[21] It appears from the judgment that the Grand Chamber judges did not want to open the proverbial floodgates. At the outset of the discussion on Article 5, the judgment goes to pains to state that, "it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a 'deprivation of liberty' within the meaning of Article 5(1) [of the ECHR]."[22] The judgment, we are told, does not "rule on the obligations that may arise under the Convention for the authorities in such situations."[23]

That said, The ECtHR found that Mr. Stanev's detention was attributable to the national authorities because he was placed in a State-run institution that did not interview him before the placement.[24] He was not given an opportunity to express his opinion about the guardian's decision, even though he could have given it.[25] He was not transferred to the institution on his request,[26] and the restrictions complained of were the result of the (in)actions of public.[27] The Court found that in the particular circumstances, with many caveats, without making any policy generalities, and only in this case, Mr. Stanev was deprived of his liberty in Article 5 terms.

The particular circumstances included the following findings of fact. Mr. Stanev needed staff permission before going to the nearest village.[28] He had three leaves of absence of about ten days each, which were "entirely at the discretion of the home's management,"[29] and he needed to travel 400km to get home, making his journey "difficult and expensive [...] in view of his income and his ability to make his own travel arrangements."[30] He was returned to the institution without regard to his wishes when he failed to return from a leave of absence in 2006.[31] Furthermore, his identity papers were constantly held by the institution, which, the ECtHR found, placed "significant restrictions on his personal liberty."[32]

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The Court found that Mr. Stanev was not at any health risk that might have warranted detention, and that he was "under constant supervision and was not free to leave the home without permission whenever he wished."[33] Having lived in the institution for eight years, the Court found that he was likely to have felt "the full adverse effects of the restrictions imposed on him."[34] In addressing the subjective aspect of Article 5, the Court noted that Mr. Stanev had actively complained of being in the institution and had attempted to leave legally. For all these reasons the Court found that he *had* been detained. The question remained: was the deprivation of liberty lawful under Article 5(1) of the ECHR?

Answering this question in the affirmative, the Court stated what I think is the most important sentence in the whole judgment:

> It seems clear to the Court 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.[35]

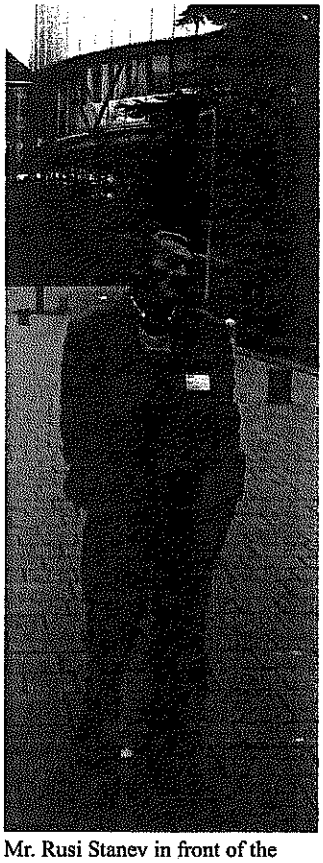
This is the closest the *Stanev* Court comes to a policy analysis. The de-coupling of guardianship and other human rights violations is a topic now well-established, and the Court will be presented with more cases in the future which will tease apart the intimate relationship between detention in an institution

and deprivation of legal capacity. Because the freshest medical report was two years old when Mr. Stanev was placed into the institution, the Court was convinced that the detention was not "in accordance with a procedure prescribed by law" under Article 5(1)(e) of the ECHR, and it therefore found a violation under this heading.

An overcoat is placed on the bed instead of mattress,' explained an orderly in Pastra. © Amnesty International, 2002

Legal capacity was hardly examined

Mr. Stanev argued that his right to a fair trial (due process rights set out in Article 6 of the ECHR) and his right to respect for private life (Article 8 of the ECHR) were violated as a result of being deprived of legal capacity and being placed under guardianship. As already noted, the ECtHR found a violation of Article 6 on the basis that Bulgarian law did not guarantee with sufficient degree of certainty access for Mr. Stanev to seek restoration of his legal capacity.[36] This is a welcome finding, as it is predictable and technocratic. Of more jurisprudential interest is the range of human rights that are automatically compromised as a result of the deprivation of legal capacity.



Mr. Rusi Stanev in front of the European Court of Human Rights in Strasbourg. © Mental Disability Advocacy Center, 2010

Mr. Stanev argued these points at considerable length under Article 8 of the ECHR. The Court refused to even entertain these arguments, and thirteen out of the seventeen judges found abruptly that "no separate issue arises under Article 8." One can only speculate as to why the majority decided this way. Perhaps at sixty-one pages, the judges thought that the judgment was lengthy enough, or has covered enough terrain already. Perhaps they simply ran out of steam, or time. Perhaps they were in a rush to clear the backlog of other cases. Alternatively, (although to be clear, they do not put it in these terms), perhaps the Grand Chamber was willing to offer the State a wide "margin of appreciation" and was reluctant to provide broad policy guidance in an area where there is not yet clear common ground amongst the member States (let alone among the judges) on an issue they consider to be a social or moral one, notwithstanding the existence of the UN Convention on the Rights of Persons with Disabilities.[37]

Whatever the reason for the Court's approach, their handing of the legal capacity claims stands in sharp contrast to its existing body of case law.[38] In its 2008 judgment in *Shtukaturov v. Russia*, the Court established that the "interference with the applicant's private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life."[39] In the *Shtukaturov* case, the applicant was placed under guardianship without his knowledge, and was sent by his guardian to a psychiatric hospital for seven months. In the *Stanev* case, the applicant was sent by his guardian to a social care institution for seven years.

The *Stanev* judgment is appended by two separate partly dissenting opinions, the first by the judges from Belgium and Luxembourg (who are both Vice Presidents of the Court, i.e. very senior) and Estonia, and the second by Judge Kalaydjieva from Bulgaria (who herself is from Bulgaria and used to work as a human rights attorney). Both opinions regret that the Court failed to investigate the Article 8 claims, with Judge Kalaydjieva correctly identifying legal capacity as "the primary issue" in the case. She notes that the government offered no justification for Mr. Stanev's preferences being ignored, and that "instead of due assistance from his officially appointed guardian, the pursuit of his best interests was made completely dependent on the good will or neglect shown by the guardian."

Judge Kalaydjieva writes that she would have found a violation of Article 8 of the ECHR, stridently setting out that the Bulgarian law "failed to meet contemporary standards for ensuring the necessary respect for the wishes and preferences he was capable of expressing." This language of contemporary standards is, in my view, code for Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which sets out that everyone with disabilities should have legal capacity on an equal basis with others, and that the State is required to make assistance available to those who need help in exercising their

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legal capacity. It should be pointed out, however, that Bulgaria had not ratified the CRPD when the violations took place, so Bulgaria was not legally bound by its provisions.

Judge Kalaydjieva further notes the access to justice argument which was missed in the majority judgment; namely that Mr Stanev had to rely totally on the discretion of the guardian to initiate legal proceedings to restore his legal capacity, and to get out of the institution. Her insight highlights 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.

Conclusions

I would like to make two concluding remarks. First, that the Court should engage with developments in United Nations human rights law. Second, that despite its weaknesses, the *Stanev* judgment is a significant advance in international human rights law.

First, *Stanev* is the latest example of how the ECtHR is unwilling to interpret the ECHR in the light of UN human rights treaties, in this case the CRPD.[40] One frustration is that CRPD provisions do not map neatly onto the ECHR, but the main frustration is that the Court is not even engaging with what the CRPD has to say. The ECHR was written in the late 1940s, and it is likely that none of the drafters had a situation similar to *Stanev* in mind. By contrast, the CRPD is a document adopted in 2006, drafted largely by experts (many of whom were people with disabilities) who knew the features of guardianship and institutionalization very well. Its provisions — in particular Articles 12 and 19 — speak directly to a *Stanev* scenario.

The ECtHR first cited the CRPD in 2009, three years after its adoption, in the case of *Glor v. Switzerland*.[41] The Court stated that the CRPD represents a European and universal consensus on the necessity of addressing the treatment of people with disabilities. Although these are encouraging words, the Court did not rely on the CRPD in finding in that case for the first time that disability constituted a "status" as a protected ground of discrimination under Article 14 of the ECHR; or that people with disabilities constitute a vulnerable group for whom the State's margin of appreciation to permit differential treatment should be narrow. More surprisingly, in very important judgments concerning the right to legal capacity in 2008,[42] 2009,[43] and 2011,[44] the Court failed even to mention the CRPD, despite legal capacity being a central concern in each of the cases, and a central feature of the CRPD. In a 2010 judgment on the right to vote of a person deprived of legal capacity, the Court cited the CRPD in passing but failed to use it in its analysis,[45] and in a case against the UK in the same year, the Court mentioned offhand that the amicus curiae brief had cited the CRPD in its submissions.[46]

In a 2010 case concerning a deaf man who died in custody, the Court cited the CRPD early in its judgment, but despite the CRPD's strong language about reasonable accommodation in detention,[47] the Court did not rely on it in finding that "[w]here the authorities decide to place and maintain in detention a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to his special needs resulting from his disability."[48] In a 2011 case about a person with HIV, the Court referenced the CRPD in relation to the prohibition of disability-based discrimination but did not cite it in the main points of the case (for example, whether HIV can be considered a disability which, since *Glor v. Switzerland*, is already an established prohibited ground of discrimination under the "other status" provision in Article 14 of the ECHR).[49] It is probably too early to conclude that the Court is being disablist in its approach, and perhaps too early to conclude that it is taking a different approach to that which it took following the 1989 adoption of the Convention on the Rights of the Child (CRC), although a review of the ECHR judgments from the 1990s citing the CRC suggest a Court slightly more willing to weave CRC principles into its judgments than the current bench's treatment of the CRPD.[50]

Second, the *Stanev* judgment is a significant advancement of European and global case law. Writing in 2007, Sir Nicholas Bratza (the President of the seventeen-judge Grand Chamber that adjudicated the *Stanev* case, and the President of the ECtHR itself) observed that since the first major mental health case of *Winterwerp v. the Netherlands* in 1979, "the jurisprudence of the Court in the succeeding twenty years is notable for the almost complete dearth of judicial decisions in this vitally important area." He goes on to explain that, "This gap is a reflection not of adequate safeguarding by member States of the Convention rights of those with mental disabilities but rather of the acute practical and legal difficulties faced by an especially vulnerable group of persons in asserting those rights and in bringing claims before both the domestic courts and the European Court."[51] Exactly so. That Mr. Stanev was able to bring his case to the public attention through the international litigation is due to his tenacity, to non-governmental organizations, and the donors that

fund them.[52] No civil legal aid is available in Bulgaria for this type of case, so the vast majority of cases go ignored.

The *Stanev* judgment has been described in the blogosphere as an "exciting decision," a "huge achievement,"[53] and a "landmark ruling."[54] My colleague Lycette Nelson, who represented Mr. Stanev before the Grand Chamber, describes the judgment as having "enormous significance."[55] The international NGO, Interights, which submitted an excellent amicus brief said on its website that, "there is no mistaking the significance of the *Stanev* judgment, which will benefit tens of thousands of persons with disabilities,"[56] although this seems to miscalculate the number of potential beneficiaries by several million.

It is surely a jurisprudential failure that the Court did not directly address the right to legal capacity, and it is frustrating that the Court is not yet willing or able to offer macro comments about societal exclusion of people with disabilities. I share the frustration, but am not yet overly concerned. The Court is not a UN treaty body that comments on government progress and makes recommendations and has a more personable relationship with civil society. Nor is it an international think-tank or an advocacy organization. We are still in the early days of disability litigation: this is a relatively new and unsettled area in the European legal system, however backward that may seem to we advocates who operate in the CRPD ecosystem. The ECtHR is a judicial body that currently faces a barrage of criticism from governments for overstepping the boundary between national sovereignty and universal human rights. Perhaps these political considerations were at play in the *Stanev* case.

As a judicial body the Court has adjudicated the particular facts of the case. That it has chosen to couch the violations in overly narrow terms does not detract from the significant advances in international law. This is the first case in which the Court has found that a person in a disability institution was unlawfully deprived of liberty. This is the first case that the Court found that the regime and conditions of a disability institution violate the absolute right to be free from torture and inhuman or degrading treatment or punishment.

Franz Kafka once wrote that, "paths are made by walking." Mr. Stanev's case clears 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 others to take action, by carrying out implementation advocacy, raising judicial awareness of disability rights, empowering victims of human rights violations to continue seek justice through the courts, and ensuring the viability of organizations that enable this to happen.

Endnotes: *Stanev v. Bulgaria*: On the Pathway to Freedom

[1] Stanev v. Bulgaria, App. No. 36760/06, Eur. Ct. H.R. (2012). Also see the admissibility decision of June 29, 2010.

[2] Mental Disability Advocacy Center, Guardianship and Human Rights in Bulgaria: Analysis of Law, Policy and Practice, (2007), *available at* http://mdac.info/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_Bulgaria.pdf.

[3] For more on these situations of conflict of interest, *see* MDAC 2007, comments under indicator 11 at p. 42: "The guardian should not have a conflict of interest with the adult, or the appearance of such a conflict."

[4] Stanev at para. 19.

[5] "Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 22 December 2003," CPT/Inf (2004) 23, 24 June 2004, para. 22. (hereinafter "CPT report").

[6] Stanev at para. 20.

[7] Karen Allen, *Mental health travesty in Bulgaria*, BBC News, December 16, 2002, http://news.bbc.co.uk/2/hi/health/2579865.stm.

[8] CPT report at para. 26.

[9] Stanev at para. 209.

[10] CPT Report at para. 27.

[11] *Id.*

[12] Amnesty International, Bulgaria: Far from the eyes of society: Systematic discrimination against people with mental disabilities (2002), *available at* http://www.amnesty.org/en/library/info/EUR15/005/2002.

[13] CPT Report at para. 32.

[14] *Id.* at para. 29: "[t]he daily expenditure for food per resident averaged 1.50 BGL and could go up to 2 BGL when there were donations." According to the history section of www.xe.com, in December 2002 1.5 BGL was the equivalent to 0.89 US dollars.

[15] In doing so, the CPT invoked Article 8(5) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (November, 26 1987) which provides that, "[i]f necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned."

[16] CPT Report at para. 34.

[17] The CPT carried out a periodic visit to Bulgaria from October 18-29, 2010 and visited the "Home for men with psychiatric disorders in the village of Pastra, Rila municipality." CPT, *News Flash*," November 3, 2010, www.cpt.coe.int.

[18] Stanev at para. 212.

[19] *Id.* at para. 210.

[20] For a review of ECHR case-law on this, *see* chapter 2 of Peter Bartlett, Oliver Lewis, and Oliver Thorold *Mental Disability and the European Convention on Human Rights*, (2007).

[21] In 2007, an international study estimated that there were nearly 1.2 million people living in residential institutions for people with disabilities in European Union member states (the study included Turkey, but excluded Germany and Greece for which no data was available). *See* Jim Mansell, Martin Knapp, Julie Beadle-Brown and Jeni Beecham, *Deinstitutionalisation and community living — outcomes and costs: report of a European Study* 26 (2007). My estimate of upwards of 2.5 million is based on the fact that the European Union's 27 countries constitute around 502 million people, and that the number of people in the Council of Europe (which comprises 47 member states including all EU member states) is around 800 million, and that countries in former Soviet Union have higher rates of institutionalization than western European countries many of which are undergoing a de-institutionalization process.

[22] *Stanev* at para. 121.

[23] *Id.*

[24] *Id.* at para. 122.

[25] *Id.*

Endnotes continued on page 72

CASE SUMMARY: SHTUKATUROV V RUSSIA, EUROPEAN COURT OF HUMAN RIGHTS, APPLICATION NUMBER 44009/05, 27 MARCH 2008

FACTS

Mr Pavel Vladimirovich Shtukaturov lodged an application with the European Court of Human Rights in December 2005. He argued that he had been deprived of legal capacity without his participation and knowledge and was detained in a psychiatric hospital and that this infringed a number of rights protected by the European Convention.

Mr Shtukaturov was born in 1982 and lives in St Petersburg in Russia. After finishing school he worked as an interpreter but left this job after he became aggressive and unsympathetic. He lost his friends and became negative towards his family. He was hospitalised with anorexia and was later diagnosed with "simple schizophrenia". He returned a number to the psychiatric hospital and lived with his mother when he was not in hospital. Whilst living with his mother he did not work and received a disability pension. His mother felt that he exhibiting anti-social behaviour and was aggressive. As a result she was afraid of him and initiated legal proceedings in the Vasileostrovskiy District Court of St Petersburg and applied to be appointed as his guardian. She stated that he was incapable of leading an independent social life: he had not registered a house he had inherited from his grandmother; he was inert and passive and rarely left the house and sometimes was aggressive. Mr Shtukaturov was not informed of these legal proceedings.

Mr Shtukaturov's doctors were consulted by the district court and were asked whether Mr Shtukaturov suffered from mental illness and whether he was able to understand and control his actions. The expert team concluded that the applicant was suffering from "simple schizophrenia with a manifest emotional and volitional defect" and that he could not understand his actions and control them. As a result of these findings the judge declared the applicant legally incapable. Mr Shtukaturov's mother was then appointed as his legal guardian and authorised by law to act on his behalf in all matters. The effect of this was that Mr Shtukaturov lost his legal capacity as he was no longer entitled to act on his own behalf. He maintained that he was never informed of these proceedings and the fact that he had lost his legal capacity. Furthermore, he was unaware what the purpose of the medical examination was and was not invited to participate in the proceedings. The judge hearing the matter therefore had not seen Mr Shtukaturov.

A year after the judgment had been handed down Mr Shtukaturov discovered a copy of the judgment in his mother's papers. He then contacted a lawyer and started proceedings to appeal against the judgment. On 4 November 2005, Mr Shtukaturov's mother requested that he be admitted to a psychiatric hospital, and as she was his legal guardian this admission was considered to be voluntary. This hospital denied Mr Shtukaturov access to his lawyer on the basis that he was mentally incapable of meeting with him and that as he had no legal capacity all actions had to be done through his guardian – his mother. Mr Shtukaturov did manage to contact his lawyer and requested him to make an application to the European Court of Human

Rights – which the lawyer did. Despite this the hospital continued to prevent Mr Shtukaturov from meeting or speaking with his lawyer and removed all writing equipment and telephones.

Mr Shtukaturov's lawyer complained to the St Petersburg guardianship office stating that Mr Shtukaturov had been hospitalised against his will and without medical necessity and that he was being prevented from meeting with his lawyer. Mr Shtukaturov believed that his mother had hospitalised him in order to gain possession of the flat he had inherited from his late grandmother. Despite not meeting Mr Shtukaturov personally, the guardianship office informed Mr Shtukaturov's lawyer that the hospitalisation had been lawful and that only his mother could determine his eventual release.

The European Court issued an interim order directing the Russian authorities to facilitate Mr Shtukaturov's lawyer's access to his client. However they did not comply with this interim order and Mr Shtukaturov was forced to apply to numerous courts to ensure compliance. Eventually, on 16 May 2006 he was discharged from hospital and able to meet with his lawyer. Mr Shtukaturov had no success in getting the judgment declaring his mother to be his legal guardian overturned in Russia.

CLAIMS

Article 6 – right to a fair hearing

Mr Shtukaturov stated that the initial court proceeding which appointed his mother as his guardian were unfair and so violated his right under article 6 of the European Convention.

The Court held that by not meeting with Mr Shtukaturov personally the Russian court's actions were unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6.

Article 8 – right to respect for private and family life, home and correspondence

Mr Shtukaturov also claimed that depriving him of his legal capacity breached his rights to right to respect for his private and family life, his home and his correspondence under article 8 of the European Convention. The article stipulates that there should be no interference by public authorities in the exercise of this right.

The Court confirmed that "any interference with an individual's right to respect for his private life will constitute a breach of Article 8 unless it was "in accordance with the law", pursued a legitimate aim or aims, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought."[1] The Court looked at the legal proceedings that deprived Mr Shtukaturov of his legal capacity and especially the fact that the proceedings were procedurally flawed in that he had not participated in them. The Court said that Russian

[1] Shtukaturov v Russia para 85

law did not allow for partial legal incapacity (except in cases involving alcohol or drug abuse) and so because the Russian court had found Mr Shtukaturov to be mentally ill it had had to find him legally incapable. But the Court felt that this was a violation of his rights: "in the Court's opinion the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with the cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be "of a kind or degree" warranting such a measure."[2] There was therefore a violation of Mr Shtukaturov's rights.

Article 5 – right to liberty

Mr Shtukaturov also argued that his right to liberty under article 5 of the European Convention had been infringed. He stated that article 5 permits lawful detention of person of unsound mind as a limitation to the right to liberty – but that his detention in the psychiatric hospital had been unlawful, and that his right to liberty had been infringed.

In looking at the factual situation the Court noted that "the applicant lacked de jure legal capacity to decide for himself. However, this does not necessarily mean that the applicant was de facto unable to understand his situation."[3] The Court therefore concluded that "even though the applicant was legally incapable of expressing his opinion, the Court in the circumstances is unable to accept the Government's view that the applicant agreed to his continued stay in the hospital. The Court therefore concludes that the applicant was deprived of his liberty by the authorities within the meaning of Article 5."[4] The Court held that although the detention was lawful in the sense that Mr Shtukaturov's legal guardian had consented to the detention (which was required by law) the "notion of "lawfulness" in the context of Article 5 § 1 (e) has also a broader meaning."[5] The detention cannot be lawful within the meaning of the Convention if the domestic procedures do not guard against arbitrariness. The Court referred to its judgment in Winterwerp of 24 October 1979, where it "set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder."[6]

In Mr Shtukaturov's case the Court declared that the detention had been arbitrary as there was no evidence presented as to what had necessitated the hospitalisation and whether he was of unsound mind at that time. His right had therefore been violated.

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[2] Shtukaturov v Russia para 94
[3] Shtukaturov v Russia para 108
[4] Shtukaturov v Russia para 109
[5] Shtukaturov v Russia para 113
[6] Shtukaturov v Russia para 114

Additionally, Mr Shtukaturov argued that he was unable to obtain his release from the hospital, which also violated article 5 as the article requires that "everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

The Court held that the possibilities available to Mr Shtukaturov, requesting a release through his mother and an inquiry from the prosecution authorities, were not sufficient, and so his rights had been infringed.

Article 3 – right not to be subjected to torture or inhuman and degrading treatment

Mr Shtukaturov also submitted that the compulsory medical treatment he received in hospital amounted to inhuman and degrading treatment which violates the right under article 3 of the European Convention which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court held that there was no evidence that Mr Shtukaturov had been given the medication he complained about and that he had suffered ill-effects. Consequently, the Court rejected this claim.

Article 13 – right to an effective remedy

Mr Shtukaturov also argued that the fact that he had been unable to obtain a review of his status as a legally incapable person violated his rights under article 13 of the Convention which guarantees the right to an effective remedy.

The Court held that this issue had been effectively dealt with in its analysis of the violation of Mr Shtukaturov's right to procedural fairness and non-interference in his private life.

Article 14 - discrimination

Mr Shtukaturov also argued that he had been discriminated against which was prohibited by article 14 of the Convention. However the Court held that given its finding that articles 5, 6 and 8 of the Convention had been infringed there was no need to consider this aspect.

Article 34 – right to approach the European Court of Human Rights

Mr Shtukaturov also argued that Russia had violated its obligations under article 34 of the Convention which requires states to not hinder people from making applications to the European Court.

The Court reiterated "that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaint."[7] It held that by preventing Mr Shtukaturov from contacting his lawyer the Russian authorities interfered with his right under article 34 to approach the Court. The Court also stated that by failing to comply with the interim measure issued by the Court, the Russian Federation was in breach of its obligations under Article 34 of the Convention.

CONCLUSION

In conclusion the Court held that the proceedings declaring Mr Shtukaturov legally incapable were unfair and so violated article 6 of the Convention; that the Russian law prohibiting courts from declaring partial incapacitation in cases of mental illness such as Mr Shtukaturov were inconsistent with the Convention; and that Mr Shtukaturov's hospitalisation was unlawful, as was the fact that he was unable to obtain his release. The Court also held that the Russian Federation had failed to comply with its obligations under Article 34 of the Convention by hindering the applicant's access to the Court and not complying with an interim measure indicated by the Court in order to remove this hindrance.

[7] Shtukaturov v Russia para 138