ACCESS TO JUSTICE FOR PERSONS WITH MENTAL DISABILITIES: WITHOUT PROCEDURAL ACCOMMODATION, AN IMPOSSIBILITY

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Introduction

In large parts of Central and Eastern Europe, persons with mental disabilities, especially those who are institutionalised, are generally barred from access to the law. Procedural rules regarding legal standing at both the national and supranational level, as well as institutional attitudes of denial operate in concert to keep (institutionalised) persons with mental disabilities caught in a non-place where the law is beyond invoking. These people, held in the exclusive control of the State, are effectively banned from the space the rest of us share where the law has jurisdiction. In that sense, mental health institutions are in reality extraterritorial, not belonging to legal order. In many countries of the region, large numbers of people with mental disabilities are institutionalised. Their abuse and dispossession of access to justice is a ‘hidden human rights crisis’ in the words of the Council of Europe’s Commissioner of Human Rights.1

In large parts of Central and Eastern Europe, the majority of persons with mental disabilities are institutionalised soon after they are born. Their abandonment means that they have no relatives or friends to function as guardians independently from the State. Their guardians are appointed by the State and are usually employees of the institution that they need protection against. Guardianship systems are crude, effectively placing incapacitated persons in a ‘civil death’ situation: they cannot exercise any rights on their own (including authorise an attorney). Moreover, incapacitation proceedings are separate from guardian appointment proceedings. Accordingly, there are people who were deprived of capacity but have no guardian (yet): a complete blockage.

This article will review case law and pending cases at the European level indicative of prevailing patterns of procedural disenfranchisement of persons with mental disabilities in institutions. It will argue that procedural justice for persons with mental disabilities in terms of admittance to remedies is only possible through reasonable accommodation of proceedings allowing NGOs, as a matter of right, to represent victims who died before having a chance to authorize representation, or after a case was brought, where there are no concerned relatives, as well as to represent victims who are unable to give consent and have no other representation.

Procedural accessibility for institutionalised persons with mental disabilities depends on standardizing recognition of NGOs’ legal standing to act on their behalf, whether living or deceased, without specific authorization. If such procedural recognition is withheld, persons with mental disabilities will continue

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1 Amicus curiae submission by the Commissioner before the Court, available at: https://wcd.coe.int/ViewDoc.jsp?id=1851457, accessed 28 October 2015.
to exist outside of the perimeter of remedies, and impunity will be continuously reproduced, their basic rights indefinitely remaining a purely nominal value. The existing lack of remedy reachability results in a virtual impossibility of redress. An adjustment to standing rules is indispensable.

**Criminal (in)justice**

In Central and Eastern Europe, institutionalised people with mental (and physical) disabilities’ neglect by criminal justice systems is as prevalent as their criminal neglect and abuse by the institutions that hold them. In terms of basic access to criminal justice, they are denied by the authorities, as are their needs of humane treatment, therapy, psychosocial care, and human integration in the institutions. They are deprived of the protection of criminal law to a point where their right to recognition as persons before the law is denied. The criminal justice authorities who owe them *ex officio* protection against abuse remain blind to them as holders of rights, allowing their abusers to go unpunished. Institutions being purposefully built away from society, in remote and isolated locations, with no public access, police and prosecutors are largely unaware or indifferent to the ill-treatment of people detained there. The lack of (effective) investigations is of epidemic proportions. Criminal justice denial is institutionalised.

The authorities’ disregard for people in mental care facilities as subjects of criminal law protection amounts to refusing them recognition as humans.

**How is this possible?**

The cause is lack of representation: institutionalised persons with mental (and physical) disabilities cannot represent themselves, and no adequate representatives are available. Their vulnerability entails a near-absolute inability to complain: their disabilities and their social isolation mean they have no access to information about remedies. Their abandonment (the majority have no (concerned) relatives) means they have no family/ community or other social support. Their deprivation of liberty means they have no access to alternative representation. Their not having legal capacity or not being recognized as having competence to exercise rights makes it practically impossible for them to bring a complaint independently of a guardian. Their actual or perceived limited competence causes their interpretation of facts to be disbelieved, or disrespected. For legal redress, credibility is vital. Persons with disabilities are ignored or questioned because of their disability: they are assumed not to be credible.

Their not having effective guardianship means they are left without resource. Guardians in fact serve to block their access to the courts where domestic law requires a guardian’s consent to bring legal action. Guardians generally lack good faith, being part, as a rule, of a conflict of interests – an institution’s director (or other employee) would be a victim’s guardian, as well as (an employee of) the one person with overall responsibility for any victimization occurring within the institution. A guardian may also be altogether absent because of a time lapse between proceedings to deprive a person of capacity and proceedings to appoint a guardian. In a third scenario, a relative who is interested in a person’s removal by means of institutionalisation will be their guardian. Incapacitated persons cannot validly sign a power-of-attorney on their own.

Institutionalised persons with mental disabilities’ exclusion from society means they are dependent on staff, which makes them extremely vulnerable. Abuses occurring inside institutions being hidden from society, public opinion is not available to mobilise on behalf of victims. Not having representation, institutionalised crime victims are dependent on *ex officio* action by police and prosecutors. Law enforcement and the justice system, however, suffer from institutionalised prejudice against mental disability and normalize victims’ neglect and injury. As a result, crime against institutionalised persons with mental disabilities goes unprevented, unpunished, and unredressed. Cases almost never reach the courts.
The only proxy: an NGO

The Bulgarian Helsinki Committee (BHC)\(^2\) is experienced in representing institutionalised victims with mental disabilities, striving to compel domestic authorities to grant the criminal justice access first denied. The BHC’s litigation on behalf of children and adults with mental and physical disabilities swallowed up by the institutions tells paradigmatic stories.

Aneta and Nikolina

In July 2015, the European Court of Human Rights (the Court) communicated to the Bulgarian Government two applications against Bulgaria filed by BHC on its own behalf in the name of two deceased girls with mental disabilities who had lived in institutions and whose rights under the European Convention on Human Rights (the Convention) had been violated.\(^3\) Aneta (age 15) died in 2006 of stomach puncture. Her stomach was found to contain 4 kilograms of trash: 25 shoe insoles, 8 rags, 3 sponges, 6 socks, 3 pieces of paper and 3 stones. The investigation that followed uncovered nothing about how the child swallowed those objects, and found no one responsible; it was terminated two years later. Aneta had been abandoned at birth, and had no close relatives. At age 3, she was diagnosed with developmental disabilities. All her life, she lived in social care institutions.

Nikolina (age 19) died in 2007 of, \textit{inter alia}, marasmus (a severe form of malnourishment). She was hospitalized with sepsis (a whole-body infection), multiple organ dysfunction, coagulopathy (a clotting disorder) and anaemia, after having been unable to feed for two months and having suffered haemorrhages all over her body. No investigation followed until BHC intervened, three years later. In that delayed investigation, the prosecutor’s office attributed Nikolina’s death to her intellectual disability, found no one responsible and closed the case. Nikolina had been abandoned and placed in an institution when she was one month old. Her father died, and her mother never showed an interest in her; neither did her older siblings. At 6 months old, she was diagnosed with developmental disabilities. At 14 years old, she was placed under guardianship by a court. There is no information in the case file whether a guardian was appointed, or who that person was. Her life was spent in institutions.

Boris

In a third BHC case on behalf of a dead institutionalised child brought before the Court,\(^4\) Boris’ deprived life and unaccounted-for death are detailed. He died (age 14) of dysentery in a social care home where several epidemics of dysentery had already taken place, killing other children. Boris was held in the home for more than a week without diagnosis and treatment, before being hospitalized. He had been abandoned, and institutionalised, when he was 18 days old. From age 3, he had suffered from malnutrition. His malnourishment progressed over the years, with nothing being done to counter it. At the time of his death, he weighed \textbf{8 kilograms}. Boris had no access to rehabilitation before he was 12. Until then, he ‘only lay in a basket’, as a staff member put it. With rehabilitation, in less than a year he was able to walk assisted. Boris’ death was not investigated before BHC intervened, several years later. The Prosecutor’s Office then found that his death was natural due to his Down’s syndrome, said to have decreased his immunity. The prosecutors did not discuss his 11 years of malnourishment as a factor in this decreased immunity. They ignored the dysentery epidemics; dysentery, they stated, was ‘normal’ for large groups of children. Neither did the prosecutors discuss Boris’ deprivation of access to rehabilitation, or his delayed hospitalization. They took into account, however, his ‘oligophrenia’ as a cause of his death.

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2 BHC is the largest Bulgarian human rights organization, active in strategic litigation at the national and European level (www.bghelsinki.org).
3 Applications Nos 35653/12 and 66172/12, Bulgarian Helsinki Committee v. Bulgaria: http://hudoc.echr.coe.int/eng#{"fulltext":"35653/12","documentcollectionid2":"GRANDCHAMBER","CHAMBER"COMUNICATEDCASES"","itemid":"001-156281"}, accessed 28 October 2015.
4 While this article was being written, a letter arrived from the Court giving notice that this application was declared ‘manifestly ill-founded’ without any reasons given in the regrettable practice of the Court.
Unlikely allies

The cases of Aneta, Nikolina and Boris were brought to court by BHC after BHC mounted and exhausted a litigation campaign to bring the Prosecutor’s Office to properly investigate their deaths, along with 235 other deaths of institutionalised children and young people with mental disabilities between 2000 and 2010.

In 2007, BHC asked the Prosecutor’s Office to inspect all mental health institutions for children and young people to uncover criminal neglect, bodily harm and death caused there. In 2008, the prosecutors inspected all institutions and found, by official decrees, a large number of disturbing facts concerning structural deficits of care, and a great many deaths and bodily harm incidents. However, they refused to open criminal proceedings to investigate these facts. BHC then brought an actio popularis civil court action against the Prosecutor’s Office, claiming that it was liable for institutional discrimination against children and young people in mental care homes. If these children had not been disabled and institutionalised, i.e. stigmatized and powerless, under state control, deprived of any social representation – no family/public to stand up on their behalf, and no real guardians (institution directors) – BHC argued, the Prosecutor’s Office would not have neglected their deaths and bodily harm but would have investigated them. Boris Velchev, Prosecutor General at the time, requested a partnership with the BHC.

As a result, in 2010, prosecutors and BHC monitors, accompanied by health and social workers, did a fresh round of inspections in all institutions. BHC lawyers produced comprehensive reports with findings, detailing hundreds of instances of neglect and death. The body count was 238 children in ten years. BHC found severe malnutrition, delayed hospitalisation, no in-house doctors and grave ill-treatment.5

With very few exceptions, none of the deaths were investigated, resulting in utter impunity for those responsible and lack of protection for the victims. The Prosecutor General publicly stated that each death and instance of bodily harm would be investigated, and BHC lawyers would have access to the cases in order to monitor the results and to appeal against ineffective prosecutorial decrees. Between 2010 and 2015, out of hundreds of investigations, not a single case was brought to court. Prosecutors have been closing the cases one by one, finding the deaths due to the disabilities of the deceased or it being impossible to prove anyone’s guilt. The BHC has been appealing against hundreds of ill-founded decrees. Aneta’s case was reopened, obtaining no results. Criminal proceedings were initiated in the deaths of Nikolina and Boris and were similarly closed without result, despite the BHC’s appeals.

A public interest action

In this case study, an NGO has acted on behalf of hundreds of dead individuals separately, without any authorization and without any connection between the victims and the NGO. The NGO has been recognised as having such standing by the domestic criminal justice authorities, and has been exhausting remedies for the victims’ sake in its own right. It has been acting as a special representative on behalf of the public in the name of the victims.

Supranational standing

Before the Court, the BHC claimed that it should be allowed, as a matter of principle, to act as a special representative of the deceased because, if not, their rights would be immaterial, and the State would enjoy a license to continue with impunity. If the BHC’s standing to litigate in the children’s name is not recognized, they will be victimized at Convention level by the same denial of access to justice they suffered at national level. The remedy to the pervasive dispossession of institutionalised persons with mental disabilities of avenues of redress in the region is to allow NGOs to pursue justice for victims in the NGOs’ own right.

On the merits, BHC claims that the victims suffered violations to their right to life, their right to be free from inhuman/degrading treatment, their right to an effective remedy, and their right to equality before the law. None of the deprivation they suffered would have occurred but for their disabilities and their social segregation, permitting the State’s institutions to ill-treat them in the dark, away from public scrutiny, with the (un)concerned Prosecutor’s Office turning a blind eye when the time came for accountability. Had they not been stigmatized by ableist prejudice and banished from society, their deaths would not have been normalized by inaction and explained away by disability.

Representative action, representative cases

BHC represents Aneta, Nikolina and Boris, and Aneta, Nikolina and Boris represent a host of people lost to the institutions. Their cases are not exceptional. They are emblematic of the ‘hidden human rights crisis’ in Europe, as the Council of Europe’s Commissioner of Human Rights has termed the plague suffered by persons with mental disabilities.

‘In Europe today, thousands of people with disabilities are still kept in large, segregated and often remote institutions. In a number of cases they live in substandard conditions, suffering neglect and human rights abuses. In too many cases, premature deaths are not investigated or even reported. […] The Commissioner is concerned that human rights violations experienced by people with disabilities are often not brought to courts. In practice, there are a number of barriers to accessing justice for people with disabilities, including physical access difficulties. […] Persons with disabilities often experience isolation. This is especially true for people living in institutions: many of the residents have lost all contact with their families, or are orphans.’

The Commissioner acknowledges institutionalised persons’ lack of information on their rights, their deprivation of legal capacity, the inaccessibility of legal aid and the inadequacies of legal representation, with no guardian being appointed or with conflicts of interests. He documents these as reasons why legal proceedings are not accessible and there is ‘a significant discrepancy between the scale of human rights violations perpetrated against persons with disabilities and the relatively low number of court cases tackling these violations.’

The Commissioner confirms that access to justice for persons with intellectual disabilities is highly problematic due to restrictive rules on legal standing, with frequent abuses against such people being ignored, an atmosphere of impunity surrounding them.

Other international authorities reflect this reality too. The Special Rapporteur on Disability has stated that ‘people with developmental disabilities […] encounter significant problems in accessing the judicial system to protect their rights […]’. A 2007 study in Europe found that legal proceedings were generally not accessible for people with intellectual disabilities, the legal frameworks disregarding their specific physical, intellectual and other needs; institutionalised people had very limited possibilities to claim their rights.

Fifteen dead children and no NGO

In the case of Nencheva and Others v. Bulgaria, the Court found that fifteen children and young people with physical and mental disabilities died in the winter of 1996-1997 from undernourishment, lack of medicine, and cold (lack of heating, clothes, bed covers) in a social care home. These fifteen children

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6 Amicus curiae submission by the Commissioner before the Court, available at: https://wcd.coe.int/ViewDoc.jsp?id=1851457, accessed 28 October 2015.
7 Amicus curiae submission by the Commissioner before the Court, available at: https://wcd.coe.int/ViewDoc.jsp?id=1851457.
8 Amicus curiae submission by the Commissioner before the Court, available at: https://wcd.coe.int/ViewDoc.jsp?id=1851457.
11 Judgment of 18 September 2013, application number: 48609/06.
died, one by one, in a period of three months during which the authorities remained inactive while the director of the home continually asked for help. The Court characterized this as a ‘national level drama’. It qualified the case as an exceptional one affecting the public interest, and noted with concern that the Government gave no explanation why the investigation took two years to even start. The proceedings lasted eight years, and resulted in no conviction. The investigation took six of these years, stalling for four; it was ineffective, and did not establish the concrete reasons behind each death. Only 13 of the 15 deaths were investigated, with no explanation given to the Court. The wrong persons were brought to court, and they were acquitted. The Bulgarian court reasoned who might be the right persons to be brought to court, but the Prosecutor’s Office did not act on that. The Court found a violation of the State’s duty to protect the children’s right to life because of its failure to investigate their deaths (Article 2 – procedural aspect, of the Convention).

Eight of the dead children, who did not have parents, were represented before the Court by an NGO, the others being represented by their parents. The Court did not recognize the NGO’s standing because it had not attempted to act on behalf of the dead children at the domestic level.

Therefore, in similar circumstances, an NGO which did act as a special representative of the victims before the national authorities would have standing before the Court on behalf of the deceased.

Valentin: one (of many)

After Nencheva came Câmpeanu – and the Court lived up to that promise. On 17 July 2014, the Grand Chamber ruled in the ground-breaking case of Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, and changed the legal standing scene under the Convention. Valentin who died at the age of 18 had no next of kin. He was considered highly vulnerable by the Court: a Roma youth with severe mental disabilities, infected with HIV, who lived his whole life in the hands of the State and who perished in a hospital as a result of neglect. Following his death, without having had any significant contact with him while he was alive or having received any authority from him or any other competent person, the applicant NGO (the CLR) brought before the Court a complaint concerning, amongst other things, the circumstances of his death. While alive, Valentin did not initiate any proceedings before the domestic authorities to complain about his medical or legal situation. Although formally he had legal capacity, in practice he was treated as an incapacitated person. In view of his state of extreme vulnerability, the Court considered that he was not capable of initiating any proceedings by himself, being without legal support and advice. He was thus in a wholly different and less favourable position than other persons on whose behalf applications had been lodged after their death: those persons were not prevented from bringing proceedings during their lifetime.

The Court attached considerable significance to the fact that neither the CLR’s capacity to act for Valentin nor their representations on his behalf before the domestic medical and judicial authorities were questioned by the latter; such initiatives, which would normally be the responsibility of a guardian or representative, were thus taken by the CLR without objections from the authorities, who acquiesced in the procedures and dealt with the applications submitted to them. The Court also noted that no competent person or guardian had been appointed by the State to take care of Valentin’s interests. Owing to the failure of the authorities to appoint a legal guardian or other representative, no form of representation was available for his protection before the national authorities. The Court also considered significant that the main complaint concerned Valentin’s right to life, which could not be pursued by him by reason of his death.

12 Paragraph 123 of the judgment.
13 Paragraph 93 of the judgment.
14 Application number: 47848/08.
Qualifying this case, again, as an exceptional one, the Court recognized the NGO’s standing to act as Valentin’s representative, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention.

'To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law […]. Allowing the respondent State to escape accountability in this manner would not be consistent with the general spirit of the Convention, nor with the High Contracting Parties’ obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court.’

The Court reasoned that granting standing to the CLR to act as a representative for Valentin was consonant with access to court rights under Article 5 § 4 of the Convention. Mental illness could not justify impairing the very essence of the right to be heard by a court. Indeed, the Court admitted, special procedural safeguards may be called for in order to protect the interests of persons who, due to mental disabilities, are not capable of acting for themselves. Valentin’s vulnerability, coupled with the authorities’ failure to provide him with legal support, were factors for the exceptional recognition of the CLR’s locus standi, the Court held. Had it not been for the CLR, the case of Valentin would never have been brought to the attention of the authorities, whether national or international.

The Court went on to find a violation of Valentin’s right to life: a continuous failure of the medical staff to provide him with the appropriate care and treatment was a decisive factor in his death. His death was not exceptional: the Court found that at the relevant time 109 deaths were reported at the same psychiatric hospital in little more than a year (2003-2004). The Court expressly held that the authorities’ response to that general situation was inadequate, while they were fully aware that the lack of heating and appropriate food and the shortage of medical staff and resources, had led to an increase in the number of deaths. By placing Valentin in that hospital, notwithstanding his already heightened state of vulnerability at the time, the authorities unreasonably put his life in danger.

The Court further considered that the authorities not only failed to meet Valentin’s most basic medical needs while he was alive, but also to elucidate the circumstances of his death, or find those responsible. This was a violation of the procedural duty inherent in protection of his right to life under Article 2 of the Convention. The Court took note of the CLR’s assertion that in the case of the 129 deaths at the hospital between 2002 and 2004 the criminal investigations were all terminated without anyone being identified or held civilly or criminally liable. According to the CLR, despite highly credible allegations concerning suspicious deaths in psychiatric institutions in Romania, there had never been any final decision declaring a staff member criminally or civilly liable in relation to such deaths.

The Court further found that the Romanian legal framework relating to the rights of mentally disabled individuals was ill-suited to address their specific needs, notably regarding the practical possibility for them to have access to any available remedy. The Court had previously found Romania to be in breach of Articles 3 and 5 of the Convention on account of the lack of adequate remedies concerning people with disabilities, including their limited access to any potential remedies. Therefore, the Court considered that the State had failed to provide a legal mechanism able to afford redress to people with mental disabilities claiming to be victims under Article 2 (right to life) of the Convention: a violation of Article 13 (right to an effective remedy) in conjunction with Article 2 of the Convention.

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15 Paragraph 112 of the judgment.
16 Paragraph 141 of the judgment.
17 Paragraph 121 of the judgment.
18 Inter alia, C.B. v. Romania and B. v. Romania (No. 2), cited below.
The Court established that the State’s failure to secure and implement an appropriate legal framework that would have enabled complaints concerning breaches of Valentin’s right to life to be examined by an independent authority revealed the existence of a wider problem calling for the Court to indicate general measures for the execution of its judgment. It recommended that the State envisage general measures to ensure that mentally disabled persons in a situation comparable to that of Valentin are afforded independent representation enabling them to have Convention complaints relating to their healthcare and treatment examined before a court or other independent body.

An exception or the rule?

In other words, the Court established that in Romania persons with mental disabilities lacking families and held under institutional control generally did not have access to a legal remedy, and needed outside representation. The general situation was such that Valentin’s case was illustrative.

At the same time, the Court termed this illustrative case an ‘exceptional’ one, and granted the NGO standing on those terms only. The ruling is, therefore, marred by an internal conflict between a limited, case-specific approach to representative standing, and the Court’s own admission that the situation generally is inconsistent with the rights not just of Valentin but of many like him: the abnormal death rate, the lack of remedies, the lack of social and legal representation, the lack of (effective) investigation; the inadequacy of the law as a whole to provide redress to persons like Valentin.

Ionel – one too many for an exception?

After Cămpeanu, the Court decided the case of Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania:19 another ‘exceptional’ case in a row. The Court reiterated that ‘in exceptional circumstances and in cases of allegations of a serious nature, it should be open to associations to represent victims, in the absence of a power of attorney and notwithstanding that the victim may have died before the application was lodged under the Convention.’20 It considered that ‘to find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention.’21

Like Valentin, Ionel died in state custody and left no known relatives. He also suffered from mental illness. In his case too, there were serious allegations of a breach of the rights under Articles 2, 3 and 13 of the Convention (right to life, freedom from inhuman/degrading treatment, right to an effective remedy). Similarly, the only person ever to represent Ionel was an NGO – the APADOR-CH, which assisted him on several occasions before the authorities. Ionel had a closer connection with the APADOR-CH than Valentin had with CLR – one of the differences between their cases. The other one was that Ionel was able, during his life, to lodge complaints. Still, the Court recognized that APADOR-CH should be granted standing to represent him before it.

On the merits, the Court found a violation of the procedural head of Article 2 – the State’s duty to effectively investigate Ionel’s death. Ionel died in prison, serving a sentence. He self-harmed by inserting a nail in his head. He attempted suicide by overdose and fell into a coma. In APADOR-CH’s view, through their defective manner of approaching his situation, the authorities had exposed him to serious and prolonged suffering. Instead of being treated for his mental illness, he had been punished for having harmed himself and for his occasional aggressive behaviour. Rather than offering support, the State chose as a matter of policy to punish prisoners who, like Ionel, harmed themselves, by not ensuring that they received appropriate medical treatment if such treatment was not available in the prison system.

19 Judgment of 24 March 2015, application number: 2959/11.
20 Paragraph 42 of the judgment.
21 Paragraph 42 of the judgment.
Uniformity: no access to criminal justice, so many deaths

In all of the ‘exceptional’ cases outlined above, the domestic justice system’s response to the deaths was a non-variable: none of the cases were brought to a criminal court (effectively). Therefore, the exceptions disclose a rule: the death of a disabled person in a home is not an issue under criminal law.

The violations found are not exceptional either. The deaths in the decided cases were followed by a host of other deaths. While the court was reviewing the cases of Nencheva, Câmpeanu and Garcea, between 1 June 2010 and 31 December 2014, in Bulgaria, according to official statistics, in just one type of institution (medical care homes for children under the age of 3 both with and without disabilities (where some older children live too)), 292 children died. Following the rule, these deaths have not been investigated.

The exclusion of persons with mental disabilities from implementation and enforcement of the law has been reflected at UN level as well. The Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman and degrading treatment has found that ‘[persons with disabilities], often segregated from society in institutions, including prisons, social care centres, orphanages and mental health institutions, are targets for neglect and abuse’. According to the Special Rapporteur, they often find themselves in the very situation ‘of powerlessness, whereby the victim is under the total control of another person’ that ‘torture, as the most serious violation of the human right to personal integrity and dignity, presupposes: for instance, when they are deprived of their liberty, or when they are under the control of their caregivers or legal guardians.’ They are deprived of their liberty for long periods, including for a lifetime, against their will or without free and informed consent, he has held.

‘Inside these institutions, persons with disabilities are frequently subjected to unspeakable indignities, neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. [...] The Special Rapporteur is concerned that in many cases such practices, when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognized as torture or other cruel, inhuman or degrading treatment or punishment.’

The Special Rapporteur has noted that discriminatory legal frameworks and practices depriving persons with disabilities of legal capacity or failing to secure their equal access to justice, resulting in impunity for violence against them, are a form of acquiescence with such violence. He has stressed States’ duties under Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD) to prevent and protect persons with disabilities from all forms of violence, abuse and exploitation, and to investigate and prosecute those responsible.

A court (slowly) evolving: Not seeing the forest for the trees

Contrary to what the Court has been willing to admit, the above cases of persons with mental disabilities barred from justice are not exceptional but representative in Eastern Europe; they are the rule. And they require a procedural rule, not a procedural exception.

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A class of outcasts

The constitutive element of this class of cases is the victims’ lack of access to justice at the national level. The cases reflect a class of victims cast by the State in a non-space outside of the protection of the law. These people were physically removed from the territory where the law is operative, and held in a spatially defined vacuum where there is no law in practice, where the reality of law is out of reach; an embassy of non-law where annihilation of legal personhood is normalised through systemic denial of procedural rights. Institutionalised persons with mental disabilities are continuously dehumanized through practical denial of their possession of rights. Where there is no hope of enforcement, there is no right. Access to remedial mechanisms is an integral part of the recognition of rights. Where there are no rights, there is not a human being: a human is defined by being the subject of rights; an emanation of mankind’s innate dignity. By being denied access to rights, persons with mental disabilities in institutions are excluded from humanity as defined by (human rights) law. They suffer a comprehensive denial of personhood: a dismissal of their right to recognition as persons before the law.27

The essence of the right to recognition as a person before the law is acknowledging the human as a rights holder. Non-recognition of a person as a possessor of rights amounts to telling her or him: ‘You are nothing’. This is what justice institutions do to persons with mental disabilities.

Persons with mental disabilities in institutions are dispossessed of recognition as law’s subjects because the institutions function as places of hidden interruption of the law. They are a legal limbo, where humans are held in complete powerlessness through a removal of their legal agency. Mental care facilities are extra-legal spaces reducing people to non-persons, in a manner comparable to an act of forced disappearance. Similarly to enforced disappearance, institutionalization places persons outside of the remit of the law, and diminishes them to a state of effective non-existence, an existence outside humanity.

Recognition as a person before the law is fundamental to a dignified life. It flows from the principle of equality, the inherent value of all who are people. Where one person is denied, personhood for the entire world is negated.

No access to the civil courts

In many cases, persons with mental disabilities are barred from accessing a court in respect of their institutionalization, which the Court has repeatedly recognized to be unlawful and unjustified deprivation of liberty. In the cases of Stanev v. Bulgaria and Stefan Stankov v. Bulgaria, the Court found violations of the applicants’ rights under Article 5 § 1 and Article 5 § 4 of the Convention.28 It also found that the applicants were deprived of accessing their right to compensation for their unlawful deprivation of liberty and for their denied access to a court in respect of that deprivation: a violation of Article 5 § 5.29 Because the applicants were deprived of a legal remedy for the inhuman or degrading living conditions in the

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27 The Universal Declaration of Human Rights, Article 6: Everyone has the right to recognition everywhere as a person before the law. The International Covenant on Civil and Political Rights, Article 16: Everyone shall have the right to recognition everywhere as a person before the law. The Convention on the Rights of Persons with Disabilities, Article 12(1): States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

28 Respectively, judgments of 17 January 2012 and 17 March 2015, application numbers: 36760/06 and 25820/07. Article 5 § 1 reads: ‘Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […][…] (e) the lawful detention of […] persons of unsound mind […]; […]’ Article 5 § 4 reads: ‘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.’

29 Article 5 § 5 reads: ‘Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.’
institutions, the Court also found a violation of Article 13 of the Convention. Furthermore, the Court found a violation of the applicants’ right under Article 6 § 1 (fair trial) of the Convention because they had no possibility of applying to a court for restoration of their legal capacity.

In the case of Stanev, the Court issued an injunction for the State to take the necessary general measures to afford access to court in respect of the latter issue. It acknowledged in that way that Stanev exemplified a general situation. In the case of Stankov, the Court found that this injunction was not implemented. Therefore, the general situation has continued, unremedied.

This non-implementation of a ruling after justice was done by the Court raises a further issue: persons with mental disabilities’ access to implementation as a separate aspect of their access to justice. Where a person has had access to a (supranational) court, and has won a ruling in her or his favour, the question still remains whether they effectively had access to justice as long as the ruling remains unimplemented.

In the case of Mihailovs v. Latvia, the Court found the same violations of Article 5 § 1 and Article 5 § 4 of the Convention as in the above cases. In the case of B. v. Romania (No. 2), the Court found a violation of the applicant’s right to private life (Article 8 of the Convention) because of the inadequacy of the procedural safeguards and of the remedies in respect of her psychiatric detention. In the case of D. D. v. Lithuania, the Court found a violation of Article 6 § 1 in respect of the applicant’s access to a fair trial to change her legal guardian, as well as a violation of Article 5 § 4 because she was deprived of an opportunity to contest her continued involuntary institutionalization before a court. In the cases of Filip v. Romania and C.B. v. Romania, the Court found violations of the applicants’ rights to access court protection in respect of their unlawful psychiatric confinement: violations of Articles 5 § 1 and Article 5 § 4 of the Convention. In the Filip c. Roumanie case, the Court additionally found a violation of Article 3 of the Convention (prohibition of inhuman/degrading treatment – procedural aspect) because of the failure of the State to properly investigate the applicant’s ill-treatment in the psychiatric hospital where he was detained.

All of these cases are indicative of a pattern. This is evidenced by their number and factual and legal similarity. The pattern consists in persons with mental disabilities being prevented from having recourse to procedures and remedies concerning basic rights.

Deontology

All humans are equal before the law, and entitled without any discrimination to equal protection of the law. Recognition of every person as a subject of the right to be protected by law and of the right to be equal before the judiciary is the basis of the rule of law. To ensure everyone’s recognition as a person before the law, States have a duty to secure implementation mechanisms – effective remedies.

Effective remedies require adjustment: procedural accommodation of persons with disabilities’ special needs in order for them to access justice on an equal footing.

30 Article 13 reads: ‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority […]’
31 Article 6 § 1 reads: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]’
32 Paragraph 258 of the judgment.
33 Paragraph 186 of the judgment.
34 Judgment of 22 January 2013, application number: 35939/10.
35 Judgment of 19 May 2013, application number: 1285/03.
36 Judgment of 14 February 2012, application number: 13469/06.
37 Respectively, judgment of 14 March 2007 and of 20 April 2010, application numbers: 41124/02 and 21207/03.
Under Article 2 CRPD, States have a general duty to take all legal measures needed for the implementation of CRPD rights, as well as to abolish all discriminatory provisions and to refrain from any act inconsistent with the CRPD. They must take all appropriate measures to eliminate disability discrimination. Under Article 5, States 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. They shall prohibit all disability discrimination and guarantee to persons with disabilities equal and effective legal protection against discrimination. In order to eliminate discrimination, States shall take all appropriate steps to ensure that reasonable accommodation is provided. Specific measures which are necessary for de facto equality of persons with disabilities are not discrimination. Under Article 12, States recognize the right of persons with disabilities to equal recognition everywhere as persons before the law. Under Article 13, States shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through procedural accommodations, in order to facilitate their effective role as participants in all legal proceedings. Under Article 16, States shall take all appropriate legislative and other measures to protect persons with disabilities from all forms of violence and abuse. They shall take all appropriate prevention measures by ensuring assistance, including through provision of information on how to recognize and report violence and abuse. States shall put in place effective legislation to ensure that violence and abuse are identified, investigated and prosecuted.

Therefore, States have a clear duty under international law to ensure access to justice for persons with disabilities by providing procedural accommodations. Other authorities agree. In his concurring opinion in the Câmpeneu case, Judge Pinto de Albuquerque reasoned that institutionalised persons’ lack of access to justice, as exemplified by Valentin’s case, required a principled approach by the Court: establishment of standing rules flexibility as a matter of course to accommodate persons with mental disabilities’ factually unequal situation as regards recourse to remedies. He advocated NGO standing assimilation in comparable cases as a rule, and not as an exception. Here is an excerpt of his criticism of the judgment of the Court:

‘An intolerable legal gap in the protection of human rights emerged [...] in view of Mr Câmpeneu’s lifelong state of extreme vulnerability, the absence of any relatives, legal guardians or representatives and the unwillingness of the respondent State to investigate his death and bring to justice those responsible. This legal black hole, where extremely vulnerable victims of serious breaches of human rights committed by public officials may linger for the rest of their lives without any possible way of exercising their rights, warranted a principled response by the Court. [...]’

Furthermore, in relation to Article 2 [right to life] cases, I do not agree with the statement that the applicant must have become involved as a representative before the alleged victim’s death. [...] The Court does not have to consider whether the applicant has ever interviewed the alleged victim [...] or even seen him or her alive, because that would make the application depend on fortuitous facts which are not within the applicant’s power.

More importantly, the majority’s reasoning is logically contradictory in itself. On the one hand, they affirm that the case at hand is ‘exceptional’ [...] but on the other hand, they consider that this case reveals ‘the existence of a wider problem calling for [the Court] to indicate general measures for the execution of its judgment’ [...]. If the case reveals a wider problem, then it is not exceptional. Ultimately, the majority acknowledge that this is not an exceptional case [...].

 [...] I stress the ‘exceptional’ character of the case, the majority regretfully close the door to any future extension of the present finding, concerning the situation of a mentally disabled person, to cover other victims of human rights violations [...] who might have had no access to justice in their own countries. [...] Instead of relying on the ‘exceptional circumstances’ of the case [...] I would have preferred to rise above the specificities of the case, and address the question of principle raised by the case: what are the contours of the concept of representation of extremely
vulnerable persons before the Court? It seems to me that this question could, and should, have been answered on the basis of the general principle of equality before the law [...].

[...] [T]he Court has to interpret the conditions of admissibility of applications in the broadest possible way in order to ensure that the victim's right of access to the European human rights protection system is effective. Only such an interpretation of [...] the Convention accommodates the intrinsically different factual situation of extremely vulnerable persons who are or have been victims of human rights violations and are deprived of legal representation. Any other interpretation, which would equate the situation of extremely vulnerable persons to that of other victims of human rights violations, would in fact result in discriminatory treatment of the former. Different situations must be treated differently. Thus, the right of access to court for extremely vulnerable persons warrants positive discrimination in favour of these persons when assessing their representation requirements before the Court.

[This construction] is supported by a literal interpretation of the final sentence of Article 34 of the Convention. Extremely vulnerable persons who have been hindered 'in any way' – that is, by actions or omissions on the part of the respondent State – in the exercise of their rights must be provided with an alternative means of access to the Court. [...] [...] [T]he Court should have established a concept of de facto representation, for cases involving extremely vulnerable victims who have no relatives, legal guardians or representatives. [...] [...] [T]he Court should have addressed the case on the basis of [...] the principle of equality before the law [...] distilling from the principle of equality [...] a rule on "de facto representation" [...].'

The Council of Europe Commissioner for Human Rights made a broadly similar submission to the Court regarding Article 13 CRPD and the obligation on States to ensure equal access to justice for persons with disabilities, stressing the NGO factor:

'The CRPD is grounded in the premise that public authorities should go further than to just help persons with disabilities to adjust to existing conditions: they should seek to adapt the conditions in order to accommodate everyone, including those with special needs.

The Council of Europe 2006-2015 Action Plan to promote the rights and full participation of people with disabilities in society noted that people with disabilities often face a number of barriers in access to the legal system, requiring a range of measures and positive actions. The Action Plan states that when assistance is needed to exercise legal capacity, member states must ensure that this is appropriately safeguarded by law. A specific action to be taken by member states in this respect is "to encourage non-governmental advocacy networks working in defence of people with disabilities' human rights."'

The Commissioner noted 'a tendency in domestic law to accept that a third person or organisation takes legal action in the name of victims of alleged human rights violations in domestic courts, especially in cases concerning vulnerable groups of people. Research findings show that in many Member States of the European Union, NGOs are able to initiate court proceedings either in the name of the victim or on their own behalf, in certain circumstances without the consent of the victim.' He stated that mental health facilities should be open to independent public scrutiny to prevent human rights violations; in this sense, NGOs should be given access to monitor practices otherwise hidden from society and NGO monitors should be able to bring legal action on behalf of victims who are unable to do so.

Relying on the principle of effectiveness and the need to adapt standing requirements, the Commissioner took the view that 'strict application of standing requirements to persons with disabilities, and in

38 Amicus curiae submission by the Commissioner before the Court, available at: https://wcd.coe.int/ViewDoc.jsp?id=1851457, accessed 28 October 2015.
particular intellectual disabilities, would have the undesired effect of depriving a particularly vulnerable
group of any reasonable prospect of seeking and obtaining redress for violations of their human rights
and fundamental freedoms set forth in the Convention. It would also run counter to the Convention's
objective of preventing the occurrence or recurrence of human rights violations by the States parties.’ He
argued that NGOs should have standing ‘when there is an identified victim […] in a situation of extreme
vulnerability, for example persons detained in psychiatric and social care institutions; [and] in the absence
of family, when no means of representation are available – no guardian, or when there is a conflict of
interest between the alleged victim and the legal representative.’

The way ahead

Reasonable accommodation in access to justice: a matter of equal justice

As vulnerable victims lacking legal agency (competence and/or capacity, as well as liberty and social
integration), institutionalised persons with mental disabilities are entitled to reasonable accommodation
in terms of procedural rules granting legal standing to NGOs where no one else is willing or able to bring
legal action in a person’s defence. Bringing such action is in all cases a matter of public interest because
the public interest cannot be unaffected if violations of the basic rights of the most vulnerable people
remain unaccounted for. Unless NGOs are allowed, as a rule, to legally act on behalf of persons with
mental disabilities who cannot act for themselves and for whom there is no one else to act, those people
will never obtain basic access to remedies, the authorities that should be acting \textit{ex officio} in their defence
serving as a shield for their abusers instead. The factual and legal inability of individuals with intellectual
disabilities to access justice means impunity for the violators, and no curbing of future violations.

Standing rules to access both national and international courts should be adapted as a matter of principle
– not simply in ‘exceptional circumstances’, as the Court’s case law has it today – to allow NGOs to bring
legal action on behalf of institutionalised persons, regardless of victim consent (excluding cases where
there is proof that a victim disagrees) or whether they are living or dead; especially if they are children.

Such reasonable accommodation is a prerequisite to enable persons with mental disabilities to exercise
their rights on the same basis as others. Without it they are denied (procedural) equality before the law.
It is an essential component of non-discrimination because proceedings are structurally discriminatory,
designed in such a way that disability is excluded. NGO standing on behalf of persons with mental
disabilities should be de-exceptionalised; it should be rooted as a norm of access to justice. No remedy
can be considered effective or fair if it excludes persons with mental disabilities. A practical way to
complete a remedy with accessibility, is to provide for representative NGO standing as a matter of
course. Remedy normalcy should integrate NGO standing.

No prior connection should be required between the NGO lodging the complaint and the alleged victim,
since an NGO may uncover a case when the victim is beyond communication (dying; dead; too young;
or suffering from severe conditions preventing information exchange). This should not prevent the NGO
from pursuing justice for that individual.

No separate requirement of a general interest in a case should be made either. Abuses committed
against people with disabilities in social care homes or psychiatric hospitals affect the public interest by
definition.

An entelechy of rights for persons with disabilities requires removing the barriers that separate them
from the courts of law and prevent them from overcoming their enforced segregation in order to claim
equal liberty. Not removing those barriers to justice makes sure the abuses and the impunity continue.
In order to prevent and put an end to these abuses, the important role played by NGOs in shedding light on the human rights violations experienced by vulnerable persons and facilitating the latter’s access to justice must be officially recognised. Allowing NGOs to lodge applications with the Court on behalf of persons with disabilities is fully in line with the principle of effectiveness in which the Convention is grounded.39

Denial of reasonable accommodation is, in general, a serious form of inequality and ill-treatment. When such denial concerns access to justice, it amounts to institutionalised revictimisation. When legal processes refuse to take into account their inbuilt hurdles for persons with mental disabilities, and refuse to allow for compensatory measures, such as special representation, the law as practised now becomes a tool of punishment of the victims, and doubles the original abuse for which justice is not being done.

Such law becomes a vehicle of nullification of the personhood of the victims. Blind law that withholds recognition from a human facing it loses its own face. This faceless law is a reflection of a collective loss of humanity when we neglect to see the harm done by the processes designed to exclude persons with mental disabilities and to treat them as nothing.

Before the law

In Kafka’s parable ‘Before the law’, a person comes from afar to reach the law. But there is a door there, and a gatekeeper who stops him. The doorman says the person will have to wait to be let in. Though the door is open, the person submits. He waits for many years, and never defies the gatekeeper’s rule. At the end of his life, he asks the gatekeeper why no one else ever came to try and gain entry to the law. The gatekeeper tells him that the door was only made for him, and he will now close it.

As long as we adhere to wrongful provisions, and fail to disown them, we are that wasting person, ceding to petty, arbitrary authority our brief, unique chance to do justice to the moral law within.

39 Amicus curiae submission by the Commissioner before the Court, available at: https://wcd.coe.int/ViewDoc.jsp?id=1851457, accessed 28 October 2015.