

[This is an Accepted Manuscript of a book chapter in L Davidson (ed), *International Development, Mental Health and Well-Being: The Sustainable Development Goals* (Routledge, 2018), which will be available online at <http://www.routledge.com>]

Mental Disability, the European Convention on Human Rights and Fundamental Rights and Freedoms, and the Sustainable Development Goals

Peter Bartlett

Nottinghamshire Healthcare NHS Trust Professor of Mental Health Law, School of Law and Institute of Mental Health, University of Nottingham

Abstract: Since Winterwerp v the Netherlands in 1979, the European Court of Human Rights and, later, the European Committee for the Prevention of Torture, have been developing law and policy on human rights and mental disability (taken in this chapter to include psychosocial disability/mental health problems, and mental disabilities related to old age). This paper charts the shape of those developments, relating to psychiatric detention, psychiatric treatment, and systems of guardianship. The new paradigm of human rights, manifest in both the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the 2015 United Nations Sustainable Development Goals (SDGs) is explored, and the potential and limitations of the ECHR in advancing that new agenda considered.

Introduction

The Sustainable Development Goals (SDGs)¹ arrive at an interesting time in disabilities law. The United Nations Convention on the Rights of Persons with Disabilities (CRPD)² was passed by the General Assembly in December 2006, and came into effect less than two years later. Currently, it has been ratified by 172 jurisdictions.³ The ethos of the CRPD has notable consistencies with the SDGs, sharing objectives relating to the attainment of substantive equality for all. The intersections are at their most visible in provisions relating to economic, social and cultural rights: both contain provisions promoting rights to health,⁴ education,⁵ gender equality,⁶ employment,⁷ access to

¹ United Nations General Assembly, A/69/L.85 (12 August 2015). Available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/253/34/PDF/N1525334.pdf?OpenElement> (accessed 26 July 2017).

² General Assembly, A/61/611.

³ See <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>, accessed 11 February 2017.

⁴ CRPD, Art.25; SDG3.

⁵ CRPD, Art.24; SDG4.

⁶ CRPD, Art.6; SDG5.

justice,⁸ and the development of inclusive societies.⁹ Whilst their approaches are slightly different, both also promote notions of equitable distribution of resources and poverty reduction.¹⁰ In terms of disability, it is pity that the SDGs did not draw out those synergies more explicitly; relatively few of the specific objectives within the broader SDGs refer to disability directly, and only one target - the aim to reduce premature mortality by one third¹¹ - makes any reference to mental disability specifically. Still, the introduction to the SDGs does make clear that human rights must be available without discrimination on the basis of disability,¹² and calls for the empowerment of people with disabilities.¹³ Further and significantly, as part of the implementation process, data is to be collected relating to disabilities¹⁴ so that discrepancies relevant to people with disabilities at least will be visible. Thus, there is much to link these two documents.

Linking either document with the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹⁵ is more complex. The ECHR is, essentially, a convention protecting civil and political rights. As noted above, the SDGs are primarily designed to implement economic and social rights, so the core question in relation to these documents is how far the enforcement of civil and political rights can promote economic and social rights - essentially through the back door. This chapter will argue that it is likely to be very limited in this regard.

The SDGs do understand their mission in terms of a broader human rights agenda. Whilst their specifics are generally aspects of economic and social rights, the long introductory passage to the SDGs acknowledges the importance of the promotion of *all* human rights, not just social and cultural rights.¹⁶ The promotion of civil and political rights, therefore, must be understood as part and parcel of the SDGs' overall vision, even if it is not its primary focus. Insofar as the focus is on civil and political rights (the focus of the ECHR), the question is, however, which articulation of civil and political rights is to be promoted. As will be discussed below, the CRPD is widely understood¹⁷

⁷ CRPD, Art.27; SDG8.

⁸ CRPD, Art.12; SDG16.3.

⁹ CRPD, Arts.19, 29, 30; SDG16.

¹⁰ CRPD, Arts.28; SDG1, 2, 10.2

¹¹ SDG target 3.4. Insofar as it is understood as a disability issue, target 3.4 does call for better treatment of substance abuse.

¹² SDG, para 19.

¹³ SDG, para.23.

¹⁴ SDG target 17.18.

¹⁵ 213 UNTS 222, as amended by ETS Nos.44, 45, 55, 118, 155.

¹⁶ See, e.g., the Preamble to the SDGs, and paras.3, 8, 10, 19, 20, 29, 35.

¹⁷ This is discussed further below.

as having introduced a ‘new paradigm’ for disabilities law, applying both to its articulation of social and economic rights and, at least as significantly, to its articulation of civil and political rights. That new paradigm is reflected in the synergies noted above between the CRPD and the SDGs, and is based on much firmer expectations of equality, non-discrimination and community integration than previously. As will be discussed, it is unclear how far that new approach is permeating into broader human rights discourse, even at the level of other United Nations bodies. Insofar as the new paradigm is adopted by the SDGs, however, it is also questionable whether the ECHR should, can and will be able to incorporate it into its jurisprudence. In this context, it becomes a question of which human rights vision is to be promoted.

The ECHR and Mental Disability: Where are we now?

The original text of the ECHR was finalised in 1950, and came into effect in 1953. The first case concerning mental disability was not heard by the European Court of Human Rights (ECtHR), the Convention’s judicial mechanism, until 1979. At issue in that case was the interpretation of Article 5 of the ECHR, the relevant portions of which provide:

“5(1) Everyone has the right to liberty and security of the 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 for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants...

5(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reason for his arrest and of any charge against him.

....5(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

The case *Winterwerp v the Netherlands*¹⁸ determined the fundamental requirements for the lawful detention of individuals on the basis of mental disorder, and has set the tone for much of the jurisprudence that has followed. Detention of persons with mental disabilities would be justified only if there was a “true mental disorder” evidenced by “objective medical expertise” and of a

¹⁸ Application No. 6301, judgment of 24 October 1979; (A/33) (1979-80) 2 EHRR 387.

“nature or degree warranting detention”.¹⁹ Consistent with Article 5(2) of the ECHR, it was held that reasons for the detention had to be provided to the detainee in a language he or she could understand. The ongoing justification for the detention was contingent on the continuation of a mental disorder, and consequently Article 5(4) provided not just a right to approach a court to determine that the original detention was justified, but also to do so at reasonable intervals (something like every six months), to ensure that the detention remained justified.²⁰ Whilst these did not necessarily need to have all the pomp and ceremony of traditional court hearings, they did need to meet basic standards of procedural fairness, including a right to legal representation, paid for by the state when necessary.

The subsequent ECtHR jurisprudence has provided ongoing elaboration of those fundamental principles. As of 29 April 2017, *Winterwerp* had been cited in 234 English language judgments of the court, including 100 in the last five years.²¹ The sort of issues that have engaged the Court are as follows.²² Regarding the nature of the mental disorder, the Court has been clear that detention will not be justified simply because behaviour deviates from the prevailing norms of the society:²³ there must be a recognised medical condition at issue. Beyond this, the Court has been extremely hesitant to insist that domestic courts challenge the diagnoses and assessments of medical experts, although it has recently made clear that in the event of inconsistencies within or between reports, domestic courts must explore or question those inconsistencies.²⁴ In recent years, the Court also has been much more insistent that proper medical assessments take place on a regular basis, and that the resulting medical reports expressly address the question of whether the disorder is of a nature or degree such that detention is a proportionate response.²⁵ Consistent with this, it is now

¹⁹ *Winterwerp*, para.39.

²⁰ *Ibid*, para.55; but *cf Johnson v the United Kingdom*, Application No.22520/93, judgment of 24 October 1997 as to the limits of the right to release.

²¹ Information drawn from HUDOC database, <http://hudoc.echr.coe.int/eng#>. Accessed 29 April 2017.

²² For an expanded discussion of the ECHR case law generally as it related to people with mental disabilities, and on the Article 5 case law in particular, see Bartlett, P., Lewis, O., & Thorold, O., *Mental Disability and the European Convention on Human Rights* (Leiden: Martinus Nijhoff, 2006), especially chapter 2 on the Article 5 issues, and Gable L., & Gostin, L., ‘Human Rights of Persons with Mental Disabilities: The European Convention on Human Rights’, in Gostin *et al* (eds.) (2010), *Principles of Mental Health Law and Policy*, (Oxford: Oxford University Press), chapter 3.

²³ See, e.g., *Rakevich v Russia*, Application No.58973/00, judgment of 28 October 2003, para.32.

²⁴ *Rudenko v. Ukraine*, Application No.50264/08, judgment of 17 July 2014.

²⁵ See, e.g., *Akopyan v Ukraine*, Application No.12317/06, judgment of 5 September 2014 (regarding the admission of a person who was never properly assessed); *Atudorei v Romania*, Application No.50131/08, judgment of 16 December 2014 (where there was no record as to how diagnosis reached, and no evidence that detention was a proportionate response to the mental condition); *Biziuk v Poland No 2*, Application No.24580/06, judgment of 17 April 2012 (involving the continued detention and a violation of Art.5, since

clear that detention must be the least restrictive alternative available, and it is expected first that alternatives to detention will have been attempted and will have failed.²⁶ A comprehensive list of the justifications for detention under Article 5(1)(e) of the ECHR has never been provided. Therapeutic justifications would seem acceptable if the detention is proportionate, and dangerous individuals may be detained even if there is no treatment available.²⁷ That said, it would seem that the individual must be actually dangerous to justify the detention; a mere concern that he or she may become dangerous, for example by failing to comply with treatment outside hospital, does not seem to suffice.²⁸

Early on, the ECtHR determined that the place of detention had to be an appropriate therapeutic environment.²⁹ It does not quite follow from this that detentions under Article 5(1)(e) must be in hospitals rather than prisons, for example, although sceptical comments about the general appropriateness of detaining people requiring psychiatric care in such an environment are contained in the jurisprudence,³⁰ and detention in those environments will be permitted only if their facilities and milieu reach an appropriate therapeutic standard.

A second stream of cases concern guardianship processes - proceedings that transfer legal control of a person's decisions to another person known as a 'guardian' in cases where the individual is considered to be of compromised capacity. The specifics of guardianship schemes are determined by domestic law, and vary considerably. Sometimes, authority for all decisions is transferred to a guardian ('plenary guardianship'). Sometimes blocks of decisions are transferred (such as all decisions relating to the finances, property and legal affairs of the individual, or all personal decisions in relation to that person), and sometimes they are much more nuanced. The guardian

there was too long a delay between the last medical assessment and the hearing); *Kędzior v. Poland*, Application No.45026/07, judgment of 16 January 2013(2013) (where the initial report at the time of detention did not discuss the need for the person to be in an institution (in this case, a social care home), and where there were no formal assessments following admission); *X and Y v Croatia*, Application No.5193/09, judgment of 3 February 2012 (which involved the use of out-of-date medical reports to justify admission to a social care home); *Yaikov v. Russia*, Application No.39317/05, judgment of 18 September 2015 (a one and half year gap between the medical report and the court hearing was held sufficient to ground a violation of Article 5).

²⁶ See, e.g., *Varbanov v Bulgaria*, Application No.31365/96, judgment of 5 October 2000; *Tupa v Czech Republic*, Application No.39822/07, judgment of 26 August 2011.

²⁷ See, e.g., *Hutchinson and Reid v the United Kingdom*, Application No.50272/99, judgment of 20 May 2003, at para.52.

²⁸ *Plesó v. Hungary*, Application No.41242/08, judgment of 2 January 2013; but again, cf *Johnson v the United Kingdom*, Application No.22520/93, judgment of 24 October 1997.

²⁹ See *Aerts v. Belgium*, Application No. 25357/94, judgment 30 July 1998, (1998) 29 EHRR 50.

³⁰ See, e.g., *Claes v. Belgium*, Application No. 43418/09, judgment of 10 April 2013.

may be a family member or friend of the person under guardianship, or a government official, or indeed the head of the care facility in which the individual lives. Rights to apply to supersede a guardianship order may be problematic: in some domestic systems, such an application is viewed as a legal procedure, and therefore may be commenced only by the guardian, and not by the individual affected by the order. Even if there is cogent evidence that the individual has regained capacity, therefore, he or she may be unable to challenge the guardianship order, if the guardian chooses not to consent to the application.

In *Matter v Slovakia*,³¹ the Court held that guardianship proceedings concerned “civil rights and obligations”, and therefore attracted the procedural protections of Article 6 of the ECHR – essentially, the right to a proper court hearing. Since that time, a small but developing and important stream of jurisprudence has arisen, providing additional shape to that basic position which seems to be following in fairly close parallel to the post-*Winterwerp* jurisprudence discussed above. Thus, persons who are the subject of guardianship applications must be notified of the guardianship process and hearings; they have a right to be heard and represented at them, at least when they are able to express an opinion; and the proceedings must be of a suitably judicial character.³² The person subject to guardianship must be able to challenge the guardianship at reasonable intervals, and must be given support in exercising that right.³³ Medical reports must be current, and directed to the question of whether guardianship is both a proportionate response to the situation and the least restrictive option available.³⁴

The two strands of jurisprudence noted thus far come together in a range of cases concerning the deprivation of liberty of people lacking capacity to consent to hospital and care home admissions, and people under guardianship.³⁵ The foundational case here is *HL v the United Kingdom*,³⁶ where a man with fairly profound autism was admitted informally to hospital and kept there for a number of months without the consent of his family or carers. He never tried to leave, but it was clear that had he done so, he would have been detained under the relevant mental health law. The court held

³¹ Application No. 31534/96, judgment of 5 July 1999, (2001) 31 EHRR 32.

³² See, e.g., *Shtukurov v Russia* Appn 44009/05, judgment 27 March 2008; *Stanev v Bulgaria* Application No. 36760/06, judgment 17 January 2012; *A. N. v. Lithuania*, Application No.7280/08, judgment of 31 August 2016; *DD v Lithuania*, Application No.13469/06, judgment of 14 May 2012; *MS v Croatia*, Application No.36337/10, judgment of 25 July 2013.

³³ See, e.g., *A. N. v. Lithuania*, Application No.17280/08, judgment of 31 August 2016.

³⁴ *Ibid.*

³⁵ For a discussion of this jurisprudence, see Bartlett, P. (2015), *Capacité juridique, limitation de liberté d’aller et venir et droits de l’homme*, 2015:6 *Revue de droit sanitaire et social*, 995-1006.

³⁶ Application No. 45508/99, judgment of 5 October 2004, (2005) 40 EHRR 32.

that, absent real consent to an admission, a deprivation of liberty sufficient to engage Article 5 would occur if an individual were under “effective and complete control” of the institutional administration. At that point, the protections discussed above flowing from *Winterwerp* and the subsequent jurisprudence come into effect.

HL, too, has started a line of jurisprudence. It applies not merely where there is no authority beyond the institution to authorise admission, but also where admission of an adult³⁷ is authorised by a guardian.³⁸ It applies not merely to hospitals, but to any location where the state detains people on the basis of mental incapacity or through a guardian, most notably social care homes and similar residential care facilities.³⁹

As to ensuring reasonable standards of detention, including standards of care, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) exercises a pivotal role, as it sets standards that apply across the region, and visits and reports on institutions in the member states.⁴⁰ These standards and reports have been tremendously influential, and are routinely cited by the ECtHR in its jurisprudence.

The ECtHR is also developing a jurisprudence that engages with standards of institutions with a sufficient nexus to the state, including any institution in which the state detains an individual. That is based upon Article 3 of the ECHR concerning the right to freedom from torture and inhuman or degrading treatment or punishment, Article 8 which protects the right to privacy and family life, and Article 2 which relates to the right to life (and provides rights to an investigation when deaths occur in custody). Article 3 cases tend to deal with overall standards. The ECtHR will find conditions to be “inhuman” where they cause actual bodily injury or intense physical or mental suffering. Conditions will be “degrading” when they arouse feelings of fear, anguish and inferiority

³⁷ Admission of children based on parental responsibility is different and complicated: see *Nielsen v Denmark*, Application No.10929/84, judgment of 28 November 1988, (A/144) (1989) 11 EHRR 175, and the considerable case law after it.

³⁸ See, e.g., *Shtukaturv v Russia* Application No.44009/05, judgment 27 March 2008; *Stanev v Bulgaria* Application No.36760/06, judgment 17 January 2012; *Červenka v. the Czech Republic*, Application No.62507/12, judgment of 13 January 2017.

³⁹ See, e.g., *Stanev v Bulgaria* Application No.36760/06, judgment 17 January 2012; *Červenka v. the Czech Republic*, Application No.62507/12, judgment of 13 January 2017; *Kędzior v. Poland*, Application No.45026/07, judgment of 16 January 2013.

⁴⁰ Regarding the standards, see European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2006), *The CPT Standards*, CPT/Inf/E (2002) 1 - Rev. 2006. Available online at <http://www.cpt.coe.int/en/docsstandards.htm>. Chapter V contains the standards relevant for psychiatric institutions. Regarding country visits and reports, see <http://www.cpt.coe.int/en/visits.htm>.

capable of humiliating and debasing the person subject to them.⁴¹ As an example, an Article 3 violation was found in the case of *Stanev v Bulgaria*⁴² where the complainant was detained in a social care home for a period of approximately seven years with insufficient and poor quality food, and inadequate heating. He was able to shower only once a week in an unhygienic and dilapidated bathroom, and the toilets, which were dangerous to access, were in an execrable state.⁴³

Often, the ECtHR cases are fact-specific, with an accretion of factors leading to the finding of an Article 3 violation, but there have been some instances where more specific failings appear sufficient in themselves. It has long been clear that conduct that is therapeutically necessary, taking into account prevalent legal and medical standards,⁴⁴ will not be considered in breach of Article 3, but recently the Court seems to have been more insistent that the argument for therapeutic necessity be made out. Thus, in *Bureš v. the Czech Republic*, the physical restraint of an individual for two hours was held to be sufficient in itself, absent a justification as to its necessity and proportionality by the state, to constitute an Article 3 violation.⁴⁵ Further, in *Bureš* and in *MS v Croatia*,⁴⁶ additional Article 3 violations were found where the relevant states did not adequately investigate the complaints of the individuals about their treatment. In *Gorobet v Moldova*, the provision of psychiatric treatment over forty-one days was similarly held to violate Article 3, in circumstances where the patient's condition did not constitute a risk to himself or others.⁴⁷ Thus, the required therapeutic necessity did not exist. The mode of administration may also be relevant: to be Article 3 compliant, compulsory treatment must be administered in the least invasive manner practicable.⁴⁸

In *X v Finland*, the Court relied on the right to private life contained in Article 8 of the ECHR, finding that psychiatric detention could not of itself justify compulsory psychiatric treatment: a separate set of standards and legal processes was required, with the possibility of judicial scrutiny where

⁴¹ See *Labia v Italy*, Application No.26772/95, judgment of 6 April 2000 (Grand Chamber); *Jalloh v Germany*, Application No. 54810/00, judgment of 11 July 2006 (Grand Chamber).

⁴² *Stanev v Bulgaria*, Application No.36760/06, judgment 17 January 2012.

⁴³ *Ibid*, para.197-213.

⁴⁴ See *Herczegfalvy v. Austria*, Application no 10533/83, judgment of 24 September 1992 (A/244), (1993) 15 EHRR 437.

⁴⁵ Application No.37679/08, judgment of 18 January 2013, para.58-106. See also *M.S. v Croatia (No.2)*, Application No.75450/12, judgment of 19 May 2015, para.86-112, on a similar set of facts.

⁴⁶ *MS v Croatia*, Application No.36337/10, judgment of 25 July 2013.

⁴⁷ Application No.30951/10, judgment of 11 January 2012.

⁴⁸ *Nevmerzhitsky v the Ukraine*, Application No.54825/00, judgment of 12 October 2005.

requested by a patient.⁴⁹ Whilst as yet at an early stage of development, this may prove significant, as Article 8(2) allows restrictions of rights based on a variety of factors including the prevention of disorder, public safety, the protection of health or morals and the protection of the rights and freedoms of others. The text of the Article makes clear, however, that these may only be relied on when “necessary in a democratic society”. Defining standards for compulsory treatment as an Article 8 issue, rather than an Article 3 one, may provide space for the development of jurisprudence as to what types of compulsion are appropriate in this context, if any, with proper consideration of what is necessary in a democratic society.

It will be clear from the preceding discussion that the ECtHR has now developed significant jurisprudence in the field of mental disability. The question for the remainder of this chapter is how well that integrates with the SDGs.

The SDGs and human rights

The SDGs overtly locate themselves in the context of human rights. The preamble states that they “seek to realize the human rights of all”. The introduction resolves “to protect human rights”,⁵⁰ and goes on to state:

“We envisage a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination; of respect for race, ethnicity and cultural diversity; and of equal opportunity permitting the full realization of human potential and contributing to shared prosperity.”⁵¹

It continues at paragraph 19:

“We reaffirm the importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We

⁴⁹ Application No.34806/04, judgment of 3 July 2012; see also *LM v Slovenia*, Application No.32863/05, judgment of 12 September 2014 on the same point. The Court notes that “a medical intervention in defiance of the subject’s will gives rise to an interference with respect for his or her private life, and in particular his or her right to physical integrity”, citing *Glass v the United Kingdom*, Application No.61827/00, judgment of 9 June 2004, para.70.

⁵⁰ SDG Introduction, para.3.

⁵¹ SDG, Introduction, para.8.

emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.”⁵²

The specific reference to disability is notable here. The SDGs did not particularly highlight disability issues in their specific goals and targets. Indeed, the only express references to mental disabilities in the goals and targets are a nonspecific target to “promote mental health and well-being” and, insofar as addictions are within the scope of mental disorders, to strengthen the prevention and treatment of substance abuse. Both of these are targets in SDG3 - the goal relating to ensuring healthy lives and promote well-being for all at all ages.⁵³ People with mental disabilities should, of course, benefit from many of the other SDGs, but only insofar as they are members of society with rights like any other member of society. There are no other specific goals or targets referring to mental disability. The fact that the human rights and non-discrimination provisions of the SDGs clearly include people with mental disabilities is thus particularly important: the full participation of and benefit to people with mental disabilities in the implementation of these generally applicable SDGs will be pivotal if the SDGs are to provide meaningful improvements for them.

The question in terms of disability law is what promotion of ‘human rights’ means. As noted in the introduction, the adoption of the CRPD in 2005 and its coming into effect two years later has raised fundamental challenges to the previous consensus on human rights for people with disabilities as a whole, and with mental disabilities in particular. Previously, at least as regards mental disability, international law had accepted that this was a class of people to whom different rules should apply: compulsion would sometimes be necessary, and the role of international law was to set appropriate bounds on the compulsion, and provide safeguards.⁵⁴ The CRPD instead starts from a perspective

⁵² SDG, The new Agenda, para.19. Para.10 of the Introduction further states that the SDGs are “guided by the purposes and principles” of the UN Charter, and “grounded in the Universal Declaration of Human Rights” and other human rights treaties. Further explicit references to the respect for human rights are contained in para.20 (in particular regarding gender parity), para.29 (regarding migrants and refugees) and para.35 (human rights as a condition precedent for sustainable development); and in SDG target 4.7 (knowledge of human rights as a target of education); and in para.74(e) (values of the review process for the SDGs).

⁵³ See SDG3, and specifically targets SDG3.4 and 3.5.

⁵⁴ See, e.g., United Nations, ‘Principles for the Protection of Persons with Mental Illness’, adopted by General Assembly resolution 46/119 of 17 December 1991 (the MI Principles); and at the Council of Europe level

of non-discrimination: the objective is to make people with disabilities full participants in society. Whilst particular efforts and programmes may be necessary to accomplish this (known as ‘reasonable accommodations’ under the Convention), these must be to support people with disabilities to enjoy the rights and freedoms in a like way to the rest of society.

This suggests that under the CRPD, there is no place for the use of disability as a condition precedent for compulsion or similar mechanisms of control: either the mechanisms apply to society as a whole, or they must not apply to people with disabilities. This is not limited to laws that refer to disability explicitly; mechanisms that impact differentially on people with disabilities are also discriminatory, and are inconsistent with the CRPD.

The definition of disability in the CRPD is open-ended, but expressly includes people with “physical, mental, intellectual or sensory impairments”.⁵⁵ There can be no doubt that people with intellectual disabilities or people with enduring mental illnesses or psychosocial disabilities are within the scope of this definition. This in turn means that the legal, social and administrative structures on which much of mental disability law and policy have been based in the modern era are not CRPD compliant. Indeed, the CRPD Committee has recently issued guidance stating that systems of detention based in whole or in part on disability do not comply with the CRPD,⁵⁶ and in its first General Comment on Article 12 takes the view that systems of law based on guardianship or incapacity are similarly non-compliant with the Convention, if based in whole or in part on mental disability.⁵⁷ Like the guidance, the General Comment also reiterates that both detention and

(Council of Europe Recommendation Rec(2004)10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorder (2004)), and Recommendation No.R (99) 4 of the Committee of Ministers to member states, on principles concerning the legal protection of incapable adults (1999).

⁵⁵ CRPD, Article 1.

⁵⁶ Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities. Adopted during the Committee’s 14th session, held in September 2015. This reflects and extends views contained in the Committee’s country reports dating back to 2011: see, e.g., the first six country reports of the Committee, CRPD/C/TUN/CO/1 (13 May 2011) para 14 (Tunisia); CRPD/C/ESP/CO/1 (19 October 2011), para.35-36 (Spain); CRPD/C/PER/CO/1 (9 May 2012), para.28-9 (Peru); CRPD/C/HUN/CO/1 (22 October 2012), para.27-28 (Hungary); CRPD/C/CHN/CO/1 (15 October 2012), para.25-26 (China); CRPD/C/ARG/CO/1 (8 October 2012), para.23-26 (Argentina).

⁵⁷ Committee on the Rights of Persons with Disabilities, General Comment 1(2014): Article 12: Equal Recognition before the law, CRPD/C/GC/1. The General Comment makes it clear that this applies not only to régimes of court-appointed and similar guardians based on categories of incapacity, but also to decision-specific laws relating to capacity that allow for decision-making based on best interests or similar criteria. Instead of laws that restrict or remove legal capacity based on mental disability, the Committee, reflecting Article 12(4) of the CRPD, proposes the provision of support for decision-making, allowing that the best

compulsory treatment violate of the CRPD. It insists that the compulsory régimes which were the foundation of traditional mental disability law must be dismantled entirely.

This chapter will not debate the merits of the Committee's position. Suffice it to say that whilst it has a basis both in the Convention itself and in the Convention's drafting processes, and whilst the CRPD Committee is the treaty body established by the Convention and thus has particular weight in the Convention's interpretation, the Committee view has been controversial.⁵⁸ Even at the UN level, there would appear to be conflicting views. General Comment No.35 of the Human Rights Committee (HRC) relating to liberty and security of the person (published ten months prior to General Comment No.1 on Article 12 of the CRPD) requires that states provide community services for people with mental disabilities, and that detention of persons with mental disability must be

interpretation of an individual's will and preferences may be used when the decision of that individual really cannot be ascertained, as for example when the individual is unconscious.

⁵⁸ A considerable literature has developed, both as regards the 'new paradigm' of the CRPD, and the Committee's approach to incapacity in particular. See chapter [[]] by Dainius Puras and Julie Hannah [[ADD REF LATER]], and chapter [[]] by Peter Lehmann [[ADD REF LATER]] for views supportive of the Committee's General Comment No.1 on Article 12 of the CRPD, and for a critique of the new paradigm, see chapter [[]] of this book by David Bilchitz [[ADD REF LATER]]. For further reading, see also, e.g., MacKay, D., (2006), The United Nations Convention on the Rights of Persons with Disabilities, *Syracuse J Int'l Law & Com* (2006-7) 34:323; Lawson, A. (2006), The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?, 34 *Syracuse J Int'l Law & Com* (2006-7) 563; Mégret, F. (2008), The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?, *Human Rights Quarterly*, 30:494; Bartlett, P. (2012), The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law, *Modern Law Review*, 75:752-778; Kayess, R., & French, P. (2008), Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities, *Human Rights Law Review* (8)1; Silecchia, L. (2013), The Convention on the Rights of Persons with Disabilities: Reflections on Four Flaws that Tarnish its Promise, *Journal of contemporary Health Law and Policy* (30). Available at: <http://scholarship.law.edu/jchlp/vol30/iss1/10>; Dhanda, A. (2008), Constructing a New Human Rights Lexicon: Convention on the Rights of Persons with Disabilities, *International Journal on Human Rights*, (5)43; Weller, P. (2011), The Convention on the Rights of Persons with Disabilities and the social model of health: new perspectives', *Journal of Mental Health Law*, (Spring) 74-83; Minkowitz, T. (2006), The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions', *Syracuse J Int'l Law & Com* 34 (2006-7) 405; Dhanda, A (2006), Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?, *Syracuse J Int'l Law & Com* (2006-7) 34:429-462; Glen, K. B. (2012), Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond, *Columbia Human Rights Law Review*, 44: 93; Flynn E., & Arstein-Kerslake, A. (2014), Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity, *International Journal of Law in Context* 10:81-104; Series, L. (2015), Relationships, autonomy and legal capacity: Mental capacity and support paradigms, *International Journal of Law and Psychiatry*, 40:80-91; Gooding, P. (2015), 'Navigating the 'Flashing Amber Lights' of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns, *Human Rights Law Review* 15:45-71; Dawson, J. (2015), A realistic approach to assessing mental health laws' compliance with the UNCRPD, *International Journal of Law and Psychiatry*, 40:70-79; Peay, J. (2015), Mental incapacity and criminal liability: Redrawing the fault lines?, *International Journal of Law and Psychiatry*, 40:25-35; Davidson, L. (2017). Capacity to consent to or refuse psychiatric treatment: An analysis of South African and British law, *South African Journal of Human Rights*, Vol.32, Issue 3, 457-489, at 461-464.

proportionate and a last resort. It also requires that the wishes of the individual being detained are taken into account. However, despite its insistence that there are appropriate safeguards, it still allows for mental disability to be a factor in detention.⁵⁹ The HRC General Comment may thus represent the best of the ‘old’ paradigm, where compulsion could be based at least in part on disability, but it remains at odds with the CRPD Committee position.

Which paradigm of human rights for people with mental disability do the SDGs support? They do not say expressly. Nonetheless, they return repeatedly to the importance of equality, empowerment, and non-discrimination as regards gender.⁶⁰ Adopting a similar approach to the human rights of people with disabilities would suggest that the SDGs are broadly in harmony with the new paradigm as proposed by the CRPD.

That poses problems for the ECHR. As will be clear from the discussion above, the ECtHR jurisprudence flows from the older paradigm of human rights and mental disability: it is very much about controlling arbitrariness in the exercise of compulsory powers. There is no suggestion that the existence of those powers is necessarily problematic. Indeed, Article 5(4) of the ECHR itself expressly allows the detention of “persons of unsound mind”; it is difficult to see how the sort of fundamental challenge to detention contained in the CRPD Committee guidance can be achieved, given that drafting.

This is reflected in the jurisprudence itself. The ECtHR now routinely notes relevant Articles of the CRPD in its judgments, and the CRPD does seem to be being used as a marker that disability rights has come of age, and attained a level of gravitas in international law. It is less clear how directly it has affected the Court’s decision-making. The case for influence is strongest in the case of *Hiller v Austria*,⁶¹ where a detained psychiatric patient, MK, was given leave to wander the grounds of the psychiatric hospital, and while doing so escaped and committed suicide. His family alleged a violation of the right to life under Article 2 of the ECHR. In the section of the judgment considering the international legal context, the majority decision cites the CRPD, as well as the view of the UN High Commissioner for Human Rights that compliance with the CRPD requires the absolute

⁵⁹ UN Human Rights Committee, General Comment no.35: Article 9 (liberty and security of person), CCPR/C/GC/35 (16 December 2014), para.19. Although it pre-dates the CRPD Guidelines by ten months, it does not pre-date the comments of the CRPD Committee in its country reports, noted above.

⁶⁰ See Preamble, Introduction para.3, The New Agenda, paras.20, 24, 27, 35, 37, targets 1.2, 1.4, 2.2, 2.3, 4.3, 4.6, 6.2, 8.5, 8.8, 11.2, 11.7, 13.b, and all of SDG5.

⁶¹ Application No.1967/14, judgment of 22 November 2016.

prohibition of detention on the basis of disability, and the abolition of laws authorising the detention of people with mental disabilities on the basis of dangerousness to themselves or others.⁶² The majority found no violation of Article 2, firstly on the basis that on the facts, the hospital had no reason to expect that MK would commit suicide. Whilst that would have been sufficient to decide the case, the Court refers to the CRPD material as evidence of the modern approach in psychiatric treatment giving patients the greatest possible personal freedom, with a view to reintegration into society. The judgment noted its consonance with the Court's own jurisprudence discussed above that any encroachment on the right to liberty must be the least restrictive possible.⁶³ However, this falls considerably short of the abolition of detention based on mental disability as advocated in the High Commissioner's report. Whilst the Court's approach in this regard helpfully buttresses the broadly progressive approach it had been developing for some time, it does not challenge the core of compulsion in mental disability law. Further, the CRPD in *Hiller* is cited not for its specific provisions, but for the general principle favouring as much freedom as possible being granted to people with mental disabilities in hospitals and similar settings. The separate decision of Judge Sajó expressly identifies the CRPD and the High Commissioner's statement as the basis of the majority's decision on the point, but the majority's position could have been (and indeed was) supported by evidence well beyond the CRPD, and is consistent with ECtHR jurisprudence going back many years. As such, it is at best unclear whether the CRPD brought much to the decision at all.

If one views the old paradigm as regressive, discriminatory, and a perpetuation of the mechanisms that have stood in the way of real advances in disability rights over the last few centuries, the ECHR becomes part of the human rights problem, rather than part of the solution. Certainly, the text of Article 5(1)(e), which places "persons of unsound mind" in the same list as "alcoholics", "drug addicts" and "vagrants", does little to inspire confidence that the ECHR will change fundamental attitudes and challenge stigma. Furthermore, however much the ECtHR tries to ensure that the simple existence of a mental disorder is insufficient to warrant detention and that detention may occur only when it is a proportionate response to the actual mental condition of the individual, mental disability remains a *sine qua non* for the detention. People with mental disabilities remain a group to which special rules apply, and the discriminatory approach that has resulted in the loss of

⁶² *Hiller*, para.36.

⁶³ *Ibid*, para.54.

their fundamental human rights is perpetuated by the ECHR which is intended to protect the human rights of all. These are strong and serious arguments that cannot be ignored.

Whatever the merits of that approach, it is not yet reflected in international practice. Across the world, people with mental disabilities currently end up in institutions, often highly controlling institutions, that they often do not wish to be in: in any meaningful sense, they are deprived of liberty there. Across the world, people with mental disabilities are deprived of the right to make individual decisions, categories of decisions, or all decisions, sometimes simply because they have a mental disability and sometimes because there is some evidence, whether strong or weak, of some form of mental incapacity. In much of the world, these interventions are governed by legal mechanisms of varying degrees of effectiveness. Sometimes, however, it would seem that they flow from practice, with no questions in relation to legal justification, standards and safeguards being asked. However important the new human rights paradigm may be, and however much the new paradigm should be promoted, the existing, non-compliant structures will be around for many years to come. For the people enmeshed in those structures, the substantive and procedural protections of the old paradigm may well still bring considerable benefits. However much the new paradigm should be promoted, it seems likely that for some time the old paradigm may be of considerable importance.

That suggests that both the old and the new paradigms may be needed, at least for a transitional period. The difficulty of their theoretical inconsistency makes coherent policy-making extremely difficult. This is typical of a wider array of challenges flowing from the implementation of the CRPD. However desirable the approach of the CRPD may be, implementation poses significant difficulties related not merely to economic factors, but also political will and legal structures.⁶⁴ The way forward in this regard may be difficult, but if the SDGs are to be taken seriously in their claim to be part of a project of promotion and realisation of human rights, the implementers of the SDGs must pick their way through this rather difficult landscape.

⁶⁴ For a longer discussion of these implementation issues, see Bartlett, P. (2013), *Implementing a Paradigm Shift: Implementing the Convention on the Rights of Persons with Disabilities in the Context of Mental Disability Law*, in Center for Human Rights and Humanitarian Law (American University Washington College of Law); (2014) *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report* (Washington: Centre for Human Rights and Humanitarian Law, American University Washington College of Law) 169-180. Available online at http://antitorture.org/wp-content/uploads/2014/03/PDF_Torture_in_Healthcare_Publication.pdf.

Social and economic rights in the context of civil and political rights

The previous section of this chapter discussed overall models of human rights, and the tensions – perhaps irresolvable – in relation to the approach to human rights. Moving down a level from the overall paradigmatic context of human rights discussed in the previous section, a wide array of human rights are contained in the SDGs which have long been understood as important by disability rights advocates, regardless of the paradigm to which they adhere. Particularly clear examples, noted in the introduction above, include rights to health, gender equality, employment, education,⁶⁵ access to justice, and the development of inclusive societies. However disability rights advocates situate themselves in the broader debates about overall approaches to human rights, these objectives are shared. The question for the current section is how far they can be achieved through the ECHR. As the discussion of the ECtHR's jurisprudence above makes clear, the ECHR is designed to protect civil and political rights. The disability-related objectives of the SDGs are economic and social rights. The question, therefore, is how far the social and economic rights of the SDGs may be enforced collaterally, through civil and political rights.

That in turn is a subject that has generated its own literature.⁶⁶ This is an area where the law is developing, and what were clear lines in the past are not necessarily so clear now. At the same time, the ECHR remains a document protecting civil and political rights: in the end, it cannot escape its own textuality. Certainly, for people detained by the state in institutions, the ECHR does require standards to be met. For example, as noted above, detention must occur in an appropriate place – a “therapeutic environment”, to use the language of *Aerts v Belgium*.⁶⁷ For anyone detained, suitable treatment for physical or mental disabilities or illnesses must be available.⁶⁸ This does provide some interface with the promotion of mental health and well-being, an aim contained as part of SDG3 (ensuring healthy lives and promoting well-being for all at all ages).⁶⁹ The requirement to meet standards is not restricted to the provision of medical services, however. It extends to the

⁶⁵ The right to education is an exception in this discussion: whilst it is generally considered an economic and social right, it is also contained in Protocol 1, Article 2 of the ECHR, and will be discussed further below.

⁶⁶ See, e.g., Mowbray, A. (2004), *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart); Koch, I. E. (2009), *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leuven, Brill); Starmer, K. (1999), *European Human Rights Law* (London: Legal Action Group) chapter 5.

⁶⁷ *Op cit.*, nt.29.

⁶⁸ See, e.g., *Claes v. Belgium*, Application No.43418/09, judgment of 10 April 2013; *Vasenin v. Russia*, Application No.48023/06, judgment of 17 October 2016; *Murray v. The Netherlands*, Application No.10511/10, judgment of 26 April 2016 (Grand Chamber).

⁶⁹ SDG3, target 3.4.

conditions of detention more generally, including, for example, appropriate sanitary conditions, adequate heating, the availability of suitable activities, the protection of life and protection from violence and abuse at the hands either of others housed at the institution or staff of the institution.⁷⁰ Whether inadequate conditions will accrete sufficiently to become violations of either Article 3 or 5 of the ECHR will depend on the facts of the case. Whilst the ECtHR routinely cites the CPT Standards reports of CPT site visits to buttress the evidence before the Court,⁷¹ it cannot be said that violations of the CPT standards are always sufficient to found an ECHR violation. Nonetheless, the requirement that the state meets standards in its provision of care creates positive obligations on the state that grey the boundary between civil and political, as opposed to economic and social rights: in this context, they become the opposite sides of the same coin.

Positive duties under the ECHR are at their clearest when the individual is detained by the state.⁷² In detention environments, the state has taken responsibility for the individual, and it can and should be deemed to be aware of what occurs in its institutions, as detainees are acknowledged as particularly vulnerable in these situations. Whilst the imposition of certain standards of care and positive obligations is obviously important and beneficial to those in these environments, it also runs directly into the tensions noted in the previous section: positive rights and obligations (including the right to health, for example) are at their strongest when the individual is detained in an institution; yet it is precisely such detention that, for coherent reasons, the CRPD seeks to abolish.

Whilst the positive duties of states are at their strongest if the individual is detained, some rights relevant to the SDGs do extend to a community environment. For example, the state is required to establish an appropriate system of criminal law to protect its citizens, and it must make reasonable efforts to protect individuals who it has reason to believe are being subjected to torture, inhuman or degrading punishment or treatment, even when such maltreatment is not at the hands of the

⁷⁰ See, e.g., *ZH v. Hungary* Application No.28973/11 (2014); *Stanev v Bulgaria*, Application No.36760/06, judgment 17 January 2012.

⁷¹ From the recent jurisprudence of the Court, see e.g., *Munjaz v. the United Kingdom*, Application No.2913/06, judgment of 17 October 2012; *Murray v. The Netherlands*, Application No.10511/10, judgment of 26 April 2016 (Grand Chamber); *Akopyan v the Ukraine*, Application No.12317/06, judgment of 5 September 2014; *MS v Croatia (No.2)*, Application No.75450/12, judgment of 19 May 2015; *M v The Ukraine*, Application No.2452/04, judgment of 19 July 2012; *Mihailovs v Latvia*, Application No.35939/10, judgment of 22 April 2013.

⁷² The enhanced duty of states in these circumstances is sometimes referred to as its 'operational' duty, and is based on the case of *Osman v the United Kingdom*, Application No.87/1997/871/1083, judgment of 28 October 1998, (2000) 29 EHRR 245.

state. For example, a state was held to violate Article 3 when it provided insufficient protection to a mother and her developmentally disabled daughter, following the mother's credible complaints of harassment by local children.⁷³ The ECtHR has taken the view that the right to respect for private life in Article 8 includes "a person's physical and psychological integrity",⁷⁴ and that this may impose positive obligations on states to provide support for individuals. For example, in *Marzari v Italy*, the applicant had a physical disability that required a certain type of accommodation, and the ECtHR stated:

"[A]lthough Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual."⁷⁵

The engagement of any ECHR Article, including Articles 3 and 8, carries with it procedural rights under Article 6, and so the individual has a wide right to a fair, timely, public and impartial hearing. Sadly, this line of jurisprudence has not translated into results for people with either mental or physical disabilities. At present, the case law in this area is an ongoing litany of 'sorry, not this time.'⁷⁶ The individual can thus require the state to explain itself, but that is of limited benefit if the state is not obliged to provide the services at issue.

The weak enforcement of positive obligations to provide services applies not merely for people in the community; it also applies on the borderline between institutional and community settings. In

⁷³ *Đorđević v. Croatia*, Application No. 41526/10, judgment of 24 October 2012.

⁷⁴ *Botta v Italy*, Application No.21439/93, judgment of 24 February 1998, (1998) 26 EHRR 241.

⁷⁵ *Marzari v Italy*, Application No.36448/97, decision of 4 May 1999, CD 179-80.

⁷⁶ See *Marzari* (housing), *Pentiacova v Moldova*, Application No.14462/03, decision of 4 January 2005 (in relation to provision of kidney treatment); *Tchaghiaschvili v Georgia*, Application No.19312/07, decision of 2 September 2014 (regarding nursing care, prosthesis and other care costs following a disabling accident); *Molka v Poland*, Application No.56550/00, decision of 11 April 2006 (with regard to the access of a person in wheelchair to a polling booth at an election); *Sentges v the Netherlands*, Application No.27677/02, decision of 8 July 2003 (concerning the availability of a prosthetic robotic aid for a wheelchair); *McDonald v the United Kingdom*, Application No.4241/12, judgment of 20 August 2014 (in relation to the provision of toileting assistance at night), *Clunis v the United Kingdom*, Application No.45049/98, decision of 11 September 2001 (with respect to the failure to intervene to ensure the provision of psychiatric treatment in a community setting for psychosis).

Kolanis v the United Kingdom,⁷⁷ for example, a person detained in a high secure forensic psychiatric facility ‘successfully’ challenged her continued detention before a tribunal on the basis that her disorder was no longer of a nature or degree that warranted detention. The tribunal held that she could be released into the community to live with her family, if continuing psychiatric oversight was provided in the community. Eleven months later, she was still detained, as no psychiatrist had been found who was prepared to offer the community services to her. Notwithstanding the jurisprudence to the effect that for compliance with Article 5(4), the domestic court must be able to ensure compliance with its decisions,⁷⁸ the court held that where reasonable efforts had been made, albeit unsuccessfully, to provide the service, the ongoing detention was not a violation of Article 5.

Similarly, there is as yet no suggestion in the ECHR jurisprudence that the Court’s requirement that detention must be the least restrictive option available would require the state to develop the community services that would make the detention unnecessary. In this the ECtHR jurisprudence may be juxtaposed with the case of *Olmstead v LC*⁷⁹ in the American Supreme Court in which it was held that unjustified institutionalisation was discriminatory, both because it deprived detainees of participation in community life, and because it severely limited the daily life activities of detainees. Persons with mental disorders were required to enter hospital for medical services that persons with physical disorders would receive in the community. By framing the matter in a discrimination context, the Court was able to fashion the remedy in terms of reasonable accommodation: American state governments would be required to provide community services only where such provision was not disproportionate to the state’s entire mental health budget. Whilst this did not oblige states to close their psychiatric institutions, effectively it did require states to develop community programmes. Perhaps notably, the Supreme Court did not fundamentally challenge medical authority, as the case applied only to individuals whose doctors agreed were suitable for community treatment.

In principle, an *Olmstead* argument is possible under the ECHR. Article 14 provides that the rights and freedoms of the ECHR are to be enjoyed without discrimination, and since the decision in *Glor v*

⁷⁷ Application No.517/02, judgment of 21 June 2005; (2006) 42 EHRR 12. For a similar case relating to delayed release, see *Johnson v the United Kingdom*, Application No.22520/93, judgment of 24 October 1997, (1997) 27 EHRR 296, where the delay between the applicant’s actual release and the initial court order that detention was unnecessary if suitable community facilities were made available was three and a half years.

⁷⁸ See, e.g., *X v the United Kingdom*, Application No.7215/75, judgment of 5 November 1981, (1981) 4 EHRR 188.

⁷⁹ 527 US 581 (1999).

Switzerland in 2011, this Article has been taken to preclude discrimination on the basis of disability.⁸⁰ Whilst this applies only where an ECHR right or freedom is at issue, that will often be the case in an *Olmstead* situation, since the restrictions on psychiatric patients in this situation will often be sufficient to constitute deprivations of liberty under Article 5, and will always be so if formal legal detention powers are used. It must therefore be implemented in a non-discriminatory fashion, and following *Olmstead*, this is doubtful if hospital admission is required for care and treatment of mental disabilities, but not for physical disabilities. The key building blocks for an *Olmstead* challenge are thus in place.

Whether the Court will be prepared to take this step is not obvious. Even though the requirements on states to develop meaningful community services would be limited by a 'reasonableness' criterion, such a decision would be a significant step into the enforcement of social rights by the Court. There would be fiscal ramifications in terms of the allocation of resources within states that might well be resisted vehemently by those states, at a time when the protection and advancement of human rights generally appears at best unfashionable.⁸¹ That, of course, misses the human side of the argument. In many countries within the Council of Europe, widespread and long-term institutionalisation is still the norm, and even objectively 'good' institutions have detrimental effects. The environments are controlling, disempowering, stigmatising (including self-stigmatising) and often experienced by detainees as violative. That is assuming it to be a 'good' institution, without the bullying, compulsory medication (often for sedation), poor conditions, lack of programmes (be they therapeutic educational, or occupational), little nutritious food, and lack of stimulating activity that characterise so many other institutions. People may be admitted to them

⁸⁰ *Glor v. Switzerland*, Application No.13444/04, judgment of 6 November 2011. Article 14 of the ECHR protects individuals from discrimination only in the enjoyment of the rights and freedoms of the ECHR; it is not a general prohibition of discrimination in domestic law beyond ECHR rights. The Article protects against discrimination "on any ground such as..." sex, race, colour, and a range of other factors, "or other status". The *Glor* decision holds that disability is not by implication included in the list of prohibited factors.

⁸¹ See, eg., Martha Spurrier, 'Theresa May has said she'll rip up human rights. We should all be afraid' *The Guardian*, 27 June 2017, <https://www.theguardian.com/commentisfree/2017/jun/07/theresa-may-human-rights-european-charter-terrorists> (regarding the United Kingdom); 'Polish PM angers human rights campaigners with plans to shake up NGOs' *The Guardian*, 28 November 2016, <https://www.theguardian.com/world/2016/nov/28/polish-pm-beata-szydoa-angers-human-rights-campaigners-ngos>; 'The Latest: Poland prime minister defends courts legislation', *Washington Post* 20 July 2017 https://www.washingtonpost.com/...polish.../a7bfb95a-6d4c-11e7-abbca53480672286_... (regarding Poland); Human Rights Watch 'France: Presidential Run-Off Offers Choice on Rights', 1 May 2017, <https://www.hrw.org/news/2017/05/01/france-presidential-run-offers-choice-rights> (regarding France); 'EU Parliament demands action on Hungary human rights', *Aljazeera*, 17 May 2017, <http://www.aljazeera.com/news/2017/05/eu-parliament-demands-action-hungary-rule-law-170517160254027.html>. Web sites in this cite last accessed 26 July 2017.

as infants or children, transferred to an adult institution on attaining their majority, and subsequently transferred to an institution for the elderly if they live that long. If an individual could have been somewhere else, and had a different life supported by good community services, it is surely a fundamental dereliction of human rights to deny him or her that different life. How far the ECtHR is prepared to go down this road remains to be seen, but there is little evidence of movement in that direction at this time.⁸²

The right to education warrants a brief discussion, because, unlike other economic and social rights, it is contained expressly in the ECHR. Article 2 of Protocol 1 of the ECHR provides a right to education, and requires states to “respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. The Article appears to have been subject to little litigation in the ECtHR. Certainly, it is clear that the education system must be administered in a fair and non-discriminatory way, and to that end parents have the right to challenge decisions about the placement of their children.⁸³

The Court has said little regarding the actual scope of the right to education. It does hold that the design and planning of curriculum is a matter for individual states.⁸⁴ The case law of the European Commission of Human Rights,⁸⁵ now fairly old, similarly appears deferential to states in relation to which school a student should attend, provided that the state has considered parental opinions and has a rational reason for its view.⁸⁶

“Education” under Article 2 of Protocol 1 has been defined by the Court as “the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the

⁸² *Olmstead* was cited to the ECtHR in *Červenka v. the Czech Republic*, Application No.62507/12, judgment of 13 January 2017, at para.100. The Court decided the case on other grounds, making some helpful comments about the risk of arbitrariness when individuals are admitted to social care homes by guardians, but did not address the *Olmstead* issues.

⁸³ *DH v the Czech Republic*, Application No.57325/00, judgment of 13 November 2007; *Horváth v Hungary*, application no 11146/11, judgment of 29 January 2013, (2013) 57 EHRR 31, both concerning the inappropriate placement of Roma children in schools for students with mental disabilities.

⁸⁴ *Kjeldsen, Bus Madsen and Pedersen v Denmark* (A/23), judgment of 7 December 1976.

⁸⁵ Until 1998, the European Commission of Human Rights was a pre-trial body that determined admissibility of cases to the ECtHR and, if deemed admissible, provided for consideration of the Court as to the merits of the case.

⁸⁶ *SP v the United Kingdom*, Application No.28915/95, decision of 17 January 1997; *Northcott v the United Kingdom*, Application No.13884/88, decision of 5 May 1989; *Klerks v the Netherlands*, Application No.25212/94, decision of 4 July 1995 (with regard to the education of a deaf child).

young”, where “teaching” is “the transmission of knowledge and to intellectual development”.⁸⁷ It would seem that considerable deference will be paid to states on the content of education; but are there minimum standards to which education must comply under Protocol 1, in the same way that there are minimum standards for institutions under Article 3? In many countries within the Council of Europe, the standard of education provided to people with mental disabilities is significantly below the standard offered to the general population. Sometimes, it seems that little actual education is provided at all, with programmes merely filling time rather than fulfilling educational objectives. The existing case law concerning curriculum would appear to be based around specific subjects that were controversial, such as sex education. The question of whether a system adequately meets fundamental educational objectives at all does not appear to have been asked of the Court.

The CRPD provides an express right to be included in the general education system,⁸⁸ rather than to be taught in segregated classes or ‘special’ schools. Whether that right will be read into Protocol 1 is unclear. There is old case law from the European Commission of Human Rights which holds no violation of Protocol 1 when parents object to placement of their child in a special school rather than in a general classroom, provided that such placement was preceded by an appropriate consideration of the situation by the state.⁸⁹ More recently, in *DH v the Czech Republic*⁹⁰ and also *Horváth v Hungary*,⁹¹ the ECtHR failed to criticise the existence of ‘special’ schools *per se*, focusing rather on the discriminatory enrolment of Roma children in those schools. That said, the Court was not asked whether the existence of the schools was compliant with modern human rights standards. In addition to the above cases, which were about classifying Roma children as requiring ‘special’ education, the Court has considered segregated education based on Roma ethnicity. *Oršuš v. Croatia*⁹² concerned the placement of Roma children in separate classes, apparently based on their lack of knowledge of the Croatian language. The Court held that such differential treatment of a specific ethnic group, given the objection of the children’s parents, even absent discriminatory intent on the part of the state, engaged Article 14 of the ECHR. For Convention compliance, the differential treatment required objective justification by the state as to why the policy and its

⁸⁷ *Campbell and Cosans v the United Kingdom* (A/48), judgment of 25 February 1982.

⁸⁸ CRPD, Article 24(2)(a).

⁸⁹ See, e.g., *Connolly v the United Kingdom* Application No.14138/88, decision of 2 October 1989; *PD v the United Kingdom*, Application No.141/37/88, decision of 2 October 1989; *J and BL v the United Kingdom*, Application No.14136/88, decision of 2 October 1989.

⁹⁰ *DH v the Czech Republic*, Application No.57325/00, judgment of 13 November 2007,

⁹¹ *Horváth v Hungary*, Application No.11146/11, judgment of 29 January 2013, (2013) 57 EHRR 31.

⁹² Application No.15766/03, judgment of 16 March 2010 (Grand Chamber).

implementation were in pursuit of a legitimate aim, and were appropriate, necessary and proportionate ways to achieve that aim.⁹³ If that is the case for ethnic differentiation, consistency would require it also to be the case for differentiation based on disability. Thus, it seems that in the ECtHR a finding of a breach of Article 14 arising from segregated schooling may perhaps remain open, depending on the facts of individual cases.

However the Court approaches the debate between segregated and integrated education, the question of standards remains. It does seem that, in many countries, the education provided to people with mental disabilities is of a lower quality than that provided to the rest of the population. That raises the question of discrimination under Article 14. There are of course issues of evidence and proof to be considered. In *Oršuš*,⁹⁴ parents advanced the claim that their children's placement in a specific school was discriminatory because of the substantially reduced curriculum relative to the other schools in the vicinity. The Court held that the factual basis for that claim was not made out in the case, and therefore dismissed the application on this point, but did not foreclose the argument that in such an event, a violation of Protocol 1 might be found justified. The argument would be more complex for students with mental disabilities, where some variation in curriculum might well be justified, if not expected as a reasonable accommodation. Notwithstanding complications of evidence and proof, it does seem that the Court will not be able to avoid answering questions of discrimination in this area for long. If, following *DH* and *Horváth*, it is unacceptable to give Roma children substandard education based on their ethnicity, why could it be acceptable to give substandard education to people based on their disabilities? It remains to be seen how the Court will be address this issue.

The way forward?

As noted in this chapter's introduction, the SDGs arrive at an interesting time, and how far the rights acquired under the ECHR will be relevant to buttressing and furthering the SDGs is not entirely clear. Certainly, the ECtHR can be relied on to continue to protect the procedural rights of people with disabilities in institutions. The ECtHR's increasing insistence in recent years that a sound and robust evidential base be provided for the detention of those with mental disabilities is

⁹³ Para.155. In this case, the justifications raised by the state were held insufficient, and a violation of Article 14 was found.

⁹⁴ Application No.15766/03, judgment of 17 July 2008. The case was further considered by the Grand Chamber on the question of discrimination by segregating Roma students, but not on the immediate point of whether differential curriculum could found discrimination.

encouraging, and may provide protections beyond the mere procedural and into the more substantive. The SDGs are based on the importance of human rights, and insofar as this sort of 'old paradigm' approach is what is envisaged by the SDGs, the ECHR has much to offer, at least in the realm of civil and political rights.

The SDGs are not primarily about civil and political rights, however. In the last twenty years the ECtHR has begun to articulate more positive obligations on states, and some of these will chime more closely with the economic, social and cultural rights of particular relevance to the SDGs. These positive obligations seem to be under ongoing development, and leave some scope for optimism that there may be significant and meaningful intersection with the SDGs. Nonetheless, that optimism must be subject to circumspection. The positive obligations tend to bite when a violation of the applicant's civil or political rights occurs; the positive obligation is to remedy that breach or, perhaps more importantly, to have ongoing processes to make sure such breaches do not happen in the first place. Such positive obligations are obviously beneficial and desirable, but in terms of enforcing and promoting social and economic rights they are very limited. As discussed above, they apply primarily – indeed, at least as regards mental disability, almost exclusively – to people who are detained in institutional settings. That leaves a huge question unresolved: what about everyone else? The current jurisprudence suggests that the role of the ECHR in providing social and economic rights for people with mental disabilities in community settings may well be very limited.

The arrival of the CRPD throws a new factor into the equation. For now, it seems at best doubtful that the detail of the CRPD is having much effect on how the ECtHR is making decisions. Yet the CRPD has provided a helpful marker that disability rights have come of age, and must be taken seriously. That may be having a synergistic effect on the Court (although it was starting to take disability issues more seriously even before the adoption of the CRPD). Whether it gives the ECtHR the impetus to press more robustly for the provision of services where Articles of the ECHR are engaged – the provision of community services to avoid the need for ongoing psychiatric detention, for example, or giving real substance to the right to education in Protocol 1 – remains to be seen.