

Constitutional Court of the Republic of Moldova

In the matter of the constitutionality of national legislation governing legal capacity and the guardianship system

Written submissions of the Mental Disability Advocacy Centre

By email

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OVERVIEW

1. This written submission is provided in response to the questions addressed by the Constitutional Court of the Republic of Moldova to the Mental Disability Advocacy Centre (MDAC) in the context of the Court's consideration of the constitutionality of several provisions of Moldovan legislation which concern legal capacity and placement under guardianship of people with disabilities.
2. MDAC is an international human rights organisation that uses the law to secure equality, inclusion and justice for people with mental disabilities worldwide. MDAC's vision is a world of equality where emotional, mental and learning differences are valued equally; where the inherent autonomy and dignity of each person is fully respected; and where human rights are realised for all persons without discrimination of any form.
3. MDAC has participatory status at the Council of Europe, special consultative status with the United Nations Economic and Social Council and it has standing to lodge collective complaints under the European Social Charter. It works to advance the human rights of children and adults with actual or perceived intellectual or psycho-social disabilities (mental disabilities). MDAC operates at the global level as well as regional and domestic levels in Europe and Africa. MDAC has won a number of cases at the European Court of Human Rights (ECtHR) related to the rights of people with mental disabilities, most notably, *Shtukaturov v. Russia*,¹ *Stanev v. Bulgaria*,² *Stankov v. Bulgaria*³ and, recently, *Kocherov & Sergeyeva v. Russia*.⁴ It has served as a third party intervener in a number of cases before the European Court of Human Rights, including *Kędzior v. Poland*,⁵ *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,⁶ *ZH v. Hungary*⁷ and *Blokhin v. Russia*.⁸ For more information, please visit www.mdac.org.
4. The Constitutional Court of the Republic of Moldova has posed two questions for consideration:
 - a) *Instituirea tutelei în privința persoanelor declarate incapabile în urma unei tulburări psihice reprezintă o măsură adecvată de protecție a drepturilor acestora? (Is establishing guardianship over persons declared incapable because of a mental disorder an appropriate measure to protect their rights?)*
 - b) *În special, încheierea actelor juridice de către tutore în numele persoanei fizice declarate incapabile, fără consultarea acesteia, este în măsură să afecteze dreptul la viața privată a acestor persoane? (Specifically, does the power of a guardian to*

¹Application No. 44009/05, judgment of 27 March 2008.

²Application No. 36760/06, judgment of 17 January 2012.

³Application No. 25820/07, judgment of 17 March 2015.

⁴Application No. 16899/13, judgment of 29 March 2016.

⁵Application No. 45026/07, judgment of 16 October 2012.

⁶Application No. 47848/08, judgment of 17 July 2014.

⁷Application No. 28973/11, judgment of 8 November 2012.

⁸Application No. 47152/06, judgment of 14 November 2013.

conclude legal acts on behalf of a person who has been declared incapable, without consultation with that person, affect the person's right to private life?)

5. This intervention will seek to answer each question in turn and to provide an opinion for the Court's consideration based on international legal standards and MDAC's extensive litigation, advocacy, research and other experience in this area.

A. Is establishing guardianship over persons declared incapable because of a mental disorder an appropriate measure to protect their rights?

Key rights and principles in international disability law

6. The most comprehensive and authoritative international law on matters relating to guardianship and legal capacity in the context of disability is the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Adopted by the United Nations General Assembly on 13 December 2006, it entered into force on 3 May 2008. As of 31 July 2016, it has been signed by 187 States and ratified by 166 States and by the European Union. Its provisions are legally binding for most Council of Europe Member States – 46 Member States signed and 43 Member States have already ratified the CRPD. Moldova signed the CRPD on 30 March 2007 and ratified it on 20 September 2010.⁹
7. The CRPD has been characterised as a major leap forward in international human rights law which represents the first serious effort to discontinue the marginalisation of disability within human rights.¹⁰ It does not create new rights, but it is the first legally binding instrument to comprehensively reaffirm and reinforce existing rights in a framework specific to persons with disabilities.¹¹ The fundamental purpose of the CRPD 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.¹²
8. The principles of equality and non-discrimination are among the main features of the CRPD. The general provision on equality and non-discrimination can be found in Article 5(2) which expressly obliges States to “prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds”. This general wording is further emphasised and reiterated throughout the other provisions of the CRPD.
9. The CRPD – negotiated, agreed and ratified by a vast majority of States globally– supersedes all previous standards in this area. It is the result of a paradigm shift in law, politics and psychiatry: these fields of expertise have increasingly recognised that a medical model of disability which views individuals with impairments as powerless, in need of protection and incapable is no longer appropriate. Instead, the standards codified in the CRPD are grounded in a social model of disability which considers individuals with disabilities to be active rights-holders and not

⁹ See http://www.ohchr.org/Documents/HRBodies/CRPD/OHCHR_Map_CRPD.pdf (last accessed: 30 July 2016). Status of ratifications can be consulted at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=114&Lang=EN (last accessed: 30 July 2016).

¹⁰ Andreas Dimopoulos, *The UN Convention on the Rights of Persons with Disabilities* (Ashgate Publishing Limited, 2010) at 79.

¹¹ United Nations Officer of the High Commissioner for Human Rights (OHCHR), *From Exclusion to Equality: Realizing the Rights of Persons with Disabilities, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (2007), at 5.

¹² Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

objects of protection. It recognises that many of the factors contributing to an individual's disability lie, not in the fact of the individual's impairment, but in the numerous disabling barriers in society – including legal barriers, such as deprivation of legal capacity and the existence of guardianship or other substituted decision-making systems.

10. This is explicitly codified in the definition of “persons with disabilities” in Article 1 of the CRPD which states:

“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.”
(emphasis added)

11. At the foundation of this shift in focus, we are required to challenge our assumptions about people with disabilities. People with disabilities have long been assumed to be incapable of managing their affairs, making competent decisions or participating in public affairs. The developments in law, politics, psychology and psychiatry which are reflected in the CRPD have now definitively shown that these assumptions are no longer acceptable and are factually inaccurate.
12. This social model of disability does not deny or ignore the fact that people with disabilities (as all people) may require certain supports to fully realise their rights, including their right to equality before the law. Article 5(3) of the CRPD, for example, includes a right to reasonable accommodation for people with disabilities. Article 9 enshrines a right to accessibility and Article 12, which guarantees the right to equal recognition before the law and to legal capacity on a basis of equality, explicitly requires States to take measures to provide access to support in the exercise of legal capacity and to ensure that such measures include appropriate and effective safeguards to prevent abuse. Further, Article 16 of the CRPD also contains an explicit duty on States to take measures to ensure protection of people with disabilities from exploitation, violence and abuse. However, these safeguards, supports and measures must respect the rights of persons with disabilities and be in line with the fundamental principles of the CRPD, including principles of dignity, autonomy, participation and equality. In relation to the right to equal recognition before the law in particular, the Council of Europe Commissioner for Human Rights frames it as “a move from charity to a rights-based approach and from paternalism to empowerment.”¹³

Legal capacity and guardianship

13. The definition of legal capacity contained in the CRPD is mirrored in Moldovan law.¹⁴ The Committee on the Rights of Persons with Disabilities (‘the CRPD Committee’) has extensively explored the substance of Article 12 in its General Comment No.1 on equal recognition before the law.¹⁵ It recognises that the right to legal capacity is a legal construct which acknowledges individuals as holders of rights, as persons before the law, and which enables them to exercise

¹³ “Who Gets to Decide: Right to legal capacity for persons with intellectual and psychosocial disabilities”, CommDH/IssuePaper(2012)2, published 20 February 2012 at para. 3.

¹⁴ Republic of Moldova, Civil Code, Law No. 1107 of 6 June 2002, Articles 18 and 19.

¹⁵ Committee on the Rights of Persons with Disabilities, *General Comment No. 1, Article 12: Equal recognition before the law*, CRPD/C/GC/1 of 19 May 2014.

those rights by making binding decisions and requiring respect for such decisions. Legal capacity affects all areas of life, from daily decisions, such as entering into contracts to buy or sell property and personal commodities, to decisions about our personal relationships (marriage, sexual and reproductive decisions), our careers (education and ability to contract for employment or enter business agreements), our health (consenting to or refusing medical treatment), our participation in political processes (voting, standing for election), and a myriad of other large and small decisions. It is a key component of access to justice allowing us to seek remedies for violations of other rights, including the right to choose where and with whom to live (Article 19, CRPD). The Council of Europe Commissioner for Human Rights describes legal capacity as going beyond decision-making: “it is about what it means to be human”.¹⁶

14. The rights to choice and autonomy are central to the concept of legal capacity. A key component of Article 12 of the CRPD, and indeed of the CRPD as a whole, is the recognition that decisions must no longer be made on behalf of people with disabilities in their supposed best interests: rather people with disabilities must be supported to make decisions for themselves which reflect their expressed will and preferences or the best interpretation of their will and preferences.¹⁷
15. The ‘best interest’ test has often been used in making decisions about people with disabilities. In practice, this has been used to design measures which ostensibly ensure that people with disabilities are protected. Generally, in order to protect individuals from abuse or violence, the law will impose restrictions on and limit the rights of persons who abuse or exercise violence over others or who are in a position to do so, not on the victims of abuse. However, in the context of disability, the law has – without evidence – classed all persons with disabilities as potential victims and created measures that seek to exercise preventive control over and place restrictions on their rights instead of the rights of those who carry out abuses. This is a form of disability-based discrimination and stigma born of stereotypes to justify a parallel form of governance (guardianship) which would otherwise be unacceptable.
16. For example, when the law seeks to protect people from robbery, it adopts punitive legislation targeting those who would commit robbery. It does not place restrictions on the number of goods someone can acquire or display in public; or condition acquiring goods on people installing alarm systems in their houses. When society wants to protect women against sexual assault, it punishes perpetrators, it creates awareness programs and it ensures the presence of law enforcements officers on the streets. It does not prohibit women from wearing certain items of clothing, nor does it impose curfews or prohibit women from living in certain places.
17. Guardianship systems, however, see people with disabilities not as valuable members of society who may or may not need support in decision-making but rather as objects of charity in need of protection and as non-legal persons who cannot take decisions. Guardianship systems simply appoint a substitute person recognised under the law as the decision maker and erase the legal identity of the person whose life is affected by these decisions. In the words of Thomas Hammarberg, former Commissioner for Human Rights of the Council of Europe:

¹⁶“Who Gets to Decide”, fn 13 at para. 1.1.

¹⁷See CRPD Committee General Comment No. 1, fn 15 at paras. 21, 27 and 29.

“systems of guardianship frequently rely on an image of people with disabilities being either incapable of making decisions (an extremely rare situation in reality) or paternalistic notions that they might make ‘bad decisions’. Yet, all of us make decisions in our lives which other people are likely to disagree with – and restricting our right to make these would be unthinkable on the most part.”¹⁸

18. This approach of substituting one individual’s judgement for that of another denies a human being their right to individual recognition before the law. Their existence becomes a non-existence before the law. Another person or institution intrusively steps into their place, without having to step into their shoes. The CRPD Committee has been very clear that, “there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.”¹⁹ It has established that “a person’s status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in Article 12.”²⁰
19. Moreover, the right to equality before the law and the availability of supported decision-making cannot be limited to certain persons with disabilities, such as those with less severe impairments, as this is in clear violation of Article 12 of the CRPD whereby “States Parties shall take appropriate measures to provide access by persons with disabilities [no limitation of scope to *certain* persons with disabilities] to the support they may require in exercising their legal capacity”,²¹ read together with Article 1, according to which the CRPD’s purpose is to “[...]promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by *all* persons with disabilities [...]”²² (emphasis added).
20. The CRPD Committee has called repeatedly on State Parties to “replace guardianship and mental health law with supported decision-making mechanisms and abolish all deprivation of legal capacity both fully and partially in relation to all persons with disabilities.”²³ The Republic of Moldova will be reviewed by the Committee in the spring of 2017.

Mental capacity and legal capacity as distinct concepts

21. It is important to distinguish between the concept of mental capacity and the legal construct that is legal capacity. A medical diagnosis or ascribed disability is often erroneously considered to be synonymous with a need to restrict or deny legal capacity. The CRPD Committee has stated that legislation or other measures should not confuse mental capacity and legal capacity, and that “‘unsoundness of mind’ and other discriminatory labels”²⁴ cannot justify denial of legal standing or legal agency. Mental capacity is one’s capacity to make decisions and can vary from person to person and from one moment to the next depending on internal and external factors.

¹⁸In Foreword to Mental Disability Advocacy Centre, *Legal Capacity in Europe A Call to Action to Governments and to the EU* (Budapest, 2013).

¹⁹ CRPD Committee General Comment No. 1, fn15 at para. 5.

²⁰ CRPD Committee General Comment No. 1, fn 15 at para. 9.

²¹Article 12(3) of the CRPD (Interpretative note added).

²²Article 1 of the CRPD.

²³ UN Committee on the Rights of Persons with Disabilities. *Concluding observations on the initial report of Ukraine*, CRPD/C/UKR/CO/1, 2 October 2015 ([Full text](#), last accessed 30 July 2016), para. 27; UN Committee on the Rights of Persons with Disabilities. *Concluding observations on the initial report of the Czech Republic*, CRPD/C/CZE/CO/1, 15 May 2015 ([Full text](#), last accessed 30 July 2016), para. 27; UN Committee on the Rights of Persons with Disabilities. *Concluding observations on the initial report of Denmark*, CRPD/C/DNK/CO/1, 29 Oct 2014 ([Full text](#), last accessed 30 July 2016).

²⁴CRPD Committee General Comment No. 1, fn 15 at para. 13.

It may also vary depending on social and political contexts and the discipline or profession of the person assessing someone's mental capacity. As set out above, legal capacity is an objective legal construct. Article 12 of the CRPD requires that we refocus our legal capacity regimes away from identifying and categorising mental capacity, then conflating it with legal capacity through the automatic deprivation of decision-making rights based on a person's diagnosis, disability category or other mental capacity assessment. Rather, legal capacity regimes must be based on a presumption of legal capacity for everyone and focus on identifying what supports are required in a given case in order to facilitate an individual in the exercise of her or his legal capacity, where such supports are requested by the person concerned.

22. The explicit guarantee of legal capacity for people with disabilities in Article 12 is a logical corollary of this shift in understanding. In this light, systems such as guardianship which deny people with disabilities their right to legal capacity and place the power to make decisions about their lives in the hands of a substituted decision-maker or guardian, are a form of formal, regulated discrimination: it is a systematic removal and restriction of rights – a form of less favourable treatment – that affects a very significant number of adults and children from a range of different backgrounds whose only common characteristic is that they have some form of disability. This is in direct violation, not just of Article 12, but also of the prohibition of discrimination on the basis of disability in Article 5 where such discrimination is defined as:

*"...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"*²⁵

Guardianship both violates rights and condones abuses

23. Guardianship systems are inadequate because, as set out above, they violate international human rights law. In the past decade it became clearer and clearer that guardianship systems also deprive people of basic human rights and actually condone and facilitate abuse and exploitation. They must therefore not simply be abolished but be replaced by alternative systems which prevent abuses while also allowing people to retain their existence as persons before the law and to enjoy the rights they have by virtue of their status of human beings.
24. The abuses against people with disabilities which are facilitated or encouraged by guardianship are increasingly well documented. People under guardianship have discovered their homes have been sold by their guardians without their knowledge²⁶ and they are often forced to live in institutions or on the streets and subjected at the will of their guardians to forced medication and physical restraints when in such institutions.²⁷ In Moldova, it has been reported that there is an intimate link between placement under guardianship and placement in long-term or life-long institutionalisation and/or other measures which segregate persons with disabilities (particularly

²⁵Article 2 of the CRPD.

²⁶ See examples of such cases in Emily Gurnon. *Guardianship in the US: protection or exploitation?* Next Avenue, 23 May 2016, available at <http://www.nextavenue.org/guardianship-u-s-protection-exploitation/> (last accessed 30 July 2016); European Union Agency for Fundamental Rights, *Legal capacity of persons with intellectual disabilities and persons with mental health problems* (Luxembourg, 2013), available at <http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf> (last accessed 30 July 2016) at 44.

²⁷ See, among others, *Stanev v. Bulgaria*, fn 2; *Shtukaturov v. Russia*, fn 1; and *Stankov v. Bulgaria*, fn 3. For examples outside Europe, see Emily Gurnon. *Guardianship in the US: protection or exploitation?*, fn 26.

people with mental disabilities or people with intellectual disabilities) from their societies and communities.²⁸ There are documented cases of people under guardianship losing their entire savings because their guardian spends them against their wishes.²⁹ People are often deprived of their legal capacity and/or have guardians appointed for them without even being informed of the proceedings and once they discover it, they have no recourse to seek restoration of their legal capacity.³⁰ They are deprived of liberty and subjected to forced and non-consensual treatment which is exacerbated by the complete lack of procedural guarantees enjoyed by people without disabilities.³¹

25. Such abuses have repeatedly been reported in Moldova.³² It is also worth mentioning that such abuses are not specific to countries with certain income levels or from certain geographical areas; they happen across the globe, wherever guardianship systems exist. In [a 2010 report](#), the U.S. Government Accountability Office (GAO) found hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010. Guardians also stole \$5.4 million in assets from their wards in that period, the GAO reported.
26. In Bulgaria, it has been reported that people under guardianship can be exposed to physical and mental harm and that guardianship promotes abandonment and dislocation.³³ In Croatia, it has been reported that when people are placed under guardianship it enables their forced placement in psychiatric hospitals for years at a time where they are subjected to forced and non-consensual treatment.³⁴ The Finnish system of guardianship has forced people to live in segregated institutions, far from friends or families who want to live together with them.³⁵
27. Deprivation/restriction of legal capacity and the imposition of guardianship violates human rights in and of itself, but the above examples illustrate that it also results in violations of many other rights. The CRPD Committee has recognised that:

“Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education

²⁸Ludmila Ciocan, *The System of Guardianship in Practice in the Republic of Moldova: Human Rights and Vulnerability of Persons Declared Incapacitated*, study conducted with the support of the Office of the High Commissioner for Human Rights, at 3, available at http://www.supporteddecisionmaking.org/sites/default/files/system_guardianship_practice_moldova.pdf (last accessed 30 July 2016).

²⁹ See examples of such cases in Arian Campo-Flores and Ashby Jones. *Abuse Plagues System of Legal Guardians for Adults. Allegations of financial exploitation and abuse are rife, despite waves of overhaul efforts*, the Wall Street Journal, 30 October 2015, available at <http://www.wsj.com/articles/abuse-plagues-system-of-legal-guardians-for-adults-1446225524> (last accessed 30 July 2016); *Guardianship horror stories may lead to change*, The Miami Herald, 22 March 2015, available at <http://www.miamiherald.com/news/local/community/broward/article16018967.html> (last accessed 30 July 2016).

³⁰This has been the case with several clients of MDAC's, including Mr. Shtukaturov and Mr. Stanev. For further examples, see Arian Campo-Flores and Ashby Jones. *Abuse Plagues System of Legal Guardians for Adults*, fn 29 and Michael Barajas. *How judges, probate attorneys, and guardianship orgs abuse the vulnerable*. San Antonio Current, 4 September 2012, available at <http://www.sacurrent.com/sanantonio/how-judges-probate-attorneys-and-guardianship-orgs-abuse-the-vulnerable/Content?oid=2243812> (last accessed 30 July 2016).

³¹ See, for example, *Shtukaturov v. Russia*, fn 1 and *Sýkora v. Czech Republic*, Application No. 23419/07, judgment of 22 November 2012; For further details and examples across Europe see Mental Disability Advocacy Centre, *Legal Capacity in Europe*, fn 18.

³²See *The System of Guardianship in Practice in the Republic of Moldova* fn 28 and Mental Disability Advocacy Centre, OHCHR et. al, *The Human Rights of People with Mental or Intellectual Impairments in the Republic of Moldova*, (Chisinau: 2015), available at http://www.mdac.org/sites/mdac.info/files/moldova_report_2015_english.pdf (last accessed 30 July 2016).

³³ Oliver Lewis, *Why should Bulgaria change its guardianship system?* (Mental Disability Advocacy Centre, 2016), available at <http://mdac.org/en/olivertalks/2016/03/14/why-should-bulgaria-change-its-guardianship-system> (last accessed 30 July 2016).

³⁴Human Rights Watch, *Ana's story: fighting for disability rights in Croatia*, 2015, available at <https://www.hrw.org/news/2015/10/20/anas-story-fighting-disability-rights-croatia> (last accessed 30 July 2016).

³⁵Mental Disability Advocacy Centre, *Finnish man with intellectual disabilities asks the Strasbourg Court: Protect my family rights*, (MDAC, 2016), available at <http://mdac.org/en/news/finnish-man-intellectual-disability-asks-strasbourg-court-protect-my-family-rights> (last accessed 30 July 2016).

and work. The denial of legal capacity to persons with disabilities has, in many cases, led to their being deprived of many fundamental rights, including the right to vote, the right to marry and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.”³⁶

28. The Council of Europe Commissioner for Human Rights recognises that deprivation of legal capacity leads to learned helplessness and dependence, individuals are more likely to be diminished in the eyes of service providers, community members, public officials and others and that, “This diminishment contributes to the risk of stereotyping, objectification, and other forms of exclusion which people with disabilities disproportionately face, which in turn adds to the experience of powerlessness and the vulnerability to abuse and neglect.”³⁷
29. The rights contained in Article 12 of the CRPD have been recognised as closely linked to many other rights, including the right to liberty and security of the person (Articles 14 and 25): “Respecting the right to legal capacity of persons with disabilities on an equal basis with others includes respecting the right of persons with disabilities to liberty and security of the person.”³⁸ The CRPD Committee emphasises that:

“The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker, is an ongoing problem. This practice constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention. States parties must refrain from such practices and establish a mechanism to review cases whereby persons with disabilities have been placed in a residential setting without their specific consent.”³⁹

30. The European Court of Human Rights has also acknowledged the link between denial of legal capacity and the right to liberty.⁴⁰
31. The right to legal capacity has further been closely associated with and considered to impact on the rights of people with disability to access to justice (Article 13),⁴¹ freedom from torture (Article 15), freedom from violence, exploitation and abuse (Article 16,) personal integrity (Article 17),⁴² nationality (Article 18),⁴³ privacy (Article 22),⁴⁴ and political participation (Article 29).⁴⁵

Further standards on legal capacity and supported decision-making

³⁶CRPD Committee General Comment No. 1, fn 15, at para. 8.

³⁷ “Who Gets to Decide”, fn 13, at para. 1.2.

³⁸ CRPD Committee General Comment No. 1, fn 15, at para. 40.

³⁹Ibid.

⁴⁰ *Shtukaturv v. Russia*, fn 1 and *Stanev v. Bulgaria*, fn 2.

⁴¹ “The recognition of the right to legal capacity is essential for access to justice in many respects”. CRPD Committee General Comment No. 1, fn 15, at para. 38.

⁴² CRPD Committee General Comment No. 1, fn 15, at para. 42.

⁴³ CRPD Committee General Comment No. 1, fn 15, at para. 43.

⁴⁴ CRPD Committee General Comment No. 1, fn 15, at para. 47. Also, in *Shtukaturv v. Russia*, fn 1, the European Court of Human Rights found the complete denial of legal capacity to violate Article 8 of the Convention.

⁴⁵ CRPD Committee General Comment No. 1, fn 15, at para. 48 - 49. See also, decision of the European Court of Human Rights in *Alajos Kiss v. Hungary*, Application No. 38832/06, judgment of 20 May 2010.

32. From the CRPD perspective which prioritises a focus on support needs, it becomes more evident that, rather than protecting the rights of people with disabilities and facilitating the exercise of those rights, guardianship regimes themselves represent a legal barrier to the exercise of fundamental human rights and leave individuals vulnerable to abuse. The denial or restriction of legal capacity inherent in guardianship regimes is not necessary, proportionate, tailor-made or, most importantly, in keeping with the rights and obligations contained in Article 12 and the CRPD in general. Instead of perpetuating these regimes, States need to consider how and to what extent they can provide support to people with disabilities to make decisions, including how legal regimes can facilitate and provide recognition to existing informal mechanisms of support, such as that provided by family or friends – the burden is not entirely on the State to provide comprehensive support to all people with disabilities who request it if individuals already have access to necessary supports informally to which the State can simply give recognition.
33. Indicators of a noticeable move away from substituted decision-making models (such as that embodied by the Moldovan guardianship system) and towards autonomy and supported decision-making practices are reflected in the legal and policy activities of many international standard setting bodies in addition to the CRPD, such as in reports by the Commissioner for Human Rights of the Council of Europe,⁴⁶ judgments of the ECtHR⁴⁷ and documents of the European Union Fundamental Rights Agency.⁴⁸
34. In 2009, the Parliamentary Assembly of the Council of Europe invited Member States to “guarantee that people with disabilities retain and exercise legal capacity on an equal basis with other members of society,”⁴⁹ which can only be achieved by ensuring, inter alia, that: the right of persons with disabilities to “make decisions is not limited or substituted by others, that measures concerning them are individually tailored to their needs and that they may be supported in their decision making by a support person.”⁵⁰ It further requires that, “people placed under guardianship are not deprived of their fundamental rights (not least the rights to [...] bring legal proceedings [...]), and, where they need external assistance so as to exercise those rights, that they are afforded appropriate support, without their wishes or intentions being superseded.”⁵¹
35. The European Convention on Human Rights does not expressly mention the right to legal capacity. However, the ECtHR has repeatedly highlighted that the question of legal capacity falls under article 8 (the right to respect for one's private and family life)⁵² and found restrictions or denial of legal capacity and placement under guardianship to be in violation of article 6 (right to fair trial) of the Convention.⁵³

⁴⁶ See eg. Commissioner for Human Rights of the Council of Europe. *The right of people with disabilities to live independently and be included in the community. Issue Paper commissioned and published by Thomas Hammarberg*. CommDH/IssuePaper(2012)3; *Who gets to decide?*, fn 13.

⁴⁷ See eg. *Lashin v Russia*, Application No. 33117/02, judgement of 22 January 2013; *MS v Croatia*, Application No. 36337/10, judgement of 25 April 2013; *Šýkora v The Czech Republic*, Application No. 23419/07, judgement of 22 November 2012; *DD v Lithuania*, Application No. 13469/06, judgement of 14 February 2012; *Stanev v Bulgaria*, fn 2; *X and Y v Croatia*, Application No. 5193/09, Judgment 3 November 2011.

⁴⁸ *Legal capacity of persons with intellectual disabilities and persons with mental health problems*, fn 26.

⁴⁹ Council of Europe, Parliamentary Assembly. *Access to rights for people with disabilities and their full and active participation in society*, Resolution 1642 (2009), adopted on 26 January 2009.

⁵⁰ *Ibid*, para. 7.1.

⁵¹ *Ibid*, para. 7.2.

⁵² *Shtukaturov v. Russia*, fn 1 and *Ivinović v. Croatia*, Application no. 13006/13, judgement of 18 September 2014.

⁵³ *Shtukaturov v. Russia*, fn 1 and *Stanev v. Bulgaria*, fn 2.

36. Moldova has already been urged by several international human rights bodies to abolish its guardianship system. In 2015, the UN Special Rapporteur on Disability, Catalina Devandas-Aguilar, stated that “the Republic of Moldova can progress with a view to moving away from the degrading limitations established by the system of guardianship”, urging the Moldovan Government for “the adoption of a series of measures of immediate effect, such as halting the process of legal incapacitation; putting an end to practices requesting incapacitation for certain administrative procedures such as receiving a disability certificate or receiving a pension; and establishing expedited ways of restoring legal capacity for those deprived of it.”⁵⁴

Alternatives to deprivation/restriction of legal capacity and guardianship

37. Rather than calling for an end to protection of the interests and well-being of people with mental disabilities, the CRPD **challenges the way in which States have historically sought to provide such support** and urges a move towards a more effective mechanism: supported decision-making.

38. The CRPD Committee has clarified that a system of supported decision-making must include, among other things, at least the following:⁵⁵

- a. Legal recognition of everyone’s legal capacity and their right to exercise it;
- b. Arrangements for the promotion and establishment of supported decision-making.
- c. Regulations to ensure that support respects the person’s will and preferences, including the establishment of feedback mechanisms to ensure that support is meeting the person’s needs;
- d. Reasonable accommodations (adjustments) and access to support where necessary to exercise legal capacity;
- e. Ensure the availability of a wide variety of support measures; the type and intensity of support to be provided will vary significantly from one person to another owing to the diversity of persons with disabilities; and
- f. At all times, including in crisis situations, the individual autonomy and capacity of persons with disabilities to make decisions must be respected.

39. This means that governments should develop legislation that recognises the right to legal capacity of everyone with disabilities. The new structures should:⁵⁶

- g. Recognise that supported decision-making must be built on relationships of trust;
- h. Assign clear roles to supporters to provide information to help people with disabilities to make choices and to assist them to communicate their choices to third parties (such as banks, doctors, employers, etc.); and
- i. Prevent and remedy exploitation, violence and abuse, as detailed in Article 16 of the CRPD.

40. Thus, a number of clear, specific obligations fall on States under Article 12 (which enshrines a set of civil and political rights which must be realised immediately and are not subject to the

⁵⁴ *Statement of the United Nations Special Rapporteur on the Rights of Persons with Disabilities, Catalina Devandas Aguilar, on the conclusion of her official visit to the Republic of Moldova, 10 to 17 September 2015*, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16441&LangID=E> (last accessed 30 July 2016).

⁵⁵ UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of China*, CRPD/C/CHN/CO/1, para 22 and UN Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Austria*, CRPD/C/AUT/CO/1, para. 28. In addition to this, the CRPD Committee has restated these requirements in its General Comment No. 1, fn 15, paras. 17-18.

⁵⁶ *As Legal Capacity in Europe A Call to Action to Governments and to the EU*, fn 18, pp. 19-21.

principle of progressive realisation⁵⁷): The will and preferences of a person must be respected and they must be allowed to exercise free and informed consent, including regarding institutionalisation.⁵⁸ States must take deliberate, well-planned steps towards the realisation of the rights contained in Article 12 in consultation with and with the meaningful participation of people with disabilities.⁵⁹ Some such steps can be derived from the State obligations elaborated upon in General Comment No. 1 and a list is provided by the Committee in paragraph 50. States must recognise people with disabilities as persons before the law on an equal basis with others. They must refrain from taking any action which deprives people with disabilities of the right to equal recognition before the law and must take actions to prevent non-State and private actors from interfering with the ability of people with disabilities to enjoy their right to legal capacity.⁶⁰ They must “holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others”, and abolish substitute decision-making regimes such as guardianship⁶¹ and “all practices that in purpose or effect violate article 12”.⁶²

41. Article 12(3) requires States to provide access to the support necessary to enable people with disabilities to make decisions that have legal effect and this support should not amount to substitute decision-making.⁶³ They must “take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person’s autonomy, will and preferences”.⁶⁴ They are obliged to “facilitate the creation of support, particularly for people who are isolated and may not have access to naturally occurring support in the community.”⁶⁵ Informal support is provided daily to people with and without disabilities by their families, friends and community through, for example, simply being a discussion partner. These forms of supported decision-making must be recognised and validated where they exist and facilitated where they do not.

42. General Comment No. 1 of the Committee sets out some examples of types of supports that may be needed, such as measures of universal design and accessibility (e.g. sign language and easy-read in banks); development and recognition of diverse, non-conventional methods of communication (especially for non-verbal people); and advance planning, stressing that support must be provided only with the consent of the person concerned. The obligation to provide support is closely linked to the obligations in Article 9 to ensure accessibility (e.g. by providing information on healthcare options or voting procedures in an easy-read format for people with intellectual disabilities) and the obligation in Article 5(3) to provide reasonable accommodations so that people with disabilities can make decisions about their lives on a basis of equality with others (e.g. recognising and validating the assistance of a support-person who can help convey the implications of a decision to someone who communicates in alternative ways and facilitate communication of that person’s will and preferences; or simply allowing someone additional time to think the decision over in private and to communicate it at a later date). These

⁵⁷CRPD Committee General Comment No. 1, fn 15, at para. 30.

⁵⁸ Office of the High Commissioner for Human Rights, *Thematic study on the right of persons with disabilities to live independently and be included in the community*, A/HRC/28/37 of 12 December 2014 at para. 16.

⁵⁹ CRPD Committee General Comment No. 1, fn 15, at para. 30.

⁶⁰ *Ibid*, at para. 24.

⁶¹ *Ibid*, at para. 7.

⁶² *Ibid*, at paras. 9 and 25.

⁶³ *Ibid*, at paras. 16 - 17.

⁶⁴ *Ibid*, at para. 26.

⁶⁵ *Ibid*, at para. 29(d).

obligations are separate from and complementary to the right to support in the exercise of legal capacity.⁶⁶

43. The right to support is not limited by conditions of proportionality or undue burden and the obligation on the State to provide access to support in the exercise of legal capacity is absolute.⁶⁷ In light of the right to live independently in the community with choices equal to others (Article 19, CRPD), the Committee has recognised that “support in the exercise of legal capacity should be provided through a community-based approach. States parties must recognize that communities are assets and partners in the process of learning what types of support are needed in the exercise of legal capacity... This is consistent with the Convention’s emphasis on the full inclusion and participation of persons with disabilities in the community”.⁶⁸ The Council of Europe Commissioner for Human Rights states that the design of adequate support will “depend on individual needs as well as the type of challenges persons with disabilities face when trying to exercise their legal capacity in a given national context. As individuals will need and want different types of support, member states should strive towards developing a range of different support options rather than trying to find one model for all.” Some of the types of support the Commissioner refers to include powers of attorney, advance directives, communication support or someone with whom to discuss complex options and decisions.⁶⁹
44. Such supported decision-making regimes and measures must include safeguards to balance the powers of the supporter so as to prevent abuse. General Comment 1 of the Committee sets out the underlying principle that “At all times... the individual autonomy and capacity of persons with disabilities to make decisions must be respected.”⁷⁰ Article 12(4) requires States to “create appropriate and effective safeguards for the exercise of legal capacity” whose primary purpose is to ensure respect for the person’s rights, will and preferences and including safeguards against undue influence. Importantly, the ‘best interests’ principle is not considered to be a safeguard which is in compliance with Article 12(4).⁷¹ The Council of Europe Commissioner for Human Rights calls for safeguards to ensure that support persons act diligently and in good faith, respecting the autonomy and dignity of their clients.⁷²
45. States must provide training for people receiving support so that they can decide when less support is needed or when they no longer require support.⁷³ In other words, support should be centred on facilitating the individual as a subject of rights rather than substitute decision-making which posits individuals as objects to be ‘decided about’. The individual concerned must be able to choose whether to accept support, what sort and level of support they require, how the support is to be provided and when that support will end.
46. It is not sufficient to develop supported decision-making systems in parallel with the maintenance of substitute decision-making regimes.⁷⁴ Detailed guidance on the provision of

⁶⁶ CRPD Committee General Comment No. 1, Article 12: Equal recognition before the law, CRPD/C/GC/1 of 19 May 2014 at para. 34.

⁶⁷ Ibid.

⁶⁸ Ibid, at para. 45.

⁶⁹ “Who Gets to Decide: Right to legal capacity for persons with intellectual and psychosocial disabilities”, fn 13, at para. 5.2.

⁷⁰ CRPD Committee General Comment No. 1, fn 15, para. 18.

⁷¹ Ibid, paras. 20 - 22.

⁷² “Who Gets to Decide: Right to legal capacity for persons with intellectual and psychosocial disabilities”, fn 13, at para. 5.2.

⁷³ CRPD Committee General Comment No. 1, fn 15, at para. 24.

⁷⁴ Ibid, at para. 28.

supported decision-making regimes is contained in paragraph 29 of General Comment 1. Paragraph 29(f) specifically prohibits States from allowing support in decision-making to “be used as a justification for limiting other fundamental rights of persons with disabilities, especially the right to vote, the right to marry, or establish a civil partnership, and found a family, reproductive rights, parental rights, the right to give consent for intimate relationships and medical treatment, and the right to liberty.”⁷⁵ States are under an obligation to ensure that legal capacity to make decisions is respected in crisis situations and that independent support is provided for decisions regarding psychiatric and other medical treatment. States must “ensure that accurate and accessible information is provided about service options and that non-medical approaches are made available.”⁷⁶

47. People with disabilities must be closely consulted and actively involved in developing and implementing legislation, policies and other decision-making processes that give effect to Article 12.⁷⁷

Examples of supported decision-making systems

48. Increasingly, States and other initiatives across the globe are integrating CRPD standards and making supported decision-making systems available to people with disabilities in practice – systems that aim to replace the excessive restrictions imposed through guardianship. In practice, these systems can take a variety of forms and are already being successfully implemented in many countries.

49. For example, a pilot project in Bulgaria is called ‘Empowering People with Intellectual Disabilities’. An NGO report documenting it explains that:

“This form of supported decision-making starts with establishing a network of support for the person. In order to identify the people who will be included in the network of support, a personal profile is made and the members of the network of support are chosen by the concerned person – a relationship of trust between the person and the members of the network is essential. The network provides the necessary support to the person concerned according to their wishes and choices. The whole process is guided and monitored by a facilitator.”⁷⁸

50. The types of decisions which are covered by this supported decision-making model include decisions related to accommodation (for example, the type of accommodation, location, whether to live alone or with others), relationships and lifestyle (including choosing with whom to spend time and what activities to undertake), choices about work, education and recreation, health issues (consideration of advice from health professionals, including making choices about treatment options), financial decisions (how to manage, spend or save money) and contracts (providing the necessary support to the person in order for him/her to understand the meaning of a contract before engaging in it).⁷⁹

⁷⁵ See also CRPD Committee General Comment No. 1, fn 15, at para. 33: “The need for support and reasonable accommodation in making decisions shall not be used to question a person’s legal capacity.”

⁷⁶ CRPD Committee General Comment No. 1, fn 15, at para. 42.

⁷⁷ Ibid, at para. 50(c).

⁷⁸ *Guide of promising practices on legal capacity and access to justice*, (AJUPID, 2015), at 7, available at http://www.ajupid.eu/images/documents/promising_practices/BAG_AJUPID_UK_2015_BV.pdf (last accessed 30 July 2016).

⁷⁹ For more details see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 6-8.

51. Similar initiatives exist in other countries, including through what are often called 'Circles of Support'. In Ireland, for example, a:

"...Circle of Support involves a small number of people coming together regularly to provide support to a person with a disability, who they care about. They might gather once a month, or once every few weeks. It might depend on the nature of the circle, the members or the support needs. Some people use Circles of Support for specific things they wish to achieve (such as finding a place to live or getting a job). Such issue-specific Circles may therefore be time-limited and only last for the duration of the issue. Other Circles go on for much longer and may serve as a source of constant support and counsel for the person over a person's whole life. Professionals serve as facilitators or can help establish a Circle, though the intensity of their role will vary."⁸⁰

52. Finland has been developing a "self-directed support" practice (SDS), which allows persons with disabilities to organise their social care, by giving them control over the funds they are receiving from the government for social services. This is done in steps, involving person-centred planning, where the person's wishes, aspirations and strengths are discussed and described with the person and those closest to her/him. Then there is an evaluation of support needs, which was previously led by a social worker, but is now done by giving the person concerned the possibility to make choices. Following this a personal budget is created and a plan for the way money will be spent and what services will be offered.⁸¹

53. In France people who need support can choose multidisciplinary support as an alternative to legal guardianship. When they have difficulties in making decisions, they can sign a contract with a local authority for a defined period of time and receive support in decision-making from a social worker. The person concerned decides what the objectives of the contract should be and they may include financial issues, health-related issues, finding employment etc. This helps people gain autonomy and self-confidence. No judge or psychiatrist is involved in the management of these contracts; there is no restriction of legal capacity nor any management of finances without the consent of the person concerned.⁸²

54. Sweden has a service called the Personal Ombud (PO). The PO supports people in all kind of matters, including housing or occupation, but also existential matters (Why should I live? Why has my life become the life of a mental patient? Have I any hope for a change?), sexuality and problems with relatives. A PO is also skilled to be able to argue effectively for the client's rights in front of various authorities or in court. Most POs are trained social workers, but some are lawyers and some have other specialised training. A PO spends a lot of time talking with their clients. He/she doesn't work Monday-Friday office hours like most other services. The week has 7 days and each day 24 hours and the PO must be prepared to work at all these various hours, because their clients' problems are not concentrated to office hours and it is easier to contact some people at evenings and weekends. The PO does not have an office because "office is

⁸⁰ For more details and personal stories see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 26-29.

⁸¹ For more details and personal stories see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 9-13.

⁸² For more details and personal stories see *Guide of promising practices on legal capacity and access to justice*, fn 78, pp. 14-17.

power". The PO works by telephone or internet from her/his own home and meets clients in their home or at neutral venues in town.⁸³

55. In Australia the *South Australian Office of the Public Advocate (OPA)* has developed a supported decision-making project. Within the project people with intellectual and cognitive disabilities or brain injury who were at the risk of being placed under guardianship were helped to sign supported decision-making agreements with someone they trust. This meant the person would help them in making decision regarding their accommodation, health, lifestyle and other welfare matters. Potential participants were interviewed to find out what was most important to them and the contracts were tailored for the individual needs of every person. After a careful assessment of the practice, personal empowerment, self-esteem, confidence in decision-making and increase in support networks were listed as some of the general benefits for the individuals involved in the project. Many participants also reported that they felt more in control of their lives and there was an increase in their self-confidence.⁸⁴
56. British Columbia in Canada offers people the possibility of concluding a "Representation Agreement" which deals with personal planning/advance care planning. A Representation Agreement offers people, including people with disabilities, a way to authorize someone — called a representative — to assist them or to act on their behalf for health care and personal care matters. It can also cover routine financial affairs and legal matters. A representative has legal authority to help people manage their affairs and carry out their wishes when they need temporary or ongoing assistance due to illness, injury or disability.⁸⁵
57. Clearly, there are several systems available to replace guardianship which respect people's will and preferences, are less likely to condone abuses and are in accordance with international law. These are practices every State should consider in developing its own system of supported decision-making in line with its obligations under international law.

Opinion

For the reasons set out above, we ask the Constitutional Court to find that every person has a right to equal recognition before the law; that people with disabilities have a right to legal capacity on an equal basis with others; and that guardianship, as a system of substitute decision-making, is in violation of Articles 5 and 12 of the CRPD and, in accordance with Article 4 of the Constitution of the Republic of Moldova, is thereby unconstitutional.

We ask the Constitutional Court to direct that the Moldovan Government introduce an alternative system of supported decision-making to safeguard the rights of people with disabilities who require support in the exercise of their legal capacity.

⁸³For more details see the webpage of the Personal Ombud at <http://po-skane.org/in-foreign-languages/> (last accessed 30 July 2016).

⁸⁴For more details see the webpage of the South Australian Office of the Public Advocate at http://www.opa.sa.gov.au/resources/supported_decision_making (last accessed 30 July 2016).

⁸⁵For more details see Canada, British Columbia, Victoria, Representation Agreement Act, RSBC 1996, Chapter 405.

B. Specifically, does the power of a guardian to conclude legal acts on behalf of a person who has been declared incapable, without consultation with that person, affect the person’s right to private life?

Jurisprudence on legal capacity, guardianship and the right to private life

58. As set out in our reply to Question 1 above, all forms of substitute decision-making – and in particular guardianship regimes – violate many rights under international law and are incompatible with modern legal, political and psychiatric understandings of disability. The consequences of the restriction or deprivation of a person’s legal capacity are far reaching and severe. Once a person is deprived of his or her legal capacity, the person’s legal acts and transactions are considered void and without any legal force. Once appointed, a guardian is often empowered to conclude all legal acts and transactions on behalf of the person concerned. Guardians are almost always responsible for a wide range of financial transactions, including disposing of movable and immovable property; contracts concerning property rental; initiating or authorising bank transfers; applying for social security, welfare and unemployment benefits and disposing of such benefits; managing any income received from employment relationships; and making legal statements in relation to inheritance issues in probate proceedings. They are also usually responsible for concluding legally recognised acts concerning, for example, medical treatment, place of residence or employment. MDAC’s 14 years of experience litigating these matters have shown that it is most commonly in relation to decisions concerning financial transactions, deprivation of liberty and institutionalisation, and medical interventions such as forced treatment or abortion that serious rights violations and abuse occur because guardians disregard the will and preferences of the individual concerned and impose unwanted decisions.

59. At the regional level, it has been the consistent case-law of the ECtHR that the concept of "private life" under Article 8(1) of the Convention does not have an exhaustive definition but includes matters relating to an individual’s physical, moral and psychological integrity. The concept of private life "stands for the sphere of immediate personal autonomy."⁸⁶ Private life embraces aspects of an individual’s physical and social identity,⁸⁷ sexual life,⁸⁸ a right to personal development and the right to establish and develop relationships with other human beings and with the outside world.⁸⁹ Article 8 has also been recognised as of central importance for the individual’s "self-determination",⁹⁰ for "a settled and secure place in the community"⁹¹ and for "secur[ing] to the individual a sphere within which he can freely pursue the development and fulfilment of his personality".⁹²

60. An increasing number of cases have been brought before both the ECtHR and national constitutional courts in the last decade as domestic provisions sanctioning and maintaining

⁸⁶Karen Reid, *A practitioner’s guide to the European Convention on Human Rights*, (Thomson Reuters, 2015), page 866.

⁸⁷*Mikulic v. Croatia*, Application No. 53176/99, judgment of 7 February 2002, at para 53.

⁸⁸*Dudgeon v. the United Kingdom*, Application No. 7525/76, judgment of 22 October 1981, Series A. No. 45, pp. 18 -19 at para 41 and *X and Y v. the Netherlands*, Application No. 8978/80, judgement of 26 March 1985.

⁸⁹*Pretty v. UK*, Application No. 2346/02, judgement of 29 April 2002, at para 63; *Burghartz v. Switzerland*, Application No. 16213/90, opinion of the Commission, 37, at para 47; *Friedl v. Austria*, Application No. 15225/89, judgment of 31 January 1995, Series A No. 305-B, opinion of the Commission, p. 20, para 45; and *Niemietz v. Germany*, Application No. 13710/88, judgment of 16 December 1992.

⁹⁰*Connors v UK*, Application No. 66746/01, judgment of 27 May 2004, at para. 82.

⁹¹*Gladysheva v. Russia*, Application No. 7097/10, judgment of 6 December 2011, at para 93; *Yordanova and Others v. Bulgaria*, Application No. 25446/06, judgment of 24 April 2012, at para 118; *Connors v. the United Kingdom*, Application No. 66746/01, judgment of 27 May 2004 at paras. 81-84, and *Orlic v. Croatia*, Application No. 48833/07, judgment of 21 June 2011. at paras. 63-70.

⁹²*Shtukaturov v. Russia*, fn 1, at para 83; *Bruggemann and Scheuten v. Germany*, Application No. 6959/75, Commission’s report of 12 July 1977, Decisions and Reports 10, p. 115 at para 55.

guardianship systems are increasingly acknowledged to be contrary to international human rights law and to domestic constitutional rights and principles in various jurisdictions. As a result, there is a growing body of jurisprudence across jurisdictions finding guardianship systems to encroach on the private life of people with disabilities and holding that they have seriously violated the dignity, freedom and rights to private and family life of people with disabilities. Article 8(1) protections relating to the right to private life – physical and psychological integrity, autonomy, self-determination and dignity – are all vitiated by guardianship systems which deny the individual’s autonomy and self-determination and override his or her will and preferences.

61. In several cases, the ECtHR has recognised that decisions taken by guardians – overriding or ignoring the wishes of the person placed under guardianship – profoundly impact on the person’s day-to-day living and interaction with the world, clearly fall within the scope of Article 8(1) and constitute a very serious interference with rights protected by this article.⁹³ For example, the overreaching and adverse effects of having one’s legal capacity deprived were very clearly depicted by the Court in the case of *X and Y v Croatia* where the appointed guardian was given the power to represent the applicant in all her “personal matters and matters concerning her property, managing her assets and taking proper care of her person, rights, obligations and well-being.”⁹⁴ The Court elaborated that:

“Divesting someone of legal capacity entails serious consequences. The person concerned is not able to take any legal action and is thus deprived of his or her independence in all legal spheres. Such persons are put in a situation where they depend on others to take decisions concerning various aspects of their private life, such as, for example, where to live or how to dispose of their assets and all income. Numerous rights of such persons are extinguished or restricted. For example, such person is not able to make a will, cannot be employed, and cannot marry or form any other relationship creating consequences for their legal status, etc.”

62. As a consequence, the Court noted that the measure of divesting someone of their legal capacity amounts to a serious interference with that person’s private life⁹⁵ and ultimately found that in the applicant’s case her incapacitation did not pursue a legitimate aim and was not necessary in a democratic society.⁹⁶ Similarly, in *Shtukaturov v Russia* the Court took note of the total dependency and vulnerability of people under guardianship, stating that “as a result of his incapacitation the applicant became fully dependent on his official guardian in almost all areas of life”,⁹⁷ and found full incapacitation to be disproportionate and in breach of Article 8.⁹⁸
63. The Court also increasingly relies on provisions of the CRPD in its decisions,⁹⁹ including taking note of the emerging international recognition of and consensus around the importance of autonomy and the provision of support in decision-making for individuals with mental disabilities when assessing the proportionality of incapacitation measures.

⁹³See for example *Shtukaturov v. Russia*, fn 1, at para 83; *Salontaji-Drobnjak v. Serbia*, Application No. 36500/095, judgment of 13 October 2009, at para 144; *X and Y v Croatia*, fn 47, at para 102; *Sýkora v Czech Republic*, Application No. 23419/07, judgment of 22 November 2012, at para 101; and *Lashin v. Russia*, Application No. 33117/02, judgment of 22 November 2012.

⁹⁴ *X and Y v Croatia*, fn 47, at para. 103.

⁹⁵ *Ibid*, at para 102.

⁹⁶ *Ibid*, at para 116.

⁹⁷*Shtukaturov v Russia*, fn 1, at para 90.

⁹⁸ *Ibid*, para 96. See also *Sýkora v Czech Republic*, fn 93.

⁹⁹ See for example *Glor v Switzerland*, Application No. 13444/04, judgement of 30 April 2009, at para. 53 and *Çam v Turkey*, Application No. 51500/08, judgment of 23 February 2016 at para 53.

64. The Court has consistently stressed that “strict scrutiny is called for where measures that have such adverse effect on one’s personal autonomy are at stake”,¹⁰⁰ and that consideration of alternative measures to restriction or deprivation of legal capacity is a factor when considering the proportionality of such measures. In *Ivinović v. Croatia* the Court emphasised that the domestic authorities must properly consider less restrictive alternative measures to any restriction of legal capacity and the latter must only be applied as a last resort.¹⁰¹
65. It is important, however, to note that the European Convention – negotiated and entering into force more than half a century before the CRPD – contains no specific reference to legal capacity nor to equality before the law. As such, the Court has been constrained to consider these questions where they arise within the framework of a Convention ill-suited to providing comprehensive solutions in this area. The case law of the Court is therefore necessarily ad hoc, fragmented and predominantly focused on the procedural rather than substantive aspects of these issues.
66. Movement towards closing the gap between domestic law and standards of international set out in the CRPD is not only visible in the ECtHR’s jurisprudence but also in decisions taken by domestic courts all over Europe. For example, the Czech Constitutional Court – although it has not yet had the opportunity to rule on the unconstitutionality of the Czech guardianship system per se – took note of the evolving trends in disability rights and the required a human rights approach to disability in its recent decisions.¹⁰² In its decision from 2009, the Constitutional Court emphasised that the starting point should be the “priority of a fundamentally free, autonomous individual, whom the state may not prevent from pursuing his idea of happiness by forcing upon him state protection where the individual, perhaps with the help of his family, can take care of himself.”¹⁰³ The Court stated that “limiting legal capacity is always a serious interference in the personal integrity of the person being limited.”¹⁰⁴ It noted that “the institution of removal of legal capacity, which is an obvious relic of the old regime, is constitutionally considerably problematic”¹⁰⁵ and that “the limitation of legal capacity must always be considered the most extreme means”,¹⁰⁶ so courts must always weigh less restrictive alternatives.

Guardianship, property and institutionalisation: the need for safeguards against exploitation and abuse

67. Article 12(4) of the CRPD requires that effective and appropriate safeguards are in place to prevent abuse, conflict of interest or undue influence in the exercise of legal capacity – which, according to Article 12(5) of the CRPD, includes exercising the “right 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.” This obligation needs to be interpreted and implemented in light of the aforementioned State obligation to provide to people with disabilities the assistance they

¹⁰⁰*Shtukaturov v. Russia*, fn 1, at para 88, *X and Y v Croatia*, fn 47, at para 109, *M.S. v. Croatia*, fn 47, at para. 97.

¹⁰¹*Ivinović v Croatia*, fn 52, at para. 44.

¹⁰²Judgments of the Czech Constitutional Court, Case No. 2009/08/18 - I. ÚS 557/09 and Case No. 2011/03/13 - Pl. ÚS 43/10. In the former case the Constitutional Court annulled the consecutive decisions of the Kladno District Court, the Regional Court in Prague and Supreme Court denying to reinstate the full legal capacity of the complainant. In the latter case the Constitutional Court held that the domestic provisions preventing people whose legal capacity have been restricted from exercising their procedural capacity within administrative court proceedings are unconstitutional.

¹⁰³Judgment of the Czech Constitutional Court, Case No. 2009/08/18 - I. ÚS 557/09, para 24, available in English at <http://www.usoud.cz/en/decisions/20090818-i-us-55709-limitation-of-legal-capacity-1/> (last accessed 30 July 2016).

¹⁰⁴*Ibid*, at para 21.

¹⁰⁵*Ibid*, at para 23.

¹⁰⁶*Ibid*.

need in making decisions, including financial decisions and decisions about where to live.¹⁰⁷ The existence of some kind of support need in relation to financial decision-making in many cases still directly and automatically leads to deprivation of legal capacity and the appointment of a guardian, despite the international legal standards set out above which clearly prohibit this. Nonetheless, in many jurisdictions, courts are recognising that deprivation or restriction of legal capacity and the imposition of guardianship do not provide this support and lead to abuse rather than prevent it.

68. The case law of the ECtHR and the Czech Constitutional Court above reflect the very real abuses that are people with disabilities are made vulnerable to when they are placed under the power of a guardian, especially in the areas of private life or property and finances. Placing such decision-making power in the hands of third parties – relatives, friends or professional guardians – at least facilitates, if not calls for abuse. For example, in 2015, the Hungarian Ombudsman initiated an ex officio investigation into the human rights violations experienced by people placed under guardianship, specifically violations caused by the conduct of their professional guardians. The Ombudsman’s report reached out to guardianship authorities and civil society organisations, including organisations representing people with mental disabilities, to share their experiences. One guardianship authority explicitly acknowledged that the majority of complaints – the number of which is growing year by year – raise concerns about management of finances by guardians¹⁰⁸ and that many civil and criminal proceedings have been initiated against the guardians in this respect.¹⁰⁹ It should be noted that abuse also happens when it is a family member who is granted the power to manage the person’s finances and property, especially as there is frequently a conflict of interest when relatives – who may have a vested interest – have control over an individual’s personal and financial affairs.
69. The very close link between deprivation of legal capacity and detention in social care or psychiatric institutions referred to in response to Question 1 above, deserves to be reiterated in this context. It is clear from MDAC’s experience with numerous cases that a guardian’s decision to place an individual in an institution is frequently motivated by their own financial interests. Once a person is placed in an institution and therefore out of sight, he or she also loses control of their property and finances, receiving only a nominal amount of pocket money to spend in or around the institution. For instance, one of MDAC’s clients in Hungary was placed under guardianship on the application of his sister who was then appointed as his guardian. He alleged that this application and her subsequent decision to place him in a social care institution was partly motivated by his sister’s desire to take control of his finances and, in particular, of the apartment in which our client had been living and in which he owned a share in common with his sister. In the case of *Stanev v Bulgaria*, Mr. Stanev was living in a house adjacent to her sister’s until his sister and step-mother applied to have his legal capacity removed because they were no longer willing to share the property with him. His placement under guardianship made it possible for his relatives to place him in an institution against his will and gain full control of the property.

¹⁰⁷ Promising practices exist to demonstrate that the provision of support in the management of finances enables people to preserve their autonomy and effectively exercise decision-making power and control over their own finances: in addition to some of the examples set out in the section entitled ‘Examples of supported decision-making systems’ above, see *The Example of Israel: Alternatives to Guardianship in Financial Affairs*, BIZCHUT, Sufficiency of Law, Deficiency of Rights, International legal workshop Sofia, 29-30 April 2015, collection of materials.

¹⁰⁸ The other area where people under guardianship challenged their guardian’s decisions concerned the placement in residential social care institutions.

¹⁰⁹ Commissioner for Fundamental Rights, Report of the Commissioner for Fundamental Rights in case No. A/B-2709/2016, 2016.

70. This link between denial of legal capacity and the right to liberty has since been acknowledged by the ECHR in several other cases.¹¹⁰In the case of *Kędzior v. Poland* the ECtHR took note of the deficiencies of domestic legislation allowing guardians to make legal decisions with regard to placement in a social care institution against a person's will. Mr. Kędzior was placed in a social care institution by his brother who had been appointed as his guardian. Under domestic law, his placement was deemed to be voluntary as his guardian had requested it on his behalf, therefore, Mr. Kędzior had no opportunity to challenge the placement. The ECtHR held that Mr. Kędzior was de facto detained and his right to liberty had been violated, as well as his right to a review of the lawfulness of his detention. The ECtHR awarded Mr. Kędzior compensation but, because he remained under guardianship, Mr. Kędzior never had access to the damages, which were allegedly misspent. Following the ECtHR's decision in this case, the Polish Constitutional Court has recently ruled that laws allowing guardians to detain people in social care institutions blatantly violate fundamental human rights to personal liberty and human dignity.¹¹¹Importantly, the Constitutional Court made it clear that the underlying premise of guardianship laws which assumes that the decision of the guardian is always compatible with the will of the person concerned, is not convincing because requests for placement in social care institutions are not always motivated by a desire to protect the welfare of the individual under guardianship. The Constitutional Court stated that ignoring the will and the decision-making authority of a person under guardianship objectifies that person and, as it is based on the traditional medical model of disability, assumes that a person with a disability is an "object" of help who needs a guardian to replace him or her in all legal actions. As the court noted, this view is inconsistent with the recently emerging social model of disability and with international human rights law, including the CRPD.¹¹²
71. Similarly, in 2015, the Slovenian Constitutional Court ruled that people deprived of legal capacity and placed in institutions against their will must be provided with an opportunity to challenge their placement before a court. The Court also ordered the ex post judicial review of all placements in secured wards of social care institutions.¹¹³
72. One final example emanates from a 2015 case in Israel, a country where some of the most advanced and effective alternatives to substitute decision-making have been implemented: The Haifa Family Court granted the request of a 78 year old woman with advanced Alzheimer's disease to make use of the "decision supporter" model as an alternative to guardianship. The court stated that "granting an order in support of the decisions reflects the best interest of the Petitioner, protects her rights and she benefits from this, as we do too, as a society."¹¹⁴

Opinion

For the reasons set out above, we ask the Constitutional Court to recognise the Moldovan guardianship system, which allows a guardian to conclude any legal acts on behalf of another individual without their full and informed consent, violates the right to private life and Articles 5 and 12 of the CRPD. We reiterate our request in relation to Question 1

¹¹⁰*Kedzior v Poland*, fn 5 and *Stankov v Bulgaria*, fn 3.

¹¹¹Constitutional Tribunal of the Republic of Poland, *Case No. K 31/15, judgment of 28 June 2016*, the decision is available in Polish at <http://trybunal.gov.pl/sprawy-w-trybunale/katalog/s/k-3115/> (last accessed 30 July 2016).

¹¹²Ibid.

¹¹³Constitutional Court of the Republic of Slovenia, *Case No. U-I-294/12*, 10 June 2015, available at <http://odlocitve.us-rs.si/documents/f1/58/u-i-294-123.pdf>.

¹¹⁴The Haifa Family Court, guardianship case 43640-01-15, *XY v Custodian General Haifa and Northern District (the Ward)* et al.

whereby we ask the Constitutional Court to find that every person has a right to equal recognition before the law; that people with disabilities have a right to legal capacity on an equal basis with others; and that guardianship, as a system of substitute decision-making, is in violation of Articles 5 and 12 of the CRPD and, in accordance with Article 4 of the Constitution of the Republic of Moldova, is thereby unconstitutional.

We also reiterate our request that the Constitutional Court direct that the Moldovan Government introduce an alternative system of supported decision-making to safeguard the rights of people with disabilities who require support in the exercise of their legal capacity.