

**USING STRATEGIC LITIGATION TO RECOGNISE AND
ENFORCE THE RIGHTS OF PEOPLE WITH INTELLECTUAL
IMPAIRMENTS IN INSTITUTIONAL RESIDENTIAL SETTINGS:
WHAT IS THE POTENTIAL AND HOW CAN IT BE ACHIEVED IN
EUROPEAN COUNTRIES?**

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The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

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Acknowledgements

My experience as the sister of a person with intellectual impairments has motivated me to work and study in the field of disability and human rights. As a result, I have developed various research projects for leading supranational and national disability and human rights organisations, around topics including discrimination, accessibility, and advocacy. In 2004, I began to work for a well-known supranational disability and human rights organisation, on a piece of landmark research into the human rights of people with mental disabilities living in institutional residential settings in Argentina. As part of the fieldwork for this research in Argentina, I visited a number of institutional residential settings in the country, and witnessed how many residents in these settings were suffering egregious violations of their human rights. In particular, this work experience marked me deeply. Some years later, I began my PhD at the University of Leeds, being clear about my decision to develop academic research focused on the human rights of people with intellectual impairments living in institutional residential settings.

This thesis is therefore the result of a personal journey, which would not have been possible without the invaluable help of various persons. In the first place, my sister has been my inspiration at every stage of this thesis, and I thank her for this. Without being exhaustive, I am also grateful to the following individuals, who in various ways provided me with crucial help for the completion of this thesis. My supervisors, Professors Anna Lawson and Mark Priestley, provided me with outstanding guidance and overall support throughout my studies. Various professionals, who agreed to be interviewed as participants for this research, contributed to this thesis with their vital voices. Due to confidentiality issues and agreements made with these professionals regarding their participation in this study, I cannot name them here. Those who assisted me whilst searching for research participants (particularly, Dr. Oliver Lewis, Victoria Butler-Cole, Stefan Trommel, Azahara Bustos, Raúl Navarro Membrilla, Dr. Clarisa Ramos Feijóo, and Eduardo Díaz) generously shared their professional contacts with me.

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Abstract

This thesis addresses strategic litigation with a focus on tackling human rights violations occurring in institutional residential settings in European countries for people with intellectual impairments. The thesis aims to determine the potential value of strategic litigation as a means to recognise and enforce the rights of this group, as well as to explore how this potential value can be realised.

The thesis adopts socio-legal research empirical methods, by exploring the experiences of key stakeholders involved with strategic litigation in the field of disability (including intellectual impairments) and human rights. Legal documentary analyses have been performed to establish the context for this research, at national (England, Ireland and Spain), European (Council of Europe -CoE- and European Union -EU-), as well as global levels. Qualitative interviews have been conducted with supranational and national disability and human rights organisations, and with lawyers working in the three national legal systems.

The findings reveal diverse factors that contribute to shaping the current state of affairs with regard to relevant national and supranational strategic litigation. People with intellectual impairments in institutional residential settings in European countries face several barriers to accessing justice and strategic litigation. Strategic litigators have to overcome the major barrier of making contact with this group. Strategic litigators experience further barriers to bringing strategic cases (for example, a lack of human resources). The findings include suggestions for overcoming and/or reducing some of these barriers.

In the area of access to justice and strategic litigation, for many people who are part of the group under analysis, there is either no, or poor, recognition. Strategic litigation has potential for tackling human rights violations happening in institutional residential settings. However, certain circumstances need to be met in order for this to happen. This thesis suggests different options for key

stakeholders to be able to work towards overcoming the aforementioned challenges, thereby making it possible for strategic litigation to achieve its potential.

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Chapter 1

RESEARCH QUESTIONS AND KEY CONCEPTS

1.1 Introduction

The purpose of this introductory chapter is to set out the research questions, analyse the key concepts, and present the structure of the thesis. The first section of the chapter will be devoted to establishing the thesis' main and subsidiary research questions. In particular, this section will offer contextual information, and an explanation of why the subject of this thesis is topical, or in other words worth reading. This first section of the chapter then seeks to argue why research on strategic litigation and people with intellectual impairments in institutional residential settings in European countries is needed and original. The second section of the chapter will explore various key concepts that are discussed in the thesis. Firstly, it will analyse the concept of people with intellectual impairments in institutional residential settings in European countries, in the context of disablement. Secondly, it will explore the concept of the recognition and enforcement of the human rights of people with intellectual impairments, in institutional residential settings in European countries. Thirdly, the chapter will attempt to offer clarification of the concept of strategic litigation, including its origins and key features. The final section of the chapter will outline the structure of the thesis, explaining how the remaining chapters will progress and develop the thesis' argument.

1.2 Research question, context and contribution of the research

1.2.1 Research question

This thesis aims to explore the potential of strategic litigation as a means to recognise and enforce the human rights of people with intellectual impairments, in institutional residential settings in European countries. With the purpose of grasping this potential, the thesis will look at some of the challenges of using strategic litigation for this group. It will also explore some of the ways of enhancing the employment of relevant strategic litigation. The main research question that will guide this thesis can therefore be phrased as follows: what is the potential of strategic litigation to recognise and enforce the rights of people with intellectual impairments in institutional residential settings, and how can this potential be achieved in European countries?

To achieve this thesis' overall purpose, the previous main research question will be expanded with specific research questions: what are the human rights of people with intellectual impairments in institutional residential settings in European countries, and how have they been violated? How is access to justice experienced by people with intellectual impairments, in institutional residential settings in European countries? How has strategic litigation been employed to recognise and enforce the rights of people with intellectual impairments living in institutional residential settings in European countries, in national, European and global instances? What are the barriers to using strategic litigation? And how can the barriers to strategic litigation be overcome and/or reduced and their impact maximised?

1.2.2 Context and contribution of the research

Although comparative and comprehensive data about persons with intellectual impairments who live in institutional residential settings in Europe is rather scarce,

one report estimates that in Europe there are “nearly 1.2 million people living in residential establishments for people with disabilities in 25 countries”.¹ This document additionally affirms that persons with intellectual impairments formed the biggest group identified “for whom approximately 265000 places were provided”.² There is ample evidence that people with intellectual impairments in Europe remain disproportionately likely to be placed in institutional residential settings, which, in itself, strongly suggests human rights violations (contrary to Articles 14 and 19 of the United Nations Convention on the Rights of Persons with Disabilities -CRPD).³ There is also evidence that, once inside such institutions, people continue to experience a wide variety of human rights violations.⁴ Leading organisations such as Mental Disability Advocacy Centre (MDAC) and Disability Rights International (DRI)⁵ have been working endlessly to expose these human rights violations, which include such issues as “arbitrary detention, guardianship, forced psychiatric medication, denial of inclusive education, and abuse, neglect and death”.⁶ People with intellectual impairments

¹ The report clarifies that these 25 countries are the ones “which could provide these data” (J. Mansell, M. Knapp, J. Beadle-Brown and J. Beecham, “Deinstitutionalisation and community living. Outcomes and costs: report of a European study”, 2007 <http://www.kent.ac.uk/tizard/research/DECL_network/Project_reports.html> last accessed 21 February 2016, p. 25).

² J. Mansell, M. Knapp, J. Beadle-Brown and J. Beecham (2007), op. cit., p. 94.

³ Chapter 2 is dedicated to the rights, as well as violations, of people with intellectual impairments in institutional residential settings in European countries.

⁴ Same footnote as above.

⁵ This organisation was formerly known as Mental Disability Rights International (MDRI).

⁶ MDAC, “Reflections on institutionalisation”, Bulletin, 2008 <<http://archive.constantcontact.com/fs018/1101955585337/archive/1102295177363.html>> last accessed 21 February 2016. These organisations issued a number of reports documenting these human rights violations, and the following are just some examples: MDAC, “Cage Beds. Inhuman and Degrading Treatment or Punishment in Four EU Accession Countries”, 2003 <http://www.mdac.org/sites/mdac.org/files/English_Cage_Beds.pdf> last accessed 22 February 2016; MDAC, “Inspect! Inspectorates of mental health and social care institutions in the European Union”, 2006 <http://www.mdac.info/sites/mdac.info/files/English_Inspect!%20Inspectorates%20of%20Mental%20Health%20and%20Social%20Care%20Institutions%20in%20the%20European%20Union.pdf> last accessed 22 February 2016; MDRI, “Hidden Suffering: Romania’s Segregation and Abuse of Infants and Children with Disabilities”, 2006 <http://www.driadvocacy.org/wp-content/uploads/romania-May-9-final_with-photos.pdf> last accessed 22 February 2016; MDAC, “Guardianship and human rights in the Czech Republic. Analysis of law and policy”, 2007 <http://www.mdac.info/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_the_Czech_Republic.pdf> last accessed 22 February 2016; MDRI, “Torment Not Treatment: Serbia’s

who are living in European institutional residential settings are particularly vulnerable to torture or inhuman and/or degrading treatment. Back in 2002, Burke and Quinn stated that in these settings “there is often a massive imbalance of power” between the resident and the authorities.⁷ Nevertheless, the United Nations (UN) Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on Torture) points out that, in a number of cases, the torture or inhuman and/or degrading treatment suffered by this group of people with intellectual impairments is not recognised as such.⁸ Within this context, this group faces particular and major barriers to access to justice.⁹ In this thesis the concept of justice will be represented by the notion of the human rights articulated in the CRPD.

There are a range of various national, regional and international mechanisms for strategic litigation, as well as a relatively well developed civil society that can put forward strategic litigation under these mechanisms. However, there remains a need for comprehensive research into the obstacles that people with intellectual impairments, in particular in institutional residential settings, face in using litigation to challenge human rights violations associated with institutional

Segregation and Abuse of Children and Adults with Disabilities”, 2007 <<http://www.driadvocacy.org/wp-content/uploads/Serbia-rep-english.pdf>> last accessed 22 February 2016; MDAC and the Association for Social Affirmation of People with Mental Disabilities (SHINE), “Out of Sight. Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia”, 2011 <http://www.mdac.info/sites/mdac.info/files/croatiareport2011_en.pdf> last accessed 22 February 2016; DRI, “Left Behind. The Exclusion of Children and Adults with Disabilities from Reform and Rights Protection in the Republic of Georgia”, 2013 <<http://www.driadvocacy.org/wp-content/uploads/Left-Behind-final-report1.pdf>> last accessed 22 February 2016; DRI, “No way home. The Exploitation and Abuse of Children in Ukraine’s Orphanages”, 2015 <<http://www.driadvocacy.org/media-gallery/our-reports-publications/>> last accessed 22 February 2016.

⁷ C. Burke and G. Quinn, “Chapter 6: The integrity of the person: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and disability”, in G. Quinn and T. Degener (Eds), *Human Rights and Disability: the Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, HR/PUB/02/1 (United Nations: New York and Geneva, 2002), p. 134.

⁸ Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, “Torture and other cruel, inhuman or degrading treatment or punishment” A/63/175, 2008, p. 9.

⁹ These barriers will be evidenced in Chapter 3.

residential living. There is a general lack of studies about the possibilities that litigation, when used strategically, has to offer for addressing human rights violations suffered by people with intellectual impairments in institutional residential settings. There is indeed not much knowledge about how this very specific strategic litigation process works, and more particularly, with regard to how people with intellectual impairments enter into it, or how they do not enter into it, or even how they pass through the various obstacles. Moreover, there is a lack of clarity regarding the role of strategic litigators (as well as potential strategic litigators) regarding strategic litigation designed for recognising and enforcing the rights of people with intellectual impairments in institutional residential settings in European countries. This thesis attempts to make a contribution to this state of affairs.

1.3 Key concepts

1.3.1 Disablement and people with intellectual impairments in institutional residential settings in European countries

With a view to understanding how disablement affects the group of people under analysis, this section will build on the concepts of the social model of disability, intellectual impairment, and institutional residential settings.

a) Social model of disability

In relation to the social model of disability,¹⁰ Barnes and Mercer argue that this model was crystallized and codified for the first time in Britain by the Union of the Physically Impaired Against Segregation (UPIAS).¹¹ UPIAS' Fundamental Principles of Disability define disability as:

The disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities.¹²

Also, according to the UPIAS, an impairment is defined as “lacking part or all of a limb, or having a defective limb, organ or mechanism of the body”. These definitions clearly highlight how disability and impairment are different concepts. Disability is related to the actions of a society, while the content of the concept of

¹⁰ Among the authors who prefer to use the term “social model”, see: J. Morris, *Pride Against Prejudice: Transforming Attitudes to Disability* (London: The Women’s Press, 1991); M. Priestley, *Disability: A Life Course Approach* (Cambridge: Polity Press, 2003); C. Thomas, *Female Forms: Experiencing and Understanding Disability* (Buckingham: Open University Press, 1999). Barnes and Mercer (2003) also use the term “social model”, but when defining the model in analysis, they define it as a “socio-political model of disability”; see C. Barnes and G. Mercer, *Disability* (Cambridge: Polity Press, 2003), p. 11.

¹¹ C. Barnes and G. Mercer, *Disability* (Cambridge: Polity Press, 2003), p. 2.

¹² Union of the Physically Impaired Against Segregation, “Fundamental Principles of Disability-Comments on the discussion held between the Union and the Disability Alliance on 22nd November, 1975” <<http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/UPIAS%20Principles%202.pdf>> last accessed 22 February 2016, p. 4.

impairment is provided by medical science. Oliver defends the notion that by approaching disability and impairment as separate concepts, one can attempt to identify and address issues that can be changed through collective action rather than medical or other professional treatment.¹³ According to Barnes and Mercer, in the “socio-political model of disability”, disability is “the outcome of social barriers and power relations” and not the result of an “individual pathology”.¹⁴ Similarly, Priestley states that, “social scientists have increasingly come to view disability as the product of complex social structures and processes, rather than as the simple and inevitable result of individual differences or biology”.¹⁵

Disability, according to scholars who support the social model approach, can be traced back to a specific point in history. Finkelstein argues that disability is a product of the Industrial Revolution: “it took the Industrial Revolution to give the machinery of production the decisive push which removed crippled people from social intercourse and transformed them into *disabled people*” (*emphasis added*).¹⁶ Finkelstein explains that before the Industrial Revolution, it can be assumed that “cripples” lived similarly to the “cripples” under a feudal system. He explains that in the earliest time of the British capitalist system there was a “rural” population and production was “essentially agricultural”, but the situation changed with the “new capitalist market forces”, which oppressed the population until “families could no longer cope [with] the crippled members” (members who had to beg and to be assisted by the church in “special poor houses”). This last tendency grew increasingly worse, until the final exclusion of the disabled from society.

¹³ M. Oliver, “A sociology of disability or a disablist sociology?”, in L. Barton (ed.), *Disability and Society: Emerging Issues and Insights* (London: Longman, 1996), p. 38.

¹⁴ C. Barnes and G. Mercer (2003), *op. cit.*, p. 12.

¹⁵ M. Priestley (2003), *op. cit.*, p. 13.

¹⁶ V. Finkelstein, “Disability and the Helper Helped Relationship”, in A. Brechin, P. Liddiard and J. Swain (eds.), *Handicap in a Social World* (Milton Keynes: Hodder and Stoughton, 1983), p. 3.

In contrast to the social model of disability, the individual model of disability is found in the work developed by many authors. The literature offers terms such as personal tragedy,¹⁷ medical models,¹⁸ and the individual model¹⁹. According to Barnes and Mercer, the perception of disability as “an individual and medical issue” implies that:

[F]irst, disability is regarded as a problem at the individual (body-mind) level; second, it is equated with individual functional limitations or other ‘defects’; and third, medical knowledge and practice determines treatment options.²⁰

The fundamental difference between the social model of disability and the individual model of disability is thus clear: the social model fundamentally locates disability at the level of the actions of society, while the individual model locates disability at the level of the person and proposes that responses to disability are provided by medical science. The social model of disability thus constitutes a useful tool for advancing inclusion. As the assumption of disability is produced by the actions of the society, this raises the idea that a different societal response is possible. For this fundamental reason, the social model of disability will be the model used to guide this thesis.

¹⁷ C. Barnes and G. Mercer (2003), op. cit., p. 2.

¹⁸ J. Morris (1991), op. cit., p. 180.

¹⁹ M. Priestley, “Constructions and Creations: idealism, materialism and disability theory”, *Disability and Society* 13:1, 1998, p. 75; M. Priestley, *Disability: A Life Course Approach* (Cambridge: Polity Press, 2003), p. 13.

²⁰ C. Barnes and G. Mercer (2003), op. cit., p. 2.

In relation to terminology, it has just been demonstrated how, in the social model of disability, a person is *disabled* because of society's actions and not because of his/her impairment. Therefore, in this thesis, the terminology "disabled persons" will be used rather than "persons with a disability" or "persons with disabilities". In addition, the term "disability" (or "disabilities") is commonly used in current relevant international documents regarding policy and human rights. The terms "disabled persons" and "disability", then, will be used in this thesis (other than in original quotations, which might use a different terminology).

Finally, it is important to recall that this thesis' main research question has been restricted to the situation of people with intellectual impairments, and therefore not all disabled people are included in the research for this thesis. However, as will be explained in more detail shortly, many of this thesis' findings will also be of interest to all disabled people in general.

b) Intellectual impairment

Following the distinction proposed by the UPIAS between disability and impairment,²¹ in this thesis, disability will be considered as separate from impairment. This is in line with the postulates of the social model of disability. Impairment will be treated as a functional limitation, and within this context, the next paragraphs will be devoted to defining the concept of intellectual impairment.

Among the various examples of medical definitions of intellectual impairment is the one given by the American Association on Intellectual and Developmental Disabilities (AAIDD):

²¹ Exposed in the previous sub-section.

Intellectual disability is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills. This disability originates before the age of 18.²²

It is argued by Barnes and Mercer that there has tended to be little debate about impairment itself, and that there has been more focus on disability as a social construction. These authors stress that,

[T]he disability studies literature contains little discussion of the social construction of medical knowledge about impairment *beyond labelling* approaches (*emphasis added*).²³

One exception to this tendency is the work of Ryan and Thomas. Ryan and Thomas tried to locate the concept of “mentally handicapped people” in the context of history. They explain how,

The changing definitions of difference constitute the history of mentally handicapped people. These definitions have always been conceived of by others, never are they the expression of a group of people finding their own identity, their own history.²⁴

Ryan and Thomas demonstrate how definitions of “mentally handicapped people” have been used historically to exclude, discriminate against, and dominate these persons. In other words, they argue that definitions were

²² <<http://aaidd.org/intellectual-disability/definition#.VcT8pqNwaUk>> last accessed 22 February 2016.

²³ C. Barnes and G. Mercer (2003), *op. cit.*, p. 71.

²⁴ J. Ryan and F. Thomas, *The Politics of Mental Handicap* (Revised Edition, Free Association Books, London, 1987), p. 13.

artificially created, at various historical moments, to instrumentalise the exclusion of these people. In Ryan and Thomas's historical analysis, "IQ tests" constitute an example of this exclusion. According to these authors, reflecting the "formal dividing line between normal and subnormal", these tests pretended to measure the "fixed potential with which each individual was born and which determined his or her educability" and therefore the tests can be subjected to the following criticisms:

Within psychology the IQ definition led to a completely one dimensional view of mentally deficient people. They were seen only in terms of their IQs (or the equivalent, their mental ages). Countless experiments, and a whole theoretical approach, were based on the hypothesis that it is meaningful to identify and group together people on the basis of common low IQ scores and then to compare them with higher IQ groups. Differences between people with the same IQ scores were ignored. The basis of the comparisons was not questioned, not even the extremely narrow range of qualities that the IQ test measured.²⁵

More recently, Aspis has criticised the label of people with "learning difficulties" as artificially *imposed* by the system (the society) on people who are physically or intellectually different, in comparison with what can be "expected" or what is seen as "normal". Aspis states that:

I usually describe myself as a disabled person who has been labelled by the system as having learning difficulties. This makes very clear that the name, and the identity 'learning difficulty', have been *imposed* on me by the system, in particular, the education system which pre-defines

²⁵ Ibid, p. 112.

'learning ability'. There is a great deal of research which supports this view.²⁶

The work developed by Rapley is an even more recent example of work that focuses on debating intellectual impairments in the context of the social model.²⁷ This author refers to people with intellectual impairments as "otherness", identifying a historical perspective for the construction of this concept.²⁸

The previous examples of attempts to socially construct the concept of intellectual impairment are challenging and, as Barnes and Mercer argue, more discussion is needed. For the purposes of this thesis, however, a definition of intellectual impairment is necessary, and given the incipient debate regarding the social construction of this type of impairment, the absence of a generally accepted definition of intellectual impairments in this debate, and the understanding of disability as separate from impairment, the definition offered by the AAIDD will be adopted.

Some examples of terminologies have been advanced. Amongst these examples, some authors choose the term "intellectual disability"²⁹ while others prefer "mental retardation"³⁰. In less recent publications, for example, the

²⁶ S. Aspis, "What They Don't Tell People with Learning Difficulties", in M. Corker and S. French (eds), *Disability Discourse* (Milton Keynes: Open University Press, 1998).

²⁷ M. Rapley, *The Social Construction of Intellectual Disability* (The Cambridge University Press, Cambridge, 2004).

²⁸ M. Rapley (2004), op. cit., p 4.

²⁹ M Rapley (2004), op. cit., p. 4; P. Jenkins, *Questions of Competence: culture, classification and intellectual disability* (Cambridge University Press, Cambridge, 1999), p. 4; P. Mittler, "Meeting the Needs of People with an Intellectual Disability: International Perspectives", in S. Herr, L. Gostin and H. Koh (eds), *The Human Rights of Persons with Intellectual Disabilities. Different but Equal* (Oxford: Oxford University Press, 2003), p. 27.

³⁰ A. Renteln, "Cross-Cultural Perceptions of Disability: Policy Implications of Divergent Views", in S. Herr, L. Gostin and H. Koh (eds), *The Human Rights of Persons with Intellectual Disabilities. Different but Equal* (Oxford: Oxford University Press, 2003), p. 60; R. Luckasson, "Terminology and Power", in S. Herr, L. Gostin and H. Koh (eds), *The Human Rights of Persons with Intellectual Disabilities. Different but Equal* (Oxford: Oxford University Press, 2003), p. 49.

terminology “mentally handicapped”³¹ has been used. The CRPD adopts the terminology “intellectual impairments” in its Article 1, when defining disability.³² For the purposes of this thesis, the terminology “people with intellectual impairments” will be adopted (except within original quotations, which might use a different terminology). This is primarily because this terminology is consistent with the interpretation given in this thesis to the meaning of disability and impairment. In other words, and following the social model of disability, it is a consequence of looking at disability as the product of the actions of a society and differentiated from impairment.

Additionally, it must be noted that people with intellectual impairments are, in many international publications, included under the global terminology of “mental disability” or “mental disabilities”. In such a way, persons with intellectual impairments are included under the terms “mental disability” or “mental disabilities” alongside people who have impairments related to mental health. Leading organisations working for people with intellectual impairments (such as the MDAC or DRI), who also work with issues related to mental health, have chosen the terms “mental disability” or “mental disabilities” to refer to intellectual impairments as well as mental health. Therefore, in this thesis, the terms “mental disability” and “mental disabilities” will be employed when noting original quotations.

Finally, an interesting related question is what happens in the case of persons who are thought to have intellectual impairments but who, in reality, do not, and who are excluded or discriminated by society on the basis of their *perceived* impairment or impairments. There are scholarly and legal instruments that cover discrimination in all situations (in other words, in the situation of a *perceived*

³¹ J. Ryan and F. Thomas (1987), *op. cit.*, p. 11.

³² Article 1 of the CRPD establishes that,

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

impairment *-emphasis added-*³³ and in the situation of a *real* impairment or impairments). As exclusion or discrimination *in the facts* are the same, the scholarly and legal instruments that argue that a *perceived* impairment also deserves protection are to be followed in the context of this thesis.

Within this context, and going back to this thesis' main research question, it is necessary to note that not all persons with intellectual impairments are the focus of the thesis. Only those who are in institutional residential settings, are of interest with regard to answering the thesis' main and subsidiary research questions.

c) Institutional residential settings

Experts such as Freyhoff, Parker, Coué and Greig acknowledge the complexities in defining institutional residential settings for people with intellectual impairments. These authors describe how certain “services may not differentiate clearly by age or by disability”,³⁴ or for instance, how “in Romania, the distinction between mental illness and intellectual disability was not always recognised”. Despite difficulties such as these, the literature offers examples of definitions of institutional residential settings. Back in 1961, Goffman proposed the concept of total institutions:

A total institution may be defined as a place of residence and work where a large number of like-situated individuals, cut off from the wider society

³³ M. Priestley (2003), *op. cit.*, p. 3.

³⁴ G. Freyhoff, C. Parker, M. Coué and N. Greig (eds), “Included in Society. Results and Recommendations of the European Research Initiative on Community-Based Residential Alternatives for Disabled People”, 2004 <<http://publicpolicy.ceu.edu/sites/default/files/publications/included-in-society-results-and-recommendations-2004.pdf>> last accessed 22 February 2016, p. 29.

for an appreciable period of time, together lead an enclosed, formally administered round of life.³⁵

More recently, the European Coalition for Community Living (ECCL) suggested a definition, which was adapted from a definition elaborated by the organisation People First of Canada:

An institution is any place in which people who have been labelled as having a disability are isolated, segregated and/or compelled to live together. An institution is also any place in which people do not have, or are not allowed to exercise control over their lives and their day-to-day decisions. An institution is not defined merely by its size.³⁶

From both of these definitions of “institution”, it is possible to identify some key negative points in the context of the residents’ lives in these settings: a lack of privacy, an imposed routine, an absence of independence, the impossibility of making one’s own decisions, and segregation.

Indeed, various sources concur with the idea that institutional residential settings segregate, as well as exclude, their residents. For example, Priestley associates “separate institutions of welfare production” with segregation.³⁷ Freyhoff, Parker, Coué and Greig illustrate that “over the past two centuries” it was the policy of many countries to place disabled people in “institutions”.³⁸ According to these authors, people with intellectual impairments have been the “most affected by these policies”. These authors also describe that although the primary goal of

³⁵ E. Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books: New York, 1961), p. xiii.

³⁶ ECCL <<http://www.community-living.info/?page=280>> last accessed 22 February 2016.

³⁷ M. Priestley, *Disability Politics and Community Care* (Jessica Kingsley Publishers: London, 1999), p. 49.

³⁸ G. Freyhoff, C. Parker, M. Coué and N. Greig (eds) (2004), *op. cit.*, p. 10.

institutional residential settings “was that people with special needs would have those needs met more effectively if they were all gathered in the same place”, the result has been segregation and exclusion.

Currently, there is clear support for “the closure of all large residential centres”,³⁹ or all residential centres exhibiting the aforementioned negative characteristics, towards a life in the community. But there are still a number of institutional residential settings hosting people with intellectual impairments and segregating and excluding them from society. Indeed Inclusion International warns about “euphemisms for institutions”, such as “homes for special care”, “personal care homes”, “farms/ranches”, “community living centres”, and “cottages”.⁴⁰ This situation stands in opposition to the social model of disability, which, as has been illustrated, promotes inclusion. In other words, institutional residential settings are associated with negative characteristics of living, which lead to the exclusion and segregation of people with intellectual impairments in these settings, causing their disablement.

With regard to terminology, the scholarship evidences a variety of terms for making reference to institutional residential settings. Relevant examples are as follows: the Australian Institute for Family Advocacy and Leadership Development refers to the terms “institutional care” and “large residential centres”;⁴¹ the work edited by Bartlett and Wright refers to the terms “asylum” and

³⁹ Institute for Family Advocacy and Leadership Development, “Presenting the Evidence. Deinstitutionalisation: A Review of Literature”, 2007 <[http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/c3bf64efd446b5d3ca2577b300725acf/\\$FILE/100930%20%20Disability%20Enterprises%20Presenting%20the%20Evidence.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/c3bf64efd446b5d3ca2577b300725acf/$FILE/100930%20%20Disability%20Enterprises%20Presenting%20the%20Evidence.pdf)> last accessed 22 February 2016, p. 5.

⁴⁰ Inclusion International, “Inclusive Communities = Stronger Communities: Global Report on Article 19: The Right to Live and Be Included in the Community”, 2012 <<http://inclusion-international.org/wp-content/uploads/2010/05/Global-Report-Living-Colour-dr2-2.pdf>> last accessed 22 February 2016, p. 84.

⁴¹ Institute for Family Advocacy and Leadership Development (2007), op. cit.

“institutions”;⁴² Carter, Burke and Moore refer to the term “asylum”;⁴³ the ECCL refers to the terms “institutionalisation” and “long-stay residential institutions”;⁴⁴ Mansell, Knapp, Beadle-Brown and Beecham refer to the terms “institutional services”, “institutional care”, “institutional models of residential care”, and “institutions”;⁴⁵ and Priestley chooses the term “institutional welfare arrangements”.⁴⁶ In this work, the terminology “institutional residential settings” will be employed, except for in literal quotations that might use a different terminology. The main reason for the decision to use the term “institutional residential settings” is that this terminology offers more clarity than other terms such as “institutions” (which could lead to confusion, as for instance, with political institutions).

As previously mentioned, this thesis’ main research question has been restricted to an investigation of the situation affecting people with intellectual impairments in institutional residential settings in European countries. Therefore, the research question does not include all disabled people. Nor does it include people with psychosocial impairments or even all people with some sort of cognitive impairment (for instance, those who develop dementia or brain injury later in life). The reasons behind this choice lie in the fact that people with intellectual impairments are particularly likely to spend a considerable proportion of their lives in institutional residential settings and to miss out on strong family connections or other support networks.⁴⁷ Moreover, and as exposed in sub-section 1.2.2, there are a considerable number of people living in institutional residential settings.

⁴² P. Bartlett and D. Wright, *Outside the Walls of the Asylum: the history of care in the community 1750-2000* (London: The Ashlone Press, 1999).

⁴³ M. Carter, T. Burke and S. Moore, “Case studies in deinstitutionalisation. Implementing Supported Housing Programmes in Two Australian States”, Institute for Social Research, 2008 <<http://apo.org.au/resource/case-studies-deinstitutionalisation-implementing-supported-housing-programs-two-australian>> last accessed 22 February 2016.

⁴⁴ G Freyhoff, C Parker, M Coué and N Greig (eds) (2004), op. cit.

⁴⁵ J. Mansell, M. Knapp, J. Beadle-Brown and J. Beecham (2007), op. cit.

⁴⁶ M. Priestley (1999), op. cit.

⁴⁷ See, for instance, G. Freyhoff, C. Parker, M. Coué and N. Greig (eds) (2004), op. cit.

In any case, it is important to note that although this thesis' research and findings relate to people with intellectual impairments in institutional residential settings, many of these findings are likely to have relevance for other disabled people living in institutional residential settings, and even to many people with intellectual (or perhaps other) impairments who are not in institutional residential settings. In addition, this thesis' findings are also likely to be relevant for people living in the community.

1.3.2 Recognition and enforcement of the human rights of people with intellectual impairments, in institutional residential settings in European countries

The following sub-section will be devoted to defining justice, when this is looked at from the perspective of people with intellectual impairments; to this aim, the thesis will propose the notion of justice as recognition and enforcement. Taking this notion on board, the sub-section that follows will attempt to grasp the concept of access to justice for this group.

a) Justice as recognition and enforcement

Fraser's "*critical* theory of recognition"⁴⁸ is promising for approaching the matter of justice for people with intellectual impairments (including those in institutional residential settings). She recognises an analytical distinction between two paradigms of justice: recognition and redistribution. Fraser states that, in the case of recognition, injustice is cultural or symbolic. As an example of this injustice,

⁴⁸ N. Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age", *New Left Review*, 212, 1995, pp.68-93.

she mentions “nonrecognition (being rendered invisible via the authoritative representational, communicative, and interpretative practices of one’s culture)”. In the case of redistribution, injustice is socioeconomic. Exploitation, economic marginalisation and deprivation are amongst the examples of injustice in terms of redistribution. The distinction between recognition and redistribution is purely analytical, meaning that in practice these two paradigms of justice are intertwined. Fraser explains that each type of injustice (cultural or socioeconomic) requires a different type of remedy. In the case of cultural injustice, the remedy “is some sort of cultural or symbolic change”, which for instance “could involve upwardly revaluing disrespected identities”. With regard to socioeconomic injustice, the remedy “is political-economic restructuring of some sort”, for example, the redistribution of income. Fraser offers various examples of collectivities that ideally fit in between the paradigms of recognition and redistribution. She mentions despised sexuality as an ideal,

[E]xample of collectivity that fits the recognition model of justice. It only exists as a collectivity by virtue of the reigning social patterns of interpretation and evaluation, not by virtue of the division of labour... The root of the injustice, as well as its core, will be cultural misrecognition, while any attendant economic injustices will derive ultimately from that cultural root.

At the other end of the spectrum, which is the paradigm of redistribution, Fraser includes the case of “[t]he Marxian conception of the exploited class, as an example of an ideal-typical mode of collectivity whose existence is rooted wholly in the political economy”. Also, there are collectivities or groups, such as the ones defined by gender or race, which Fraser considers to be “examples of bivalent collectivities”.

Fraser does not mention disability (including people with intellectual impairments) in the context of her work. Therefore, in the context of Fraser’s distinction, the challenge with regard to people with intellectual impairments is to decide whether

the root of the injustice they suffer is cultural or socioeconomic, or whether they represent a bivalent collectivity. In a very interesting contribution, Danermark and Gellerstedt consider the law as an example of a context where disabled people can suffer injustice at a cultural level.⁴⁹ Many people with intellectual impairments in institutional residential settings suffer injustice in the form of human rights violations. It appears, therefore, that the root of this injustice is cultural (and its remedy would be recognition). Recognition can, therefore, play a central role when thinking about justice with regard to the group under scrutiny.

In terms of redistribution, it could be argued that institutional residential settings are the result of bad or poor financial investments, which otherwise could be allocated for residential settings in the context of the community. Hence, it could be argued that the root of the injustice suffered by this group is financial, and that the solution would be to redistribute financial resources. This discussion, focused on people with intellectual impairments, indeed exemplifies the complexities (as Fraser recognises) in separating justice as recognition from justice as redistribution. Indeed, as has already been explained, Fraser remarks that this last distinction exists only for analytical purposes.

In particular, the idea of recognition (and, perhaps to a lesser extent, of redistribution) is also fundamental to this thesis' purpose, as it does not rest on an individual's rationality or capability, concepts which entail particular challenges, particularly when thinking about people with the most severe intellectual impairments. Therefore, it is through the lens of focusing justice on recognition (and without excluding, at the same time, the dimension of redistribution), that the matter of access to justice by people with intellectual impairments will be approached in this thesis.

⁴⁹ B. Danermark and L. Coniavitis Gellerstedt, "Social justice: redistribution and recognition – a non-reductionist perspective on disability", *Disability & Society* 19:4, 2004, p. 350.

However, it is interesting to ask whether recognition (as intertwined with redistribution) is a beginning or an end in itself. An option that can help with this last dilemma is to combine Fraser's idea of recognition (and redistribution) with the notion of rights enforcement. Translated to the case of people with intellectual impairments in institutional residential settings, this means that in terms of justice, their rights should not only be recognised, but also enforced. Put differently, the notion of enforcement suggests an enjoyment of rights in practice or in reality. The idea of enforcement builds on, as well as reinforces, the concept of recognition. Departing from the basis that the rights of people with intellectual impairments are to be recognised and enforced by justice, and that to this end they are to have access to justice, what does this access to justice entail specifically? The next sub-section will address the concept of access to justice by this group.

b) Conceptualising access to justice

Access to justice for disabled people is a topic that has engaged legal experts only fairly recently.⁵⁰ Given the egregious human rights violations that people with intellectual impairments suffer in institutional residential settings, access to justice acquires particular significance for this group.⁵¹ However, despite the fact

⁵⁰ See, for example, S. Ortoleva, "Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System", *ILSA Journal of International and Comparative Law*, 17, 2011, p. 281; C. Cojocariu, "Handicapping Rules: The Overly Restrictive Application of Admissibility Criteria by the European Court of Human Rights to Complaints Concerning Disabled People", *European Human Rights Law Review* Vol. 6, 2011, pp. 688-689; Ministry of Justice, "Getting it right for victims and witnesses", Consultation Paper CP3/2012, January 2012; E. Flynn, "Making human rights meaningful for people with disabilities: advocacy, access to justice and equality before the law", *The International Journal of Human Rights* 17:4, 2013, pp. 491-510; A.M.M. Lawson and E. Flynn, "Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities", in *Yearbook of European Disability Law*, L. Waddington, G. Quinn and E. Flynn (eds), 2013, pp. 7-44; E. Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate: Aldershot, 2015).

⁵¹ As exposed in sub-section 1.2.2.

that in recent years the access to justice for people with intellectual impairments has attracted more interest,⁵² this is still an incipient field of research.

According to Rhode, a prominent scholar in the field of access to justice, a central problem in the debate about access to justice is that there is a lack of clarity, or consensus, about what the problem is.⁵³ Rhode mentions that, for instance, justice can be approached from a procedural perspective, meaning the “access to legal assistance and legal processes that can address law-related concerns”. Rhode also mentions that justice can be viewed from a substantive perspective, and in this way, access is viewed as “access to a just resolution of legal disputes and social problems”.

Scholars from the disability field have identified a similar distinction to that suggested by Rhode. Flynn and Lawson suggest that access to justice for disabled people can be approached from either a narrow or a wider interpretation.⁵⁴ They argue that a narrow interpretation focuses “on issues of access”, whilst a wider interpretation “entails ensuring (and therefore defining) justice”.

There are examples of definitions of access to justice that follow one or other of these two approaches. Rickard-Clarke offers what can be interpreted as a narrow concept of access to justice: “[t]he term access to justice from the point of view of an individual would normally refer to the right to seek a remedy before a court

⁵² See, for example, J. Talbot, “Fair access to justice? Support for vulnerable defendants in the criminal courts”, Prison Reform Trust, London, 2012; Norah Fry Research Centre, “What happens when people with learning disabilities need advice about the law”, 2013 <<http://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/Legal%20Advice%20Learning%20Disabilities%20Final%20Report.pdf>> last accessed 22 February 2016.

⁵³ D.L. Rhode, “Access to Justice: An Agenda for Legal Education and Research”, *Journal of Legal Education* 62:4, 2013, p. 532.

⁵⁴ A.M.M. Lawson and E. Flynn (2013), op. cit.

or tribunal and which can guarantee independence and impartiality in the application of law".⁵⁵ As an example of a broad approach to access to justice, Cappelletti and Garth affirm that:

The words 'access to justice' are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system-the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.⁵⁶

Although it can be argued that both approaches to access to justice are equally good, in this thesis the focus will be placed on a broad definition of access to justice, which offers room not only for thinking about issues of access, but also for the incorporation and understanding of justice as a concept. As already explained, this thesis will follow the CRPD for approaching access to justice by people with intellectual impairments in institutional residential settings. In other words, the justice through the recognition and enforcement of the rights of persons with intellectual impairments in institutional residential settings will be measured through their real access to the human rights recognised by the CRPD. Chapter 2 will cover these rights in detail.

1.3.3 Strategic litigation

a) Origins

⁵⁵ P.T. Rickard-Clarke, "Access to justice: accessibility". *Legal Information Management* 11:3, 2011, p. 159.

⁵⁶ M. Cappelletti and B. Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective", *Buffalo Law Review* 27:2, 1978, p.181.

Strategic litigation, or “bringing selected legal cases in the courts”, is a strategy included under the scope of “public interest law”, but as argued by the participants in a symposium organised by the Ford Foundation, it is not the only strategy:

[B]ringing selected legal cases in the courts is one important public interest law strategy, but it is not the only one. Public interest law work could also include law reform, legal education, legal literacy training and legal services. Moreover, it is a field that is not reserved for lawyers: public interest law often involves lobbying, research, public education and other activities which do not necessarily require technical expertise.⁵⁷

As the previous quote evidences, “public interest law” involves a range of activities, and strategic litigation is just one of these. Taking this distinction into consideration, various authors disagree about the origins of strategic litigation (also referred to as “public interest litigation”, “public law litigation” and “test case litigation”, to offer some examples). Some scholars argue that the origins of strategic litigation can be traced back to the United States of America (US); however, they disagree about the exact time when this litigation emerged in the US. Hershkoff argues that “public law litigation” describes a phenomenon that dates from the 1950s.⁵⁸ She explains that various commentators have stated that “public law litigation” emerged in the US with “the celebrated campaign that resulted in the decision in *Brown v. Board of Education* ...⁵⁹ in which the U.S.

⁵⁷ Symposium on Public Interest Law in Eastern Europe and Russia, sponsored by The Ford Foundation – New York, Constitutional and Legislative Policy Institute – Budapest, June 29th – July 8th 1997, University of Natal, Durban, South Africa, Symposium Report, a publication of the Public Interest Law Initiative in Transitional Societies, Columbia Law School, New York, preface iii-iv.

⁵⁸ H. Hershkoff, *Public Interest Litigation: Selected Issues and Examples*, n.d. <<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf>> last accessed 22 February 2016.

⁵⁹ 347 US 483 (1954).

Supreme Court declared unconstitutional a state's segregation of public school students by race".

In contrast, O'Connor and Epstein argue that "public interest law"⁶⁰ in the US "came to the fore in the late 1960s".⁶¹ These authors mention the National Consumers' League (NCL) as the first structure that contributed to what later became known as "public interest law". O'Connor and Epstein state that the NCL used "litigation to improve the working conditions of women and children".

Smith maintains that "both England and Scotland have a long history going back at least to the late 18th century of litigation by pressure groups for a political goal".⁶² He claims that strategic litigation goes back earlier than the US origins identified by others. Indeed Harlow and Rawlings detail how the English case *Somerset v Stewart* (1772) represented a test case that led to the abolition of slavery.⁶³

Reflecting upon the previous literature, it appears that strategic litigation became more of a movement in the US, or that there was more investment of resources in it as a specific tool. Therefore, the literature suggests that strategic litigation has been practised in Europe for a long time, but not in such a regulated way as in the US, and with the support of organisations specifically set up to do that.

⁶⁰ Which includes strategic litigation, as previously explained.

⁶¹ K. O'Connor and L. Epstein, "Rebalancing the Scales of Justice: Assessment of Public Interest Law", *Harvard Journal of Law & Public Policy* 7, 1984, pp. 483-505.

⁶² R. Smith, "Experience in England and Wales: Test case strategies, public interest litigation, the Human Rights Act and legal NGOs", JUSTICE, London, 2003 <http://www.essex.ac.uk/armedcon/story_id/000696.pdf> last accessed 22 February 2016.

⁶³ C. Harlow and R. Rawlings, *Pressure through law* (Routledge: London, 1992), pp. 12-17.

In particular, in the case of Central and Eastern Europe, a region with a high concentration of institutional residential settings,⁶⁴ Goldston illustrates that before the 1990s “public interest litigation” was unknown in the region.⁶⁵ According to Goldston, “public interest litigation” is a post-Communist phenomenon, because in the context of Communism “[t]he idea of articulating an alternative, nongovernmental vision of the public interest through law was impossible”. There were no independent courts, as “the state was, by definition, an expression of the public’s interest; and law and politics were fused as one”. Indeed, in Eastern Europe for example, the Ford Foundation [a historical funder of strategic litigation] began its Eastern Europe PIL [public interest law] programme in 1995-1996.⁶⁶

b) Key features

Two main defining characteristics of strategic litigation have been identified, after analysing the evidence: first, motive; and, second, the support of a non-governmental organisation (NGO), lawyer, commission or other relevant body. This section will attempt to identify some of the main characteristics shared by various definitions of strategic litigation, with the final goal of proposing an overall concept that will guide this thesis.

The evidence shows that what differentiates strategic litigation from “common litigation” is that strategic litigation implies a strategy (with the focal point to be explained). Common litigation is concerned primarily with defending the interests of an individual client. The European Roma Rights Center (ERRC), Interights and

⁶⁴ See G. Freyhoff, C. Parker, M. Coué and N. Greig (eds) (2004), op. cit.

⁶⁵ J. A. Goldston, “Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges”, *Human Rights Quarterly* 28, 2006, pp. 492–527.

⁶⁶ A. McCutcheon, “Eastern Europe: Funding Strategies for Public Interest Law in Transitional Societies”, in M. McClymont and S. Golub (eds), *Many roads to justice: the law-related work of Ford Foundation grantees around the world*, The Ford Foundation, 2000.

Migration Policy Group (MPG), note that strategic litigation may defend the interests of an individual client.⁶⁷ However, its strategy is always focused on obtaining a result that exceeds this individual sphere. Common litigation can, nevertheless, have an effect that reaches well beyond the individual sphere –an example of this being the well-known US Supreme Court case of *Gideon vs. Wainwright*,⁶⁸ a summary of which is worth including here. Clarence Gideon was a drifter arrested in 1961. When he had to appear in court, he did not have any legal representation. Although Gideon asked for a lawyer, this was refused. Without a legal representative, he was found guilty and sent to prison. Once in prison, Gideon filed a petition to the US Supreme Court. On March 19, 1963, the Supreme Court ruled that all accused persons have the right to counsel.

After this ruling by the US Supreme Court, the case of Clarence Gideon led to the establishment of the public defender system in the US. This example shows how common litigation can, like strategic litigation, achieve an outcome that exceeds the individual sphere; however, as seen here, these effects are unintended. In this sense and in the example in question, Clarence Gideon was pursuing his own interests and not seeking the establishment of the public defender system in the United States. What differentiates strategic litigation from common litigation is then the motive of obtaining a result that exceeds the individual sphere: strategic litigation presupposes this motive, while common litigation does not.

In addition, it is important to differentiate strategic litigation from a strategic case. In such a way, the previous case of Clarence Gideon can be classed as a strategic case (as it had a public impact); however, it would be inaccurate to consider this legal case as strategic litigation, because as was just described, the

⁶⁷ European Roma Rights Center (ERRC), Interights (The International Centre for the Legal Protection of Human Rights) and Migration Policy Group (MPG), “Strategic litigation of race discrimination in Europe: from principles to practice - A manual on the theory and practice of strategic litigation with particular reference to the EC Race Directive”, 2004 <http://www.migpolgroup.com/public/docs/57.StrategicLitigationofRaceDiscriminationinEurope-fromPrinciplestoPractice_2004.pdf> last accessed 22 February 2016, p. 35.

⁶⁸ *Gideon v. Wainwright*, 372 US 335 (1963).

public impact produced by the Gideon case was unintended. In other words, it is not possible to speak about strategic litigation, where the litigation did not have a strategy. Once again, litigation without a strategy may result (for a variety of reasons) in a strategic case; however, it would be plainly wrong to characterise this litigation without a strategy as strategic.

The concept of “public interest” is related to the matter of motive in strategic litigation. Rabkin argues that “public interest law” usually “means that the suit is not about a particular plaintiff’s private rights, but instead is literally about an interest of the public’s”.⁶⁹ The concept of “public interest” will be “influenced by the legal and political culture of any given society in which it is used”.⁷⁰

Because strategic litigation presupposes a motive (which is to obtain a result exceeding the individual sphere), or searches for the “public interest”, this strategy is considered to be related to social (and individual) justice.⁷¹ Indeed the element of social change (or arguably justice) is central in one of the earliest definitions of “public law litigation”, proposed by Chayes in 1976: “[t]he practice of lawyers in the United States seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms”.⁷²

Strategic litigators thus aim to produce social change and “the chief focus is law or public policy reform”.⁷³ Regarding the interpretation of the word “reform”, it is considered necessary to clarify the following. Evidence shows how strategic

⁶⁹ J. Rabkin, “Public Interest Law: Is it Law in the ‘Public Interest?’” *Harvard Journal of Law & Public Policy* 8, 1985, p. 341.

⁷⁰ Symposium on Public Interest Law in Eastern Europe and Russia (1997), op. cit.

⁷¹ Public Interest Law Initiative-Columbia University Budapest Law Center, “Public Policy Advocacy: Strategic Litigation and International Advocacy”, 2003 <http://www.essex.ac.uk/armedcon/story_id/000698.pdf> last accessed 22 February 2016.

⁷² A. Chayes, “The Role of the Judge in Public Law Litigation”, *Harvard Law Review* 89, 1976, p. 1281.

⁷³ European Roma Rights Center (ERRC) et al (2004), op. cit., p. 35.

litigation, among other objectives, can encourage the enforcement or application of “favourable rules that are underused or ignored”.⁷⁴ This means that, for example, a case that had the effect of applying the existing law to an area of practice to which it had not previously been applied and thereby changing practice, will count as “reform”. In this last case, the reform would be with regard to the application or implementation of the law and not concerned with the text of the law. In addition to law or public policy reform, strategic litigation “can also positively influence public opinion”.⁷⁵ Moreover, strategic litigation can aim at a societal expression of the wrong, the recognition of the wrong.

Through reforming the text of law and policy, changing its implementation, influencing public opinion, or recognising the wrong, the social change achieved by strategic litigation materialises what is known as “expressive law”. There is interesting scholarship about the expressive function of law.⁷⁶ Amongst this scholarship, the contributions by Lessig are fundamental.⁷⁷ Building upon the idea of social construction (which Lessig does not intend to define, instead directing the reader to the relevant work produced by Watzlawick), Lessig develops the notion of “social meanings”. He argues that social meanings “constitute what is authority for a particular society, or particular culture”.

⁷⁴ European Roma Rights Center (ERRC) et al (2004), op. cit., p. 36. Also see Public Interest Law Initiative-Columbia University Budapest Law Center (2003), op. cit.

⁷⁵ <<http://www.interights.org/our-cases/index.html>> last accessed 22 February 2016.

⁷⁶ Some relevant examples are: L. Lessig, “The Regulation of Social Meaning”, *University of Chicago Law Review* 62:3, 1995, pp. 943-1045; C.R. Sunstein, “On the Expressive Function of Law”, *University of Pennsylvania Law Review* 144, 1996, pp. 2021-2053; D.M. Kahan, “What Do Alternative Sanctions Mean?”, *The University of Chicago Law Review* 63, 1996, p. 591; R. Cooter, “Expressive Law and Economics”, *Journal of Legal Studies* 27, 1998, p. 585; J. Mazzone, “When Courts Speak: Social Capital and Law’s Expressive Function”, *Syracuse Law Review* 49, 1999, p. 1039; R.H. McAdams, “Focal Point Theory of Expressive Law”, *Virginia Law Review* 86, 2000, pp. 1649-1729; A. Geisinger, “A Belief Change Theory of Expressive Law”, *Iowa Law Review* 88, 2002, pp. 35–73; M.A. Stein, “Under the empirical radar: an initial expressive law analysis of the ADA”, *Virginia Law Review* 90, 2004, p. 1151; A. Geisinger and M.A. Stein, “A theory of expressive international law”, *Vanderbilt Law Review* 60, 2007, p. 77; O. Lewis, “The Expressive, Educational and Proactive Roles of Human Rights: An Analysis of the United Nations Convention on the Rights of Persons with Disabilities”, in B. McSherry and P. Weller (eds), *Re-thinking rights based mental health laws*, Hart Publishing: Oxford, 2010.

⁷⁷ L. Lessig, “The Regulation of Social Meaning”, *University of Chicago Law Review* 62:3, 1995, pp. 943-1045.

According to Lessig, social meanings are “the semiotic content attached to various actions, or inactions, or statuses, within a particular context”. Lessig states that social meanings are “the product of a text in a particular context”, and therefore, if either the text or context is changed, the social meanings will be reshaped. Lessig then applies this idea to various legal examples, one of which is collective action.

The expressive function of law is, therefore, based on the crucial idea that social meanings are constructed. A logical consequence of this idea is that social meanings can be changed. In other words, if social meanings are artificial, as opposed to natural, this means that these can be created; that different alternatives are possible when thinking about social meanings. Departing from this basis, the expressive function of law is not really a theory in its own right. Rather, the expressive function of law is about the value of law as a tool for expressing our societal values. It is about looking at society’s expression of its own values, which can then influence public opinion. Favouring the notion that the expressive function of law can be manifested through litigation, Hershoff claims:

The very act of litigation affords a juridical space in which those who lack formal access to power become visible and find expression. Moreover, because courts are only one means for the enforcement of law, reform can be sustained only when it becomes second-nature and interwoven into discourse, low-level discretionary acts, and market exchanges. Lawsuits can give what Professor Dan M. Kahan in a different context describes as “gentle nudges” for the internalization of changed social values by altering the terms of public discussion and giving voice to reform goals.⁷⁸

⁷⁸ H. Hershkoff (n.d.), op. cit.

It is by using the court system⁷⁹ or justice sector⁸⁰ that the social change pursued by strategic litigation can be produced. National, regional and supranational instances can be taken as jurisdictions in which to bring a case in the context of strategic litigation. In addition, some instances will vary according to the topic that is under litigation. For the purposes of this thesis, cases litigated under national courts, as well as under the European Court of Human Rights (ECtHR) will be taken into account. Individual complaints brought to quasi-judicial instances such as national ombudsmen and commissions, or the CRPD Committee, will also be considered.

In addition, strategic litigation can be pursued by key stakeholders such as non-governmental organisations NGOs, law firms, human rights institutions and equality bodies. In this way, cases that are strategically litigated are generally brought into the court system or the justice sector by “non-governmental organisations (‘NGOs’) and law firms”,⁸¹ as well as human rights institutions and equality bodies, and many structures have created programmes for strategically litigating in relation to specific rights. Examples of these initiatives include: drugs and human rights;⁸² issues of torture in Central Asia;⁸³ lawyers for human rights;⁸⁴ matters regarding corruption; the rights of minorities and indigenous;⁸⁵

⁷⁹ European Roma Rights Center (ERRC) et al (2004), op. cit., p. 35.

⁸⁰ Public Interest Law Initiative-Columbia University Budapest Law Center (2003), op. cit.

⁸¹ European Roma Rights Center (ERRC) et al. (2004), op. cit., p. 35. Also about the employment of strategic litigation by NGOs, see M. Ilieva, “Strategic litigation The role of NGOs”, 17-18 December 2005, London <http://www.essex.ac.uk/armedcon/story_id/000697.pdf> last accessed 22 February 2016.

⁸²

<http://www.exchangesupplies.org/conferences/NDTC/2009_NDTC/presentations/niamh_eastwood.swf> last accessed 22 February 2016.

⁸³ <http://www.justiceinitiative.org/db/resource2?res_id=102932> last accessed 22 February 2016.

⁸⁴ <<http://www.lhr.org.za/programme/strategic-litigation-unit>> last accessed 22 February 2016.

⁸⁵ <<http://minorityrights.org/what-we-do/strategic-litigation-programme/>> last accessed 22 February 2016.

the right to education;⁸⁶ and disabled people's rights (including people with intellectual impairments)⁸⁷.

From the overall preceding analysis, the following concept of strategic litigation emerges:

Strategic litigation is a strategy employed by, for example, NGOs and law firms. Ideally, this strategy is one with the motive of obtaining a result that exceeds its own individual sphere, directed to produce a social change by reforming the text of law or public policy, changing its implementation, influencing public opinion, or recognising the wrong. The social change pursued by strategic litigation makes this strategy especially appropriate to address the rights of minorities and disadvantaged, deprived or marginalised groups (including people with intellectual impairments in institutional residential settings). With these aims, strategic litigation works through the presentation of cases under national, regional and/or supranational judicial as well as quasi-judicial instances.

Strategic litigation, in this sense, thus has similarities to the concept of "cause lawyering". Acknowledging the complexities of defining "cause lawyering", Hilbink highlights some key defining characteristics already identified in the literature, amongst which are: the "belief in a cause and a desire to advance that cause", as well as the fact that "lawyers engage in action for social change" and "represent the underrepresented, the subordinated, and the public interest".⁸⁸ With a strict focus on the matter of disability, Stein, Waterstone and Wilkins take the view that "cause lawyers" are those who design and bring "cases that seek to

⁸⁶ <<http://www.right-to-education.org/node/84>> last accessed 22 February 2016.

⁸⁷ For instance, see <http://mdac.org/en/what-we-do/strategic_litigation> last accessed 22 February 2016.

⁸⁸ T. Hilbink, "You Know the Type. . .: Categories of Cause Lawyering" 29 *Law and Social Inquiry*, 2004, p. 659.

benefit various categories of people with disabilities and who have formal connections with disability rights organizations”.⁸⁹

However, strategic litigation (as understood in this thesis) is narrower than what Black refers to as “the mobilization of law” or “the process by which a legal system acquires its cases”.⁹⁰ Vanhala sets out to study legal mobilization in the field of disability, and more concretely, she explores the matter of legal mobilization in the case of social movement organizations, offering some explanations for the development of litigation as a strategy used by some key movement organizations.⁹¹ In further work, Vanhala explains that:

Legal mobilization can include many different types of strategies and tactics, such as raising rights consciousness among particular communities or the public, delivering public legal education or specialized legal education, lobbying for law reform or changes in the levels of access to justice, providing summary legal advice and referral services, and undertaking strategic or test case litigation.⁹²

Therefore, the concept of strategic litigation used in this thesis can be considered as one strategy in the context of legal mobilization.

⁸⁹ M.A. Stein, M.E. Waterstone, and D.B. Wilkins, “Book Review of Cause Lawyering for People with Disabilities” (2010), Faculty Publications. Paper 265, <<http://scholarship.law.wm.edu/facpubs/265>> last accessed 23 May 2016, p. 1661.

⁹⁰ D.J. Black, “The Mobilization of Law”, *The Journal of Legal Studies*, Vol. 2, No. 1 (Jan., 1973), pp. 126.

⁹¹ L. Vanhala, “Disability Rights Activists in the Supreme Court of Canada: Legal Mobilization Theory and Accommodating Social Movements”, *Canadian Journal of Political Science / Revue canadienne de science politique*, Vol. 42, No. 4 (Dec., 2009), p. 982.

⁹² L. Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (New York: Cambridge University Press, 2011), p. 6.

1.4 Structure of the thesis

The remaining chapters in this thesis will be structured as follows. Chapter 2 will analyse the human rights of people with intellectual impairments living in institutional residential settings in European countries, as well as the violations of these rights, according to various areas of institutional living: entry into institutional residential settings and continued residence; legal capacity; conditions within institutional residential settings; relationships and privacy; health; and education and employment.

Chapter 3 will analyse the right to access to justice for people with intellectual impairments in institutional residential settings in European countries, with a primary focus on European and UN jurisdictions, as well as the barriers this group encounter to accessing this right.

Chapter 4 will progress from the epistemology and research strategy to the methods selected for the thesis: legal documentary analysis and qualitative interviews.

Chapter 5 will set out the context of some possible instances where strategic litigation can be taken forward, at the national (England, Ireland and Spain), European and UN levels. The chapter will also provide evidence of the employment of relevant strategic litigation in these instances. Overall, this chapter's context will be very relevant for understanding the interview findings in this thesis with regard to some of the barriers to, as well as the opportunities for, strategic litigation.

Chapter 6 will be focused on presenting and analysing the thesis' interview findings with regard to the barriers to strategic litigation. It will first explore the barriers that people with intellectual impairments in institutional residential settings in European countries face with regard to accessing justice and strategic

litigation, before, once in, or after, court. Second, the chapter will address the barriers encountered by current and/or recent strategic litigators in the area. Finally, the chapter will discuss the barriers to engaging in strategic litigation that are faced by potential key stakeholders in the area.

Chapter 7 will suggest some ways (resulting from the interview findings) of overcoming and/or reducing the following barriers: barriers faced by people with intellectual impairments in institutional residential settings in European countries, to accessing justice and strategic litigation; barriers faced by current and/or recent strategic litigators in the area; and barriers faced by potential strategic litigators.

Finally, Chapter 8 will focus on providing an answer to this thesis' main research question. The chapter will be devoted to the analysis of the potential for increased, or more effective, use of strategic litigation methods in the future, as well as exploring options for realising this potential.

1.5 Conclusion

This thesis is focused on people with intellectual impairments and how institutional residential settings have contributed to their historic disablement in Europe. Subsequently, the thesis is focused on the concept of human rights and how disablement results in (or is equivalent to) violations of such rights. The law has the potential to redress some violations if they are known and if there is access to justice. Insofar as the thesis seeks to identify and remove the barriers that lead to human rights violations, a social model of disability is of interest. Strategic litigation offers a possibility to change the institutional arrangements and prevent future disablement and rights violations. Strategic litigation also represents an option for remedying human rights violations that are already happening in institutional residential settings for people with intellectual impairments in European countries; in other words, ways of addressing current situations of disablement. However, little is known about its actual potential. In the journey of exploring this strategy's potential, the next step will be to determine which human rights people with intellectual impairments in institutional residential settings have in European countries, as well as how these rights have been violated. This will allow for setting up the scenario to shape the need for relevant strategic litigation, or put differently, to understand the situation or situations that strategic litigation, which is the object of this thesis, purports to prevent or remedy. The next chapter is devoted to this aim.

Chapter 2

PEOPLE WITH INTELLECTUAL IMPAIRMENTS IN INSTITUTIONAL RESIDENTIAL SETTINGS IN EUROPEAN COUNTRIES: HUMAN RIGHTS AND TYPICAL VIOLATIONS

2.1 Introduction

Analyses of the human rights of people with intellectual impairments who are in institutional residential settings in European countries have only been conducted fairly recently.⁹³ Back in 2002, a study carried out by Quinn and Degener (amongst others) that analysed human rights and disability in the context of the United Nations' (UN) human rights instruments identified the need for legal analysis with regard to this group's human rights.⁹⁴ This chapter aims to contribute to this analysis by providing an overview of what emerges from a range of legal sources, and in so doing, it focuses on this group's human rights as well on these rights violations. The presentation of this group's human rights (and violations) will be done by following some of the most relevant issues related to institutional living: entry into institutional residential settings and continued residence; legal capacity; conditions within institutional residential settings; relationships and privacy; health; and education and employment.

⁹³ Report by C. Parker for the United Nations Human Rights Office of the High Commissioner, "Forgotten Europeans Forgotten Rights – The Human Rights of Persons Placed in Institutions", 2011 <http://www.europe.ohchr.org/Documents/Publications/Forgotten_Europeans.pdf> last accessed 22 February 2016.

⁹⁴ G. Quinn and T. Degener (eds), *Human Rights and Disability: the Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, HR/PUB/02/1, United Nations, New York and Geneva, 2002, p. 289.

2.2 Human rights and violations of people with intellectual impairments living in institutional residential settings in European countries

2.2.1 Entry into institutional residential settings and continued residence

a) The right to live independently and be included in the community, and the right to liberty

The right of disabled people to live in the community, which is established in Article 19 of the Convention on the Rights of Persons with Disabilities (CRPD), is rather recent. Article 19 of the CRPD establishes an “equal right of all persons with disabilities to live in the community”. The European Coalition for Community Living (ECCL) affirms that the CRPD is “the first legally binding instrument to give explicit recognition to the right to live and participate in the community”.⁹⁵ The CRPD Committee offers guidance about Article 19, for instance, through its concluding observation about Argentina, in which it urges the country “to develop and implement comprehensive programmes that will enable persons with disabilities to have access to a wide range of in-home, residential, community-based and other rehabilitation services and to freely choose where and how to live”.⁹⁶ In its concluding observation about El Salvador, the CRPD Committee suggests that the State should offer disabled people and their families “the

⁹⁵ European Coalition for Community Living, “Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities”, 2009 <<http://www.nuigalway.ie/cdlp/documents/ecclfocusreport2009finalweb.pdf>> last accessed 22 February 2016, p 3.

⁹⁶ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of Argentina as approved by the Committee at its eighth session (17-28 September 2012)”, CRPD/C/ARG/CO/1, at para. 34.

possibility of a personal assistant or support services in the home”.⁹⁷ Some of the earliest UN legal instruments, provided that certain circumstances are met, allow for the institutionalisation of people with intellectual impairments. These are the Declaration on the Rights of Mentally Retarded Persons, and the Declaration on the Rights of Disabled Persons.⁹⁸

The Council of Europe’s (CoE) revised European Social Charter⁹⁹ establishes the “right of persons with disabilities to independence, social integration and participation in the life of the community” (Article 15). In addition, certain policy and strategy documents issued by the CoE promote independent living/living in the community.¹⁰⁰ Although these last documents do not establish enforceable rights, they are influential in strategic litigation, for instance in terms of the European Social Charter.¹⁰¹

In the case of the EU, Article 26 of the Charter of Fundamental Rights of the European Union (EU CFR) “recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”.

⁹⁷ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of El Salvador, adopted by the Committee at its tenth session (2/13 September 2013)”, CRPD/C/SLV/CO/1.

⁹⁸ Declaration on the Rights of Mentally Retarded Persons (at para. 4); Declaration on the Rights of Disabled Persons (at para. 9).

⁹⁹ This is quite different from the original instrument, and many states are party to the latter but not the former.

¹⁰⁰ Malaga Political Declaration: Improving the Quality of Life for People with Disabilities, Enhancing a Coherent Policy for and Through Participation, adopted in April 1992 at the 474th meeting of the Ministers’ Deputies; Disability Action Plan 2006-2015, Recommendation Rec(2006)5 of the Council of Europe to Member States on the Council of Europe Action Plan 2006-2015, adopted by the Committee of Ministers on 5 April 2006 at the 961st meeting of the Ministers’ Deputies, p. 21.

¹⁰¹ Amongst possible instances for strategic litigation, Chapter 5 will introduce strategic litigation under the European Committee of Social Rights, which is the monitoring mechanism for the European Social Charter.

Article 14 (1) (b) of the CRPD recognises that State Parties shall guarantee that “persons with disabilities” are not “deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty”. Through its concluding observations, the CRPD Committee interprets that deprivation of liberty because of a disability (including “intellectual disability”) is contrary to the CRPD.¹⁰² In September 2015, the CRPD Committee issued guidelines on Article 14 of the CRPD.¹⁰³ According to these guidelines, Article 14 “is, in essence, a non-discrimination provision” (paragraph 4). It prohibits the detaining of a disabled person on the basis of his/her impairment, even if there are other reasons for detention, such as that the person is deemed dangerous to himself/herself or others (paragraph 6). Such a practice “is discriminatory in nature and amounts to arbitrary deprivation of liberty” (paragraph 6). Also, the involuntary commitment of disabled people, on health care grounds, contradicts the previous absolute prohibition of detaining a person on the basis of his/her impairment, as well as “the principle of free and informed consent of the person concerned for health care (article 25 [of the CRPD])” (paragraph 10). Moreover, the CRPD Committee stresses that detaining disabled people “based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty” (paragraph 13).

Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) establishes that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”. Interpreting

¹⁰² Committee on the Rights of Persons with Disabilities, “Consideration of reports submitted by States parties under article 35 of the Convention. Concluding observations of the Committee on the Rights of Persons with Disabilities. Peru”, CRPD/C/PER/CO/1.

¹⁰³ 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 Article, the Human Rights Committee has issued general comment No. 35.¹⁰⁴ Although this general comment recognises that a deprivation of liberty cannot be justified by the mere existence of a disability, it contemplates that “any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others”.¹⁰⁵ From this interpretation by the Human Rights Committee, it is clear that there is conflict with the previous CRPD Committee’s guidelines on Article 14 of the CRPD.¹⁰⁶ These guidelines interpreted the CRPD as prohibiting the detention of a disabled individual on the grounds that they are considered to be dangerous to himself/herself or others,¹⁰⁷ for reasons pertaining to health care,¹⁰⁸ or overall due to “other reasons tied to impairment”¹⁰⁹. The general comment, by contrast, for instance would permit the detention of a disabled individual in the case that he/she could pose a danger to others (for example, the danger of injuring them), which is against the prohibition of detention on the grounds of considering a disabled person to be dangerous to others as established by the Committee’s guidelines on Article 14 of the CRPD.

¹⁰⁴ Human Rights Committee, “General comment No. 35. Article 9 (Liberty and security of person)”, adopted by the Committee at its 112th session (7-31 October 2014), CCPR/C/GC/35. This General comment replaces the general comment No. 8 (sixteenth session), adopted by the Human Rights Committee in 1982.

¹⁰⁵ *Ibid*, at para. 19.

¹⁰⁶ 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”.

¹⁰⁷ *Ibid*, at para. 6.

¹⁰⁸ *Ibid*, at para. 10.

¹⁰⁹ *Ibid*, at para. 13.

The Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which is commonly known as the OPCAT,¹¹⁰ establishes that:

[D]eprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority –Article 4 (2).

This last instrument presents clear prospects for people with intellectual impairments living in institutional residential settings, because of its broad interpretation of the notion of deprivation of liberty. Nevertheless, it appears that the matter of the form (such as written or verbal) with regard to the “order of any judicial, administrative or other authority” is not completely clear. The OPCAT created the Subcommittee on Prevention of Torture (SPT). It is composed of twenty-five “independent and impartial” experts, and amongst its functions it visits “social care institutions and any other places where people are or may be deprived of their liberty”.¹¹¹ In the future, the SPT is planning to address due process and judicial review in places such as those “where mental patients and others are confined”.¹¹² Hopefully, this will offer further guidance on the matter of the right to liberty for people with intellectual impairments.

¹¹⁰ The OPCAT has the objective of establishing a system of regular visits, which should be undertaken by independent international and national bodies, to different places where people are deprived of their liberty (Article 1) and requires states parties to put in place “one or several visiting bodies” (Article 3).

¹¹¹ <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIntro.aspx>> last accessed 22 February 2016.

¹¹² Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “Provisional statement on the role of judicial review and due process in the prevention of torture in prisons, adopted by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment at its sixteenth session, 20 to 24 February 2012”, CAT/OP/2, p. 3.

In the European context, Article 5 (1) of the European Convention on Human Rights (ECHR) and Article 6 of the European Union's (EU) Charter of Fundamental Rights (EU CFR) -which recognises a "right to liberty and security of person"- are of relevance. Article 5 (1) of the ECHR requires "a procedure prescribed by law" for cases of deprivation of liberty. Amongst the cases for deprivation of liberty, Article 5 (1) (e) includes "persons of un-sound mind": In so doing, the Article contemplates "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of un-sound mind, alcoholics or drug addicts or vagrants". The European Court of Human Rights (ECtHR) interpreted Article 5 of the ECHR on numerous occasions. For example, the ECtHR holds that even if an individual does not resist his or his placement, this may constitute a deprivation of liberty.¹¹³ As Parker points out:

Thus, the European Court of Human Rights recognizes that a person may be de facto detained even if no order has been given by a judicial, administrative or other public authority. This is important because if a person is not deemed to be deprived of his/her liberty, certain safeguards will not apply.¹¹⁴

In the case *Winterwerp v. the Netherlands*, the ECtHR considers that "the mental disorder must be of a kind or degree warranting compulsory confinement".¹¹⁵ Overall, when a person with intellectual impairments is deprived of his or her liberty, this gives rise to various safeguards, including the following. In the first place, there is the right to challenge the lawfulness of detention. In this context, the ECtHR decided that when a person is detained on the grounds of "unsound mind" -Article 5 (4) (e), an independent judicial body is to periodically review the

¹¹³ *De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, application Nos 2832/66, 2835/66 and 2899/66, Judgment of 18 November 1970.

¹¹⁴ Report by C. Parker for the United Nations Human Rights Office of the High Commissioner (2011), op. cit., p. 12.

¹¹⁵ *Winterwerp v. the Netherlands*, Application No. 6301/73, Judgment of 24 October 1979, at para. 39.

person's detention.¹¹⁶ Another fundamental safeguard is the right to legal assistance, which will be explored in chapter 3, in the context of access to justice for people with intellectual impairments.

Comparing Article 5 of the ECHR with Article 14 of the CRPD, potential tensions can be identified. In such a way, Bartlett states that Article 14 of the CRPD "takes a starting point that compulsion is not justifiable on the basis of disability",¹¹⁷ whilst Article 5 of the ECHR departs from considering the lawfulness of detention of "persons of un-sound mind". As previously mentioned, recent guidelines on Article 14 of the CRPD establish that under no circumstances can a person be detained on the basis of his/her impairment. How these tensions are resolved will very much depend on the approach adopted by the ECtHR.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European convention against Torture) required the establishment of The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).¹¹⁸ With regard to the issue of admission to an institutional residential setting, this Committee stresses that the person concerned should be heard by a judge, not only at the moment of deciding on his/her placement, but also when his/her placement is reviewed.¹¹⁹ The CPT also suggests that a person admitted to an

¹¹⁶ *X. v. The United Kingdom*, application No. 7215/75, Judgment of 5 November 1981. More recent cases interpreting Article 5 of the ECHR are *H.L. v. the United Kingdom*, application No. 45508/99, Judgment of 5 October 2004; *Stanev v. Bulgaria*, application No. 36760/06, Judgment of 17 January 2012; and *D.D. v. Lithuania* (no. 13469/06), Judgment of 14 February 2012.

¹¹⁷ P. Bartlett, "A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention", *The International Journal of Human Rights*, 16:6, 2012, pp. 831-844.

¹¹⁸ For instance, this Committee visits "social care homes", which are institutions in which people with intellectual impairments are likely to be held <<http://www.cpt.coe.int/en/about.htm>> last accessed 22 February 2016.

¹¹⁹ See, for example, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 8 to 12 December 2008, CPT/Inf (2009) 28; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of

institution should be given “full, clear and accurate information” (which includes a copy of any court decision, as well as written information about the decision, and also about the avenues and deadlines to appeal),¹²⁰ have access to independent legal assistance, free of charge if necessary,¹²¹ and a right to bring proceedings against the decision to place them in the institutional setting.¹²² The CPT recommends that a person admitted to an institution, as well as his or her family members, receive an information leaflet addressing the institution’s routine and the admitted person’s rights (including the right to lodge a formal complaint

Punishment (CPT), Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 30 May to 30 June 2012, CPT/Inf (2014) 1; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), Report to the Moldovan Government on the visit to the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 1 May to 10 June 2011, CPT/Inf (2012) 3; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 13 to 20 February 2013, CPT/Inf (2012) 3, CPT/Inf (2014) 16.

¹²⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2009), Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 8 to 12 December 2008, *op. cit.*; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2014), Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 13 to 20 February 2013, *op. cit.*

¹²¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2009), Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 8 to 12 December 2008, *op. cit.*; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2012), Report to the Moldovan Government on the visit to the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 1 May to 10 June 2011, *op. cit.*; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2014), Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 13 to 20 February 2013, *op. cit.*

¹²² European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2012), Report to the Moldovan Government on the visit to the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 1 May to 10 June 2011, *op. cit.*; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2014), Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 13 to 20 February 2013, *op. cit.*

and the modalities for doing so).¹²³ Furthermore, the CPT recommends that persons who are unable to understand the leaflet receive adequate assistance for these purposes, such as verbal explanations.¹²⁴ The CPT also highlights the need to make the best effort possible to avoid conflicts of interest, which happens when a person's guardian is simultaneously employed as staff member in the institutional residential setting.¹²⁵

In addition, the CPT published standards that aim to improve access to justice for people who are involuntarily detained, including the "mentally handicapped".¹²⁶ These standards provide relevant guidance, which is along the same lines as the previous concluding observations.¹²⁷ The standards require that an initial placement decision be made by a judge and if the decision is made by a non-judicial authority, the person must have the right to bring judicial proceedings. These standards also suggest that "patients" should be given an introductory

¹²³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2009), Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 8 to 12 December 2008, op. cit.; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2014), Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 30 May to 30 June 2012, op. cit.

¹²⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2009), Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 8 to 12 December 2008, op. cit.; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2014), Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 30 May to 30 June 2012, op. cit.

¹²⁵ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2012), Report to the Moldovan Government on the visit to the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 1 May to 10 June 2011, op. cit.; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) (2014), Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 13 to 20 February 2013, op. cit..

¹²⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT standards*, CPT/Inf/E(2002)1-Rev.2013.

¹²⁷ *Ibid*, pp. 55-56.

brochure that includes their rights, as well as appropriate assistance in the case that they are not able to understand it. The standards also recommend that, at reasonable intervals, a “patient” can request the revision of his/her placement by a judicial instance.

b) Institutionalisation and arbitrary deprivation of liberty

Leading experts in the field of human rights and disability, and human rights organisations, agree that institutionalisation stands in opposition to the human rights of people with intellectual impairments as well as inclusion policies. According to the ECCL “the segregation of people with disabilities is in itself a violation of their human rights and is contrary to both national and European social inclusion policies”.¹²⁸ In line with this, Parker argues that “[i]nstitutionalization itself can lead to serious and often long-term adverse consequences for persons of all age groups”,¹²⁹ as well as that “the continued institutionalisation of disabled people in long stay institutions (often for life), that is common practice in many parts of Europe, represents a serious violation of rights under the CRPD, in particular Article 19”¹³⁰. Parker also expresses this last view in a report elaborated alongside Clements, arguing that “forcing people with disabilities to live in institutions, prevents them from developing and

¹²⁸ European Coalition for Community Living, *Creating Successful Campaigns for Community Living. An advocacy manual for disability organisations and services providers* (2008) <http://community-living.info/wp-content/uploads/2014/02/Advocacy_manual.pdf> last accessed 22 February 2016, p. 15.

¹²⁹ Report by C. Parker for the United Nations Human Rights Office of the High Commissioner (2011), *op. cit.*, p. 6.

¹³⁰ C. Parker, “An Overview of Article 19 of the UN Convention on the Rights of Persons with Disabilities” in European Coalition for Community Living, *Focus on Article 19 of the UN Convention on the Rights of Persons with Disabilities*, 2009 <<http://www.nuigalway.ie/cdlp/documents/ecclfocusreport2009finalweb.pdf> > last accessed 22 February 2016, p. 22.

maintaining relationships with their family, friends and the wider community”.¹³¹
A report by Inclusion International affirms that:

Institutions remains a powerful and negative force for people with intellectual disabilities in both high income countries where they continue to exist and draw resources from the provision of services in the community and in low income countries (e.g. Eastern Europe) where the centralized state continues to invest in refurbishing and reinventing institutions. Despite many years of advocacy by self-advocates, families and other human rights activists, institutions continue to exist as a significant violation of the CRPD and other human rights conventions. In addition to the challenges of closing institutions that remain there continues to be a real threat that they will continue to be built in different forms in the future.¹³²

Also the arbitrary deprivation of liberty constitutes a risk for many disabled people (including those with intellectual impairments), as according to Bartlett, in CoE countries “detention becomes a matter of discretion on the part of clinicians and/or social services personnel, with courts, where they are required to approve detentions, becoming little more than a rubber stamp”.¹³³

¹³¹ C. Parker and L. Clements, “The European and the Right to Community Living. Structural Funds and the European Union’s Obligations under the Convention on the Rights of Persons with Disabilities”, Open Society Foundations, 2012 <<http://www.refworld.org/pdfid/4fbcc96d2.pdf>> last accessed 22 February 2016, p. 21.

¹³² Inclusion International, “Inclusive Communities = Stronger Communities: Global Report on Article 19: The Right to Live and Be Included in the Community”, 2012 <<http://inclusion-international.org/wp-content/uploads/2010/05/Global-Report-Living-Colour-dr2-2.pdf>> last accessed 22 February 2016, p. 84.

¹³³ P. Bartlett, “A mental disorder of a kind or degree warranting confinement: examining justifications for psychiatric detention”, *The International Journal of Human Rights* 16:6, 2012, pp. 831-844.

2.2.2 Legal capacity

a) The right to exercise legal capacity on an equal basis with others

Article 12 (1) of the CRPD establishes that disabled people “have the right to recognition everywhere as persons before the law”. Disabled persons “enjoy legal capacity on an equal basis with others in all aspects of life” -Article 12 (2). States Parties should provide disabled people with “the support they may require in exercising their legal capacity” -Article 12 (3). State Parties should ensure that safeguards connected to the exercise of legal capacity

... respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests –Article 12 (4).

Moreover, in connection with issues of property and financial affairs in relation to disabled persons, states should implement measures that ensure “the equal right of persons with disabilities” -Article 12 (5). Provided that certain guarantees are in place, the early UN instrument, the “Declaration on the Rights of Mentally Retarded Persons” accepts total or partial restrictions on legal capacity. For this purpose, this Declaration requires a procedure “with proper legal safeguards against every form of abuse”, an evaluation performed by qualified experts, a

periodic review, and a “right of appeal to higher authorities”.¹³⁴ Comparing the earlier Declaration on the Rights of Mentally Retarded Persons with Article 12 of the CRPD, the former opts for a substitution model, whilst the latter chooses a support model. In other words, in the context of the Declaration on the Rights of Mentally Retarded Persons, it is legal to declare the lack of capacity of a person with intellectual impairments, as well as to designate a guardian acting in his/her substitution. In a whole different way, the CRPD clearly states that the declaration of the lack of capacity of a person with intellectual impairments is no longer possible. According to the CRPD, a person with intellectual impairments will always have capacity, but may need support for its exercise. In General Comment No 1 (2014), the CRPD Committee offers a very broad interpretation of support, including issues such as the choice of a trusted support person, non-conventional methods of communication, or support for a disabled person so that he/she can develop the ability to plan in advance.¹³⁵ For instance, through its concluding observations about Peru, Spain and Tunisia, the CRPD Committee stresses the importance of replacing substitute decision-making with supported decision-making,¹³⁶ as well as ensuring that relevant training is provided to public officials and other stakeholders.¹³⁷ O'Mahony illustrates that:

¹³⁴ Declaration on the Rights of Mentally Retarded Persons (at para. 7).

¹³⁵ Committee on the Rights of Persons with Disabilities, “General comment No 1 (2014) Article 12: Equal recognition before the law”, CRPD/C/GC/1, at para. 17.

¹³⁶ Committee on the Rights of Persons with Disabilities, “Consideration of reports submitted by States parties under article 35 of the Convention. Concluding observations of the Committee on the Rights of Persons with Disabilities. Peru”, CRPD/C/PER/CO/1; Committee on the Rights of Persons with Disabilities, “Consideration of reports submitted by States parties under article 35 of the Convention. Concluding observations of the Committee on the Rights of Persons with Disabilities. Spain”, CRPD/C/ESP/CO/1; Committee on the Rights of Persons with Disabilities, “Consideration of reports submitted by States parties under article 35 of the Convention. Concluding observations of the Committee on the Rights of Persons with Disabilities. Tunisia”, CRPD/C/TUN/CO/1.

¹³⁷ Committee on the Rights of Persons with Disabilities, “Consideration of reports submitted by States parties under article 35 of the Convention. Concluding observations of the Committee on the Rights of Persons with Disabilities. Spain”, *op. cit.*; Committee on the Rights of Persons with Disabilities, “Consideration of reports submitted by States parties under article 35 of the Convention. Concluding observations of the Committee on the Rights of Persons with Disabilities. Tunisia”, *op. cit.*

A central aspect of Article 12 is the focus on the 'will and preferences' of the person as the determining factor in decisions about their life and this requires moving away from a 'best interests' approach, which brings with it the significant risk of paternalism and substitute decision-making.¹³⁸

Moreover, the International Disability Alliance (IDA) states that States may "need to abolish incapacity and guardianship laws and any other laws that remove a person's right to make decisions for herself or himself".¹³⁹ Amongst the laws to be abolished, the IDA mentions laws that allow compulsory mental health treatment to be imposed on someone who "lacks capacity" to make decisions, or the appointment of an administrator to manage financial affairs over a person's objection.¹⁴⁰ In fact, the CRPD Committee clarifies that practices such as guardianship "must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others".¹⁴¹

Another very difficult issue raised by the CRPD is how support for the exercise of legal capacity can be materialised, particularly in certain cases. This is relevant for people with intellectual impairments living in institutional residential settings in European countries because they are deemed to give consent if their guardian wants them to live in an institutional residential setting, regardless of their own wishes. In addition, the issue under consideration is relevant for this group because of the need to ensure that they have support to exercise legal capacity

¹³⁸ C. O'Mahony, "Legal capacity and detention: implications of the UN disability convention for the inspection standards of human rights monitoring bodies", *The International Journal of Human Rights* 16:6, 2012, pp. 883-901.

¹³⁹ International Disability Alliance, "Guidance Document – Effective Use of International Human Rights Monitoring Mechanisms to Protect the Rights of Persons with Disabilities", 2010 <<http://www.internationaldisabilityalliance.org/sites/disalliance.e-presentaciones.net/files/public/files/CRPD-reporting-guidance-document-English-FINAL-print%5B1%5D.pdf>> last accessed 22 February 2016, p. 38.

¹⁴⁰ *Ibid*, p. 38.

¹⁴¹ Committee on the Rights of Persons with Disabilities, "General comment No 1, Article 12: Equal recognition before the law", CRPD/C/GC/1, 2014, at para. 7.

when in an institutional residential setting. The European Platform of Self-Advocates (EPSA) affirms that “everyone can communicate, in some way, including people with severe and profound disabilities”¹⁴² and Inclusion International states that “all persons have a will which, with adequate support, can be discerned”.¹⁴³ However, there are likely to be cases in which it is very difficult to ascertain the will, wishes and/or preferences of a person with intellectual impairments living in an institution and, in such cases, it is not clear how support for the exercise of their legal capacity should be provided. A leading scholar in the disability field, as well as people with intellectual impairments themselves, shed light on the matter under consideration. As Quinn argues:

What about those whose will is undetectable or for whom it is not possible to ascribe a will or preference? Who are we talking about. These would include people who have been institutionalized and for whom the ‘mystic cords of memory’ that bind them to others, to family, to friends, to community are gone. And these would be people in what is often described as a ‘persistent vegetative state’ –a form of language that seems to even deny personhood.¹⁴⁴

Quinn then mentions that supports and assistants will unavoidably make decisions “for” instead of “decisions with” those persons. However, according to Quinn, this problem does not mean that the CRPD should be discredited. On the contrary, he recommends that all efforts should be made to understand the wishes of people with intellectual impairments, as according to Article 12, this

¹⁴² European Platform of Self-Advocates (EPSA), “EPSA Recommendations on legal capacity – Adopted in the General Meeting 2009 in Tampere, Finland” <http://inclusion-europe.eu/?page_id=85> last accessed 22 February 2016, p. 1.

¹⁴³ Inclusion International, “Position Paper - Legal Capacity”, 2010 <<http://inclusion-international.org/wp-content/uploads/2010/05/Position-Paper-Legal-Capacity-June-2010.pdf>> last accessed 22 February 2016.

¹⁴⁴ G. Quinn, “Personhood & Legal Capacity – Perspectives on the Paradigm Shift of Article 12 CRPD”, HPOD Conference, Harvard Law School, 20 February 2010, p. 15.

matter is to be approached as an obligation. Inclusion International suggests the following measures to assist in the context of supported decision-making:

Supported Decision-Making... helps a person to understand information and make decisions based on his or her own preferences. A person with an intellectual disability might need help with reading, or may need support in focusing attention to make a decision. A person who has no verbal communication might have a trusted person or people who interprets their non-verbal communications, such as positive or negative physical reactions, or uses Alternative and Augmentative Communication.¹⁴⁵

In addition, people with intellectual impairments expressed their views on the matter in a general meeting hosted by the EPSA.¹⁴⁶ During this meeting, they described their desire for a “support person or even a group of support people”, who is/are chosen by themselves. They also want to be asked about their opinions, and to have access to “independent and accessible resource services”.

In particular, in the case of people with intellectual impairments living in European institutional residential settings, there are links between the restrictions on legal capacity and supported decision making, for instance with regard to entry and continued living in an institution and decisions about day-to-day living within institutional residential settings. Always considering each case on its individual basis, support is, as highlighted by the CRPD Committee, “a broad term that

¹⁴⁵ Inclusion International (2010), op. cit. On alternative and augmentative communication, these terms are “used to describe the different methods that can be used to help people with disabilities communicate with others. As the term suggests these methods can be used as an alternative to speech or to supplement it.” <<http://www.inclusive.co.uk/infosite/aac.shtml>> last accessed 22 February 2016.

¹⁴⁶ European Platform of Self-Advocates (EPSA) (2009), op. cit., p. 2.

encompasses both informal and formal support arrangements, of varying types and intensity”.¹⁴⁷

In the context of the CoE, back in 1999, the Committee of Ministers issued a Recommendation with regard to “incapable adults”.¹⁴⁸ This Recommendation is directed to “adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions”. The document then clarifies that “[t]he incapacity may be due to a mental disability, a disease or a similar reason”. From this content, it is clear that people with intellectual impairments are amongst the people addressed by the Recommendation. Principle 2 (1) of this Recommendation is advanced for its time, as it establishes that measures and other legal arrangements for the protection of incapable adults should be “sufficient... to enable a suitable legal response to be made to different degrees of incapacity and various situations”. Nevertheless, Principle 2 (4) reflects content that is clearly outdated in comparison to Article 12 of the CRPD, when it establishes that the measures for protection “should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned”. In terms of the ECHR, this instrument does not contain explicit provisions about legal capacity. Nevertheless, and as pointed out by the CoE Commissioner for Human Rights, for instance the ECtHR has interpreted the ECHR understanding that “depriving individuals of their legal capacity constitutes a serious interference with the individual’s right to respect for private life (Article 8)”.¹⁴⁹ Finally, and within the EU, Article 20 of the EU CFR establishes that “everyone is equal before the law”.

¹⁴⁷ Committee on the Rights of Persons with Disabilities, “General comment No 1, Article 12: Equal recognition before the law”, op. cit., at para. 17.

¹⁴⁸ Council of Europe - Committee of Ministers, Recommendation R(99)4 on the Principles concerning the legal protection of incapable adults, adopted by the Committee of Ministers on 23 February 1999 at the 660th meeting of the Ministers’ Deputies.

¹⁴⁹ Commissioner for Human Rights, “Who Gets to Decide? Right to legal capacity for persons with intellectual and psychosocial disabilities”, CommDH/IssuePaper(2012)2, quoting *Shtukaturov v. Russia* (App no. 44009/05; Judgment of 27 March 2008), at para. 90 and *Salontaji-Drobnjak v. Serbia* (App no. 36500/05; Judgment of 13 October 2009), at para. 144, p. 15.

b) Lack of support for exercising legal capacity and guardianship

Violations of the right to exercise legal capacity on an equal basis with others can take place in the form of a lack of support for exercising legal capacity and guardianship. In this case, a person with intellectual impairments in an institutional residential setting is unable to exercise his/her legal capacity because of a lack of support (for instance, regarding using the legal system) even if he/she is not under guardianship. The situation where a person with intellectual impairments is deemed to lack capacity, and therefore a guardian -or representative- is appointed, is known as "guardianship". Back in 2000, Rosenthal illustrated that guardianship represents one of the most common forms of discrimination regarding persons with intellectual impairments.¹⁵⁰ Afterwards -and still before the approval of the CRPD- a report by the UN Secretary-General described the reality of the use of the term guardianship:

The concept of guardianship is frequently used improperly to deprive individuals with an intellectual or psychiatric disability of their legal capacity without any form of procedural safeguards. Thus, persons are deprived of their right to make some of the most important and basic decisions about their life on account of an actual or perceived disability without a fair hearing and/or periodical review by competent judicial authorities. The lack of due process guarantees may expose the individual whose capacity is at stake to several possible forms of abuse. An individual with a limited disability may be considered completely unable to make life choices independently and placed under "plenary guardianship". Furthermore, guardianship may be improperly used to

¹⁵⁰ E. Rosenthal (MDRI), "International Human Rights Protections for Institutionalized People with Disabilities: An Agenda for International Action", in M Rioux (ed), *Let the World Know: A Report of a Seminar on Human Rights and Disability*, 2000 <<http://www.independentliving.org/docs2/rosenthal.pdf>> last accessed 24 February 2016, p. 8.

circumvent laws governing admission in mental health institutions, and the lack of a procedure for appealing or automatically reviewing decisions concerning legal incapacity could then determine the commitment of a person to an institution for life on the basis of an actual or perceived disability.¹⁵¹

More recently, a report by the Mental Disability Advocacy Centre (MDAC) and the Association for Social Affirmation of People with Mental Disabilities (SHINE) about Croatia highlights several negative effects of the guardianship practice. Amongst these are: arbitrary detention (“[g]uardianship is sometimes used by families to dispose of unwanted family members”); life-long institutionalisation (staff told MDAC and SHINE that “they expected recently-arrived residents under guardianship to remain in the institution for the rest of their lives”); and abuse (for example, in terms of consent and medical treatment: “[s]ome institutions identified the indifference of guardians as a serious concern, especially when it came to consent to medical treatment”).¹⁵²

MDAC produced a report about legal capacity in Europe.¹⁵³ This report contains detailed snapshots about sixteen European countries, and amongst its findings, Chapter 2 confirms that “[f]orced hospitalisation, treatment without consent and denial of the right to access justice often go hand-in-hand with depriving a person of their legal capacity”. In addition, Chapter 3 of MDAC’s report contains facts and figures about legal capacity: for instance, the researchers stress that “[m]any governments do not know how many people are under guardianship in their

¹⁵¹ United Nations - Secretary-General, “Progress of efforts to ensure the full recognition and enjoyment of the human rights of persons with disabilities”, A/58/181, at para. 15.

¹⁵² MDAC and the Association for Social Affirmation of People with Mental Disabilities (SHINE), “Out of Sight. Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia”, 2011 <http://www.mdac.info/sites/mdac.info/files/croatiareport2011_en.pdf> last accessed 22 February 2016, pp. 54-55.

¹⁵³ MDAC, “Legal Capacity in Europe. A Call to Action to Governments and to the EU”, 2013 <http://mdac.info/sites/mdac.info/files/legal_capacity_in_europe.pdf> last accessed 22 February 2016.

country” as well as “that guardianship is applied indiscriminately”. A report by the European Union Agency for Fundamental Rights (FRA) reveals that:

Around half of the research respondents with intellectual disabilities had been wholly or partially deprived of their legal capacity and placed under a form of guardianship at some point in their lives, including a majority of respondents in Germany, Greece and Hungary.¹⁵⁴

Comparing the previous number to the experiences of interviewees with mental health problems,¹⁵⁵ far fewer of these last interviewees “had experienced formal restrictions of their legal capacity”. This report also clarifies that “a number of respondents, particularly those with intellectual disabilities, spoke negatively about guardianship overall and the restriction on their ability to make decisions”, although at the same time, other respondents expressed positive opinions about guardianship. In addition, the CRPD Committee “notes with deep concern that across the European Union a large number of persons with disabilities have their full legal capacity restricted”.¹⁵⁶

2.2.3 Standard of living

¹⁵⁴ European Union Agency for Fundamental Rights (FRA), “Legal capacity of persons with intellectual disabilities and persons with mental health problems”, Luxembourg, Publications Office of the European Union, 2013.

¹⁵⁵ Who also shared their experiences with the researchers for this report.

¹⁵⁶ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of the European Union”, CRPD/C/EU/CO/1, 2015, at para. 36.

a) The right to an adequate standard of living

Articles 9, 14, 16 and 28 of the CRPD are particularly relevant when assessing the adequacy (or inadequacy) of conditions in institutional residential settings for people with intellectual impairments. Article 9 of the CRPD is of interest because it contemplates access “to the physical environment” as well as “to other facilities and services open or provided to the public”. Article 14 of the CRPD is also relevant as it makes reference to the “provision of reasonable accommodation”. According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN Special Rapporteur on Torture), this Article

[I]mply an obligation to make appropriate modifications in the procedures and physical facilities of detention centres, including care institutions and hospitals, to ensure that persons with disabilities enjoy the same rights and fundamental freedoms as others, when such adjustments do not impose a disproportionate or undue burden. The denial or lack of reasonable accommodations for persons with disabilities may create detention and living conditions that amount to ill-treatment and torture.¹⁵⁷

Article 16 of the CRPD recognises that disabled people who have been “victims of any form of exploitation, violence or abuse” should enjoy “an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender -and age- specific needs” –Article 16 (4). It is reasonable to interpret these requirements as applying to the case of institutional residential settings for people with intellectual impairments. This Article also states that facilities should be monitored by “independent authorities”. In the

¹⁵⁷ Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, “Torture and other cruel, inhuman or degrading treatment or punishment”, A/63/175, 2008, at para. 54.

context of measures to prevent and eliminate all forms of institutional violence, the CRPD Committee includes “the drafting and introduction of protocols to register, monitor and track the conditions in institutions that care for persons with disabilities, particularly those that care for older persons with disabilities”.¹⁵⁸ Also, expanding on Article 16 of the CRPD, more specifically with regard to reporting and investigating, the CRPD Committee observes the need for training for the judiciary.¹⁵⁹ Finally, with the aim of protecting disabled people from exploitation, violence and abuse, the CRPD Committee recommends “protocols for the early detection of violence, above all in institutional settings, procedural accommodation to gather testimonies of victims, and prosecution of those persons responsible, as well as redress for victims”.¹⁶⁰

The UN Committee against Torture (CAT), the European Committee against Torture, and the UN Special Rapporteur on Torture developed guidance regarding monitoring institutional residential settings. This guidance, to be presented next, can be considered alongside the previous guidance issued by the CRPD Committee.

The CAT states in numerous concluding observations that there should be independent bodies monitoring institutional settings.¹⁶¹ The CAT observes that

¹⁵⁸ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of Belgium”, CRPD/C/BEL/CO/1, at para. 31.

¹⁵⁹ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of Denmark”, CRPD/C/DNK/CO/1, at para. 41; Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of Sweden”, CRPD/C/SWE/CO/1, at para. 42.

¹⁶⁰ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session (17-28 September 2012)”, CRPD/C/HUN/CO/1, at para. 32.

¹⁶¹ See, in example: Committee against Torture (CAT), “Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Azerbaijan”, CAT/C/AZE/CO/3; Committee against Torture (CAT), “Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Bosnia and Herzegovina”, CAT/C/BIH/CO/2-5; Committee against Torture (CAT), “Consideration of reports submitted by

monitoring bodies should implement safeguards and international standards such as the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.¹⁶²

The European Committee against Torture calls for a system of regular visits, performed by independent bodies, which should be allowed to talk privately with the person concerned, receive any complaint directly and be able to make recommendations.¹⁶³

The UN Special Rapporteur on Torture addresses the matter of inspection with regard to places of detention through his recommendations.¹⁶⁴ The Special Rapporteur on Torture affirms that to regularly inspect places of detention, especially if this inspection forms part of a system of periodic visits, constitutes one of the most effective preventive measures with regard to torture. Therefore, it is important that independent non-governmental organisations (NGOs) have full access to these places, which include “detention units of medical and psychiatric institutions” as well as “non-penal State-owned institutions caring for the elderly, the mentally disabled and orphans”.¹⁶⁵ The UN Special Rapporteur on Torture

States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Iceland”, CAT/C/ISL/CO/3.

¹⁶² Committee against Torture (CAT), “Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Bosnia and Herzegovina”, op. cit.

¹⁶³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), “Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 8 to 12 December 2008”, op. cit.; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), “Report to the Estonian Government on the visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 30 May to 30 June 2012”, op. cit.; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), “Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 13 to 20 February 2013”, op. cit.

¹⁶⁴ See “General Recommendations of the Special Rapporteur on torture”, E/CN.4/2003/68.

¹⁶⁵ Ibid, at para. 26 (f).

explains that members of an inspection team should be allowed to speak in private with detainees, as well as that the findings of the inspection should be publicly reported.¹⁶⁶ In addition to NGOs, this Special Rapporteur recommends that the following key stakeholders be given access to places of detention: official bodies (with teams to be composed of members of the judiciary, law enforcement officials, defence lawyers, physicians, independent experts and other representatives of civil society); ombudsmen and national or human rights institutions; and the International Committee of the Red Cross.¹⁶⁷

Similarly to Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 28 of the CRPD includes a “right to an adequate standard of living” for disabled people. According to this Article, the right under consideration includes “adequate food, clothing and housing”. The Committee on Economic, Social and Cultural Rights interprets this right through the General Comment No. 4 (1991) on the right to adequate housing, stating that this right “should be seen as the right to live somewhere in security, peace and dignity”.¹⁶⁸

For example, in *Price v The United Kingdom*, the ECtHR found that the conditions of detention in a prison, in the case of a disabled person, amounted to degrading treatment (therefore, breaching Article 3 of the ECHR).¹⁶⁹ This case involved a physically disabled person, who was committed to prison; she spent one night in a police cell, sleeping in her wheelchair. Subsequently, she spent two days in a prison where she required the assistance of male guards to use the toilet.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Committee on Economic, Social and Cultural Rights, “General Comment 4, The right to adequate housing (Article 11 (1) of the Covenant)”, E/1992/23, 1991, at para. 7.

¹⁶⁹ *Price v The United Kingdom*, application No. 33394/96, Judgment of 10 July 2001, at para. 30. In addition, *Stanev v. Bulgaria*, application No. 36760/06, Judgment of 17 January 2012, is of particular relevance on this point.

In the context of the EU, although the EU CFR does not contemplate an explicit right to an adequate standard of living, it recognises that the following rights are relevant when assessing the actual standard of living of people with intellectual impairments in institutional residential settings in European countries: Article 1 (Human dignity); Article 2 (Right to life); Article 3 (Right to the integrity of the person); and Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment).

b) Inadequate conditions within institutional residential settings

Between 1996 and 1997, fifteen children and young adults died in a Bulgarian institutional residential setting “for children with mental and physical disabilities”.¹⁷⁰ This case, which finally led to a judgement issued by the ECtHR,¹⁷¹ exemplifies the egregious human rights violations resulting from inadequate conditions in an institutional residential setting:

It appears that during that winter the home had approximately 0.80 euros (EUR) to spend per child per day. At the time the home employed one medical officer, five nurses, four care assistants (one for every twenty children) and a laundry assistant. It did not have a doctor, although there was a vacancy. The home was inaccessible by car because of the wintry conditions. The nearest hospital was 40 km away and there was no proper transport for sick children. The staff had to walk 5 km to get to work. The heating came on for one hour in the morning and one hour in the evening. The food was highly inadequate. The staff and the inhabitants of the nearby village brought food to the home on a voluntary

¹⁷⁰ <<http://www.ijrcenter.org/2013/06/25/in-nencheva-v-bulgaria-european-court-finds-state-responsible-for-deaths-in-institution-for-children-with-disabilities/>> last accessed 22 February 2016.

¹⁷¹ This is the judgment in *Nencheva and Others v. Bulgaria* (App 48609/06; Judgment of 18 June 2013).

basis so that the children were not left completely unfed. Maintaining basic hygiene was difficult.¹⁷²

2.2.4 Relationships and privacy

a) Family rights and the right to privacy

Article 23 of the CRPD recognises the right of disabled persons “of marriageable age to marry and to found a family”, and it addresses, in particular, the situation of disabled parents and their children. For example, this Article recognises that disabled parents have the right to “appropriate assistance... in the performance of their child-rearing responsibilities” –Article 23 (2). For instance, the Article also contemplates that a child can only be separated from their parents against the parents’ will if “competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child” –Article 23 (4). The Article also stresses that under no circumstances should a disabled child “be separated from parents on the basis of a disability of either the child or one or both of the parents” –Article 23 (4). The right of persons “of marriageable age to marry and to found a family” is also recognised in the following legal instruments: Article 23 (2) of the ICCPR; Article 12 of the ECHR; and Article 9 of the EU CFR.

Article 22 of the CRPD recognises for disabled people the right to respect for a person’s private and family life, home and correspondence, establishing that no

¹⁷² European Court of Human Rights, press release issued by the Registrar of the Court, ECHR 181 (2013) <
https://app.pelorous.com/media_manager/public/138/newsletter/Nencheva%20and%20Others%20v%20Bulgaria.pdf> accessed 29 May 2016.

matter the “place of residence or living arrangements”, the law protects a disabled person from an “arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication” and from “unlawful attacks on his or her honour and reputation”. The second part of the Article establishes the equal protection of “the privacy of personal, health and rehabilitation information of persons with disabilities”. Nevertheless, Lawson argues that:

Although interactions with others are clearly covered by this provision, it is not yet obvious how broadly the term ‘privacy’ will be interpreted. There is, however, a clear potential for considerable overlap between this right and the right to be free from inhuman and degrading treatment.¹⁷³

The right to respect for a person’s private and family life, home and correspondence is additionally contemplated in the following legal instruments: Article 17 (1) of the ICCPR; Article 8 (1) of the ECHR; and Article 7 of the EU CFR.

b) Restrictions on relationships and privacy

The IDA denounces the fact that people with intellectual impairments suffer violations to their family rights, because they are “often discriminated against in family related matters, including marriage, adoption, and divorce”.¹⁷⁴ This can be interpreted as including people with intellectual impairments living in European institutional residential settings. For example in Ukraine, the CRPD Committee

¹⁷³ A.M.M. Lawson, “The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?” *Syracuse Journal of International Law and Commerce* 34, 2007, p. 612.

¹⁷⁴ International Disability Alliance (2010), op. cit., p. 46.

“is concerned about the reports of pressure on families imposed by public officials and professionals to place their children with disabilities in institutions and deny the right of persons with disabilities to a family life”.¹⁷⁵

Restrictions on privacy are usually experienced by people with intellectual impairments living in institutional residential settings. Back in 2002, Quinn and Degener stated that “[m]any restrictions are still placed on... privacy rights for people with disabilities, especially those in institutions, throughout the world”.¹⁷⁶ Moreover, the same scholars assert that:

The right to privacy is a human right that is often neglected in the context of disability. Disabled persons frequently have to accept the involvement of many others in their private lives (doctors, therapists, personal assistants, etc.). The right to privacy is therefore difficult to protect, especially in an institutional setting.¹⁷⁷

For example, MDAC and SHINE report violations of the right to privacy in their investigation into Croatia.¹⁷⁸ These violations include bedroom overcrowding, bathrooms without partitioning between showerheads, as well as the absence of separate male and female toilets. In addition, the CRPD Committee expresses

¹⁷⁵ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of Ukraine”, CRPD/C/UKR/CO/1, at para. 42.

¹⁷⁶ G. Quinn and T. Degener, “Chapter 1: The moral authority for change: human rights values and the worldwide process of disability reform” in G. Quinn and T. Degener (eds), *Human Rights and Disability: the Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, HR/PUB/02/1 (United Nations: New York and Geneva, 2002), p. 24.

¹⁷⁷ T. Degener, “Chapter 4: Disability and freedom: the International Covenant on Civil and Political Rights (ICCPR)” in G. Quinn and T. Degener (eds), *Human Rights and Disability: the Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, HR/PUB/02/1 (United Nations: New York and Geneva, 2002), p. 57.

¹⁷⁸ MDAC and the Association for Social Affirmation of People with Mental Disabilities (SHINE), “Out of Sight. Human Rights in Psychiatric Hospitals and Social Care Institutions in Croatia”, 2011 <http://www.mdac.info/sites/mdac.info/files/croatiareport2011_en.pdf> last accessed 22 February 2016.

concern “that the minimum requirements for protecting the private life of persons with disabilities living in institutions are not guaranteed”.¹⁷⁹

2.2.5 Health

a) The right to an equal standard of health

People with intellectual impairments living in institutional residential settings in European countries are entitled to equal access to healthcare. Article 25 of the CRPD establishes that disabled people (including people with intellectual impairments) are entitled to the “highest attainable standard of health”, which therefore should be expected in the context of the institutional residential settings under scrutiny. Article 12 of the ICESCR establishes the mandate of ensuring for all persons “the highest attainable standard of physical and mental health”. Interpreting this Article, the Committee on Economic, Social and Cultural Rights issued the General Comment N° 14 “The right to the highest attainable standard of health”.¹⁸⁰ In this General Comment, the Committee on Economic, Social and Cultural Rights affirm that “coercive medical treatments” can only be applied “on an exceptional basis” and that “such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care”.¹⁸¹ However, as

¹⁷⁹ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of Belgium”, *op. cit.*, at para. 34.

¹⁸⁰ Committee on Economic, Social and Cultural Rights, “Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000). The right to the highest attainable standard of health (article 12 of the International Covenant of Economic, Social and Cultural Rights)”, E/C.12/2000/4.

¹⁸¹ *Ibid.*, at para. 34.

Parker remarks, there is a need for clarification with regard to the detailed content of “best practices” or “applicable international standards”.¹⁸² Parker additionally gives a warning about the reference to the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, because these Principles “have been subject to strong and widespread criticism”. Also, it is important to note that the Principles refer to mental health. The (ex) UN Special Rapporteur on the Right to Health stated that, “States should ensure facilities, goods, services and conditions for persons with mental disabilities so they may enjoy the highest attainable standard of health”.¹⁸³

Article 35 of the EU CFR recognises for everyone the “right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices”.

For people with intellectual impairments living in European institutional residential settings, the issue of consent to medical treatment is of fundamental importance in the area of health. Specifically with regard to disabled people, the following Articles of the CRPD are relevant to the issue of consent to medical treatment: Articles 12, 15, 16, 17, and 25. Examples of other rights that are also relevant, and that are recognised for all persons in general, are: the right to the highest attainable standard of health (for example, as recognised by Article 12 of the ICESCR); the right to a private and family life (as for instance, is established in Article 8 of the ECHR); the prohibition of torture and inhuman or degrading treatment or punishment (such as Article 7 of the ICCPR, and Article 3 of the ECHR).

¹⁸² Report by C. Parker for the United Nations Human Rights Office of the High Commissioner (2011), *op. cit.*, p. 19.

¹⁸³ Economic and Social Council, “Economic, Social and Cultural Rights. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, E/CN.4/2005/51.

The issue of medical treatment for people with intellectual impairments was a problematic and contested one when drafting Article 17 of the CRPD. Various positions were debated, and the prevailing one did not offer detailed regulation of treatment. Therefore, according to Article 17 of the CRPD: “Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others”. Lawson agrees with the final content of Article 17, as she argues that to regulate, in detail, treatment for disabled people, against their will, would imply approving such interventions.¹⁸⁴ Following a different approach, Kayess and French object to the final version of Article 17: “[t]he result is that one of the most critical areas of human rights violations for persons with disability –the use of coercive State power for the purpose of ‘treatment’- remains without any specific regulation”.¹⁸⁵ Undoubtedly, and as Lawson stresses, Article 17 of the CRPD “leaves some room for interpretation”.¹⁸⁶ In this context, the UN Special Rapporteur on Torture provides useful guidance. He made it clear that in line with the CRPD it is mandatory to obtain a person’s free and informed consent, in relation to medical care, as well as that the option of involuntary treatment is no longer possible.¹⁸⁷ Moreover, the UN Special Rapporteur on Torture states that:

Whereas a fully justified medical treatment may lead to severe pain or suffering, medical treatments of an intrusive and irreversible nature, when they lack a therapeutic purpose, or aim at correcting or alleviating a disability, may constitute torture and ill-treatment if enforced or

¹⁸⁴ A.M.M. Lawson (2007), op. cit., p. 609.

¹⁸⁵ R. Kayess and P. French, “Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities”, *Human Rights Law Review* 8, 2008, pp. 29-30.

¹⁸⁶ A.M.M. Lawson (2007), op. cit., p. 610.

¹⁸⁷ Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, “Torture and other cruel, inhuman or degrading treatment or punishment”, op. cit., at para. 44.

administered without the free and informed consent of the person concerned.¹⁸⁸

However, it remains unclear what happens in the case of treatments that do not lead to severe pain or suffering, which are not intrusive or irreversible, indeed have a therapeutic purpose, or do not aim at correcting or alleviating a disability. In other words, it is not completely clear whether or not, in the case that treatments with these characteristics are administered without the consent of a person with an intellectual impairment, this would amount to torture and/or ill-treatment.

More recently, and recalling its concluding observations on Ecuador, New Zealand and Sweden, the CRPD Committee clarifies through its Guidelines on Article 14 of the CRPD that “States parties should ensure that the provision of health services, including mental health services, are based on free and informed consent of the person concerned”.¹⁸⁹ However, Munro argues that:

The statement that treatment should usually be administered on the basis of consent is commonplace within human rights documents, but the reality is that in-patient treatment for people detained on the basis of mental disability is rarely explicitly consensual, and even where it is we have reason to be concerned about the extent to which it is informed and free.

¹⁸⁸ Ibid, at para. 47.

¹⁸⁹ 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”, op. cit., quoting the Committee’s concluding observations on Ecuador (CRPD/C/EQU/CO/1, at para. 29), New Zealand (CRPD/C/NZL/CO/1, at para. 30) and Sweden (CRPD/C/SWE/CO/1, at para. 36).

Consent has not been enough to mark the distinction between acceptable and unacceptable treatment practices.¹⁹⁰

Therefore, Munro concludes that, “we need to truly exploit the potential for domestic and supranational monitoring and inspection bodies to raise the standards of human rights protection in this context”.

Another relevant issue with regard to the health of the group under consideration is represented by experimentation. The following Articles are relevant in relation to this matter: Article 15 of the CRPD, and Article 7 of the ICCPR.

Article 15 of the CRPD affirms that, “no one shall be subjected without his or her free consent to medical or scientific experimentation”. Lawson points out that “there are clearly difficult questions of definition and scope to be addressed in this area”, and in this context, she hopes that the CRPD Committee will issue relevant guidance.¹⁹¹

Article 7 of the ICCPR establishes that “no one shall be subjected without his free consent to medical or scientific experimentation”. The Human Rights Committee’s General Comment N° 20 interprets this right as follows:

The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is

¹⁹⁰ N. Munro, “Define acceptable: how can we ensure that treatment for mental disorder in detention is consistent with the UN Convention on the Rights of Persons with Disabilities?”, *The International Journal of Human Rights* 16:6, 2012, pp. 902-913.

¹⁹¹ A.M.M. Lawson (2007), *op. cit.*, p. 607.

necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.¹⁹²

b) Poor healthcare

In many institutional residential settings, the problem is that appropriate/quality healthcare is not available. Back in 2003, Rosenthal and Sundram reported that in institutional residential settings, it is common that no or little treatment is provided to people with intellectual impairments, or that the same treatment is offered to everyone regardless of their individual needs.¹⁹³ These experts also point out that even if some sort of treatment is in place, it is usual that this is not targeted at supporting a person to develop his/her skills and potential. According to Rosenthal and Sundram, this is very common for people with the most severe intellectual impairments. However, these experts illustrate the negative consequences produced by the lack of treatment directed at enhancing a person's capabilities: not only does a person lose his/her skills, but also the person develops an "institutionalised" mentality.

The UN Special Rapporteur on Torture describes how disabled people, including those living in institutional residential settings, are the subject of "medical experimentation and intrusive and irreversible medical treatments without their consent (e.g. sterilisation, abortion and interventions aiming to correct or alleviate a disability, such as electroshock treatment and mind-altering drugs including

¹⁹² Committee on Economic, Social and Cultural Rights, "General Comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)", E/C.12/GC/20, at para. 7.

¹⁹³ E. Rosenthal and C. Sundram, "Recognizing Existing Rights and Crafting New Ones: Tools for Drafting Human Rights Instruments for People with Mental Disabilities" in S. Herr, L. Gostin and H. Koh (eds), *The Human Rights of Persons with Intellectual Disabilities. Different but Equal* (OUP: Oxford, 2003), p. 483.

neuroleptics)".¹⁹⁴ The UN Special Rapporteur on Torture also illustrates that physical restraints involve situations such as when disabled people in "institutions" are "tied to their beds, cribs or chairs for prolonged periods, including with chains and handcuffs" as well as that these restraints take place when disabled people are locked in cages or "net beds". He explained that, "within institutions, persons with disabilities are often held in seclusion or solitary confinement as a form of control or medical treatment". The UN Special Rapporteur on Torture states that seclusion or solitary confinement for control or treatment purposes "cannot be justified for therapeutic reasons, or as a form of punishment". Moreover, he stressed that "there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment". In addition, the UN Special Rapporteur on Torture warns that the "abuse of psychiatry and forcing it upon persons with disabilities, and primarily upon persons with mental or intellectual disabilities, warrants greater attention". More recently, the CRPD Committee stated that it "is concerned about the methods used in coercive and involuntary treatment of boys and girls with disabilities in mental health care settings, in particular the use of straps or belts and the use of seclusion, as reported by the Ombudsman for Children in Sweden".¹⁹⁵

In particular, the human rights violations resulting from the employment of cage beds have been thoroughly documented by MDAC in reports such as that released in 2003 covering Hungary, the Czech Republic, Slovakia and Slovenia, as well as another published in 2014 on the Czech Republic.¹⁹⁶ The conclusions of the report into Hungary, the Czech Republic, Slovakia and Slovenia are

¹⁹⁴ Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, "Torture and other cruel, inhuman or degrading treatment or punishment", op. cit., at para. 40.

¹⁹⁵ Committee on the Rights of Persons with Disabilities, "Concluding observations on the initial report of Sweden", CRPD/C/SWE/CO/1, at para. 39.

¹⁹⁶ MDAC, "Cage Beds. Inhuman and Degrading Treatment or Punishment in Four EU Accession Countries", 2003 <http://www.mdac.org/sites/mdac.org/files/English_Cage_Beds.pdf> last accessed 22 February 2016; MDAC, "Cage beds and coercion in Czech psychiatric institutions", 2014 <http://mdac.info/sites/mdac.info/files/cagebed_web_en_20140624_0.pdf> last accessed 22 February 2016.

shocking: MDAC describes the use of cage beds as “a particularly inhuman and degrading form of restraint”, and denounces the fact that despite research showing “that restraint in general is physically and psychologically damaging and simply unnecessary in most instances”, the reality is that “some people spend most of their lives in a locked cage bed”.¹⁹⁷ More than a decade after this last report, new research conducted by MDAC, this time focusing on the Czech Republic, concludes that this country is still involved in practices that “constitute ill-treatment prohibited by international law”, namely “[t]he retention of netted cage beds and supplementing them with straps, restraints and seclusion”.¹⁹⁸

2.2.6 Education and employment

a) The right to education and the right to work

The document “Salamanca Statement and Framework for Action on Special Needs Education” acknowledges that “the problems of people with disabilities have been compounded by a disabling society that has focused upon their impairments rather than their potential”.¹⁹⁹ Consequently, the right to education can play a major role. Article 24 of the CRPD offers extensive regulation of “the right of persons with disabilities to education” on the basis that “States Parties shall ensure an inclusive education system at all levels and lifelong learning” –

¹⁹⁷ MDAC, “Cage Beds. Inhuman and Degrading Treatment or Punishment in Four EU Accession Countries”, 2003 <http://www.mdac.org/sites/mdac.org/files/English_Cage_Beds.pdf> last accessed 22 February 2016, p. 57.

¹⁹⁸ MDAC, “Cage beds and coercion in Czech psychiatric institutions”, 2014 <http://mdac.info/sites/mdac.info/files/cagebed_web_en_20140624_0.pdf> last accessed 22 February 2016, p. 53.

¹⁹⁹

<http://www.unesco.de/fileadmin/medien/Dokumente/Bildung/Salamanca_Declaration.pdf> last accessed 22 February 2016.

Article 21 (1). According to the UN Special Rapporteur on the rights of persons with disabilities, one of the core elements of the right to education is that “all children must receive education in mainstream schools”.²⁰⁰ Inclusion Europe stresses that this Article requires “States to endure an inclusive education system at all levels”.²⁰¹ However, the organisation also explains that Article 24 lacks a definition of inclusive education, and warns that this absence “could allow variability in national policy and practice”. To fill this gap, Inclusion Europe proposes the following definition of inclusive education:

Inclusive Education implies that children and young people, who require additional support for special needs, should be included in the educational arrangements made for the majority of children and young people. Children and young people with intellectual disability need education at school, maybe even more than others: a lack of adequate education raises the risk for poverty and exclusion.²⁰²

Inclusion Europe, as well as Inclusion International, worked on objectives, principles and indicators in relation to inclusive education. Inclusion Europe developed objectives for achieving a proper education for children and young people “with intellectual disability”. They elaborated these objectives in relation to three groups: children and young people, schools and governments. In the case of Inclusion International, this organisation suggests that in order to achieve effective inclusive education, the regular school system must embrace the following principles: non-discrimination; accessibility; the accommodation of

²⁰⁰ Opening remarks by the Special Rapporteur on the Rights of Persons with Disabilities at the “Day of General Discussion on the Right to Education of Persons with Disabilities” <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16162&LangID=E>> last accessed 22 February 2016.

²⁰¹ Inclusion Europe, “Towards Inclusive Education – Examples of Good Practices of Inclusive Education” (n.d.) <http://inclusion-europe.org/documents/BestPracticeEducation_EN-FINALWEB.pdf> last accessed 22 February 2016, p. 3.

²⁰² Inclusion Europe, “Education for all. Diversity as an opportunity for school education. A position Paper on Education” (n.d.) <http://www.inclusion-europe.org/documents/Education_Position_Paper_final.pdf> last accessed 22 February 2016.

specific needs via flexible and alternative learning and teaching; equality of standards; participation; support for meeting disability-related needs; and relevance to preparation for the labour market. In addition, Inclusion International mentions various strategies that the regular school system can embrace in order to comply with the goal of full inclusion. Examples of these strategies are the development of policies regarding inclusive education and support to families.²⁰³ Finally, Inclusion International exposes indicators for “[e]ducation for [a]ll (EFA)”, in relation to several articles of the CRPD that have implications for the issue of education for people with intellectual impairments. In the case of Article 24, some examples of these indicators are: the development of education plans reflecting the CRPD’s approach; the elaboration of law and policy that ensure that disabled children can access support; the accommodation and adaptations required to assure education success; and the implementation of accountability mechanisms for the monitoring of disabled children’s school registration and completion.²⁰⁴

The right to education is also recognised in Article 13 of the ICESCR. In an article published in 2004, Gostin and Gable state that the ICESCR was employed to increase “the availability of educational and vocational training programs” for people with “mental disabilities” (including those with intellectual impairments).²⁰⁵ In addition, Article 2 of the ECHR’s Protocol is of importance: “[n]o person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect

²⁰³ Inclusion International, “Position Paper – Education”, 2010 <<http://inclusion-international.org/wp-content/uploads/2010/06/EDUCATION.pdf> > last accessed 22 February 2016.

²⁰⁴ Inclusion International, “The Implications of the Convention on the Rights of Persons with Disabilities (CRPD) for Education for All”, 2010 <<http://inclusion-international.org/wp-content/uploads/2013/08/ImplicationsCRPD-dr2-X.pdf>> last accessed 22 February 2016, pp. 13-20.

²⁰⁵ L. Gostin and L. Gable, “The human rights of persons with mental disabilities: A global perspective on the application of human rights principles to mental health”, *Maryland Law Review* 63, 2004, p. 35. It is important to note that these scholars analyse the mental health context with regard to mentally disabled people, including people with intellectual impairments, under the scope of mental disabilities. This approach also has been followed by a considerable number of international publications.

the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. Finally, Article 14 of the EU CFR contemplates everyone’s right “to education and to have access to vocational and continuing training”.

People with intellectual impairments’ right to work can be traced not only to “general” human rights instruments, but also to legal instruments that are specifically targeted at addressing disabled people’s human rights. For instance the right to work can be found in Article 27 of the CRPD. This Article regulates in detail the “right of persons with disabilities to work, on an equal basis with others”. With a similar wording to Article 6 (1) of the ICESCR, Article 27 (1) of the CRPD establishes that this right “includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities”.

Article 6 (1) of the ICESCR contemplates the right to work, including “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”.

Article 15 of the revised European Social Charter contemplates the “right of persons with disabilities to independence, social integration and participation in the life of the community”. In the context of this right, Article 15 (2) establishes that Parties should promote “persons with disabilities” access

[T]o employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services.

In the context of the EU, Article 15 of the EU CFR establishes the “right to engage in work and to pursue a freely chosen or accepted occupation”.

b) Limitations to education and employment

Violations of this group’s right to education can take the form of situations such as a lack of education, or the provision of a limited education. According to Inclusion Europe: “[i]ncluding children with special needs in mainstream education is still a work in progress as is proven by the data”, as well as “[o]ne truth that can be claimed, is that most countries are far from being inclusive”.²⁰⁶ A report by the CoE Commissioner for Human Rights denounces violations of the right to education of disabled children living in institutional residential settings in Bulgaria.²⁰⁷ The CRPD Committee expresses concern “about the number of boys and girls with disabilities living in institutions across the European Union who have no access to mainstream inclusive quality education”.²⁰⁸

In terms of employment, for example, a report by Disability Rights International (DRI) into Georgia states that, “the majority of long-term patients in Georgia’s psychiatric hospitals are ready for discharge, but have no place else to live and no means for securing employment”.²⁰⁹

²⁰⁶ Inclusion Europe, “Facts and Challenges of Inclusive Education” by Peter Evans (Organisation for Economic Co-operation and Development -OECD- Department of Education, France) in *Inclusion*, 1/2008 <http://www.inclusion-europe.org/documents/INCL_1_08_WEB.pdf> last accessed 22 February 2016, p. 4.

²⁰⁷ Council of Europe, Commissioner for Human Rights, “Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Bulgaria from 3 to 5 November 2009”, *CommDH(2010)1*, pp. 24-26.

²⁰⁸ Committee on the Rights of Persons with Disabilities, “Concluding observations on the initial report of the European Union”, *op. cit.*, at para. 22.

²⁰⁹ DRI, “Left Behind. The Exclusion of Children and Adults with Disabilities from Reform and Rights Protection in the Republic of Georgia”, 2013 <<http://www.driadvocacy.org/wp-content/uploads/Left-Behind-final-report1.pdf>> last accessed 22 February 2016, p. 27.

2.3 Conclusion

The evidence presented in this Chapter on the human rights of people with intellectual impairments who are in European institutional residential settings suggests that the CRPD in particular is a strong disability-specific articulation of the rights of disabled people (including the group in analysis) in a UN treaty. Nevertheless, when analysing the CRPD, there is room for varying interpretations, particularly with regard to issues such as treatment, experimentation or inclusive education. With regard to these issues, and in the case of the CRPD, a generally phrased convention has predominated. Therefore, the detailed content of certain rights of the CRPD depends, to a great extent, on the relevant approach adopted by the CRPD Committee. In other words, ambiguities inevitably remain and there is a need for further probing and clarification – through shadow reports that can enhance the concluding observations, and through strategic litigation. An important point to be made is that there are other mechanisms for enforcing the law apart from litigation, for instance, the inspection mechanisms through the SPT and the CPT. These mechanisms (as well as operating alongside litigation as a way of ensuring that the law is implemented in practice) should facilitate litigation by ensuring that the basic preconditions (access to a lawyer, legal advice, etc.) are in place. In addition to establishing the content of relevant human rights, this Chapter has evidenced a number of egregious human rights violations. Departing from this basis, the next Chapter will address the matter of access to justice for people with intellectual impairments who are living in institutions in European countries.

Chapter 3

A RIGHT TO ACCESS TO JUSTICE: A TYPOLOGY OF ELEMENTS AND BARRIERS

3.1 Introduction

This chapter has the purpose of analysing, in particular detail, the right to access justice for people with intellectual impairments in institutional residential settings in European countries, with a focus on European and United Nations (UN) jurisdictions. Towards this aim, the chapter will propose a typology of the elements of the right to access justice. Afterwards, the chapter will expose the barriers that exist to accessing justice; put differently, the chapter will address the matter of how people with intellectual impairments in institutional residential settings in European countries really access justice, in terms of the violations of their human rights as established in the previous chapter, with regard to various areas of their institutional living. The right of people with intellectual impairments in institutional residential settings in European countries to access justice has fundamental importance for this thesis: strategic litigation is a strategy that is to be approached in the wider context of access to justice. Put differently, without access to justice, strategic litigation cannot be possible. Therefore, in this thesis, the right to access justice for the group under consideration will be understood as a condition for strategic litigation. As a consequence, a proper understanding of this fundamental right is essential, and this chapter's goal is to achieve this.

3.2 The right to access justice for people with intellectual impairments in institutional residential settings in European countries: European and global jurisdictions

In European and UN human rights law, the matter of access to justice is reflected in rights that are contemplated in a number of legal instruments. With the aim of analysis, this section will offer a selection of some of the most relevant legal instruments approved under these regional and international levels. As explained in Chapter 1, the Convention on the Rights of Persons with Disabilities (CRPD) is the legal instrument guiding the approach to justice in this thesis. More concretely, in this thesis the concept of justice will be shaped by the access of people with intellectual impairments in institutional residential settings in European countries to the whole group of human rights contemplated by the CRPD. In particular with regard to access to justice, the CRPD contemplates the specific right to access to justice in Article 13, the content of which will be presented later in this section. Within this context, this section will suggest (and explore) a typology of the constituent elements of the right to access justice. This typology will be presented by following the journey that a person with intellectual impairments, who is in an institutional residential setting, is to pursue to reach to a possible remedy. The suggested typology is as follows: the right to complain; the right to access to a lawyer and the right to legal aid; the right to a fair hearing; and the right to a remedy.

3.2.1 Right to complain

The right of people with intellectual impairments to complain against human rights violations happening in institutional residential settings can be identified in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), as well as in the work developed by its monitoring mechanism (the UN Committee against Torture -CAT) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

Article 13 of the UNCAT contemplates the “right to complain”. According to Article 19 of the UNCAT, the CAT can issue concluding observations. In its concluding observations, such as those regarding Estonia, Netherlands and Russia, this Committee recognises that people with intellectual impairments should have access to effective complaint mechanisms.²¹⁰ At the same time, for instance, in its concluding observations regarding the Czech Republic, the Netherlands and Russia, the Committee expresses its concern about the absence of investigations in cases of ill-treatment and the death of people with learning difficulties living in institutional residential settings.²¹¹

The CPT published a set of standards, which include the recommendation for an effective complaints procedure: “[s]pecific arrangements should exist enabling patients to lodge formal complaints with a clearly-designated body, and to communicate on a confidential basis with an appropriate authority outside the establishment”.²¹²

3.2.2 Right to access to a lawyer and right to legal aid

According to Parker, “[t]he right to seek legal assistance” (a different way of denominating the right to access to a lawyer) is an important right although it is

²¹⁰ See, Committee against Torture (CAT), “Concluding observations on the fifth periodic report of Estonia, adopted by the Committee at its fiftieth session (6–31 May 2013)”, CAT/C/EST/CO/5; Committee against Torture (CAT), “Concluding observations on the combined fifth and sixth periodic reports of the Netherlands, adopted by the Committee at its fiftieth session (6-31 May 2013)”, CAT/C/NLD/CO/5-6; Committee against Torture (CAT), “Concluding observations on the fifth periodic report of the Russian Federation, adopted by the Committee at its forty-ninth session (29 October-23 November 2012)”, CAT/C/RUS/CO/5.

²¹¹ See, Committee against Torture (CAT), “Consideration of reports submitted by States parties under article 19 of the Convention. Czech Republic”, CAT/C/CZE/CO/4-5; Committee against Torture (CAT), “Concluding observations on the combined fifth and sixth periodic reports of the Netherlands, adopted by the Committee at its fiftieth session (6-31 May 2013)”, *op. cit.*; Committee against Torture (CAT), “Concluding observations on the fifth periodic report of the Russian Federation”, *op. cit.*

²¹² European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), “CPT standards”, CPT/Inf/E(2002)1-Rev.2013, p. 56.

mentioned in few human rights instruments.²¹³ As in the case of the right to complain, the guidance issued by various monitoring mechanisms is particularly invaluable for shaping the right to access to a lawyer.

Interpreting Article 12 of the CRPD, the Committee on the Rights of Persons with Disabilities (CRPD Committee) holds that “persons with disabilities” should enjoy “access to legal representation on an equal basis with others”.²¹⁴ The CAT maintains, through its concluding observations such as those regarding Estonia, Netherlands and Russia, that people with intellectual impairments should have access to counsel.²¹⁵ In the context of the Council of Europe (CoE), the European Court of Human Rights (ECtHR) holds that when persons “of unsound mind” are deprived of their liberty, save for “special circumstances”, they should be entitled to “receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of their detention”.²¹⁶ Additionally, the CPT concludes in its observations regarding Azerbaijan, Moldova and Montenegro that persons admitted to “institutions” should “have access to independent legal assistance, free of charge if necessary”.²¹⁷ At the level of the

²¹³ Report by C. Parker for the United Nations Human Rights Office of the High Commissioner, “Forgotten Europeans Forgotten Rights – The Human Rights of Persons Placed in Institutions”, 2011 <http://www.europe.ohchr.org/Documents/Publications/Forgotten_Europeans.pdf> last accessed 22 February 2016, p.14.

²¹⁴ Committee on the Rights of Persons with Disabilities, “General comment No 1 (2014) Article 12: Equal recognition before the law”, CRPD/C/GC/1.

²¹⁵ See, Committee against Torture (CAT), “Concluding observations on the fifth periodic report of Estonia, adopted by the Committee at its fiftieth session (6–31 May 2013)”, op. cit.; Committee against Torture (CAT), “Concluding observations on the combined fifth and sixth periodic reports of the Netherlands, adopted by the Committee at its fiftieth session (6-31 May 2013)”, op. cit.; Committee against Torture (CAT), “Concluding observations on the fifth periodic report of the Russian Federation”, op. cit.

²¹⁶ *Megyeri v. Germany*, application No. 13770/88, Judgment of 12 May 1992, at para. 23.

²¹⁷ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), “Report to the Azerbaijani Government on the visit to Azerbaijan carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 8 to 12 December 2008”, CPT/Inf (2009) 28; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT), “Report to the Moldovan Government on the visit to the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 1 May to 10 June 2011”, CPT/Inf (2012) 3; European Committee for the Prevention

European Union (EU), Article 47 (Right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights (CFR) constitutes a promising exception, as it establishes that “everyone shall have the possibility of being advised, defended and represented”.

With regard to the right to legal aid, it is important to differentiate this right in the criminal process and in civil procedures. Taking this distinction into account, the following supranational instruments are especially relevant: the document “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, and the EU CFR.

The document “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems” states that legal aid is “a foundation for the enjoyment of other rights, including the right to a fair trial”.²¹⁸ This document states that, “States should guarantee the right to legal aid in their national legal systems at the highest possible level”. This document acknowledges that State Parties have a duty and responsibility to provide a legal aid system that is “accessible, effective, sustainable and credible”. According to this document, victims are entitled to “legal aid”, which includes “legal advice, assistance and representation”, which is to be “provided at no cost for those without sufficient means or when the interests of justice so require”. Additionally, the document stresses that legal aid is to be promptly provided. Principle 6 (Non-discrimination) states that State Parties should offer legal aid “regardless of age, race, colour, gender, language, religion or belief, political or other opinion, national or social origin or property, citizenship or domicile, birth, education or social status or other status”. Disability is not mentioned in this Principle; however it can be considered under the scope of “other status”. This document also recognises that “groups

of Torture and Inhuman or Degrading Treatment of Punishment (CPT), “Report to the Government of Montenegro on the visit to Montenegro carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) from 13 to 20 February 2013, CPT/Inf (2012) 3”, CPT/Inf (2014) 16.

²¹⁸ United Nations Office on Drugs and Crime, “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, 2013, at para. 14.

with special needs” should receive additional protection and are more vulnerable. Principle 10 (Equity in access to legal aid) recognises that “[p]ersons with disabilities” are considered to be a group with special needs. Therefore, these Principles and Guidelines call for special measures in order to meet this group’s needs. As noted by Flynn and Lawson, it is important to note that the treatment of disabled people as vulnerable, and the promotion of special measures for this group of people, goes against the spirit of the CRPD.²¹⁹ Finally, Guideline 7 (Legal aid for victims) of the document under analysis suggests a series of measures that State Parties should put in place with the aim of assisting victims, such as providing “[a]ppropriate advice, assistance, care, facilities and support” as well as establishing mechanisms and procedures:

[T]o ensure close cooperation and appropriate referral systems between legal aid providers and other professionals (i.e., health, social and child welfare providers) to obtain a comprehensive understanding of the victim, as well as an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation and needs.²²⁰

In the context of criminal proceedings, these Principles and Guidelines are very significant for people with intellectual impairments living in institutional residential settings. Perhaps the majority of these persons will only be able to access legal representation if they are in a position to obtain legal aid.

²¹⁹ A.M.M. Lawson and E. Flynn, “Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities”, in L. Waddington, G. Quinn and E. Flynn (eds), *Yearbook of European Disability Law* 4, 2013, pp. 7-44.

²²⁰ United Nations Office on Drugs and Crime, “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, *op. cit.*, at para. 48.

Another legal instrument, in this case in the context of the EU, which remarkably includes the issue of legal aid for those lacking sufficient resources, is Article 47 (Right to an effective remedy and to a fair trial) of the CFR:

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

This provision does not differentiate between criminal and civil proceedings, and therefore it can be inferred that it applies to both cases. In addition, in the EU the right to legal aid for victims in criminal proceedings is established in Article 13 of Directive 2012/29/EU. However the conditions or procedural rules for victims' access to legal aid have to be determined by national law.²²¹

3.2.3 Right to a fair hearing

Flynn and Lawson claim that, alongside the right to an effective remedy,²²² the right to a fair hearing constitutes the origins of the right to access to justice.²²³ More specifically, the following legal instruments recognise the right to a fair hearing: the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); the European Convention on Human Rights (ECHR); and the EU CFR.

²²¹ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 13.

²²² To be presented shortly.

²²³ A.M.M. Lawson and E. Flynn (2013), *op. cit.*, pp. 7-44.

The UDHR recognises the right “to a fair and public hearing by an independent and impartial tribunal” (Article 10). The General Assembly²²⁴ did not proclaim this instrument as legally binding. Given that countries have been regularly accepting and applying the UDHR, Gostin and Gable consider that this instrument has the status of international customary law.²²⁵ Adopting a different position, Herr considers this instrument to be of a non-binding character.²²⁶

Similarly to the UDHR, the ICCPR contemplates the right to a fair and public hearing (Article 14.1). Interpreting Article 14 of the ICCPR, the Human Rights Committee issued General Comment No. 32 (2007), which, amongst other issues, states that “[t]he guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.²²⁷ Although disability is not mentioned in this general comment, its wording suggests that disability can be included in the context of “other status”.

Although with a different wording, certain rights contemplated by the UNCAT offer a similar content to that offered by the aforementioned right to a fair hearing. This is the case of the right to have the case promptly and impartially examined by competent authorities (Article 13).

²²⁴ Established by Article 7 of the Charter of the United Nations.

²²⁵ L. Gostin and L. Gable, “The human rights of persons with mental disabilities: A global perspective on the application of human rights principles to mental health”, *Maryland Law Review* 63, 2004, p. 33.

²²⁶ S. Herr, “From Wrongs to Rights: International Human Rights and Legal Protection”, in S. Herr, L. Gostin and H. Koh (eds), *The Human Rights of Persons with Intellectual Disabilities. Different but Equal* (OUP: Oxford, 2003), p. 119.

²²⁷ Human Rights Committee, “General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial”, CCPR/C/GC/32, 2007, at para. 9. This General Comment replaces “General Comment No. 13 – Equality before the courts and the right to a fair and public hearing by an independent court established by law”, 1984.

At the level of the CoE as well as the EU, there is a similarity with the previous legal protection offered by the UN. In the CoE, the ECHR recognises the right to a fair trial (Article 6). As Flynn notes, this Article (alongside Article 13 of the ECHR) is influenced by the language of the UDHR. However, Flynn states that Article 6 of the ECHR goes beyond the UDHR “by listing a number of core components to ensure the independence and impartiality of the judiciary, including the pronouncement of judgements, the presumption of innocence, and specific due process protections for those charged with criminal offences”.²²⁸ In the EU, Article 47 (Right to an effective remedy and to a fair trial) of the CFR establishes that:

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Further guidance about the content of the right to a fair hearing is provided by the Australian Human Rights Law Resource Centre, which summarises the basic elements of this right as follows:

Equal access to, and equality before, the courts; the right to legal advice and representation [which, in the context of the typology created for this thesis, has been presented as a separate right]; the right to procedural fairness; the right to a hearing without undue delay; the right to a competent, independent and impartial tribunal established by law; the right

²²⁸ E. Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate: Aldershot, 2015).

to a public hearing; and the right to have the free assistance of an interpreter where necessary.²²⁹

Flynn and Lawson state that these safeguards “provide important mechanisms for ensuring procedural justice”, and with regard to disabled people, the following ones are particularly relevant:

[T]he right to equal access to and equality before the courts (which resonates with the right to equal recognition as a person before the law and rights to accessible court procedures) and the right to the free assistance of an interpreter (which is particularly relevant to people with communication difficulties or people who use sign language).²³⁰

a) Right to participate as a direct/indirect participant, including as a witness

Article 13 (Access to justice) of the CRPD establishes that:

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

²²⁹ Human Rights Law Resource Centre, “The Right to a Fair Hearing and Access to Justice: Australia’s Obligations” <<http://www.hrlrc.org.au/files/hrlrc-submission-access-to-justice-inquiry.pdf>> last accessed 23 February 2016, 2009, p. 3.

²³⁰ A.M.M. Lawson and E. Flynn (2013), *op. cit.*, pp. 7-44.

preliminary stages.

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

According to Flynn, this Article includes elements of earlier drafts.²³¹ She gives the example that Article 13 of the CRPD incorporates “the obligation to enable disabled people to act as witnesses and participants in legal proceedings”.

Clearly this Article has a broader scope than previous provisions on access to justice, because a disabled person is not only contemplated as a direct victim but also as an indirect participant (such as a witness). Translated to the case of people with intellectual impairments living in institutional residential settings, this means that it is important that these persons are supported appropriately to act as witnesses, in order to help prove cases in which a person with an intellectual impairment in an institution is the victim of a crime. Therefore, Article 13 of the CRPD contributes for this last purpose. Ultimately, this Article addresses access to justice not only in the context of the court process, but also “at investigative and other preliminary stages”. This becomes particularly important for people with intellectual impairments living in institutional residential settings, given the difficulties (or barriers) that they experience in accessing the courts.²³² Therefore, the assumption that access to justice starts from before the actual court process offers additional opportunities for the claims of people with intellectual impairments to be taken seriously from the very beginning. And as a consequence, this group has additional opportunities to reach court.

²³¹ E. Flynn (2015), *op. cit.*

²³² To be explored afterwards in this chapter.

b) Right to procedural and age-appropriate accommodations

According to Article 13 (Access to justice) of the CRPD, States Parties are to provide disabled people with “procedural and age-appropriate accommodations” in the context of access to justice. Flynn stresses that this Article is innovative.²³³ In the case of people with intellectual impairments in institutional residential settings who appear in court, the obligation to provide them with procedural accommodation can be of particular importance. For instance, this obligation can be invoked to improve national procedural rules that cover the matter of people with intellectual impairments giving evidence in court.

3.2.4 Right to a remedy

The right to a remedy is contemplated in various international and European legal instruments: the UDHR; the ICCPR; the UNCAT; the ECHR; and the EU CFR. The Human Rights Committee and the CAT also offer useful relevant guidance.

The UDHR recognises the right to an effective remedy (Article 8). Article 8 establishes everyone’s “right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

The right under scrutiny is also contemplated by Article 2 (3) of the ICCPR. The Human Rights Committee provides guidance about the right to an effective

²³³ E. Flynn (2015), op. cit.

remedy, calling upon its concluding observations such as those regarding the Czech Republic and Russia for people with mental disabilities [which includes people with intellectual impairments] to be able to exercise this right against violations of their rights.²³⁴

Article 14 of the UNCAT establishes the right to obtain redress and fair and adequate compensation. The CAT issued General Comment No. 3 (2012) with the implementation of Article 14.²³⁵ In this general comment, whilst addressing the access to mechanisms for obtaining redress, the CAT stresses the need to adopt special measures with regard to persons belonging to marginalised or vulnerable groups (including, amongst other groups, persons “with mental or other disability”). As mentioned in sub-Section 3.2.2, whilst commenting on the document “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”, Flynn and Lawson stress that to consider disabled people as vulnerable, as well as to promote special measures for this group, clashes with the spirit of the CRPD.²³⁶

Additionally, the CAT recommends that States parties ensure that access to justice as well as to mechanisms for redress is available, and that positive measures ensure that all persons, regardless of “mental or other disability” (amongst many other grounds), have equal access to redress.²³⁷ The CAT also offers relevant guidance through its concluding observations on Bulgaria, Estonia

²³⁴ See, for example, Human Rights Committee, “Concluding observations on the third periodic report of the Czech Republic”, CCPR/C/CZE/CO/3; Human Rights Committee, “Consideration of reports submitted by State Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee, Russian Federation”, CCPR/C/RUS/CO/6.

²³⁵ Committee against Torture (CAT), “General comment No. 3 (2012) Implementation of article 14 by States parties”, CAT/C/GC/3.

²³⁶ A.M.M. Lawson and E. Flynn (2013), *op. cit.*, pp. 7-44.

²³⁷ Committee against Torture (CAT), “General comment No. 3 (2012) Implementation of article 14 by States parties”, *op. cit.*, at para. 32.

and Russia, stating that people with intellectual impairments living in institutional residential settings are to be provided with remedy and/or redress.²³⁸

Article 13 of the ECHR additionally recognises the right to “an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

In the EU, Article 47 (Right to an effective remedy and to a fair trial) of the CFR establishes that:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

Various scholars provide further guidance on the right to a remedy. Roth-Arriaza affirms that a remedy should be individualised and adjudicatory.²³⁹ Flynn and Lawson argue that this idea

[I]s particularly important for disabled people as it facilitates the awarding of remedies which require the performance of reasonable accommodation obligations – obligations which cannot be performed or

²³⁸ See, for example, Committee against Torture (CAT), “Consideration of reports submitted by States parties under article 19 of the Convention. Concluding observations of the Committee against Torture. Bulgaria”, CAT/C/BGR/CO/4-5; Committee against Torture (CAT), “Concluding observations on the fifth periodic report of Estonia, adopted by the Committee at its fiftieth session (6–31 May 2013)”, *op. cit.*; Committee against Torture (CAT), “Concluding observations on the fifth periodic report of the Russian Federation, adopted by the Committee at its forty-ninth session (29 October-23 November 2012)”, *op. cit.*

²³⁹ N. Roth-Arriaza, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law”, *California Law Review* 78:2, 1990, p. 475.

regulated without regard to the specific circumstances of the case and of the disabled person in question.²⁴⁰

3.3 Barriers to access to justice

The literature suggests that people with intellectual impairments encounter several barriers to accessing justice, and this chapter intends to introduce the literature documenting the most significant barriers encountered by this group. To this aim, and recognising that a degree of overlap between barriers is inevitable, the chapter will present some examples of the barriers that people with intellectual impairments can face before court, once in court, and after court. An attempt will be made to offer an overview of the most significant barriers to accessing justice; however, to begin with it is necessary to point out that following Flynn and Lawson the nature of the barriers faced by disabled people in accessing justice is “likely to vary significantly depending on the impairment type and on the intersection between disability and other identities”.²⁴¹ Therefore, the barriers to be presented are not exhaustive or final for people with intellectual impairments, as this group of people’s identities are diverse when intersected with other identities such as being a woman or being part of an ethnicity.

3.3.1 Barriers before court

Isolation is one of the most appalling barriers usually experienced by people with intellectual impairments living in institutional residential settings. As the CoE Commissioner for Human Rights notes:

²⁴⁰ A.M.M. Lawson and E. Flynn (2013), *op. cit.* pp. 7-44.

²⁴¹ *Ibid.*

[P]ersons 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. As the Commissioner has highlighted on several occasions, intellectual disabilities carry a strong stigma and many people have been abandoned by their families through shame and lack of alternatives.²⁴²

Indeed the problem of accessing remote institutional residential settings has been highlighted by Inclusion Europe.²⁴³ The issue of isolation is in turn related to the lack of support or advocacy that is generally available to residents with intellectual impairments.²⁴⁴

Isolation, as well as a lack of support or advocacy, impact on the access to knowledge about rights that is experienced by people with intellectual impairments. In addition, these barriers impact the capability of people with intellectual impairments to look at their own experiences as a rights issue. If people with intellectual impairments are isolated, and therefore are not accessing support or advocacy, this produces the result that access to knowledge of one's own rights is non-existent or limited at the very least. Generally, people with

²⁴² Commissioner for Human Rights, "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights", CommDH(2011)37, Strasbourg, 14 October 2011.

²⁴³ Inclusion Europe, "Equal Rights for All! - Access to Rights and Justice for People with Intellectual Disabilities" (n.d.) <<http://inclusion-europe.eu/>> last accessed 23 February 2016.

²⁴⁴ L. Schetzer, J. Mullins, and R. Buonamano, "Access to Justice & Legal Needs. A project to identify legal needs, pathways and barriers for disadvantaged people" in NSW, Law & Justice Foundation of New South Wales, 2002, p. 48; MDAC, "Access to justice for people with intellectual disabilities and psycho-social disabilities in Russia, Recommendations on legislative and policy measures required to achieve effective enjoyment of the right to access justice by all persons with intellectual disabilities and psycho-social disabilities in Russia", 2011 <http://mdac.info/sites/mdac.info/files/English_Access_to_Justice_for_People_with_Intellectual_Disabilities_and_People_with_Psycho-social_Disabilities_in_Russia.pdf> last accessed 23 February 2016, p. 8; L. Clements and J. Read, *Disabled People and European Human Rights - A review of the implications of the 1998 Human Rights Act for disabled children and adults in the UK* (Policy Press: Bristol, 2003), p. 41.

intellectual impairments living in institutional residential settings have a non-existent or poor knowledge of their rights.²⁴⁵ This circumstance includes not only knowledge about rights in itself but also awareness “of situations in which these rights have been infringed or denied”.²⁴⁶ A report by the Norah Fry Research Centre indeed states that people with intellectual impairments “sometimes did not see their experiences as rights issues or as requiring legal advice”.²⁴⁷ The issue of having a non-existent or poor knowledge of rights is, additionally, not only a problem faced by people with intellectual impairments themselves, but also by those who are responsible for their care.²⁴⁸ Moreover, as Flynn points out, even if disabled people (including people with learning difficulties) have access to information about their rights, they may not be able to use it.²⁴⁹ She explains that several factors, such as “the lack of choice in respect of many aspects of their lives”, may contribute to the difficulties that people with intellectual impairments have in using legal information.

²⁴⁵ Inclusion Europe, “Equal Rights for all! - Access to rights and justice for people with intellectual disabilities” (n.d.), op. cit., p. 28; L. Schetzer, J. Mullins, and R. Buonamano, “Access to Justice & Legal Needs. A project to identify legal needs, pathways and barriers for disadvantaged people” in NSW, op. cit., p. 45; Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights”, op. cit., at para. 12; European Union Agency for Fundamental Rights (FRA), “Choice and control: the right to independent living, Experiences of persons with intellectual disabilities and persons with mental health problems in nine EU Member States”, 2013 <http://fra.europa.eu/sites/default/files/fra_uploads/2129-FRA-2012-choice-and-control_EN.pdf> last accessed 23 February 2016, p. 42.

²⁴⁶ A.M.M. Lawson and E. Flynn, “Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities”, in L. Waddington, G. Quinn and E. Flynn (eds), *Yearbook of European Disability Law 4*, 2013, pp. 7-44.

²⁴⁷ Norah Fry Research Centre, “What happens when people with learning disabilities need advice about the law”, 2013 <<http://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/Legal%20Advice%20Learning%20Disabilities%20Final%20Report.pdf>> last accessed 22 February 2016, p. 54.

²⁴⁸ Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights”, op. cit., at para. 12.

²⁴⁹ E. Flynn (2015), op.cit.

Similarly to the non-existent or deficient knowledge of rights, generally people with intellectual impairments living in institutional residential settings have non-existent or deficient knowledge about how to make a complaint. According to a report by the European Union Agency for Fundamental Rights (FRA), “[a]n important barrier to obtaining redress was lack of awareness about complaint procedures combined with lack of formal support”.²⁵⁰ In some cases, people with intellectual impairments may be aware of how to make a complaint; however, they may choose not to complain because they fear reprimand or victimisation.²⁵¹ For example, the report by the FRA found that:

Most respondents said that the reason they refrained from complaining was the fear of retribution and most of those who had lived in institutions and had experienced unfair treatment never brought formal complaints.

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So these are barriers to using reporting mechanisms, and these barriers might be particularly problematic for people with intellectual impairments. A related matter is represented by the problems with the inspectorate of an institution. Looked at strictly from the perspective of access to justice, an inspection could contribute to verifying whether there are reporting mechanisms in place, as well as how people with intellectual impairments are really accessing these mechanisms. The Mental Disability Advocacy Centre (MDAC) states that the problems about inspectorates arise when there is no independent inspectorate for the institutional setting or when there is an inspectorate but this is

²⁵⁰ European Union Agency for Fundamental Rights (FRA) (2013), op. cit., p. 41.

²⁵¹ A.M.M. Lawson and E. Flynn (2013), “Disability and Access to Justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities”, op. cit., pp. 7-44; Inclusion Europe, “Equal Rights for All! - Access to Rights and Justice for People with Intellectual Disabilities”, op. cit.

²⁵² European Union Agency for Fundamental Rights (FRA) (2013), op. cit., p. 40.

ineffective.²⁵³ Indeed MDAC released a report focusing specifically on this matter, which identifies that the independent inspection of institutional settings is crucial because it lifts the invisibility that is common in institutional residential settings, and therefore, the human rights [of residents, including their right to access to justice] can be respected and protected.²⁵⁴

A different problem is related to the issue of legal capacity. The obstacle represented by restrictions to legal capacity is mentioned in a number of literature references and constitutes a fundamental one.²⁵⁵ For instance, this obstacle can take the form of a total or partial deprivation of a person's legal capacity, with the consequent designation of a guardian. In the case of institutional settings, it is not uncommon for the role of guardian to be assumed by a staff member; when this is the case, and according to the CoE Commissioner for Human Rights, it can be argued that a conflict of interests arises:

In addition, these persons might have been deprived of their legal capacity, or their legal capacity might have been restricted. At the same time, their legal representation is often inadequate, with no guardian being appointed, or a conflict of interests arising in the designation of this guardian, for example when a staff member of the institution assumes this

²⁵³ MDAC (2011), op. cit., p. 8.

²⁵⁴ MDAC, "Inspect! Inspectorates of mental health and social care institutions in the European Union", 2006
<http://www.mdac.info/sites/mdac.info/files/English_Inspect!%20Inspectorates%20of%20Mental%20Health%20and%20Social%20Care%20Institutions%20in%20the%20European%20Union.pdf> last accessed 22 February 2016, p. 7.

²⁵⁵ L. Schetzer, J. Mullins, and R. Buonamano (2002) op. cit., p. 19; Commissioner for Human Rights, "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights", op. cit., at para. 12; Inclusion Europe, "Equal Rights for all! Access to rights and justice for people with intellectual disabilities" (n.d.), op. cit., p. 7.

role. Legal incapacitation is one of the major reasons for which legal proceedings are not always accessible to people with disabilities.²⁵⁶

A different approach to legal capacity is known as “functional approach”; instead of depriving a person of legal capacity (totally or partially), this approach requires that “an assessment is carried out to determine whether, at a particular time, the individual understands the meaning and consequences of the decision to be made”.²⁵⁷ In terms of access to justice, restriction of legal capacity can have various consequences for people with intellectual impairments in institutional residential settings: it can be determined that an individual with intellectual impairments is incapable of litigating (deeming that the person does not have legal standing to litigate in court on their own behalf), or that the person does not have the capacity to instruct a lawyer, or both.²⁵⁸ With regard to this barrier, the CoE Commissioner for Human Rights affirms that “[l]egal incapacitation is one of the major reasons for which legal proceedings are not always accessible to people with disabilities”.²⁵⁹

Another barrier is represented by the problem of getting legal aid, as well as the high legal costs that, in general, characterise legal proceedings.²⁶⁰ The issues of the lack of legal aid and the difficulties in accessing it are highlighted in the

²⁵⁶ Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights”, *op. cit.*, at para. 12.

²⁵⁷ E. Flynn (2015), *op. cit.*

²⁵⁸ *Ibid.*

²⁵⁹ Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights”, *op. cit.*, at para. 12.

²⁶⁰ MDAC (2011), *op. cit.*, p. 8; Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights”, *op. cit.*, at para. 12; Inclusion Europe, “Equal Rights for all! Access to rights and justice for people with intellectual disabilities” (n.d.), *op. cit.*, p. 28.

relevant literature.²⁶¹ Similarly, the literature identifies the problem represented by high legal costs; this problem arises in both criminal and civil litigation,²⁶² and takes the form of high legal costs that include not only the lawyer's fees but also court fees²⁶³.

Even when the barrier of getting legal aid (and facing high legal costs) is resolved, there are possible issues with the available legal representation.²⁶⁴ Various reasons contribute to the problem of inadequate legal representation. Lewis has raised the matter of "the very low payment, if a payment exists, that usually is given to a lawyer who litigates in the mental disability field".²⁶⁵ Furthermore, another problem in this area is lawyers' lack of experience in the field of intellectual impairments. According to Ortoleva, there is a "lack of knowledge by legal professionals of how to work with clients with disabilities, and a lack of knowledge of the legal concerns faced by persons with disabilities".²⁶⁶ Making reference to poor people, Farrell explains that when these people approach legal services, solicitors firms are usually small and perhaps do not have the necessary

²⁶¹ Inclusion Europe, "Equal Rights for All! - Access to Rights and Justice for People with Intellectual Disabilities" (n.d.), op. cit.; L. Clements and J. Read (2003) op. cit., p. 41; Commissioner for Human Rights, "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights", op. cit., at para. 12.

²⁶² Inclusion Europe, "Equal Rights for All! - Access to Rights and Justice for People with Intellectual Disabilities" (n.d.), op. cit.

²⁶³ Commissioner for Human Rights, "Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights", op. cit., at para. 11.

²⁶⁴ Inclusion Europe, "Equal Rights for All! - Access to Rights and Justice for People with Intellectual Disabilities" (n.d.), op. cit., p. 28.

²⁶⁵ O. Lewis, "Protecting the rights of people with mental disabilities: the European Convention on Human Rights", *European Journal of Health Law* 9:4, 2002, pp. 314-315.

²⁶⁶ S. Ortoleva, "Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System", *ILSA Journal of International and Comparative Law* 17, 2011, p. 281.

expertise and resources.²⁶⁷ He adds that, in the case of larger firms, although these firms might be willing to support these cases, the problem is that usually there is a lack of contact between the firms and the people concerned.²⁶⁸ Although it would be inaccurate to consider all people with intellectual impairments as poor, Farrell's considerations about poor people (who are particularly placed in a position of disadvantage) seem useful for approaching the probable reality of people with intellectual impairments when accessing (or not) legal services. More recently, a study conducted by the Norah Fry Research Centre revealed the following findings:

[S]ome lawyers were skilled in working with people with learning disabilities and adapted their practice to meet the needs of their clients. Using plain language, treating the person with respect and being honest about the possible consequences of taking action were valued by participants in the study. However there were also examples given of where lawyers could not be understood, appeared uninterested or were not able to make a more appropriate referral. In part this seemed to depend on the amount of experience that the lawyer had in working with this group. This was a particular issue in small firms where there was less specialisation and where for example the Mental Capacity Act was not understood. Some legal professionals indicated that they were anxious about working with people with learning disabilities and were uncertain about the issues involved. There is therefore a need for clear advice to lawyers about how to work with people with learning disabilities.²⁶⁹

²⁶⁷ M. Farrell, "Using Law and Litigation in the Public Interest", in FLAC (Free Legal Advice Centres Ltd.), *Public Interest Law in Ireland – the reality and the potential*, conference Proceedings, February 2006 <http://www.flac.ie/download/pdf/flac_pil_proceedings.pdf> last accessed 23 February 2016, p. 100.

²⁶⁸ *Ibid.*

²⁶⁹ Norah Fry Research Centre (2013), *op. cit.*, pp. 56-57.

3.3.2 Barriers once in court

In the event that a person with intellectual impairments overcomes the previously mentioned barriers, sometimes there are procedural barriers to accessing certain courts. Quoting a report by the FRA, indeed the CoE Commissioner for Human Rights mentions the issue of restrictive rules on who may take a case to court.²⁷⁰

In the event that a person with intellectual impairments reaches court, an issue that is still ongoing is represented by their physical access to the court facilities.²⁷¹ As Ortoleva remarks, this lack (or the inadequacy) of physical access “remains one of the most egregious problems”.²⁷² Flynn also states that this problem “is so despite the emergence of legal obligations on courts, as public buildings, to increase their accessibility to people with disabilities, generally under anti-discrimination legislation”.²⁷³ Some obvious examples of inaccessibility at this level include the lack of ramps, or the presence of stairs, which prevent some disabled people from accessing the courtroom.

²⁷⁰ Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights”, *op. cit.*, at para. 11.

²⁷¹ L. Clements and J. Read (2003), *op. cit.*, p. 41; Commissioner for Human Rights, “Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights”, *op. cit.*; S. Ortoleva (2011), *op. cit.*, p. 305.

²⁷² S. Ortoleva (2011), *op. cit.*, p. 305.

²⁷³ E. Flynn (2015), *op. cit.*

In addition to the issue of physical access, there is the barrier of accessibility to communication and information, which according to CHANGE (a leading English national human rights organisation led by disabled people, with sound expertise in the elaboration of accessible documents for people with intellectual impairments):

Accessible information is information that people can understand. It means different things to different people. For some people it is information in large print or Braille. For others it might be information translated into their first language.²⁷⁴

The barrier of accessibility to communication and information therefore happens when materials are not offered in accessible formats (such as an easy-to-read format, which is particularly relevant for people with intellectual impairments). According to Flynn, communication should ensure “that people with disabilities understand the court procedures and can effectively communicate with the court, and officers of the court, including court-appointed lawyers or other third parties”.²⁷⁵ Flynn explains that in addition to technological aids, third parties can facilitate communication; however, sometimes the use of third parties can be controversial, such as for instance “where the type of communication an individual uses is only understood by very few people, or where third parties have a legal responsibility to represent the person’s ‘best interests’ to the court, rather than their wishes and preferences”. In addition, there is evidence that people with intellectual impairments are not familiarised with the role of third parties (such as intermediaries).²⁷⁶ In the case of lay disabled litigants, Flynn advances that there

²⁷⁴ CHANGE, “How to make information accessible: A guide to producing easy read documents”, 2009 <<http://www.changepeople.org>> last accessed 24 February 2016, p. 2.

²⁷⁵ *Ibid.*

²⁷⁶ M. Nind and J. Seale, “Concepts of access for people with learning difficulties: towards a shared understanding”, *Disability and Society* 24:3, 2009, p. 281.

are additional challenges to be faced.²⁷⁷ In Ireland, a problem that has a particular impact on people with intellectual impairments is the lack of accessible information. The National Disability Authority elaborated a Submission to Courts Service, addressing the issue of the provision of information.²⁷⁸ However, this Authority's considerations do not seem to address the needs of people with intellectual impairments in detail: for instance, these considerations do not include any mention of the possibility of including pictures/photos alongside a given text, a technique which has proved to be very effective for people with intellectual impairments.²⁷⁹ More recently, the Disability Act 2005 requires that public bodies provide written accessible information for people with intellectual impairments.²⁸⁰ Therefore, a possible solution is to develop accessible materials that would facilitate the communication between people with intellectual impairments and legal services, and therefore, would make these services more accessible to this group of people.

Another fundamental barrier is represented by how the rules of evidence are applied to people with intellectual impairments. In many cases, their testimonies are considered unreliable, and consequently these are devalued or dismissed by courts.²⁸¹ The challenge is therefore to adapt the rules of evidence to the needs of this group. Therefore, the implementation of measures (such as video link) becomes essential. However, according to Flynn:

²⁷⁷ E. Flynn (2015), op. cit.

²⁷⁸ National Disability Authority, "Submission to Courts Service", 2002 <<http://nda.ie/>> last accessed 24 February 2016, p. 13.

²⁷⁹ Ibid., pp. 13-15.

²⁸⁰ Disability Act 2005, Section 28(3).

²⁸¹ L. Schetzer, J. Mullins, and R. Buonamano (2002), op. cit., p. 19; MDAC (2011), op. cit., pp. 8-9.

Even where procedures are adapted this raises questions about whether those adaptations impact on the integrity of the criminal justice system in particular (particularly whether accommodations for witnesses or jurors with disabilities impinge on the fair trial rights of defendants).²⁸²

Finally, there is the barrier of lengthy legal procedures: the Spanish Committee of Representatives of Persons with Disabilities (CERMI) points out that the slowness of the judicial process causes irreparable damage.²⁸³ According to the CERMI, this barrier may cause irreparable damage, a situation that is happening in particular with regard to judicial proceedings addressing the right of children to an inclusive education:

When we speak about violations of fundamental rights, this delay [in judicial proceedings] may cause irreparable damage. This is happening regarding the right of boys and girls with disability to an inclusive education... When the parents are obliged to resort to the judicial system in order to maintain their daughters in the model of inclusive education, the damages caused in the development of these minors can be irreparable.²⁸⁴

²⁸² E. Flynn (2015), *op. cit.*

²⁸³ CERMI, "Derechos Humanos y Discapacidad. 5th ed. Informe España 2010", Ediciones Cinca, 2011.

²⁸⁴ *Ibid.*

3.3.3 Barriers after court

People with intellectual impairments may face barriers to obtaining an effective remedy and/or redress. As Inclusion Europe, a well-known organisation for people with intellectual impairments, points out: “[m]ost legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent”.²⁸⁵ According to the International Disability Alliance (IDA), the lack of “access to remedies for violations” means that “rights are rendered meaningless and persons with disabilities [including people with intellectual impairments] continue to occupy a marginalised position in society, excluded from invoking and exercising their human rights on an equal basis with others”.²⁸⁶ However, the barriers associated with an effective remedy and/or redress are just one of the types of barriers among the larger group of barriers that people with intellectual impairments in institutional residential settings experience after court. According to a report by the English Ministry of Justice, other issues at this stage (and which also may present barriers for this group) include “receiving verdicts in court, leaving the court and making the journey home, awaiting outcomes and receiving news at home, and moving on from the experience”.²⁸⁷

²⁸⁵ Inclusion Europe, “Equal Rights for All! Access to Rights and Justice for People with Intellectual Disabilities” (n.d.), op. cit.

²⁸⁶ International Disability Alliance (IDA), “IDA submission to the CEDAW Committee’s General Discussion on access to justice 54h [54th] session, 18 February 2013” <<http://www.internationaldisabilityalliance.org/en>> last accessed 24 February 2016, p. 1.

²⁸⁷ R. McLeod, C. Philpin, A. Sweeting, L. Joyce and R. Evans BMRB and Liverpool John Moores University, “Court experience of adults with mental health conditions, learning disabilities and limited mental capacity. Report 1: Overview and recommendations”, Ministry of Justice Research Series 8/10, 2010.

3.4 Conclusion

Not only at a European (CoE and EU) level, but also at the level of the UN, there are various legal entitlements that shape the right to access justice for people with intellectual impairments living in European institutional residential settings. As demonstrated, monitoring bodies as well as various scholars have provided invaluable guidance to further understand the content of this right. The reality is, nevertheless, that people with intellectual impairments living in institutional residential settings face several major barriers to accessing justice. These barriers are interconnected, and operate not only during the journey to court, but also in court itself as well as after court. As a result, access to justice is extremely difficult for this group. These barriers confirm that Fraser's idea of justice as recognition (and redistribution) is not a reality in the case of many people with intellectual impairments living in institutional residential settings. This idea is of fundamental importance: the group that is the subject of this thesis is not recognised (or is poorly recognised) in terms of accessing justice. As advanced in the introduction to this chapter, access to justice, in turn, is a condition for people with intellectual impairments' access to strategic litigation; strategic litigation is indeed a strategy in the context of access to justice. The evidence included in this chapter therefore reveals a departure scenario with major and diverse barriers to accessing justice and strategic litigation. The rest of the thesis will be devoted to the analysis of strategic litigation, which is the subject of this study. However, before addressing strategic litigation, the next chapter will introduce the methods selected to answer this thesis' research questions.

Chapter 4

METHODS

4.1 Introduction

The purpose of this chapter is to explain how the methods of legal documentary analysis, and qualitative interviews, were used to answer this thesis' research questions. Put differently, the chapter aims to elaborate how the research design was employed to answer the research questions. Towards this aim, the chapter will begin by presenting the epistemology and research strategy chosen for this thesis, and will then progress to an analysis of the methods selected for this research. As this chapter will argue, the knowledge needed to understand how strategic litigation works in very particular circumstances, which is the aim of answering the research questions of this thesis, relies primarily on people's (professionals') experiences of work in the area of strategic litigation regarding disability and human rights (including the human rights of people with intellectual impairments in institutional residential settings in European countries). Consequently, a fundamental method that has been employed is constituted by qualitative interviews with different groups of participants (disability and human rights organisations and lawyers), which in turn is an empirical method falling within the context of socio-legal research. Therefore, this chapter will be heavily focused on an explanation of the work that has been done around these qualitative interviews.

4.2 Epistemology and research strategy

In order to decide on the most appropriate methods to answer this thesis' main and subsidiary research questions, the first step was to consider the

epistemology, or where to look for the knowledge needed to answer these questions. For this thesis, in order to understand the legal meaning of the law (such as case-law), it was necessary to look at documents. However, it was deemed that an interpretation of the documents would not be sufficient to understand how strategic litigation worked with regard to people with intellectual impairments living in institutional residential settings in European countries. This is because, for example, strategic litigation is eminently a practical strategy. There were various options to reach for this very specific knowledge (for instance, observation), and ultimately, the knowledge of how strategic litigation works in the case of this group has not necessarily been written down. Rather, this knowledge was to be found in people's experiences, which in turn could lead to understanding what works in practice in the case of this strategic litigation. Therefore, an adequate alternative was to talk to relevant people about their experiences. This thesis therefore drew knowledge from different kinds of knowledge, or in other words, from various sources. The epistemological challenge was, therefore, whether the thesis gave any particular weight or privilege to some knowledge above others. Maximum effort was made to avoid this.

As advanced in the Chapter 1, the social model of disability was selected to guide this thesis. Institutional residential settings produce the disablement of people with intellectual impairments in these settings. Disablement, in turn, results in violations of this group's human rights. Strategic litigation can help in tackling these human right violations. The purpose of this thesis is to determine the potential of strategic litigation, as well as to suggest certain ways of realising the potential of this strategy. The social model of disability is interesting because this model seeks to remove the barriers preventing disabled people's (including those with intellectual impairments) equal participation in all aspects of life. Strategic litigation, in turn, appears to be a useful tool for changing institutional arrangements, therefore preventing future disablement. Strategic litigation can also be of assistance for addressing present disablement, through putting an end to human rights violations currently experienced by people with intellectual impairments in institutional residential settings in European countries. In addition,

and as will be further explained in this chapter, through talking to very specific people (such as staff from disability organisations, including those working in the field of intellectual impairments) about their experiences, the aim was to contribute to the goals of “emancipatory” disability research.²⁸⁸ According to Barnes and Sheldon:

Above all, the 'emancipatory' research agenda warrants the transformation of the material and social relations of research production. In short, this means that disabled people and their organisations, rather than professional academics and researchers, should have control of the research process. This control should include both funding and the research agenda.²⁸⁹

The social model of disability was, therefore, the chosen epistemology for this thesis, or in other words, what Stone and Priestley denominate as “the first principle of disability research”.²⁹⁰ According to these authors:

In particular, where disability is defined in social and material terms, the focus of disability research will have less to do with the ability of disabled people to ‘cope with’ or ‘adapt to’ their situation and more to do with the identification and removal of disabling physical and social barriers.²⁹¹

²⁸⁸ For instance, see C. Barnes and A. Sheldon, “‘Emancipatory’ Disability Research and Special Educational Needs”, in L Florian (ed), *The Sage Handbook of Special Education*, (London: Sage, 2007).

²⁸⁹ Ibid, p. 4.

²⁹⁰ E. Stone and M. Priestley, “Parasites, pawns and partners: disability research and the role of non-disabled researchers”, *British Journal of Sociology* 47:4, 1996, pp. 4-5.

²⁹¹ Ibid, pp. 4-5.

After clarifying the epistemology or sources of knowledge, the next step was to reflect on the most adequate qualitative research strategy (or strategies). Going back to the thesis' main as well as subsidiary research questions,²⁹² it became clear that the answers demanded not only a description, but fundamentally, an explanation. In this thesis, the role of the description was to prepare the context for an analysis that would attempt to explain how strategic litigation works in certain circumstances. In other words, reaching this final milestone demanded a description, but most of all an explanation. For instance, it was necessary to describe the human rights that people with intellectual impairments in institutional residential settings have in European countries. Put differently, it was necessary to explain how the content of these human rights related to the needs and goals of strategic litigation. Therefore, and following Blaikie, it was decided that the most appropriate strategies for this thesis were an inductive strategy (which allows a social researcher to develop a description of social phenomena and is appropriate for answering "what" questions) as well as a retroductive strategy (which uses creative imagination and analogy with the purpose of working back from the data to an explanation, and is more adequate for answering "why" questions).²⁹³

4.3 Methods

Once the epistemology (or sources of knowledge) had been chosen, and the inductive and retroductive research strategies had been selected, for reasons to be explained shortly, socio-legal methods were deemed to be the most appropriate for the thesis.

²⁹² As established in chapter 1.

²⁹³ N. Blaikie, *Designing Social Research* (Polity Press: Cambridge, 2010).

There is no one single narrow approach to socio-legal methods.²⁹⁴ Evidence shows, however, that these methods are characterised by principal features that include going further than typical legal research to analyse “law in action” or “law-in-society” and incorporate (for example) a policy perspective; using an interdisciplinary approach (for example, accepting the contributions of sociology or economics); and adding empirical methods to non-empirical ones, incorporating in this way the study of “groups who are effected [affected – *sic*] by, or in regular contact with, the law, courts or law enforcers”.²⁹⁵

It has already been explained that the main purpose of this thesis was to explore the potential of strategic litigation as a means to recognise and enforce the human rights of people with intellectual impairments in institutional residential settings in European countries, as well as analyse how this potential can be realised. It was also advanced that, in addition to a study of documents, the knowledge needed to answer the thesis’ main research question rested in people’s experiences and perceptions. Therefore, fundamentally this thesis intended to analyse the relevant “law in action”, by exploring certain key stakeholders’ experiences and perceptions. This is the main reason for the choice of socio-legal methods.

²⁹⁴ For socio-legal methods, see: A. Bradshaw, “Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods”, in P Thomas (ed), *Socio-Legal Studies* (Ashgate: Aldershot, 1997); B. Hutter, “Law’s Relationship with Social Science: The Interdependence of Theory, Empirical Work and Social Relevance in Socio-Legal Studies”, in K. Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Oxford University Press: Oxford, 1997); D.J. Galligan (ed), *Socio-Legal Studies in Context* (Blackwell, Oxford, 1995); D. Harris, “The Development of Socio-Legal Studies in the UK”, *Legal Studies* 2, 1995 p. 315; H. Ross et al, “Determining the Social Effects of a Law Reform”, *American Behavioural Scientist* 13, 1977, p. 209; M. Salter and J. Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson: London, 2007); P. Hillyard, “Invoking Indignation: Reflections on the Future Directions of Socio-Legal Studies”, *Journal of Law and Society* 29, 2002, pp. 645-656; P. Hillyard, “What is Socio-Legal Studies?: ESRC Review of Socio-Legal Studies” (Swindon: ESRC, 1994); R. Banakar and M. Travers (eds), *An Introduction to Law and Social Theory* (Oxford: Hart, 2002); R. Banakar, “Reflections on the Methodological Issues of the Sociology of Law”, *Journal of Law and Society* 27, 2000, pp. 273-95.

²⁹⁵ A. Bradshaw, “Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods”, in P. Thomas (ed), *Socio-Legal Studies* (Aldershot: Ashgate, 1997), p. 99; C. Stychin and L. Mulcahy, *Legal method: text and materials*, 2nd ed. (London: Sweet & Maxwell, 2003), pp. 11-12; and M. Salter and J. Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson: London, 2007), pp. 119, 132, 180.

Moreover, this study resorted in particular to sociology for an understanding of some of the key concepts discussed in it;²⁹⁶ therefore, the thesis incorporated an inter-disciplinary approach, which is another fundamental characteristic of socio-legal methods. Within this context, the selected methods or “data generation techniques and procedures”²⁹⁷ were: legal documentary analysis (with the aim of studying the law on paper) and qualitative interviews (with the purpose of studying the law in action). These methods are to be presented next; however, it is first necessary to clarify that in the cases of both methods, sampling was conducted in national, European and global jurisdictions.

4.3.1 Sampling in national (England, Ireland and Spain), European and global jurisdictions

Various reasons informed the decision to focus this thesis on Europe. In the first place, this region offers strong regional structures, for instance the Council of Europe (CoE) with its regional enforcement mechanism represented by the European Court of Human Rights (ECtHR), and the European Union (EU). Second, Europe offers associated possibilities for litigation,²⁹⁸ which had been relatively under-used at the outset of this thesis for litigation, in the context of a long history of significant institutionalisation of people with intellectual impairments. Third, focusing the thesis on Europe contributed to making the aim of this thesis achievable.

²⁹⁶ More particularly, people with intellectual impairments in institutional residential settings, in a context of disablement.

²⁹⁷ J. Mason, *Qualitative Researching* (Sage: London, 2002), p. 19.

²⁹⁸ To be presented in chapter 5.

Within the context of Europe, the selection of three national jurisdictions (England, Ireland and Spain) made it possible to look at the thesis' main research question at the national level, as well as the linkages with the European and global levels. Appendices A, B and C offer detailed information about these national jurisdictions' socio-legal contexts. A range of factors motivated the selection of these three particular jurisdictions. The most relevant factor when thinking about the choice of these jurisdictions was that they offered significant diversity in terms of their legal contexts: two of them (England and Ireland) have a common law system while the third (Spain) offers a continental one. Also these three jurisdictions have in common that they are members of the CoE and the EU. In addition, for instance in England, there is a well-documented situation of human rights violations in certain institutional residential settings hosting people with intellectual impairments.²⁹⁹ In the case of Ireland, various research reports stress that the group of people with intellectual impairments is "largely institutionalised",³⁰⁰ and that their move to the community "remains a policy challenge"³⁰¹. With regard to Spain, and in comparison with the jurisdictions of England and Ireland, it appears that strategic litigation is still largely unexplored. In addition, language competence (English and Spanish) issues were relevant to this selection of jurisdictions. As this was mostly a self-funded student project, budget constraints were significant. This also had consequences for the selection of jurisdictions. The selection of jurisdictions that use English and Spanish made it possible to avoid financial costs such as interpreters' fees. Studies and work experience in the disability and human rights field constituted a further factor that was taken into consideration. These studies and work experience meant that, for

²⁹⁹ House of Lords - House of Commons - Joint Committee on Human Rights, "A Life Like Any Other? Human Rights of Adults with Learning Disabilities", Seventh Report of Session 2007-08, *Volume 1 - Report and formal minutes*, House of Commons, London: The Stationery Office Limited, 2008.

³⁰⁰ E. Flynn and A. Power, "Fundamental Rights Agency (FRA) Research Project on the Rights of People with Intellectual Disabilities And People with Mental Health Problems", Centre for Disability Law and Policy, National University of Ireland, Galway, 2010, p. 3.

³⁰¹ Centre for Disability Law & Policy, National University of Ireland (Galway), "ANED country report on the implementation of policies supporting independent living for disabled people, Country: Ireland, report for the Academic Network of European Disability experts (ANED)", VT/2007/005, 2009, p. 13.

example, in Spain there were particularly good opportunities to engage key participants.

The analysis of these jurisdictions provided lessons about legal strategy suitable for application in other European jurisdictions, and even with relevance to application in jurisdictions outside Europe. Although the data are from three different jurisdictions,³⁰² social systems,³⁰³ and/or legal systems³⁰⁴, this thesis was not explicitly concerned with comparing one phenomenon in more than one country, nor did it set out to conduct a systematic country comparison. According to Ragin, researchers developing a comparative methodology “examine complex patterns of similarities and differences across a range of cases”.³⁰⁵ He concludes that:

Whenever a set of cases have different outcomes (cities with different reactions to Indochinese refugees... comparative methods can be used to find simple ways of representing the patterns of diversity that exist among the cases.³⁰⁶

In summary, in this thesis there was a degree of comparison amongst England, Ireland and Spain. But this was not one of the principal aims of the thesis, in the same way as classic comparative research, as defined for example by Ragin.

³⁰² C.C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (Berkeley: University of California Press, 1987), p. 35.

³⁰³ N.J. Smelser, *Comparative Methods in the Social Sciences* (Princeton, NJ: Prentice-Hall, 1976), p. 152.

³⁰⁴ M. Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Oxford: Hart, 2011), p. 155.

³⁰⁵ C.C. Ragin, *Constructing Social Research: the Unity and Diversity of Method* (Thousand Oaks, California: Pine Forge Press, 1994), p. 115.

³⁰⁶ *Ibid*, p. 129.

Rather it provided the opportunity to look at different contexts, and to compare the effectiveness or the use of strategic litigation.

4.3.2 Legal documentary analysis

Legal documentary analyses were used to establish the legal context for this research, in other words, the literature already available with regard to the thesis' main and subsidiary research questions. As the following sub-section will explain, these analyses also informed the preparation of the qualitative interviews.

For instance, reviews of the CoE, EU and United Nations (UN) relevant human rights law were conducted. These reviews were completed along with reviews of the national contexts (England, Ireland and Spain). The research also included a review of key concepts, the results of which were introduced in Chapter 1.

These legal documentary analyses included primary data (such as law, including case-law) as well as secondary data (for instance books and journals). Overall, the legal documentary analyses were approached with an interpretative analysis, not only from the perspective of the researcher but also from the perspective of legal scholars and experts.

A number of databases/search engines were employed in the research, with the purpose of identifying case-law at the supranational and national levels, as well as decisions issued by quasi-judicial bodies at the supranational level. In such a way, the following databases/search engines were consulted regarding the identification of case-law:

HUDOC – regarding case-law by the ECtHR;³⁰⁷ BAILII (the British and Irish Legal Information Institute), for the English and Irish case-law;³⁰⁸ and CENDOJ (database hosted by the governing body of the Spanish Judiciary), regarding Spanish case-law³⁰⁹. The following databases were employed for the location of quasi-judicial decisions: HUDOC – regarding decisions issued by the European Committee of Social Rights;³¹⁰ a search engine offered by the European Union Ombudsman, dedicated to its cases;³¹¹ a search engine hosted by the European Parliament Committee on Petitions;³¹² and a search engine included in the webpage of the Committee on the Rights of Persons with Disabilities, for searching the individual communications presented to this body.³¹³

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<[http://hudoc.echr.coe.int/eng#{"documentcollectionid":\["GRANDCHAMBER","CHAMBER"\]}](http://hudoc.echr.coe.int/eng#{)>
last accessed 23 May 2016.

308 <<http://www.bailii.org/>> last accessed 23 May 2016.

309 <<http://www.poderjudicial.es/search/indexAN.jsp>> last accessed 23 May 2016.

310 <<http://hudoc.esc.coe.int/eng/#>> last accessed 23 May 2016.

311 <<http://www.ombudsman.europa.eu/en/cases/home.faces>> last accessed 23 May 2016.

312 <<https://petiport.secure.europarl.europa.eu/petitions/en/petition/search-by-keywords?keyWords=&years=&searchRequest=false>> last accessed 23 May 2016.

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<<http://juris.ohchr.org/en/search/results/1?sortOrder=Date&typeOfDecisionFilter=0&countryFilter=0&treatyFilter=0>> last accessed 23 May 2016.

4.3.3 Qualitative interviews

Semi-structured qualitative interviews (with key participants representing different stakeholder groups) were employed to obtain qualitative data not available from the documentary analysis. These key participant interviews were considered essential to gaining qualitative insights into the rationale, motivations, process and outcomes for the various stakeholders involved. Legal documentary analysis was employed to inform the preparation of detailed topic guides and interview schedules specific to each jurisdiction and stakeholder group. In so doing, this analysis minimised the demand for unnecessary information requests from the interviewees. After the documentary legal analysis, further contextual detail was added through initial contact with key organisations and academics. The documentary and contextual work informed the preparation of more detailed topic guides specific to each jurisdiction and stakeholder group. An example of a topic guide is included as Appendix D. Using the topic guides, the idea was to allow the participants to order and prioritise the experiential knowledge that was most relevant to the themes under consideration. In this way, common themes could be covered across all cases and stakeholders but without interrogation regarding issues irrelevant to the individual's specific experience and expertise.

a) Participants and ethical issues

Interviews were conducted with the following categories of participants: two supranational organisations who have worked with strategic litigation and people with intellectual impairments; six national organisations (two per jurisdiction) which use strategic litigation to further the human rights of people, including disabled people, and which may or may not have used it in connection with people with intellectual impairments; six national lawyers working in the three national legal systems (two per jurisdiction) who have acted on behalf of a person

with intellectual impairments, ideally in a case that was strategically litigated, but if not then in another case ideally concerning human rights or equality; five supranational organisations concerned with people with intellectual impairments but not involved directly in strategic litigation;³¹⁴ and six national advocacy organisations (two per jurisdiction) for people with intellectual impairments who are not involved directly in strategic litigation. In total, the fieldwork included twenty-five organisations and/or lawyers working in the three countries.

The interviews with supranational organisations who have worked with strategic litigation and people with intellectual impairments sought information about: how each organisation creates and develops its strategy for this kind of litigation; the criteria considered for the selection of a strategic case; post-litigation implementation measures and advocacy; and the outcome or impact of litigation, in terms of policy and practice changes and the effect on individuals.

The interviews with national organisations that use strategic litigation to further the human rights of people, including disabled people, and which may or may not have used it in connection with people with intellectual impairments sought information about: the extent to which people with intellectual impairments have been included in these organisations' work and, in particular, people with intellectual impairments living in institutions; if they have, whether they encountered obstacles when searching for relevant cases and subsequently developing them; how they ensured communication with, and the involvement of, the person with intellectual impairments; if they had not brought any such cases, whether they envisaged any barriers during the litigation process if they did; post-litigation measures they have used to maximise the impact of any relevant cases; their reflections on how much impact the case has had and how much change it

³¹⁴ One of these organisations is an organisation "of" disabled people (including those with intellectual impairments). For the purposes of this thesis "organisations with more than 50% of the governing body composed of or reserved for disabled people" are considered organisations "of" disabled people (including those with intellectual impairments). Organisations not fulfilling this last criteria are regarded as organisations "for" disabled people (including those with intellectual impairments).

has generated; and thoughts about potential, or additional, work on people with intellectual impairments and strategic litigation.

The interviews with lawyers working in the three national legal systems who have acted on behalf of a person with intellectual impairments, ideally in a case that was strategically litigated, but if not then in another case, ideally concerning human rights or equality, sought information about: remuneration for this type of litigation, and how it compares with other types of work, including other types of litigation; the practicalities of conducting it (for example, around accessing the client and communication with the client); whether they considered that the court process used appropriate reasonable adjustments for the client; whether they perceived any barriers to accessing justice for people with intellectual impairments; whether they were satisfied with the outcome; and reflections about possible work on strategic litigation.

The interviews with supranational organisations concerned with people with intellectual impairments but not involved directly in strategic litigation sought information about: how effective relevant supranational organisations think relevant strategic litigation (with which they will probably not have been involved) has been in improving the rights of people with intellectual impairments (what difference, if any, it has made); whether the organisation has been involved in any work relating to access to justice for people with intellectual impairments and also specifically for such people living in institutions and, if so, what insights this has given rise to in terms of gathering information regarding the extent of the barriers and/or trying to remove them; awareness of national, European and/or international case-law that is relevant for people with intellectual impairments placed in institutional living, as well as an explanation of the possible use of relevant case-law in the context of the work developed by the organisation; and why they have not themselves adopted strategic litigation as a major strategy and whether they might be considering it in the future.

The interviews with advocacy organisations for people with intellectual impairments who are not involved directly in strategic litigation sought information about: possible work developed by the organisation, with regard to access to justice for people with intellectual impairments (including those living in institutions); thoughts on relevant case-law; thoughts about the importance of strategic litigation; and thoughts about the organisation's involvement in strategic litigation.

In all cases, relevant contextual information was welcomed about more general European issues as well as examples from other countries.

The researcher's academic and work experience facilitated the identification of potential participants. The researcher's academic studies made it possible to gain access to various documents related to the human rights of people with intellectual impairments. These documents included invaluable information about some of the stakeholders involved in strategic litigation regarding the group under consideration. Work experience in the area of disability and human rights meant that contacts with certain leading experts in the field had been developed in advance, therefore making the identification of initial potential participants easier. Once these potential participants were identified, a selection was made giving consideration to elements such as stakeholders' public profile and expertise in the area, their involvement in key strategic cases, and the final goal of achieving a balance of key stakeholders representing the different jurisdictions. Potential participants were first approached through communication by email and telephone. The decision regarding the best procedure to approach a participant was made on an individual basis.

All participants were provided with a participant information sheet in advance of making their decision regarding whether or not to participate. The information sheet explained the aims of the research and what would happen during the process. When required, additional explanation (verbal or email) was provided to expand and explain any requests for clarification. The information sheet was

tailored to each stakeholder group. An example of the information sheet is included as Appendix E. All participants had information about the research in advance of making their decision regarding whether or not to participate. No-one was included in the study unless they expressed willingness to participate.

Participants were required to sign a consent form. The consent form was sent by email, and participants were asked to return the signed consent form by email or fax. Only in extremely exceptional cases, when there were logistical problems around a participant returning the signed consent form, was consent obtained verbally and recorded over the phone. In particular, the consent form sought the participant's confirmation and consent regarding the following matters: that the participant had read and understood the information sheet explaining the research project, and had the opportunity to ask questions about the study; that participation was voluntary and that the participant was free to withdraw at any time without giving any reason and without there being any negative consequences; that if the participant did not wish to answer any particular question or questions, he/she was free to decline; that the participant was aware of the researcher's telephone contact details; that the participant's responses would be kept strictly confidential; that the participant understood that the researcher would contact him/her to check if he/she was happy with the information that would appear in the report or reports that resulted from the research; that the participant agreed for the data collected from him/her to be used in future research; and, finally, that the participant agreed to take part in the study and would inform the researcher should his/her contact details change. Once a participant had signed the consent form, a copy of this form with his/her signature was sent to him/her. An example of the consent form is included as Appendix F.

Due to budget and time restrictions, it was decided that all of the interviews would be conducted over the phone. This was not regarded as critical to the goals pursued in the fieldwork: it was deemed that the quality of the insights obtained from the interviewees (all of them professionals, such as staff from disability and human rights organisations, as well as lawyers working in the three national

jurisdictions) was not going to be jeopardised by conducting the interviews over the telephone. One interview was conducted with each participant, but with the opportunity for follow-up or serial conversations with individuals for whom this seemed more appropriate or necessary. As an exception, two interviews were conducted with two different participants from the same supranational organisation/stakeholder. The interviews were conducted between January 2012 and April 2012, and then between October 2013 and January 2014. The study was suspended during the intervening period. This suspension was granted because of maternity leave as well as other personal reasons.

All participants were contacted from the United Kingdom, and the duration of each interview did not exceed 1.5 hours. All of the interviews were recorded over the phone.

As previously advanced, participants had the right to withdraw from the research at any time (in total or in part), without prejudice and without providing a reason. It was decided in advance that if a participant decided to withdraw from the research, unless the participant objected, the data already collected would be used for the purposes of the research. Following this step, the study complied with the ethical research principle established by the Economic & Social Research Council Research Ethics Framework, which states that, “research participants must participate in a voluntary way, free from any coercion”.³¹⁵

The interviews conducted for this thesis provided invaluable insights into stakeholders’ experiences with strategic litigation in the area of disability (including intellectual impairments) and human rights. The interviews were crucial for obtaining information about how relevant strategic litigation works in practice in particular circumstances; overall, this information cannot be found in published documents and therefore the interviews played an essential role. By including the

315 <<http://www.esrc.ac.uk/files/funding/guidance-for-applicants/esrc-framework-for-research-ethics-2015/>> last accessed 24 February 2016.

voices of several organisations of/for disabled people (including intellectual impairments), the aim was to contribute to the goals of “emancipatory” disability research. According to Barnes, “[b]y definition “emancipatory” disability research should be judged by its ability to empower disabled people – both inside and outside the actual research process”.³¹⁶ In so doing, this research aimed to finally empower people with intellectual impairments and their organisations. In other words, it was hoped that the interview findings could assist in facilitating further understanding, and better employment, of relevant strategic litigation, which in turn could empower disabled people’s organisations concerned with this litigation, as well as people with intellectual impairments themselves.

Every effort was made to ensure that the interviews were a rewarding and empowering experience for the participants. However, it was considered that key-participant interviews might raise some sensitive or embarrassing issues (e.g. ethical and legal dilemmas encountered by professionals). Therefore, it was important to make sure that participants were adequately briefed about the subjects under discussion, and that they had the opportunity to withdraw their consent at any time (or in part). Also it was necessary to inform participants of any circumstances under which it would be legally required to reveal information or to seek additional advice. With the purpose of minimising this risk and burden, and in order to comply with the ethical research principles established by the Economic & Social Research Council Research Ethics Framework, which state that “harm to research participants must be avoided”,³¹⁷ the following steps were followed. The first set of steps was directed to make every effort to ensure that the interviewee felt safe and relaxed during the interview. Interviewees were encouraged to request breaks whenever they wished, particularly if they felt uncomfortable, distressed or distracted. Particular attention was paid to the

³¹⁶ C. Barnes and A. Sheldon (2007), *op. cit.*, p. 15.

³¹⁷

<<https://www2.le.ac.uk/departments/archaeology/documents/ESRCETHICS%20revised%202010.pdf>> last accessed 24 February 2016.

atmosphere in which the interview ended. In addition, the interviewee was offered the option of stopping the interview if he/her happened to feel uneasy.

A second ethical issue was to ensure informed consent from the diverse groups of key participants. Following Creswell's suggestions, all participants were asked to sign consent forms before they engaged in the research.³¹⁸ As previously mentioned, Appendix F provides an example of the consent form.

It was important to ensure the confidentiality and security of the personal information and data generated through the interviews. Also, following Creswell's suggestion, pseudonyms were employed for individuals and places to protect their identities.³¹⁹ This matter will be discussed in more detail later.

Given that the thesis included empirical research, it was necessary to seek ethical approval from the University of Leeds' Research Ethics Committee. After negotiations with this Committee, ethical approval was obtained on 9 May 2011. A copy of the letter granting ethical approval is enclosed as Appendix G.

b) Transcription, analysis, confidentiality and security of personal data

All of the interviews were transcribed in full. An important obstacle or limitation was the deficient quality of certain parts of the recordings. Looked at from the perspective of language competence, another challenge was constituted by the interviewees' diverse languages (and pronunciations).

³¹⁸ J. Creswell, *Research Design* (London: Sage, 2002), p. 64.

³¹⁹ *Ibid.*, p. 66.

Following Mason's distinction between organisation and making convincing arguments with qualitative data,³²⁰ the interview analysis began with coding of the themes and descriptors, according to the different groups of interviewees. Overarching themes were identified, and under these themes, a number of descriptors were included. For instance, in the case of the interviews with supranational organisations who have worked with strategic litigation and people with intellectual impairments, an overarching theme was the selection of issues and cases for strategic litigation, with the following examples of descriptors featuring under this theme: work with local partners; clear strategic goals; a connection between human rights monitoring and reporting, and the identification of issues for strategic litigation; tension between human rights monitoring and reporting, and the identification of strategic cases; internal documents which include case selection criteria; selection criteria applied with flexibility, when working with strategic cases involving disabled people (including those with intellectual impairments in institutional residential settings in European countries); and monitoring of cases communicated to the European Court of Human Rights (ECtHR) as a way of selecting relevant strategic cases.

The information contained in the transcripts was therefore organised following the categories of themes and descriptors, which included literal, interpretive as well as reflexive categories.³²¹ The next step was to break down these categories even further, identifying additional key themes and making sure that quotes were placed within the textual development of the points and analysis. The findings were finally presented through a cross-referenced analysis. For instance, this has the advantage of avoiding repetition.

³²⁰ J. Mason (2002), *op. cit.*, p. 147.

³²¹ *Ibid.*, pp. 148-150.

The personal information and data from all three jurisdictions was protected in accordance with the UK Data Protection Act (corresponding Irish/Spanish law) and the University of Leeds' Information Security Policy³²². Through these steps, and following the guidance established by the Economic & Social Research Council Research Ethics Framework, the research complied with the ethical principles, which state that “the confidentiality of information supplied by research subjects and the anonymity of respondents must be respected”.³²³

All of the data collected were used solely for the purposes of the thesis. The thesis included direct quotations from respondents, which were anonymised. During the transcription, and in preparing the analyses for validation, pseudonyms and acronyms were used for individuals and places to protect their identities. The maximum effort was made to create acronyms linking back to the characteristics of the participants working at the national and supranational levels, whilst at the same time preserving their anonymity. For the participants from the supranational organisations who have worked with strategic litigation and people with intellectual impairments, the acronym “IO1” stands for “international organisation 1”. As previously mentioned, interviews were conducted with two participants from one particular supranational organisation. This is the IO1, and the acronyms “IO1a” and “IO1b” stand for the cases of these two participants, respectively: “international organisation 1, participant a”, and “international organisation 1, participant b”. In turn, the acronym “IO2” stands for “international organisation 2”. In terms of the interviews with the six national organisations (two per jurisdiction) that use strategic litigation to further the human rights of people, including disabled people, which may or may not have used it in connection with people with intellectual impairments, the following acronyms were used: “EO1” (standing for “English organisation 1”); “EO2” (standing for “English organisation 2”); “IrishO1” (standing for “Irish organisation 1”); “IrishO2” (standing for “Irish

³²² <http://it.leeds.ac.uk/info/113/policies_and_information_security> last accessed 24 February 2016.

³²³ <<https://www2.le.ac.uk/departments/archaeology/documents/ESRCETHICS%20revised%202010.pdf>> last accessed 24 February 2016.

organisation 2”); “SO1” (standing for “Spanish organisation 1”); and “SO2” (standing for “Spanish organisation 2”). With regard to the third group of participants, which is the group pertaining to the six lawyers working in the three countries (two per jurisdiction) who have acted on behalf of a person with intellectual impairments, ideally in a case that was strategically litigated, but if not then in another case ideally concerning human rights or equality, the thesis employed the following acronyms: “EL1” (standing for English lawyer 1); “EL2” (standing for English lawyer 2); “IrishL1” (standing for Irish lawyer 1); “IrishL2” (standing for Irish lawyer 2); “SL1” (standing for Spanish lawyer 1) and “SL2” (standing for Spanish lawyer 2). The next group of participants comprised the supranational organisations concerned with people with intellectual impairments but not involved directly in strategic litigation. In this case, the following acronyms were used: “SONSL1” (standing for “supranational organisation not directly involved in strategic litigation 1”);³²⁴ “SONSL2” (standing for “supranational organisation not directly involved in strategic litigation 2”); “SONSL3” (standing for “supranational organisation not directly involved in strategic litigation 3”) “SONSL4” (standing for “supranational organisation not directly involved in strategic litigation 4”) and “SONSL5” (standing for “supranational organisation not directly involved in strategic litigation 5”). Finally, regarding the participants pertaining to national advocacy organisations (two per jurisdiction) for people with intellectual impairments who are not involved directly in strategic litigation, the study employed the following acronyms: “EONSL1” (standing for “English national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 1”); “EONSL2” (standing for “English national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 2”); “IONSL1” (standing for “Irish national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 1”); “IONSL2” (standing for “Irish national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 2”); “SPNSL1” (standing for “Spanish national advocacy organisation for people with learning difficulties who is not involved directly in

³²⁴ This is an organisation of disabled people (including those with intellectual impairments).

strategic litigation 1”); and “SPNSL2” (standing for “Spanish national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 2”). For the sake of clarity, a table including the overall list of the participants’ acronyms is included as Appendix H. It was not possible to anonymise the jurisdictions, and there was a risk that certain specific high-profile organisations or court cases could become recognisable through association of evidence. In such cases, the analysis drew more explicitly on published records but, insofar as the research participants are concerned, additional validation checks were made with them to determine their consent before publication (whilst also maintaining their pseudonyms). These additional validation checks intended to reduce the minimal risk of recognition “through association of evidence” existent in these cases. The maximum effort was made to locate all of the research participants and ask them about their consent about material for publication; however, it was not possible to obtain the relevant consent from all of the research participants. For instance, some participants had already left their organisations at the time when the attempt was made to contact them regarding their consent for publication.

The data produced for this thesis was stored on a computer at the University of Leeds. This computer was password-protected. When using a laptop, it was ensured that the data was encrypted and uploaded onto a secure server or desktop as soon as possible. Also it was ensured that the data were removed from the portable device as soon as possible, using appropriate data destruction software. With the aim of achieving physical security, a backup of the information produced for the thesis was performed regularly. For this purpose, relevant software (Windows XP Backup) was employed, and the backup information was stored in a different location away from the computer on which the working copy was held (on a different computer located in the research suite at the University of Leeds, School of Law). With regard to the data on paper, for instance the signed consent forms including the participants’ data, this data were stored in a locked cupboard. Six months after the end of these studies, the data will be irreversibly destroyed. In the case that a participant decided not to participate anymore in the research, the data provided by him/her was immediately

destroyed. Electronic databases and all other files containing personal data will be permanently deleted. Personal data contained on paper will be shredded.

4.4 Conclusion

This thesis was developed under the guidance of the social model of disability, the epistemology chosen for this study. In this context, the study was about the content of the law, but furthermore, it was about how the law (through strategic litigation) could be employed for making human rights a reality. These characteristics justified the selection of two research strategies (inductive and retroductive) as well as socio-legal methods, as being particularly appealing for answering this thesis' research questions. The selection of Europe as the geographical focus of the research, and more concretely three particular national jurisdictions (England, Ireland and Spain) made it possible to look at the research question nationally, as well as regionally and globally. This selection also had other benefits, such as making the study achievable. However, the objective was not to carry out a comparative law analysis of these jurisdictions. The method of legal documentary analysis helped to establish the evidence already published *on paper*. It was also key to preparing the context prior to the interviews. Qualitative interviews allowed an evaluation of how rights work *in reality*. These interviews made it possible to include the voices of various key stakeholders, thereby exploring how rights work in the real world. By including the voices of organisations of/for disabled people (including people with intellectual impairments), the thesis wanted to contribute to an emancipatory aim. The insights provided by these organisations allowed an analysis of better ways for employing strategic litigation, with the purpose of tackling human rights violations happening in institutional residential settings for people with intellectual impairments in European countries. These insights or findings could therefore empower disabled people's organisations concerned with this litigation, as well as people with intellectual impairments themselves. The rest of the thesis will

present the results achieved through the employment of the methods presented in this chapter.

Chapter 5

STRATEGIC LITIGATION FOR RECOGNISING AND ENFORCING HUMAN RIGHTS: NATIONAL, EUROPEAN AND GLOBAL PERSPECTIVES

5.1 Introduction

This chapter will be devoted to an exploration of what the literature tells us about the ways in which strategic litigation has been employed for recognising and enforcing the rights of people with intellectual impairments living in institutional residential settings in European countries. The chapter will perform this analysis with a focus on national (England, Ireland and Spain), European (Council of Europe -CoE- and European Union -EU-), and global (United Nations -UN-) instances. Towards fulfilling this final goal, the chapter will start by presenting stakeholders as those performing strategic litigation in the form of being strategic litigators or third party interveners, and progress by setting up the context of some possible instances for strategic litigation at the national, European and UN levels. It will also provide evidence of the employment of relevant strategic litigation in these instances, providing information about various strategic cases that have been decided with regard to the human rights of people with intellectual impairments in institutional residential settings. Finally, the chapter will include a section about the impact of strategic litigation; in particular, this last section will discuss the matter of measuring the impact of relevant strategic litigation, as well as suggesting some possible indicators that may be useful for this purpose.

5.2 Key stakeholders in the field

With regard to people with intellectual impairments, and taking into account the European focus of this thesis, research about cases that have been strategically litigated in relation to this group clearly shows that cases of this kind have been litigated by non-governmental organisations (NGOs) such as the following: the Mental Disability Advocacy Centre (MDAC),³²⁵ the International Disability Alliance (IDA)³²⁶ and the European Disability Forum (EDF).³²⁷ For instance, MDAC is an NGO registered in Hungary; this organisation also has a sister charity in the United Kingdom called “MDAC-UK”.³²⁸ MDAC focuses its work “on three clusters of human rights issues”, which are autonomy and legal capacity, institutions and the community, and ill treatment and death.³²⁹ Amongst its activities, this non-governmental organisation represents clients before domestic courts and the European Court of Human Rights (ECtHR).³³⁰ The former NGO Interights has also made invaluable contributions in the field of strategic litigation;³³¹ but unfortunately, this organisation closed down in May 2014, due to funding issues. With regard to other possible key stakeholders, such as law firms, the secondary research did not provide clear information. For example, it was found that the well-known firm Irwin and Mitchell Solicitors (an English law firm) takes on cases involving disabled people and strategic litigation (“public interest” is the terminology chosen by this law firm).³³² However, it is not clear

³²⁵ <<http://www.mdac.info/en>> last accessed 24 February 2016.

³²⁶ <<http://www.internationaldisabilityalliance.org/en/disability-rights-litigation>> last accessed 24 February 2016.

³²⁷ <<http://www.edf-feph.org/default.asp>> last accessed 24 February 2016.

³²⁸ <<http://www.mdac.info/uk>> last accessed 24 February 2016.

³²⁹ <<http://www.mdac.info/what-we-do>> last accessed 24 February 2016.

³³⁰ Ibid.

³³¹ <<http://www.interights.org/our-cases/index.html>> last accessed 24 February 2016.

³³² <<http://www.irwinmitchell.com/personal/protecting-your-rights/human-rights/disability-law>> last accessed 24 February 2016.

whether this law firm has taken on strategic legal cases involving people with intellectual impairments in institutional residential settings.

Within the context of these stakeholders, the CoE Commissioner for Human Rights has stressed the importance of the work developed on “strategic public interest litigation” by NGOs in Europe.³³³ At the same time, he warned about a problem that is happening in several European member states, namely the decreasing resources of NGOs (as well as other structures such as equality bodies) in the context of access to justice (which, as already clarified, is a condition for strategic litigation):

In a context of general deterioration of the human rights situation caused by the economic crisis, maintaining and increasing the capacity of both NGOs and national structures should therefore be an absolute priority. Unfortunately, through my country-monitoring work so far I have seen a trend in the opposite direction: the resources of such bodies are hard hit in many member states. This can only aggravate the situation even further.

This links with the issue of donors in the field of strategic litigation for people with intellectual impairments. A first glance at MDAC’s website reveals that the Open Society Foundations, which founded MDAC, is still one of its donors.³³⁴ The IDA’s website reveals several names of funders, and the Open Society Foundations is one of them.³³⁵ Other donors funding the IDA, for example, are: the Ford Foundation, the John D. and Catherine T. MacArthur Foundation, and anonymous donors. According to worldwide figures released by the International

³³³ Commissioner for Human Rights, “*Re-thinking access to justice in practice*”. Address by Nils Muižnieks, Council of Europe Commissioner for Human Rights. Fundamental Rights Conference 2012. Justice in austerity – challenges and opportunities for access to justice. Brussels, 7 December 2012, CommDH/Speech (2012) 17.

³³⁴ <<http://www.mdac.info/en/about>> last accessed 24 February 2016.

³³⁵ <<http://www.internationaldisabilityalliance.org/en/about-us>> last accessed 24 February 2016.

Human Rights Funders Group (IHRFG –a global network of donors and grant-makers), the Open Society Foundations is the top funder with regard to disability rights and access to justice/equality before the law.³³⁶ The same figures reveal that, with regard to the overall funding from several donors allocated for “people with disabilities” [including people with intellectual impairments], five percent is assigned for issues of access to justice/equality before the law. Therefore, the evidence regarding donors for this very specific litigation shows that the Open Society Foundations is a top funder, and that (arguably) a rather low percentage of funding for disabled people is assigned to access to justice worldwide.

Depending on the rules applicable to a particular court or tribunal, the previously mentioned key stakeholders can conduct strategic litigation through the most traditional form of litigation, which is to present a strategic case as a litigator (or in other words, as a lawyer for a claimant or defendant in a legal case), or through submitting third party interventions.

Third party interventions, also known as “amicus curiae” (friend of the court), have been categorised as “a more limited form of intervention”.³³⁷ According to the NGO Public Law Project, these interventions “are a method by which a person or organisation not otherwise involved in the litigation may submit specialist information or expertise to the court”.³³⁸ The Public Law Project stresses that “[b]ecause of their specialist knowledge about how particular decisions impact upon the group they represent, these [individuals or] organisations have the ability to make informed submissions that could assist the court”. In the field of intellectual impairments, organisations such as MDAC, Interights and the IDA

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<http://foundationcenter.org/gainknowledge/research/pdf/humanrights_disabilities.pdf?_ga=1.31751673.63312102.1428924555> See:
<http://foundationcenter.org/gainknowledge/research/pdf/humanrights_justice.pdf?_ga=1.191656301.63312102.1428924555> last accessed 24 February 2016.

337 K. O'Connor and L. Epstein, “Rebalancing the Scales of Justice: Assessment of Public Interest Law”, *Harvard Journal of Law & Public Policy* 7, 1984, pp. 483-505.

338 The Public Law Project, “Third Party Interventions – a practical guide”, Public Law Project, 2008, p. 3.

have usually made a number of third party interventions in cases being judged under the ECtHR. As the IDA clarified,

Most often third party interventions, in particular before the European Court of Human Rights and national Constitutional or supreme courts, are brought by NGOs or academic centres to bring to light the latest standards of international human rights law and comparative jurisprudence and practices.³³⁹

Traditionally, third party interventions have been made in the context of the judicial system. More recently, an additional document elaborated by the IDA on the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD) suggested that third party interventions can also be submitted to the CRPD Committee (which is a quasi-judicial instance).³⁴⁰

5.2.1 Ways of finding and selecting cases

In order to present a strategic case as a litigator, in the first place the key stakeholders must find a client with intellectual impairments. Because of the various barriers to accessing justice that have been exposed in Chapter 3, this can be an extremely difficult task. In particular, the stakeholder will be looking for a very specific type of case; in other words, a case with very particular characteristics.

³³⁹ <<http://www.internationaldisabilityalliance.org/en/third-party-interventions>> last accessed 24 February 2016.

³⁴⁰ International Disability Alliance (IDA), "IDA Factsheet on the Optional Protocol to the CRPD" (n.d.) <<http://www.internationaldisabilityalliance.org/en>> last accessed 24 February 2016, p. 12.

Nevertheless, the evidence shows that stakeholders do not always look in advance for a case that ends up as part of their litigation. Lewis, Executive Director of MDAC, recognises that cases that initially were not planned as strategic, can afterwards constitute strategic litigation: “I also classify within strategic litigation those cases where litigators do not proactively seek victims, but where the litigants simply appear to the litigators who have an awareness of a great case when they [sic] them”.³⁴¹ With regard to strategic litigation in a different human rights area (race discrimination), and in line with Lewis, the European Roma Rights Center (ERRC), Interights, and the Migration Policy Group (MPG) point out that the majority of cases will “probably arise in an *ad hoc* [for this special purpose] manner”.³⁴²

Therefore, it is important that litigators are flexible in recognising cases as soon as the right opportunity appears. At the same time, as stated previously, litigators usually follow a strategy, which may begin with a search for the right legal case. Towards this aim, for instance, MDAC “works in partnership with organisations (mainly disabled people’s organisations and human rights organisations) and lawyers in various countries”.³⁴³

In addition, a solid set of criteria can either guide the stakeholder’s search for a case, or test the prospects of going to court (or to a quasi-judicial instance) with regard to a potential case that has already been found. Either way, effective case selection will strengthen the possibility of fruitful strategic litigation. MDAC has a

³⁴¹ O. Lewis, “How can strategic litigation play a role in nudging States towards legal capacity utopia? A preliminary ideas paper for discussion on 13 November 2009 at the seminar on disability litigation in Washington DC, organised by the Mental Disability Rights International, the Open Society Institute and the American University”, 31 October 2009 <https://www.escri-net.org/sites/default/files/Strategic_Litigation_strategy_on_legal_capacity_0.doc> last accessed 24 February 2016.

³⁴² European Roma Rights Center (ERRC), Interights (The International Centre for the Legal Protection of Human Rights) and Migration Policy Group (MPG) (2004), “Strategic litigation of race discrimination in Europe: from principles to practice - A manual on the theory and practice of strategic litigation with particular reference to the EC Race Directive”, <http://www.migpolgroup.com/public/docs/57.StrategicLitigationofRaceDiscriminationinEurope-fromPrinciplestoPractice_2004.pdf> last accessed 24 February 2016, p. 35.

³⁴³ <http://mdac.org/en/what-we-do/strategic_litigation> last accessed 24 February 2016.

set of criteria that they denominate with the acronym “SPARR” (meaning: strength; potential; added value; relevance; and resources).³⁴⁴ This organisation firstly assesses the strength of a case by evaluating whether the evidence is strong and the case has a reasonable likelihood of success. Secondly, the case must have the potential to help other people. For example, the case needs to have the potential to advance the case-law (this can happen at different levels, for example, at an international level) and/or lead to law reform. Thirdly, MDAC must be satisfied that the organisation can add value through its expertise, for example through the organisation’s ability to bring pro bono support from a law firm. Fourthly, the organisation evaluates whether the case is relevant to one of MDAC’ six human rights goals (freedom from torture and ill-treatment, the right to live in the community, the right to legal capacity, access to justice, the right to political participation and the right to inclusive education). Finally, MDAC assesses whether the organisation has the human and financial resources to litigate the case (either at a domestic, regional or international level).

In the field of race discrimination, the organisations ERRC, Interights and the MPG have clarified that there are no universally established criteria for selecting a strategic case, but the following have been offered as examples: “the case addresses issues of substantial importance to a large number of people”; “the issue is relevant to one or more thematic priorities”; “the issue cannot be adequately addressed by grant of individual assistance”; and “the involvement is in the best interests of the minority group generally”.³⁴⁵ These organisations have also made the interesting point that the criteria for these purposes are intrinsically related to the characteristics of the organisation that pursues strategic litigation.³⁴⁶

³⁴⁴ <<http://mdac.org/en/node/1054>> last accessed 24 February 2016.

³⁴⁵ European Roma Rights Center (ERRC), Interights (The International Centre for the Legal Protection of Human Rights) and Migration Policy Group (MPG) (2004), *op. cit.*, p. 46.

³⁴⁶ The analysis of the publication of the European Roma Rights Center (ERRC) et al (2004) is focused on the work that organisations can do regarding strategic litigation and race discrimination. This seems to be because the authors of this manual are organisations themselves.

Because of the aforementioned difficulty of finding clients with intellectual impairments for very particular legal cases, the alternative of third party interventions can be of real value. Third party interventions are one of the important ways of making litigation strategic. In other words, the making of interventions in legal cases, in which one stakeholder is not a litigator, is a really important means of engaging in strategic litigation.

5.3 Strategic litigation at national level

5.3.1 England

In England (as well as in Scotland) strategic litigation appeared in the late 18th century.³⁴⁷ Currently, there is consensus about the importance of the Human Rights Act 1998 (HRA 1998) for strategic litigation, as a tool that empowered individuals and pushed key stakeholders to rethink their work from a different perspective.³⁴⁸ The HRA 1998 is a landmark instrument that incorporated the provisions of the European Convention on Human Rights (ECHR).³⁴⁹ According to the HRA, when a Court or Tribunal decides that a matter is connected with a right contemplated by the ECHR, the Court or Tribunal must consider the work

³⁴⁷ R. Smith, "Experience in England and Wales: Test case strategies, public interest litigation, the Human Rights Act and legal NGOs", JUSTICE: London, 2003 <http://www.essex.ac.uk/armedcon/story_id/000696.pdf> last accessed 22 February 2016, p. 1.

³⁴⁸ R. Smith (2003), *op. cit.*, pp. 9-11; and L. Vanhala, "Strategy choice in disability rights organizations: A theoretical re-consideration", [p]repared for delivery at the 2008 Annual Meeting of the Political Studies Association, Swansea, Wales, April 1-3, 2008, p. 3.

³⁴⁹ <<http://www.legislation.gov.uk/ukpga/1998/42/section/21>> last accessed 24 February 2016.

undertaken by the ECtHR -amongst other bodies.³⁵⁰ The HRA also establishes that “primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. And fundamentally, the HRA determines the unlawfulness of any act conducted by a public authority that is “incompatible with a Convention right”.

In terms of key stakeholders working with strategic litigation, in England (as well as Wales), with regard to a population of 50m, there are just 53 community law centres and their representative body is the Law Centres Federation (LCF).³⁵¹ There are a number of organisations dedicated to strategic litigation in this jurisdiction. Examples of these are: JUSTICE, MIND, the Disability Law Service (DLS), and the Public Law Project. Within this context, for example, the DLS is a professional organisation run by disabled people.³⁵² It works in the area of public and social welfare law, developing work in the context of the legal system, which progresses from one-to-one consultations to full representation in Court.³⁵³ In addition, for example, the Equality and Human Rights Commission (EHRC - former Disability Rights Commission/DRC) is a public body that undertakes strategic litigation. The EHRC has “a statutory remit to promote and monitor human rights; and to protect, enforce and promote equality across the nine ‘protected’ grounds - age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment”.³⁵⁴ Amongst its planned activities, the EHRC is prepared to “take legal action on behalf of individuals, especially where there are strategic opportunities to push the boundaries of the law ... [w]here there are chances to

³⁵⁰ Human Rights Act 1998, s.2, pp 2-3.

³⁵¹ Ibid, pp. 1 and 6.

³⁵² <<http://www.dls.org.uk/>> last accessed 24 February 2016.

³⁵³ Ibid.

³⁵⁴ <<http://www.equalityhumanrights.com/about-us/>> last accessed 24 February 2016.

create legal precedents or to clarify and improve the law”.³⁵⁵ However, the EHRC is only able to provide legal assistance if there is an equality dimension in the case.³⁵⁶ In relation to the area of disability, the EHRC has intervened in approximately thirteen cases involving this matter.³⁵⁷ Additionally, the EHRC can “take judicial review proceedings to prevent breaches of the Human Rights Act”.³⁵⁸ Moreover, it is interesting to note that the EHRC offers a conciliation service.³⁵⁹ With respect to litigation, the EHRC elaborated the document “Draft Casework and Litigation Strategy 2010-2012”, which addresses its role in regard to strategic litigation.³⁶⁰ More recently, the EHRC published a strategic litigation policy.³⁶¹ Strategic litigation is also developed in the context of private practices.

In terms of legal aid, Smith illustrates that this “is overwhelmingly delivered by private practitioners in England and Wales”, and that the Legal Services Commission (LSC) is the entity administering this legal aid.³⁶² Of course the funding provided by the LSC is not the only relevant possibility; for example,

³⁵⁵ <<http://www.equalityhumanrights.com/about-us/vision-and-mission/>> last accessed 24 February 2016.

³⁵⁶ Ibid.

³⁵⁷ Examples of these cases are: *R (Abdullah Baybasin) v Ministry of Justice*; *Burnip v (i) Birmingham City Council (ii) Secretary of State for Work and Pensions*; *R(RJM) v Department of Work and Pensions*; *R(N) v Secretary of State for Health*; *R(E) v Nottinghamshire Healthcare NHS Trust*; *SCA Packaging v Boyle*; *R (AM) v Birmingham City Council and The University of Birmingham*; *Brown v BERR and Royal Mail*; *London Borough of Lewisham v Malcolm*; *R(MH) v London Borough of Tower Hamlets*; *Seal v UK*, Mental Health Act.

³⁵⁸ <<http://www.equalityhumanrights.com/about-us/vision-and-mission/>> last accessed 24 February 2016.

³⁵⁹ Ibid.

³⁶⁰ Equality and Human Rights Commission, “Draft Casework and Litigation Strategy 2010-2012”, 2010, p. 4.

³⁶¹ Equality and Human Rights Commission, “The Equality and Human Rights Commission’s Strategic Litigation Policy”, 2015 <http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Strategic%20Litigation%20Policy%20100315.pdf> last accessed 24 February 2015.

³⁶² R. Smith (2003), op. cit., p. 1.

funding is also provided by local authorities.³⁶³ With regard to the matter of third party interventions, the regulation of these is not clear in the English jurisdiction and has been the subject of criticisms.³⁶⁴

Within this context, from a literature review, it is extremely difficult to identify strategic litigation involving people with intellectual impairments in institutional residential settings. For instance, no relevant strategic litigation is mentioned in the Disability Law Service's Strategic Plan 2008-2011.³⁶⁵ Another example is represented by the case of the EHRC, with no strategic litigation identified with regard to people with intellectual impairments living in institutional residential settings, after reviewing the information that this commission has made available to the public.³⁶⁶ Within this context, a relevant strategic case is the case of *HL v UK*, commonly known as the *Bournewood case*.³⁶⁷ This case involved a discussion about the deprivation of liberty of a man with autism and challenging behaviour. Because he had been "compliant" in his admission to hospital, it was argued by the state that he had not been "detained". The European Court of Human Rights (ECtHR) concluded that he had indeed been deprived of his liberty, and that the absence of procedural safeguards and access to court amounted to a breach of Articles 5(1) and (4) of the European Convention on Human Rights (ECHR). There was also the case of *P (by his litigation friend the Official Solicitor) (Appellant) v Cheshire West and Chester Council and another (Respondents); P and Q (by their litigation friend, the Official Solicitor)*

³⁶³ *Ibid*, p. 6.

³⁶⁴ *Ibid*, p. 11.

³⁶⁵ Disability Law Service, "Strategic Plan 2008-2011", Appendix I: Disabled People in Britain, a Survey of Data, Studies and Reports Revised February 2010: Further data, studies and reports 2008-2009.

³⁶⁶ Equality and Human Rights Commission, "Summary of Commission's interventions", 2016 and Equality and Human Rights Commission "Summary of the Commission's interventions in the European Court of Human Rights", 2016. Also see <<http://www.equalityhumanrights.com/about-us/devolved-authorities/commission-scotland/legal-work-scotland/strategic-human-rights-and-equality-litigation>> last accessed 24 February 2016.

³⁶⁷ *HL v. the United Kingdom*, application No. 45508/99, Judgment of 5 October 2004.

(Appellants) v Surrey County Council (Respondent), regarding the meaning of deprivation of liberty – the purpose of which was to argue that people were deprived of their liberty when they were not free to come and go as they pleased.³⁶⁸

5.3.2 Ireland

The first case strategically litigated in Ireland was *Ryan v The Attorney General* in 1965.³⁶⁹ In 1968, law students held a conference about legal education at Trinity College Dublin.³⁷⁰ As a result of this conference, the organisation, Free Legal Advice Centres (FLAC) was established, and “a sustained, systematic attempt over more than three decades to use the law in a strategic manner to tackle social exclusion in Irish society’ began”.³⁷¹ Additional legal cases appeared from the 1970s onwards, for instance, the case of *McGee v The Attorney General* in 1973 and the case of *Airey v Ireland*.³⁷² These initial cases “include many cases on Travellers’ rights and disability rights in the intervening

³⁶⁸ <https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf> last accessed 24 February 2016.

³⁶⁹ M. Farrell, “Using Law and Litigation in the Public Interest”, in FLAC (Free Legal Advice Centres Ltd.), “Public Interest Law in Ireland – the reality and the potential, conference Proceedings”, February 2006 <http://www.flac.ie/download/pdf/flac_pil_proceedings.pdf> last accessed 23 February 2016, p. 100.

³⁷⁰ G. Whyte, “Strategies for promoting social inclusion through Public Interest Law”, in FLAC (Free Legal Advice Centres Ltd.), “Public Interest Law in Ireland – the reality and the potential, conference Proceedings”, February 2006 <http://www.flac.ie/download/pdf/flac_pil_proceedings.pdf> last accessed 23 February 2016, p. 104.

³⁷¹ *Ibid*, p. 104.

³⁷² M. Farrell (2006), *op. cit.*, p. 100.

period”.³⁷³ More recently, the aforementioned FLAC conference was held in 2005.

The evidence shows that various courts in Ireland decide on strategic cases. As Cousins explains, the lower courts and administrative tribunals can decide on these cases; however, he estimates that “it is likely that the bulk of their work is of a more routine nature and that public interest litigation [or strategic litigation, choosing a different terminology] features most strongly in the High and Supreme Courts”.³⁷⁴ Cousins examined all of the written decisions of the Irish High Court and Supreme Courts given in 2003 and 2004; his findings reveal that only 33 judgements were considered as “public interest litigation”, meaning that only 3.5% of all of the written judgements of the High and Supreme Courts in 2003 and 2004 involved public interest litigation.³⁷⁵ These findings led Cousins to characterise Ireland’s public interest litigation degree as quite low.³⁷⁶ The evidence also illustrates that the decision about selecting a pathway for strategic litigation requires careful and even creative consideration.³⁷⁷ Within this context, an important element to consider is that the Constitution provides the High Court (court of first instance) with “full original jurisdiction in and power to determine all matters and questions, whether of law or fact, civil or criminal”.³⁷⁸

³⁷³ Ibid, p. 100.

³⁷⁴ M. Cousins, “Public Interest Law and Litigation in Ireland”, report for FLAC (Free Legal Advice Centres), Dublin, 2005 <<http://www.cityprojectca.org/blog/wp-content/MelCousinsReportfinal.pdf>> last accessed 24 February 2016, p. 44.

³⁷⁵ Ibid, pp. 42-43.

³⁷⁶ Ibid, p. 44.

³⁷⁷ P. Geary, with the support of Simpson Thacher and Bartlett LLP, *Guide to Strategic Litigation: an introduction*, Child Rights Information Network (CRIN), London, 2008, p. 23.

³⁷⁸ Department of Justice, Equality and Law Reform, “Irish Judicial System”, 1998, p. 12.

A number of key stakeholders are involved in bringing and funding strategic cases in Ireland. These are legal professionals, organisations, public bodies, and academics. Legal professionals appear in the relevant literature as solicitors, barristers or lawyers.³⁷⁹ As Cousins explains, private solicitors, generally working for small-medium size firms, are currently the main source of strategic litigation.³⁸⁰ Whyte also stresses that the practising lawyers involved in strategic litigation in Ireland “are relatively few”, and departing from this scenario, the reality is that “most of them are employed by the six constituent units of the Independent Law Centre Network”.³⁸¹ Amongst the organisations³⁸² working in this field, the following are some relevant examples. As previously evidenced, undoubtedly the organisation Free Legal Advice Centres (FLAC) has been a pioneer in terms of strategic litigation. Part of this organisation’s website is devoted to “public interest law”.³⁸³ The Bar Council of Ireland (the Bar)³⁸⁴ offers a Voluntary Assistance scheme, which offers important potential for advancing in the area.³⁸⁵ Through this scheme, the Bar assists non-governmental organisations that are working with people that cannot afford legal services.³⁸⁶ According to the Bar’s Chairman, in April 2006 the Bar was going to publish a report on the Voluntary

³⁷⁹ See different contributions in FLAC (Free Legal Advice Centres Ltd.), “Public Interest Law in Ireland – the reality and the potential, conference Proceedings”, February 2006 <http://www.flac.ie/download/pdf/flac_pil_proceedings.pdf> last accessed 23 February 2016.

³⁸⁰ M. Cousins (2005), op. cit., p. 19.

³⁸¹ G. Whyte (2006), op. cit., p. 103.

³⁸² The term “organisations” is used here in a broad sense. For instance, it includes human rights organisations as entities in the context of the legal profession.

³⁸³ <<http://www.pila.ie/>> last accessed 24 February 2016.

³⁸⁴ This is the governing body for the Bar <<http://www.lawlibrary.ie/viewdoc.asp?DocID=2581&UserLang=EN&m=0>> last accessed 24 February 2016.

³⁸⁵ M. Cousins (2005), op. cit., p. 19.

³⁸⁶ <<http://www.lawlibrary.ie/viewdoc.asp?DocID=542>> last accessed 24 February 2016.

Assistance scheme.³⁸⁷ The Legal Aid Board³⁸⁸ is involved in strategic litigation; however this involvement is limited as this Board's work is mainly focused on individual family law casework.³⁸⁹ A public body working on relevant strategic litigation in Ireland is the Irish Human Rights and Equality Commission (IHR&EC). According to Section 41 of the Human Rights and Equality Commission Act 2014, the IHR&EC can institute proceedings seeking a declaration that a law or policy is unconstitutional or is contrary to human rights law.³⁹⁰ A report elaborated for the European Union Agency for Fundamental Rights (FRA) qualified this power "as yet unutilised".³⁹¹ In addition, Section 10(2)(e) of the Human Rights and Equality Commission Act 2014 entitles the IHR&EC to act in the form of an *amicus curiae* or "friend of the court"; under this status, the IHR&EC is a neutral third party and offers its expertise in human rights law.³⁹² In addition, the IHR&EC can carry out inquiries and provide legal assistance.³⁹³ Finally, with respect to academics, Whyte points out that strictly speaking, in regard to strategic litigation, only two law schools (Trinity and Galway) are teaching the subject.³⁹⁴ The same scholar states that Cork (which has a research cluster on Law, Inequality and Social Exclusion) and Galway (which offers Disability Law

³⁸⁷ H. Mohan, "Response from the Bar Council of Ireland", in FLAC (Free Legal Advice Centres Ltd.), "Public Interest Law in Ireland – the reality and the potential, conference Proceedings", February 2006 <http://www.flac.ie/download/pdf/flac_pil_proceedings.pdf> last accessed 23 February 2016, p. 116.

³⁸⁸ This is an independent and publicly funded organisation <http://www.legalaidboard.ie/lab/publishing.nsf/Content/About_Us> last accessed 24 February 2016.

³⁸⁹ M. Cousins (2005), *op. cit.*, p. 20.

³⁹⁰ <<http://www.ihrc.ie/enquiriesandlegal/legalproceedings.html>> last accessed 24 February 2016.

³⁹¹ D. O'Connell, D. Griffin and P. Kenna, "Thematic Legal Study on National Human Rights Institutions and Human Rights Organisations Ireland", Galway, European Union Agency for Fundamental Rights (FRA), 2008, p. 17.

³⁹² <<http://www.ihrc.ie/enquiriesandlegal/amicuscuriae.html>> last accessed 24 February 2016.

³⁹³ <<http://www.ihrec.ie/legal/>> accessed 23 May 2016.

³⁹⁴ G. Whyte (2006), *op. cit.*, p. 103.

and Housing Law) are involved in teaching the cognate subject of Welfare Law; as Whyte states, in total “there would appear to be fewer than a dozen academics” developing work on strategic litigation and related subjects.³⁹⁵

Overall, the experts in the field of strategic litigation in Ireland stress how little data exists on strategic litigation,³⁹⁶ and the “relative paucity of superior court judgements [in the field of strategic litigation]”.³⁹⁷ They also characterise strategic litigation developed in Ireland as “usually ... piecemeal, unplanned, even haphazard”.³⁹⁸

Cousins mentions a number of obstacles for strategic litigation in Ireland, for instance: the lack of and/or insufficient funding; and that the Irish law does not count anything similar to a “class action procedure”.³⁹⁹ Some possible solutions that have been proposed with regard to the lack of and/or insufficient funding in Ireland are the establishment of a Public Interest Litigation Fund, with investors coming from a private/s body/ies,⁴⁰⁰ and tapping into the resources of the legal profession.⁴⁰¹

³⁹⁵ Ibid, p. 103.

³⁹⁶ O. Binchy, “Response from the Law Society of Ireland”, in FLAC (Free Legal Advice Centres Ltd.), “Public Interest Law in Ireland – the reality and the potential, conference Proceedings”, February 2006 <http://www.flac.ie/download/pdf/flac_pil_proceedings.pdf> last accessed 23 February 2016, p. 116.

³⁹⁷ G. Whyte (2006), op. cit., p. 103.

³⁹⁸ M. Farrell (2006), op. cit., p. 100.

³⁹⁹ M. Cousins (2005), op. cit., pp. 19-29.

⁴⁰⁰ Ibid, p. 25.

⁴⁰¹ M. Farrell (2006), op. cit., p. 101.

As evidenced by the review of the literature, for instance, no case of relevance for people with intellectual impairments in institutional residential settings appears from the details of the cases analysed by Cousins.⁴⁰² However, there have been strategic cases about the matter of education for children with severe intellectual impairments, for instance the Supreme Court of Ireland's decision in the case of *Sinnott v. Minister for Education*.⁴⁰³ This particular case, as well as other similar strategic cases, are of relevance for children with intellectual impairments in institutional residential settings in Ireland, and have been documented in a recent book authored by Whyte.⁴⁰⁴

5.3.3 Spain

Spain lacks laws/policies addressing strategic litigation. Moreover, it appears that strategic litigation is absent in the remits of key stakeholders (such as the Spanish Ombudsman). Within this context, a project dating from 2004 involving strategic litigation was identified. The Project was called "Action against discrimination" (Proyecto "Acción contra la discriminación" (ACODI), and it focused on discrimination with regard to gender and race/ethnic groups; as the project recognised, strategic litigation is not well developed in Spain.⁴⁰⁵ In addition, a report dating from 2007, authored by Gutiérrez de Cabiedes Hidalgo and covering "group litigation" in Spain, was identified. In this report, Gutiérrez de Cabiedes Hidalgo illustrates that Spain has rules for "class" or "group" litigation, mainly laid

⁴⁰² M. Cousins (2005), op. cit., pp. 45-48.

⁴⁰³ [2001] 2 IR 545.

⁴⁰⁴ G. Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland – Second Edition* (Dublin: Institute of Public Administration (IPA), 2015), pp. 305-332.

⁴⁰⁵ Women's Link Worldwide and S.O.S. Racismo, *Acción contra la discriminación – ACODI, Capítulo primero: introducción y metodología* [First chapter: introduction and methodology], 2007, p. 14.

down at the Civil Procedure Act (Ley de Enjuiciamiento Civil: LEC), Law 1/2000, passed on 7 January 2000.⁴⁰⁶ Similarly to the cases of England and Ireland, it was difficult to locate strategic cases involving people with intellectual impairments in institutional residential settings. More concretely, no cases of this type were located after reviewing the literature.

5.4 Strategic litigation at the European and global levels

The IDA made interesting considerations on the matter of choosing an appropriate instance (or mechanism) for litigation, in its document, the “IDA Factsheet on the Optional Protocol to the CRPD”. According to this organisation:

[S]everal factors which may determine the choice of the mechanism ... [these] include requirements as to standing, the probable duration of the proceedings, the extent to which domestic remedies have been and need to be exhausted, the case strategy, the resources available and the substantive legal questions at issue.⁴⁰⁷

In this document, the IDA also presents a table that makes comparisons between certain factors that should be considered when deciding on a regional or international mechanism. Relevant aspects of this table will be referred to in the discussion in this section. As this chapter’s scope does not allow a detailed study of the numerous mechanisms (or opportunities) operating at both regional (European) and international levels, a selection has been made. This selection

⁴⁰⁶ P. Gutiérrez de Cabiedes Hidalgo, “Group litigation in Spain. National report”, 2007 <http://globalclassactions.stanford.edu/sites/default/files/documents/spain_national_report.pdf> last accessed 25 February 2016.

⁴⁰⁷ International Disability Alliance (IDA), “IDA Factsheet on the Optional Protocol to the CRPD” (n.d.), op. cit., p. 7.

includes some of the most relevant opportunities, in the hope that this will offer more room for a detailed analysis.

5.4.1 Strategic litigation in the context of the Council of Europe

In the context of the CoE, mechanisms such as the ECtHR and the European Committee of Social Rights have proven to be instances where strategic litigation for people with intellectual impairments has been taken forward. This sub-section will introduce these alternatives.

a) European Court of Human Rights

Given the geographical (European) focus of this thesis, one of the most relevant judicial instances (or mechanisms) for litigating strategically with regard to the rights of people with intellectual impairments' is the ECtHR. According to Article 34 of the EHRC "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols" may present an application to the ECtHR. This regional judicial instance will be available after the exhaustion of all domestic remedies.⁴⁰⁸ In a very interesting contribution, Cojocariu details how the ECtHR was working with a "restrictive construction of the locus standi and victim status requirements".⁴⁰⁹ According to Cojocariu, this meant that only direct victims of a violation of one of the EHRC's rights, when

⁴⁰⁸ European Convention on Human Rights, Article 35.

⁴⁰⁹ C. Cojocariu, "Handicapping Rules: The Overly Restrictive Application of Admissibility Criteria by the European Court of Human Rights to Complaints Concerning Disabled People", *European Human Rights Law Review* 6, 2011, pp. 688-689.

acting in their personal capacity, could file an application before the ECtHR. He clarifies that the only exception to this situation happened to be when a victim had died, when the victim's next-of-kin might lodge a claim on behalf of the victim. He identifies how, for instance, these criteria did not offer an answer in the search for justice in the case of a dead person who is lacking a next-of-kin. Unfortunately, as highlighted by Cojocariu, this situation is common in institutional residential settings.

The legal case of *Câmpeanu v Romania*⁴¹⁰ contributed to improving the previous reality. This legal case was litigated by the Romanian non-governmental organisation (NGO) Centre for Legal Resources (CLR), with The International Centre for the Legal Protection of Human Rights (Interights) acting as advisor to counsel.⁴¹¹ Valentin Câmpeanu had severe intellectual impairments, and he had also been diagnosed as HIV-positive.⁴¹² He spent all of his life in institutional residential settings, namely at an orphanage where he was abandoned at birth, a centre for disabled children, the Poiana Mare Neuropsychiatric Hospital (PMH), and another medical and social care centre. On 20 February 2004, Mr. Câmpeanu died at the PMH. A team of monitors from the organisation CLR had visited the PMH on the day of Mr. Câmpeanu's death. They found that he was "alone in an unheated room, with a bed but no bedding, dressed only in a pyjama top and without the assistance he needed in order to eat or use the toilet". Three days later, the CLR lodged a criminal complaint, therefore beginning a series of domestic proceedings that were unsuccessful. On 2 October 2008, the CLR lodged an application with the ECtHR. On 19 March 2013, the jurisdiction was relinquished to the Grand Chamber. Various bodies and organisations intervened as third parties: Human Rights Watch, the Euroregional Center for Public

⁴¹⁰ App. 47848/08; Judgment of 17 July 2014.

⁴¹¹ <<http://www.interights.org/campeanu/index.html>> last accessed 24 February 2016.

⁴¹² See judgment issued by the ECtHR's Grand Chamber on 17 July 2014 and that can be obtained from <

Initiatives, the Bulgarian Helsinki Committee, MDAC, and the Coe Commissioner for Human Rights. The Grand Chamber delivered its judgement on 17 July 2014, finding a violation of Article 2 (right to life) of the European human rights convention, both in its substantive and its procedural aspects, as well as a violation of Article 13 (right to an effective remedy) in conjunction with Article 2. The ECtHR declared the case admissible, allowing the CLR to act as Mr. Câmpeanu's representative. The ECtHR was satisfied that,

[I]n the exceptional circumstances of this case and bearing in mind the serious nature of the allegations, it should be open to the CLR to act as a representative of Mr. Câmpeanu, 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 international law.⁴¹³

This was indeed a brave decision, as according to Cojocariu (who was the lawyer for the organisation Interights, acting as counsel for the CLR), “[u]nderstandably, the Court was uneasy about our arguments fearing that it may open the floodgate of NGO-driven public interest litigation compounding its well-known caseload problem”.⁴¹⁴ As this case demonstrates, a door of hope has been opened in terms of the right to access to justice for people with intellectual impairments, in the context of the ECtHR. Indeed, very recently the ECtHR reaffirmed

⁴¹³ Judgment issued by the ECtHR's Grand Chamber on 17 July 2014, at para 112 <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145577#{\"itemid\":\[\"001-145577\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145577#{\)> last accessed 24 February 2016.

⁴¹⁴ <<http://pedreptvorbind.blogspot.co.uk/2014/07/valentin-campeanu-was-intellectually.html>> last accessed 24 February 2016.

Câmpeanu's criteria, with respect to a case involving a man with mental health issues.⁴¹⁵

Undoubtedly, the numerous third party interventions in the case of Câmpeanu v Romania assisted the ECtHR in reaching its landmark decision. In the context of the ECtHR, the possibility of third party interventions is contemplated in the Rule 44 of the Rules of Court.⁴¹⁶ According to Harvey, an English lawyer in the Registry of the ECtHR, this mechanism "has always had a comparatively liberal policy as regards granting leave to third party interveners".⁴¹⁷ Harvey also explains that "[t]he well-established rule is that a third party intervener should not comment on the facts or merits of the case", and therefore, "the most effective third party interventions are those which respect the Court's request not to comment on the merits of a case, those which do not seek to advance their own interests and, above all, those which, in good faith, seek to provide real assistance to the Court in its adjudicative task".

Apart from Câmpeanu v Romania, very few cases concerning human rights violations suffered by persons with intellectual impairments living in institutional settings have reached the ECtHR. Other cases involving an interpretation of the rights of people with intellectual impairments living in institutional residential settings, in chronological order, include: X and Y v Netherlands⁴¹⁸ (regarding sexual abuse in an institutional setting); Skjoldager v Sweden⁴¹⁹ (regarding detention and victim status); HL v UK⁴²⁰ (regarding detention); and Nencheva

415 <<http://www.mdac.info/en/news/european-court-reaffirms-ngos-standing-secure-justice-victims-state-abuse>> last accessed 24 February 2016.

416 European Court of Human Rights, Rules of Court, 1 July 2014, Registry of the Court, Strasbourg, Practice Directions amended on 29 September 2014.

417 P Harvey, "Third Party Interventions before the ECtHR: A Rough Guide", 2015 <<http://strasbourgobservers.com/2015/02/24/third-party-interventions-before-the-ecthr-a-rough-guide/>> last accessed 24 February 2016.

418 App 8978/80; Judgment of 26 March 1985.

419 App 22504/93; Judgment of 17 May 1995.

420 App 45508/99; Judgment of 5 October 2004. Although whether autism constitutes an intellectual impairment is contested, the applicant's impairment has been considered by leading

and Others v. Bulgaria⁴²¹ (regarding the right to life). Other cases involving the rights of persons with intellectual impairments, although not related to institutional settings, are: Gauer and Others v France⁴²² (regarding the forced sterilisation of women with intellectual impairments) and Kocherov and Sergeyeva v Russia⁴²³ (regarding the right to respect for family life). Nevertheless, not all of these cases were strategically litigated.

Looking at the previous cases, and in addition to Câmpeanu v Romania, clearly Gauer and Others v France and Kocherov and Sergeyeva v Russia constitute strategic litigation. In the case of Gauer and Others v France, third party interventions were made by the NGOs the Center for Reproductive Rights, EDF, Interights, the IDA, and MDAC. The European Group of National Human Rights Institutions also submitted comments. In the case of Kocherov and Sergeyeva v Russia, third party interventions were also made. These were jointly submitted by the NGOs EDF, Inclusion Europe, Inclusion International and the IDA.

Therefore, the evidence examined reveals only one case of people with intellectual impairments living in institutional residential settings (Câmpeanu v Romania) being taken forward as part of strategic litigation. This shows a massive difference when compared with the strategic cases litigated on behalf of people with mental health issues.⁴²⁴ However, considering the overall cases involving

experts as “an intellectual disability”, and therefore, this legal case has been included in this Chapter -see P. Bartlett, O. Lewis and O. Thorold, *Mental Disability and the European Convention on Human Rights* (Leiden / Boston: Martinus Nijhoff Publishers, 2007) p. 10. In addition, from the facts of this case it seems that the applicant was detained for a long period and, in consequence, the characteristics of this case would fulfil the concept of “long-stay” institution.

⁴²¹ App 48609/06; Judgment of 18 June 2013.

⁴²² App no 61521/08; Communicated on 14 March 2011.

⁴²³ App no 16899/13; Communicated on 19 December 2013.

⁴²⁴ For some recent examples, see: *Stankov v. Bulgaria* (App No. 25820/07; Judgment of 17 March 2015); *Koroviny v Russia* (App no 31974/11; Judgment of 27 May 2014); *Mihailovs v Latvia* (App no 35939/10; Judgment of 22 April 2013); *Stanev v. Bulgaria* (App 36760/06; Judgment of 17 January 2012); *Shtukaturov v. Russia* (App no. 44009/05; Judgment of 27 March 2008); and *DD v Lithuania* (App no 13469/06; Judgment of 14 February 2012) [the facts of this case show that although the applicant lives in an institution for people with “learning disabilities”, her diagnosis is schizophrenia; therefore, for the purposes of this work, this case is considered amongst the cases involving litigants with mental health issues].

people with intellectual impairments, the evidence also shows that recently, strategic litigation (mainly through third party interventions) has been increasing.

In summary, the decision of a stakeholder regarding litigating in the ECtHR will rely on diverse factors. For example, the IDA remarked that this mechanism has a clear focus on civil and political rights and no specific focus on disability rights, and, as stated already, the estimated length of proceedings is between five and six years.⁴²⁵ Another factor to consider may be that the ECtHR can award compensation to a victim, given that it is a judicial mechanism.⁴²⁶ These are just examples of variables to be taken into account.

b) European Committee of Social Rights

The European Social Charter opens a significant channel for strategic litigation through the System of Collective Complaints. Thus, for instance, this System allows international non-governmental organisations with a consultative status in the context of the Council of Europe to submit complaints to the European Committee of Social Rights.⁴²⁷ However, as the Commissioner for Human Rights noted: “[u]nfortunately only 15 member states (13 of which are EU members) have accepted this mechanism [the System of Collective Complaints], and only one, Finland, has taken on board the right to bring collective complaints to all NGOs”.⁴²⁸ Therefore, this reality must be taken into consideration by

⁴²⁵ International Disability Alliance (IDA), “Factsheet on the Optional Protocol to the CRPD” (n.d.), op. cit., pp. 8-9.

⁴²⁶ P. Bartlett, O. Lewis and O. Thorold, *Mental Disability and the European Convention on Human Rights* (Leiden / Boston: Martinus Nijhoff Publishers, 2007), p. 60.

⁴²⁷ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Strasbourg, 9.XI.1995, Article 1, and also see <http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrgEntitled_en.asp> last accessed 24 February 2016.

⁴²⁸ Commissioner for Human Rights (2012), op. cit.

stakeholders considering this quasi-judicial instance for relevant strategic litigation.

This system can become especially relevant for people with intellectual impairments living in institutional residential settings, given the previously mentioned problems that they encounter in accessing justice. Put differently, this system does not require having a particular client in order to take a case forward. The NGO MDAC has been very aware of this. It lodged a complaint against Bulgaria, alleging “that legislation in Bulgaria is not in conformity with Article 17.2 independently and in conjunction with Article E of the Revised European Social Charter insofar as children living in homes for mentally disabled children in Bulgaria receive no education”.⁴²⁹ The European Committee of Social Rights decided that Bulgaria had violated Article 17.2, as “children with moderate, severe or profound intellectual disabilities residing in HMDCs [homes for mentally disabled children] do not have an effective right to education”.⁴³⁰ This Committee also concluded that Bulgaria had violated Article 17.2, when taken in conjunction with Article E “because there is discrimination against children with moderate, severe or profound intellectual disabilities residing in HMDCs [homes for mentally disabled children] as a result of the low number of such children receiving any type of education when compared to other children”.

Other complaints such as the following ones have been presented with regard to people with intellectual impairments, and these may have an impact on those living in institutional settings. The first complaint was presented by the International Association Autism-Europe against France.⁴³¹ This organisation

⁴²⁹ Complaint No. 41/2007. Article 17.2 basically establishes that a State party to the Revised European Social Charter should “provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools”. As previously mentioned, Article E refers to non-discrimination.

⁴³⁰ Complaint No. 41/2007, decision on the merits.

⁴³¹ Complaint No. 13/2002, decision on admissibility.

alleged that France had not satisfactorily implemented Articles 15⁴³² and 17⁴³³ of Part II and Article E⁴³⁴ of Part V of the Revised European Social Charter.⁴³⁵ The European Committee of Social Rights concluded that the State party had violated “Articles 15.1 and 17.1 whether read alone or in conjunction with Article E of the revised European Social Charter”.⁴³⁶

A second complaint was lodged by the International Federation of Human Rights (IFHR) against Belgium.⁴³⁷ The IFHR complained about a “serious shortage of accommodation for highly dependent adults with disabilities and their families”, claiming that this shortage violated various rights recognised by the European Social Charter. The European Committee of Social Rights concluded that Belgium had violated, amongst other rights recognised by the European Social Charter, Article 14.1 given “the significant obstacles to equal and effective access for highly dependent adults with disabilities to social welfare services appropriate to their needs”.

A third complaint, in this case addressing the matter of education, was presented by the Action Européenne de Handicapés (AEH) against France.⁴³⁸ The AEH alleged that France had various Articles under the European Social Charter, because children and adolescents with autism did not enjoy the right to education, while young adults with autism did not enjoy the right to vocational training. The European Committee of Social Rights found violations to Articles 15.1 and E, taken in conjunction with Article 15.1.

⁴³² The right of persons with disabilities to independence, social integration and participation in the life of the community.

⁴³³ The right of children and young persons to social, legal and economic protection.

⁴³⁴ Non-discrimination.

⁴³⁵ Complaint No. 13/2002, decision on admissibility.

⁴³⁶ Complaint No. 13/2002, decision on the merits.

⁴³⁷ Complaint No. 75/2011, decision on the merits.

⁴³⁸ Complaint No. 81/2012, decision on the merits.

Finally, a fourth complaint was presented by MDAC against Belgium, again with regard to the issue of education.⁴³⁹ This time, MDAC argued that Belgium had violated several Articles of the European Social Charter, because the State Party “has failed to establish a reasonable timeframe, to measure progress, and to finance full inclusion of children with disabilities into regular education”. There is still no final decision on the matter by the European Committee of Social Rights.⁴⁴⁰

In relation to the complaint lodged by MDAC against Bulgaria, the potential of strategic litigation for people with intellectual impairments living in institutional residential settings becomes clear. It does not solve all of the problems however. Not only (as has been advanced) have several member States not accepted this mechanism, but also it is limited to the economic, social and cultural rights contemplated by the European Social Charter. Even with these limitations, the evidence reveals that this can be a promising mechanism.

5.4.2 Strategic litigation in the context of the European Union

Although within the EU there are important ways in which institutionalisation can be challenged, at present there is a much less clear situation with regard to the potential of relevant strategic litigation. This sub-section will explore two options: the European Union Ombudsman and the European Parliament’s Petitions Committee.

⁴³⁹ Complaint No. 109/2014, submission of the Government on admissibility and the merits.

⁴⁴⁰ See <http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp> last accessed 24 February 2016.

a) European Union Ombudsman

Excepting the Court of Justice of the European Union, the EU Ombudsman “investigates complaints about maladministration in EU institutions, bodies, offices, and agencies”.⁴⁴¹ This body’s webpage explains that investigations may cover matters such as “administrative irregularities, unfairness, discrimination, abuse of power, failure to reply, refusal of information, and unnecessary delay”.⁴⁴² To date, complaints have been brought to the EU Ombudsman by MDAC with regard to the use of structural funds in Hungary and Romania.⁴⁴³

With regard to Hungary, MDAC has provided evidence that the European Commission is employing EU structural funds to finance the segregation of disabled people (including those with intellectual impairments).⁴⁴⁴ According to MDAC, this way of employing relevant funds breaches not only EU regulations, but also the EU’s commitments in terms of access to the CRPD.⁴⁴⁵

With respect to Romania, MDAC has highlighted that according to the Institute for Public Policy in Bucharest, it is estimated that “over 24 million Euro in European Structural Funds has been spent on all institutions for people with a

⁴⁴¹ <<http://www.ombudsman.europa.eu/en/atyourservice/whocanhelpyou.faces#/page/3>> last accessed 24 February 2016.

⁴⁴² Ibid.

⁴⁴³ <<http://www.mdac.info/en/news/eu-ombudsman-investigates-european-funding-disability-segregation>> last accessed 24 February 2016.

⁴⁴⁴ MDAC, “Evidence of maladministration by the Commission in using Structural Funds to finance human rights violations in Hungary”, 2013 <http://mdac.org/sites/mdac.org/files/20131218_eu_ombudsman_complaint.pdf>, last accessed 24 February 2016.

⁴⁴⁵ Ibid.

range of physical and mental disabilities in the country, affecting up to 18,000 adults".⁴⁴⁶

As a result of these complaints, the EU Ombudsman has opened an investigation into the matter of how the EU's "cohesion" policy respects fundamental rights, with a focus on how the Commission is "ensuring that EU funding is used in ways that comply with the Charter of Fundamental Rights".⁴⁴⁷

b) European Parliament Committee on Petitions

The European Parliament Committee on Petitions "is the bridge between the EU citizens and the EU institutions"⁴⁴⁸ and it may give people a means to challenge the way in which EU funds are being spent through the use of structural funds, in the case that it potentially contravenes the new Structural Fund Regulations, which stress compliance with the CRPD and deinstitutionalisation processes. Within this context, a petition was presented by Judith Klein (Hungarian) on behalf of the Open Society Foundations. This petition was supported by 12 associations with regard to the misuse of structural funds in certain central and eastern European countries in relation to disabled people.⁴⁴⁹ Through this petition:

⁴⁴⁶ <<http://www.mdac.org/en/content/european-commission-funding-disability-segregation-and-abuse-breaches-international-law#int-law>> last accessed 24 February 2016.

⁴⁴⁷ <<http://www.ombudsman.europa.eu/en/press/release.faces/en/54420/html.bookmark>> last accessed 24 February 2016.

⁴⁴⁸ <<http://www.europarl.europa.eu/committees/en/peti/home.html>> last accessed 24 February 2016.

⁴⁴⁹ Petition 1459/2012.

The petitioner drew attention to the estimated 1.2 million people with disabilities forced to live in long-term residential institutions in Europe, sometimes in inhuman conditions. The petition claimed that at least four Member States had invested EU funds in residential institutions, contrary to the Charter of Fundamental Rights, the CRPD, and EU disability policies. The petitioner called for stricter conditions and compliance measures for the use of the structural funds.

According to a recent report elaborated by Priestley, Raley and de Beco for the European Parliament Committee on Petitions that addresses the role of this Committee with regard to the implementation of the CRPD:

There is clearly a role for PETI in protecting and seeking enforcement of this right at the EU level where petitioners identify such cases, whether or not the planning and organisation of long-term care systems lies within the responsibility of national authorities. Given the existence of specific EU law relating to European investment funds and public procurement this is, conceivably, an issue where Commission infringement proceedings could be invoked as consequence of a well-substantiated petition.⁴⁵⁰

In October 2015, a hearing with experts took place with regard to the rights of disabled people (including those with intellectual impairments).⁴⁵¹ To date, no further information about this hearing has appeared on this Committee's

⁴⁵⁰ M. Priestley, M. Raley, and G. de Beco, "The protection role of the Committee on Petitions in the context of the implementation of the UN Convention on the Rights of Persons with Disabilities", Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs, 2015, p. 35.

⁴⁵¹ <<http://www.europarl.europa.eu/committees/en/peti/events.html?id=20151015CHE00221>> last accessed 24 February 2016.

webpage. As a consequence, it is not possible to know whether the matter of strategic litigation was addressed during this hearing.

5.4.3 Strategic litigation at a global level: the Committee on the Rights of Persons with Disabilities

At an international (UN) level, there are various mechanisms through which strategic litigation can be taken forward. These range from general monitoring bodies such as the UN Human Rights Committee to more specific mechanisms such as the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) –this body offers the possibilities of the communications procedure, as well as the inquiry procedure. Within this context, this sub-section will be devoted to the CRPD Committee and its communications procedure. For various reasons, which will be explained later, the communications procedure represents an interesting alternative in the case of the strategic litigation under analysis.

States Parties to the CRPD who have accepted the CRPD's Optional Protocol can submit "communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention".⁴⁵² However, it must be stressed that amongst the requisites for considering a communication admissible, there is the need to have exhausted all of the available domestic remedies (although this is not a requisite "where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief").⁴⁵³

⁴⁵² Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 1.1.

⁴⁵³ Optional Protocol to the Convention on the Rights of Persons with Disabilities, Article 2 (d).

The CRPD Committee has produced a document clarifying the procedure for submitting communications, which includes two paragraphs that are of particular importance for people with intellectual impairments living in institutional settings.⁴⁵⁴ The document determines in paragraph 6 that under rule 68 (paragraph 2) of its rules of procedure, the CRPD Committee shall apply the criteria established in Article 12 of the Convention, recognising the legal capacity of the author or alleged victim, independent of the fact that this capacity is recognised in the State party that is the subject of the communication. Paragraph 7 of the document under analysis contains the following considerations. It establishes that the CRPD Committee shall examine communications that have been submitted by alleged victim(s) or by persons who have authorisation to act on their behalf (in this case, the CRPD Committee clarifies that a confirmation of authorisation is to be included, and that for this purpose, a signed statement will suffice). In addition, the CRPD Committee offers the possibility that persons can submit a communication on behalf of the alleged victim(s), even in the case that there is a lack of evidence of consent. In this last case, the CRPD Committee requires that the applicant provides “a written justification as to why the alleged victim(s) cannot submit the communication in person and why a confirmation of authorisation cannot be provided”.

The previous evidence demonstrates that the CRPD Committee offers promising procedural rules for this group for the following reasons. First, the fundamental problem of lack of capacity (as introduced in chapters 2 and 3) can be overcome, as the CRPD Committee will automatically assume the victim’s legal capacity. Second, the document under analysis allows a person other than the victim to present a communication, even without any evidence of the victim’s consent. For cases where an individual may be completely isolated and therefore cannot provide consent, this possibility becomes invaluable. In this way, this procedure

⁴⁵⁴ Committee on the Rights of Persons with Disabilities, “Fact sheet on the procedure for submitting communications to the Committee on the Rights of Persons with Disabilities under the Optional Protocol to the Convention”, CRPD/C/5/2/Rev.1., 2012.

offers an invaluable channel for bringing litigation with regard to people with intellectual impairments, of course including strategic litigation.

The CRPD Committee has considered only one communication involving people with intellectual impairments up to now. This is the communication No. 4/2011, with regard to Hungary, people with intellectual impairments and particularly the right to vote. The CRPD Committee found that certain articles of Hungarian law contravene Article 29 of the CRPD, as well as that Hungary “has failed to fulfil its obligations under article 29, read alone and in conjunction with article 12 of the Convention”.⁴⁵⁵ From the communication, it is not possible to know whether it has been presented as strategic litigation; however, it is possible to observe how the impact of this decision by the CRPD Committee has the potential of changing the text of the national law. It could also impact on the way in which the State acts towards people with intellectual impairments with regard to their political rights. In summary, this communication demonstrates the potential of bringing strategic cases to the CRPD Committee.

However, back in 2009, Lewis gave mixed views with regard to the selection of this instance for strategic litigation, in cases involving the matter of legal capacity:

There is a need to bring cases, so that we start to get some ‘authoritative’ decisions from the expert global body. But there is a risk in relying on this quasi-judicial body which has publicly demonstrated a less than consistent approach to dealing with Article 12 and other issues. On the other hand, bringing cases could force the ComRPD [CRPD Committee] to regroup and focus on substance rather than hold lengthy debates about internal governance and procedures.⁴⁵⁶

⁴⁵⁵ Committee on the Rights of Persons with Disabilities, “Communication No. 4/2011. Views adopted by the Committee at its tenth session (2-13 September 2013)”, CRPD/C/10/D/4/2011, 2013, at paras. 9.4-10.

⁴⁵⁶ O. Lewis (2009), op. cit.

This quote illustrates that despite Lewis having some reservations about this mechanism, he nevertheless encourages the submission of communications to this Committee. In fact, the NGO MDAC (of which Lewis is the Executive Director) has been involved in the development of a docket of cases for submission to this Committee.⁴⁵⁷

Another NGO clearly interested in the opportunity offered by this Committee is the IDA. In its document, the “IDA Factsheet on the Optional Protocol to the CRPD”, it clarifies that this Committee’s Optional Protocol offers a quasi-judicial procedure, meaning that the decisions of the CRPD Committee are not legally enforceable and constitute recommendations. The IDA illustrates, however, that the CRPD Committee’s decisions are “of great value in the exercise of implementing provisions on the ground in all States parties to the CRPD”. Nevertheless, the Factsheet points out that the actual employment of the communications procedure will rely on the “sufficient awareness of the instrument and the capacity of individuals, organisations of persons with disabilities (DPOs) and NGOs to identify victims, recognise violations and to lodge complaints to the CRPD Committee”. However, the Factsheet explains that, “the CRPD Committee is already facing great constraints due to the fact that few resources and very limited meeting time have thus far been allocated to them”. Additionally, as an alternative for improving awareness about this Optional Protocol, the document under analysis suggests that the publication of communications lodged to this Committee could be of assistance.

With regard to third party interventions under the CRPD Committee, as mentioned in section 5.2, the IDA document under analysis opens the door for the submission of these interventions in the context of this mechanism. As the document explains, this decision was taken by the CRPD Committee in September 2012, during its 8th session. Nevertheless, the current situation is that

⁴⁵⁷ <http://mdac.org/en/what-we-do/strategic_litigation> last accessed 24 February 2016.

“neither the CRPD Committee, nor the OHCHR [Office of the High Commissioner for Human Rights] Petitions Unit, disseminate information about individual communications due to the confidential nature of communications”. Therefore, as the CRPD Committee clarifies:

[T]he only possibility for DPOs [disabled people organisations] to be privy to information about submitted individual communications is through the action of the author(s) to consent to sharing and disseminating information about their case. They may wish to do so guarding their anonymity.

In addition, there are additional constraints such as facts occurring after ratification, which also play a major role in the context of the strategic litigation under analysis.

There is a range of elements (positive as well as negative) that stakeholders may take on board when considering conducting strategic litigation under the CRPD Committee. The positive element of interesting procedural rules for access to the CRPD Committee can also be inferred from the IDA’s table, offered in its document, the “IDA Factsheet on the Optional Protocol to the CRPD”. Other elements that can be inferred from this table are: a broad scope towards rights (as the CRPD Committee covers both civil and political rights and economic, social and cultural rights); a shorter estimated length of proceedings compared with other mechanisms (for example, one and half year to three years for the CRPD Committee, in comparison to five to six years for the ECtHR); and a specific focus on disability rights within the CRPD.

The previous evidence does not lead to the conclusion that a stakeholder is to conduct strategic litigation under the CRPD Committee. This is a complex decision that a potential litigator (or intervener) will make after evaluating a number of factors, many of which are not even suggested here, given the limited

(and realistic) scope of this chapter. However, at this point it is fair to conclude that, despite some negative aspects, overall the CRPD Committee offers interesting prospects for strategic litigation. A clear sign of this is the interest in the mechanism showed by some of the leading NGOs working in the field of intellectual impairments.

5.5 Measuring the impact of strategic litigation

This thesis has already presented strategic litigation as one strategy to pursue a result that can benefit a group and produce social change. It has also been suggested that strategic litigation can potentially reform the text of law or public policy, change its implementation, influence public opinion, or recognise wrong. Within the context of various national, regional and global jurisdictions, certain strategic cases involving people with intellectual impairments in institutional residential settings in European countries have been mentioned. A common element in all of these strategic cases is that key stakeholders such as NGOs have supported the litigation –in the majority of cases as third party interveners. The purpose of this final section is to include some considerations regarding the matter of the impact of this strategic litigation.

The literature on the impact of strategic litigation reveals that this is an incipient field of research. One of the findings in a report elaborated by the Human Rights Implementation Centre (Bristol Law School) for the former NGO Interights is that “there is less research on the impact of strategic litigation”, in comparison to research on the impact of human rights advocacy⁴⁵⁸ (which is a different

⁴⁵⁸ Human Rights Implementation Centre, “Measuring the Impact of Interights Strategic Litigation”, Bristol, Bristol Law School, 2013 <<http://www.interights.org/document/305/index.html>> last accessed 24 February 2016.

strategy, although related to strategic litigation⁴⁵⁹). In addition, an interesting report written by Barber about how strategic litigation organisations evaluate and/or measure the impact of their work found that “[e]valuation remains a relatively foreign field to most human rights organizations, which tend to lack clear, tangible case and programmatic goals”.⁴⁶⁰

The first difficulty when thinking about the impact of strategic litigation is the notion of impact itself. As the research acknowledges, “[t]here should be further in-depth analysis of what ‘impact’ entails”.⁴⁶¹ In the broad human rights field, a number of indicators have been proposed to measure impact.⁴⁶² It is very difficult to present these indicators as universal. As the research proves, the indicators for measuring “success” (or impact) will vary according to the case.⁴⁶³ Taking this into consideration, an interesting way of evaluating the impact of strategic litigation is to follow “the different goals that it can achieve”.⁴⁶⁴

⁴⁵⁹ For example, the NGO MDAC uses advocacy “as a follow-through from successful (and unsuccessful) court judgments” <http://mdac.org/en/what-we-do/strategic_litigation> last accessed 24 February 2016.

⁴⁶⁰ C.C. Barber, “Tackling the Evaluation Challenge in Human Rights: Assessing the Impact of Strategic Litigation Organizations”, Working Paper No 55, Hertie School of Governance, Berlin, 2010 <http://www.hertie-school.org/fileadmin/images/Downloads/working_papers/56.pdf> last accessed 24 February 2016.

⁴⁶¹ Human Rights Implementation Centre (2013), op. cit.

⁴⁶² See, generally: F. Klug, “Human rights as indicators of democracy”, University of Essex, UK, 1993; R. L. Barsh, “Measuring human rights: Problems of methodology and purpose”, *Human Rights Quarterly* 15, 1993, pp. 87-121; T. Landmann, “Measuring Human Rights: Principle, Practice and Policy”, *Human Rights Quarterly* 26, 2004, p. 906; E.A. Anderson and H.O. Sano, *Human Rights Indicators at Programme and Project level. Guidelines for Defining Indicators Monitoring and Evaluation* (Copenhagen: Danish Institute for Human Rights, 2006); F. Raine, “The measurement challenge in human rights”, *International Journal of Human Rights* 4:3, 2006, pp.6-29; G. De Beco, “Human Rights Indicators for assessing state compliance with international human rights”, *Nordic Journal of International Law* 77, 2008, pp. 23-49; Office of the United Nations High Commissioner for Human Rights (OHCHR), “Human Rights Indicators. A Guide to Measurement and Implementation”, HR/PUB/12/5, 2012; J.W. Koo, S.K. Kong and C. Chung, “Measuring National Human Rights: A Reflection on Korean Experiences”, *Human Rights Quarterly* 34:4, 2012, pp. 986-1020.

⁴⁶³ C.C. Barber (2010), op. cit.

⁴⁶⁴ Human Rights Implementation Centre (2013), op. cit.

Therefore, and as has already been suggested, strategic litigation for people with intellectual impairments can have the goals of reforming the text of law or public policy, changing its implementation, influencing public opinion, or recognising wrong. These relevant goals could then be the starting point for measuring the impact of strategic litigation with regard to people with intellectual impairments living in institutional residential settings. In this context, it is interesting to take on board the contributions that Lewis has made in the field of legal capacity.⁴⁶⁵ Amongst the strengths of strategic litigation in this last field, Lewis mentions: the enablement of progressive jurisprudence by encouraging a positive outcome; a human rights documentation role; the instigation of law reform; the possibility of using judgements in capacity-building and awareness-raising activities, such as engaging the media; and a re-evaluation of positions, therefore advancing the educational and expressive value of human rights. These could be translated into interesting indicators in the field under analysis.

5.6 Conclusion

The very few examples of successful strategic litigation contained in this chapter indicate that strategic litigation for people with intellectual impairments in institutional residential settings had indeed contributed to removing some of the social barriers that lead to this group's human rights violations in these settings in Europe. In particular, they demonstrate that strategic litigation can be a useful strategy for re-balancing the power relations between people with intellectual impairments and those managing institutional residential settings or for removing the barriers that this group faces in accessing justice.

The scarcity of relevant strategic cases can be interpreted as the result of problems with this group's access to justice. The analysis presented in this

⁴⁶⁵ O. Lewis, "Advancing Legal Capacity Jurisprudence," *European Human Rights Law Review* 6, 2011, pp. 713-714.

chapter thus suggests that access to justice barriers result in poor, or non-existent, recognition (to use Fraser's terminology) through enforcement of the rights of people with intellectual impairments living in institutions –and that, in overall, this is not being remedied by strategic litigation.

Findings additionally confirm particularly which NGOs (as well some lawyers) have pursued the rather exceptional strategic litigation for this group. As this chapter demonstrates, in the context of different national, European and international jurisdictions, there are different opportunities for pursuing strategic litigation for people with intellectual impairments living in institutional residential settings in European countries. This chapter also evidences how the decision regarding whether or not to pursue relevant strategic litigation in these instances is a very complex and creative one. It is the result of an assessment of a number of factors, which vary according to the possible instance for putting strategic litigation forward. As this chapter demonstrates, strategic litigation can produce an impact that can be measured in different ways. The cases (albeit exceptional) of successful strategic litigation exposed in this chapter exemplify that strategic litigation is an interesting option for working towards the recognition through enforcement of this group's human rights. Thus, for instance strategic litigation clearly has contributed to enforce this group's human right to access to justice (as in the case of *Câmpeanu v Romania*, pursued by the NGOs CLR and former Interights),⁴⁶⁶ to education (for example, as in the complaint against Bulgaria lodged by the NGO MDAC),⁴⁶⁷ and to live independently and be included in the community (for example, through different complaints -pursued by the Open Society Foundations and the NGO MDAC- regarding the misuse of EU structural funds in central and eastern Europe)⁴⁶⁸.

⁴⁶⁶ See sub-section 5.4.1-a).

⁴⁶⁷ See sub-section 5.4.1-b).

⁴⁶⁸ See sub-section 5.4.2-a).

At the same time, overall, once again this chapter evidences how the strategic cases pursued on behalf of this group are very few. The next chapter's goal, therefore, is to address the barriers that stakeholders in the field encounter in conducting relevant strategic litigation, which may contribute to explaining the scarcity of strategic cases in this area, already identified through the literature. The interviews with these key stakeholders have been essential for identifying the barriers that current/potential stakeholders pursuing strategic litigation are faced with. Consequently, the next chapter will attempt to present the interview findings and to analyse them. The chapter will present the interview/empirical findings and confront them with the literature findings.

Chapter 6

BARRIERS TO STRATEGIC LITIGATION

6.1 Introduction

The focus of this chapter is on the barriers to strategic litigation. The chapter will draw on the interview findings. To this aim, the chapter will first explore the barriers to access to justice (and strategic litigation) that are encountered by people with intellectual impairments in institutional residential settings in European countries. Second, the chapter will explore the barriers faced by disability and human rights organisations, as well as lawyers working in the three national legal systems who have already been involved with strategic litigation. Third, the chapter will address the barriers experienced by potential strategic litigators in the area, meaning the cases of stakeholders who have been working in the area of intellectual impairments although not (as yet) with strategic litigation. As this chapter's findings will demonstrate, some of the barriers mentioned by potential stakeholders involved with strategic litigation replicate some of the barriers that are encountered by stakeholders who already have experience in working with strategic litigation. The structure chosen for this chapter has prioritised the need for a clear division between the experiences of those pursuing strategic litigation, and those who are not currently involved with it. Therefore this chapter has dedicated two different sections to the findings from the experiences of each group of stakeholders.

6.2 Barriers to access to justice and strategic litigation faced by people with intellectual impairments in institutional residential settings in European countries

The interview findings reveal several barriers that people with intellectual impairments in institutional residential settings experience in accessing justice: guardianship; poor or lack of human rights awareness; difficulties in complaining about human rights violations; problems with access to communication and information; issues with access to lawyers with expertise in the area; the judiciary's lack of awareness about people with intellectual impairments; limitations in offering evidence in court; lengthy legal proceedings; a lack of expert prosecutors and courts; and additional difficulties associated with the mobility of judges. As explained in chapter 3, access to justice in this thesis is approached as a necessary condition for strategic litigation to take place. Therefore, the barriers to be presented represent barriers to access to justice and strategic litigation faced by the group under consideration. As this section will demonstrate, several of the interview findings regarding barriers to accessing justice and strategic litigation, in the case of the group under scrutiny, confirm the relevant literature presented in Chapter 3. However, part of the following interview findings regarding the barriers to accessing justice and strategic litigation add to the literature about access to justice for people with intellectual impairments living in European institutional residential settings. In particular, the interview findings linked to particularities or characteristics with regard to the three jurisdictions (England, Ireland and Spain), such as characteristics of the legal systems, are innovative.

6.2.1 Guardianship

The fundamental problem of guardianship was raised by a number of the interviewees, mostly participants working at a supranational level: IONSL1, SPNSL2, SL1, SL2, IO1b, IO2, SONSL1,⁴⁶⁹ SONSL3, and SONSL4. The findings from the interviews with Irish and Spanish organisations for people with intellectual impairments (IONSL1 and SPNSL2), as well as Spanish lawyers (SL1 and SL2), show particular problems associated with these jurisdictions. In Ireland, at the time of conducting the interviews for this study, there was a lack of modern capacity legislation: “the lack of modern capacity legislation to us would be a major barrier of access to justice for people with intellectual disability in Ireland” (IONSL1 -organisation for people with intellectual impairments). This organisation gave more about this issue:

Well, I suppose that the biggest issue for us in access to justice in Ireland is in relation to our law on capacity. Currently, we... we don't have modern capacity legislation... So, as a result you will find that many people with intellectual disability... in most cases, decisions are made on a very informal basis... you know, their rights are obviously diminished.

However, very recently, Ireland changed its legislation regarding legal capacity. The Assisted Decision- Making (Capacity) Bill was approved in 2013, and very recently, Ireland approved the Assisted Decision- Making (Capacity) Act 2015.

With regard to Spain, the organisation for people with intellectual impairments SPNSL2 exposed a similar situation to that in Ireland:

⁴⁶⁹ Supranational organisation of disabled people (including those with intellectual impairments).

There is the tutelage system, that replaces ... it is an alternative system, it replaces the person's will; well, in principle [and] following the Convention [Convention on the Rights of Persons with Disabilities - CRPD] this should be revised... and this is a topic that makes us... we are waiting for a draft from the Ministry, but for example, here we are afraid that there will be considerable resistance [in terms of revising relevant legislation].

Both Spanish lawyers (SL1 and SL2) criticised the fact that Spanish judicial proceedings for assessing a person's capacity do not require the intervention of a lawyer. According to SL1: "everything is reduced to a medical expert's report, to a report... anyway, to an interview". Similarly, SL2 expressed:

The majority of proceedings in Spain, regarding legal capacity, are conducted through the [office of] the Public Prosecutor. Just because in this case proceedings are free [of cost], because the person that initiates them is not a lawyer representing the [person with intellectual impairments' family], but a representative from the [office of] the Public Prosecutor. And this has the consequence that the family has access to much less information... In the majority of cases, the official who initiates proceedings does not know the person with a disability, and the petition is not usually adjusted to his/her real needs. I know many cases in which the family, or even the person with a disability, states that they have not been informed about the characteristics of the proceedings, about what [outcomes] the proceedings are seeking, regarding the effects of the judgment, because they have not been made aware of this by the [office of the] Public Prosecutor... However, the biggest flaw in these proceedings is that [because the office of the Public Prosecutor] does not know the details about the [disabled person's] information, previous situation, needs, autonomy levels, required support, etc., the petition is not adequate for each circumstance, and the judgment that is requested does not always respond to what [the disabled person] needs, often establishing a higher degree of incapacity than the incapacity that the

concerned person actually has, and the quality of the outcome is lower... On the contrary, if [the disabled person] counts as an expert professional, who is aware of the person's needs, who will offer adequate information, this is easier for obtaining an adequate judgment, which does not deny the person's possibilities and establishes adequate levels of protection and support.⁴⁷⁰

For instance, in connection with the issue of guardianship, the supranational organisation IO1b raised the issue of the possible barrier of the guardian of a person with intellectual impairments refusing litigation for the individual with intellectual impairments: in certain cases, guardians "certainly would not agree to litigate on their [people with intellectual impairments] behalf". Moreover, the supranational organisation SONSL4 explained that when individuals with intellectual impairments wish to complain in court about human rights violations, even when there is the possibility of this, "they [people with intellectual impairments] are anyway in most of the cases not accepted as a party, because of the fact that they have no legal capacity".

6.2.2 Poor or lack of human rights awareness

To begin with, difficulties understanding the nature of a human rights violation were highlighted by the supranational organisation IO2. This organisation explained how for people with intellectual impairments, a human rights violation can appear as a normal event: "for a lot of people that is just the way that things are, you know, it's just normal to be forced to take medication, or to be restrained or to be denied legal personality, I mean that's just normal".

⁴⁷⁰ SL2 updated the researcher about these insights, through a message sent by email dated 19 February 2016.

Problems with regard to the awareness of people with intellectual impairments with regard to their own human rights, as well as legislation, also came across in the interviews with several national and supranational organisations (IONSL2, SPNSL1, IO1b, SONSL2, and SONSL4). The Irish organisation for people with intellectual impairments IONSL2 also stated that people with intellectual impairments are not aware of their rights, and highlighted that “there is no overall publication [amongst the literature] on the state of the rights in that regard”. According to the supranational organisation SONSL4: “those people [in institutional residential settings] usually are not informed at all that they have rights, and everything remains within the... you know, the organisation of the institution”. Overall, the poor or lack of awareness experienced by many people with intellectual impairments with regard to their own rights confirms the “non-existent or poor knowledge of their [people with intellectual impairments] rights” exposed in Chapter 3. Poor or lack of human rights awareness leads to these violations remaining unreported and therefore strategic litigation cannot take place.

6.2.3 Difficulties in complaining about human rights violations

At the level of the national participants, fear of reporting human rights violations, as well as issues regarding trusting official institutions, were shared by the English organisation for people with intellectual impairments EONSL2: “there is a lot of fear about reporting, a lot of distrust of official entities, especially the Criminal Justice System... we encounter that in quite lot of the training sessions that we deliver”.

Challenges to complaining were mentioned by participants from the supranational organisations IO1a and IO2. The organisation IO2 illustrated that

complaining can be challenging for two reasons. First, the guardian of the person with intellectual impairments is not in the institutional residential setting and this makes it very difficult for the person with intellectual impairments to complain. Put differently, the guardian is outside the institutional residential setting and therefore it is difficult for her/him to assist the person with intellectual impairments in making a complaint. Second, there is the problem of expecting an individual with intellectual impairments to complain about the institutional residential setting that (at the same time) houses as well as (apparently) protects him/her:

I mean, there is a phrase in English, which says that you bite the hand that feeds you. But if you are in an institution, and you are being housed and protected by the institution, then if you complain about the institution, you get yourself potentially into trouble, and your life becomes more difficult. And I think that kind of principle of biting the hand that is feeding you, is really very powerful, and a disincentive to people to bring litigation.

6.2.4 Problems with access to information and communication

The matter of inaccessible information came across in the interviews with an Irish organisation (IrishO1), and with Irish and Spanish lawyers (IrishL2, SL1, and SL2). The organisation IrishO1 clarified:

I mean, I don't know, there are maybe particular challenges for people with intellectual disability. Because the court session is so formal, the language is often inaccessible... so you don't get to immediately talk to the judge, it is all translated through lawyers, and the individual litigant can be a bit lost. No matter how much you try to compensate for that, make sure that they understand everything... they may be lost in the whole process.

A similarly negative insight, provided by the SL1, is that “in the Convention [CRPD] it is already established that there should be an accessible language... and I think that here, unfortunately... the Justice is not doing anything yet, absolutely anything” (SL1).

According to the supranational organisation IO1b, there is the problem of communicating with people with intellectual impairments: “people with intellectual disabilities may have all the communication difficulties, or not have communication”.

6.2.5 Issues with access to lawyers with expertise in the area

In terms of access to lawyers with expertise in the area, the interview findings reveal that many people with intellectual impairments in institutional residential settings do not access to these. Departing from this reality, the findings show several problems: lawyers receive low or zero remuneration for working in this area; few lawyers work on a pro bono basis; and there is a general lack of lawyers with expertise in the area of intellectual impairments. As a consequence, overall there are few professionals willing to work on relevant strategic cases.

The fact that lawyers usually receive low or zero remuneration for litigating on behalf of people with intellectual impairments was mentioned in interviews with English, Irish and Spanish lawyers (EL1, IrishL1, SL1, and SL2). Hence, an English lawyer stated that the local authority and Primary Care Trust “pay not particularly well”, as well as that legal aid “is not well paid and it’s getting worse” (EL1). An Irish lawyer explained that when a relevant legal case is not successful in court, remuneration is zero: “if you lose [a legal case, then remuneration] is zero” (IrishL1). Clearly, this risk of zero remuneration can constitute a barrier to

accessing justice and strategic litigation. It may well be that lawyers prefer not to risk losing a case, as their remuneration would be zero if this happened, and they are therefore inclined to avoid these type of legal cases. In addition, a Spanish lawyer mentioned that in these legal cases, remuneration usually is “in the background”:

I think that in order to do this kind of job, you have to be an activist, a militant... this is a different thing, you have to feel it... therefore, this causes the issue of remuneration, at least in my case, to stay a bit in the background. Of course, all of us [lawyers] have to make a living, [that's] true. But this is not an issue that personally worries or affects me (SL1).

Another Spanish lawyer (SL2) explained why lawyers' remuneration in this field is lower compared with that for other types of legal work: “precisely because it is not an area in which there is a lot of money being taken into consideration, as well as because there are not particularly relevant financial interests” (SL2).

According to the supranational organisation IO1a, people with intellectual impairments in institutional residential settings usually do not have access to lawyers: “people who... have intellectual disabilities and are in the institutions inside... can't access attorneys”.

A different participant (IO1b), also pertaining to this last organisation, mentioned the problem of a general lack of lawyers working pro bono: “very few lawyers litigate pro bono as well”. An analogous insight was offered by the supranational organisation IO2: “in loads of places there isn't a pro bono legal culture” (IO2).

An additional problem, raised by the previous supranational organisations (IO1 and IO2), is represented by numerous lawyers' lack of expertise in the field of intellectual impairments. According to organisation IO1 –participant IO1b: “even

those [lawyers] who are willing to do cases for free, they often don't have expertise on these cases".

6.2.6 The Judiciary's lack of awareness about people with intellectual impairments

The Irish organisation for people with intellectual impairments IONSL2 stated that the Judiciary lacks awareness about the needs of people with intellectual impairments:

I think also that there is... from... an intellectual disability perspective, I think there is also... a lack of awareness within the judiciary in the broadest sense, in terms of a lack of understanding... disability awareness, sort of speaking, about people with intellectual disabilities and their rights.

6.2.7 Limitations to offering evidence in court

A number of national organisations for people with intellectual impairments and supranational organisations (EONSL1, IONSL2, SONSL1,⁴⁷¹ and SONSL4), and lawyers (IrishL2, and SL2), mentioned the inadequacy of judicial systems with regard to offering evidence in legal cases involving individuals with intellectual impairments. IrishL2 described that "the biggest barrier by far... is the rule of evidence". For instance, the supranational organisation SONSL1 of disabled people (including those with intellectual impairments) illustrated that "the justice

⁴⁷¹ Supranational organisation of disabled people (including those with intellectual impairments).

system just not allow people to give testimony in alternate forms”. These findings confirm the barrier constituted “by how the rules of evidence are applied to people with learning difficulties”, presented in Chapter 3. Overall, this barrier means that certain strategic cases cannot go forward, as a number of human rights violations in institutional residential settings cannot be proved in court.

6.2.8 Lengthy legal proceedings

Several participants (EL1, EL2, IrishL2, IO1a, and SONSL2) made reference to the barrier of lengthy legal proceedings. According to the English lawyer (EL1), with regard to the English Court of Protection: “the Court does not move, generally... does not move very speedily, partly because it is extremely overloaded”. The fundamental problem of lengthy legal proceedings was also highlighted by the supranational participant IO1a: “the most difficult thing with litigation is that there are long periods in which nothing is happening, and sometimes it is hard for the client to understand that”.

6.2.9 Lack of expert prosecutors and specialist courts

Spanish participants (SO1 and SL1) mentioned the lack of expert prosecutors (SO1, as well as the lack of specialist courts (SL1), as a barrier to litigation involving people with intellectual impairments. The SO1 expressed: “indeed they [people with intellectual impairments] are people that require special protection, and also... require expert prosecutors who regularly visit them”. SL1 explained that although in Bilbao (North of Spain) there is at least a specialist court, there is a lack of “additional specialist Courts in all of the Autonomous Community”.

6.2.10 Additional difficulties associated with the mobility of judges

One Spanish lawyer (SL1) talked about the problem constituted by the mobility of judges in the Basque Country (North of Spain):

In the Basque Country, traditionally there are no judges from here... there are people who have come from different Spanish regions, and who established here... Adding this to... the terrorist problem of recent years... well, here the judges were moving a lot, they changed locations a lot... Therefore, we had... well, an amount of what we call here “substitute” judges, who are judges who are not career professionals... they are lawyers, well... they cover a vacancy, and today they are here, tomorrow they are there... therefore, this whole situation impacts on that... there is not what we could call a consolidation of... criteria on this subject.

Very recently, however, SL1 sent an email to the researcher stating that “[the figure of] substitute judges has disappeared already, due to a change in the law, and there is no mobility [of judges] as before”.⁴⁷²

⁴⁷² Information sent by SL1 by email dated 17 February 2016, after the researcher checked with participants the information they gave through the interviews.

6.3 Barriers faced by stakeholders who have attempted to conduct strategic litigation in the field of disability (including intellectual impairments) and human rights

The following national participants have been included as experienced with strategic litigation, from the beginning of fieldwork: EO1, EO2, IrishO1, IrishO2, SO1, and SO2. As the fieldwork progressed, it became clear that the English advocacy organisation for people with intellectual impairments EONSL1 has also been involved in strategic litigation, albeit on an exceptional basis. To a different extent, the following lawyers working in the three national legal systems interviewed for this thesis have been involved in strategic litigation: EL1, EL2, IrishL1, SL1, and SL2. Supranational organisations with experience in strategic litigation, who have been included in this capacity from the beginning of the fieldwork, are: IO1 and IO2. Whilst conducting the interview with the supranational organisation SONSL3, it became clear that this organisation has been involved in strategic litigation, however on an exceptional basis and outside a European context.

The previous findings confirm the actual involvement with strategic litigation, as well as the degree of that involvement, of the stakeholders selected for interview. These findings are particularly interesting with respect to lawyers working in the three national legal systems. As mentioned in Chapter 5, through the example of an English law firm, looking at the literature it is very difficult to identify lawyers who are working on strategic litigation for people with intellectual impairments in institutional residential settings. Moreover, the interview findings regarding lawyers conducting strategic litigation in the three national jurisdictions offer a hint that there is strategic litigation that is not public knowledge. In other words, there is strategic litigation that the public is not aware of. This is very interesting, as it reveals that strategic litigation is more blurred than it appears in the literature.

Participants working at national and supranational levels provided insights that led to understanding the concept of strategic litigation as dynamic and unpredictable. Indeed the following insights portray strategic litigation as depending on complex circumstances, which are difficult to assess at the beginning of a legal case. The English organisation EO1 stated that at the beginning of litigation it is not possible to know how strategic a case will be: in such a way, a case may “end up growing and developing into quite a large strategic case”. Another English organisation (EO2) stated: “we start cases basically... that we don’t believe initially will be strategic and then they develop in that way”. In the case of the Irish organisation IrishO1, this organisation clarified how in a legal case revolving around mental health and medical treatment, an issue which “was never apparent at the start of the case” emerged afterwards “as a whole new issue [which] could potentially lead to a very significant finding...” Similarly, the organisation IrishO2 explained that they “don’t really know how strategic they [legal cases] are going to be”. According to the supranational organisation IO1b: “there is a lot of mystique about strategic litigation, but I think strategic litigation is a label which is retrospectively applied”.

In the case of national organisations working with strategic litigation, these specific legal cases also appear to be rare. For instance, the SO1 clarified that they have worked on various strategic cases involving disability; however, they have only been involved in one legal case pertaining to the rights of people with intellectual impairments in institutional residential settings. This was a case involving a foreign national with intellectual impairments, residing in an institutional setting in Spain [SO1 strategic case].

The same difficulty with the identification of strategic cases regarding people with intellectual impairments in institutional residential settings in Europe was repeated with regard to the lawyers working in the three national legal systems interviewed for this thesis. For example, an English lawyer (EL1) described a case that “developed a strategic aspect”, and that revolved around a person with intellectual impairments “detained in a supported living placement” [EL1 strategic case].

In the case of the supranational organisations included in the fieldwork for this thesis, strategic cases regarding people with intellectual impairments in institutional residential settings in Europe are extremely exceptional. In fact, just two out of the six supranational organisations (IO1 and IO2) have litigated this type of legal case in a European context.

The supranational organisation IO1a stated that “the number of cases that we are talking about is relatively small” because this organisation’s “litigation has been involved people with psycho-social disabilities much more than people with intellectual disabilities”. In this context, this participant provided the following examples of cases involving persons with intellectual impairments in institutional residential settings: the [IO1 first strategic case] -revolving around children in institutional residential settings and the right to education; and the [IO1 and IO2 strategic case] -a case about a man with intellectual impairments, living in an institutional residential setting. The supranational organisation IO2 explained: “the only case we have been involved... and which has been strategically planned, has been the [IO1 and IO2 strategic case]”.

In comparison to the literature presented in Chapter 5, these interview findings with national organisations and lawyers working in the three national jurisdictions, as well as with supranational organisations, offer a clearer idea of the number of relevant strategic cases that have been pursued by key stakeholders. These findings also confirm the literature included in Chapter 5, in terms of the fact that cases involving people with intellectual impairments in institutional residential settings are very exceptional. Moreover, the present findings confirm this thesis’ previous interview findings regarding access to justice and strategic litigation by the group under analysis. In other words, the very small number of strategic cases identified can be linked to the numerous barriers that hinder, or prevent, people with intellectual impairments accessing justice and strategic litigation.

Departing from the previous scenario, the supranational organisations IO1 and IO2 explained that they get strategic cases by working with local partners. IO1b stated: “but how we tend to select cases is by working with local partners, our partner organisations like the [IO1 national partner organisation 1], and the [IO1 national partner organisation 2]”. Similarly, the IO2 explained: “we have lots of partners on the ground to contact, and often they have cases, and they know... we are interested in disability cases, so that’s one way of getting cases”.

In addition to getting strategic cases by working with local partners, the organisations IO1 and IO2 described different working pathways that lead to the identification of new cases for strategic litigation. The IO1 has a project on strategic litigation under the CRPD’s Optional Protocol: “We have a project that includes litigation under the Optional Protocol to the CRPD, so you know, we are looking at countries that have ratified the Optional Protocol”. The IO2 stated that they “monitor the communicated cases to the European Court of Human Rights” (participant on behalf of the supranational organisation IO1a).

As guidance concerning their criteria for selecting strategic cases, the supranational organisations IO1 and IO2 follow internal documents. According to participant IO1a, who works for a supranational organisation:

We have a strategic plan; it is a three-year plan, in which we have identified... I mean, the organisation’s board has set six core human rights areas, sort of the goal that we are working for, those are: the right to political participation, the right to legal capacity, the right to community living, the right to inclusive education, the right to be free from torture and maltreatment, and access to justice. So, that is what guides us in pretty much everything that we do both in terms of advocacy and litigation.

The IO2 clarified that they follow an internal document that “goes through the key kind of selection criteria for us”.

An essential criterion when national and supranational organisations select strategic cases is a case's potential for having general as opposed to individual effects. However, the interviewees chose different ways of phrasing this criterion: "a large public impact" or "public interest" (English organisation EO1); "a wider impact" (English organisation EO2); "a systemic issue" (Irish organisation IrishO1); "to raise wider issues" (Irish organisation IrishO2); "[a case] for not only changing the individual's situation, but also the general situation" (Spanish organisation SO1); "a clear strategic goal" (supranational organisation IO1a).

Participants working at the national and supranational levels mentioned a number of additional criteria for the selection of strategic cases. However, a case's potential for producing general effects is clearly the fundamental criterion for selecting a strategic case. As the English organisation EO1 pointed out: "the public interest is probably the most important one [category], because that will generally... we are more likely to bend or break the other rules on taking cases, if we think a case has a public interest element". Having clarified this, possible additional criteria are: a case's possibility of success (English organisation EO1, organisation IrishO2, supranational organisation IO1a, and supranational organisation IO2); a case's potential for changing the law (English organisation EO2, organisation IrishO1, and supranational organisation IO1a); a potential litigant's geographical location (English organisation EO1); and a potential litigant's access to legal aid (English organisation EO1).

In terms of the selection criteria for strategic cases, the literature presented in Chapter 5 demonstrates that a stakeholder will evaluate a potential case for relevant strategic litigation with regard to a set of criteria. As was just explained, the interview findings confirm that the most important criterion considered by national and supranational organisations is the case's potential to have general as opposed to individual effects. In addition, the interview findings reveal that there are additional criteria that are followed by supranational and national organisations when selecting strategic legal cases: a case's possibility of

success, a case's potential for changing the law, a potential litigant's access to legal aid, and a potential claimant's geographical location. However, these additional criteria may be overlooked if a case fulfils the main criterion of potentially having general (as well as individual) effects.

As the English organisation for people with intellectual impairments EONSL1 pointed out, it can be extremely difficult to find a good case for strategic litigation: "we struggle to find examples where we would have been able to pursue it [strategic litigation]... it is sometimes quite difficult to mount a strategic litigation case". The following sub-section is devoted to the barriers that may explain this state of affairs. The interview findings led to the identification of the following barriers that current/recent stakeholders encounter to strategic litigation: the obstacle of making contact with people with intellectual impairments in institutional residential settings in European countries; difficulties in communicating with people with intellectual impairments; potential litigants refusing a litigation approach; limitations imposed by potential litigants' geographical location; the volume of enquiries complicating the selection of strategic cases; challenges associated with legal costs; lack of human resources; problems in getting expert evidence; the barrier of employing international law when arguing strategic cases; separation of powers as argued by the State; and the difficulties in putting forward strategic litigation to challenge institutionalisation.

6.3.1 Obstacle of making contact with people with intellectual impairments in institutional residential settings in European countries

As a consequence of the barriers to access to justice and strategic litigation that are faced by people with intellectual impairments in institutional residential

settings,⁴⁷³ strategic litigators in turn encounter the first major barrier of making contact with this group. This is not only in line with the findings regarding the deficient or lack of access to justice and strategic litigation experienced by the group under analysis, it also provides further evidence of a fundamental reason why relevant strategic cases are so exceptional. Strategic litigators face the reality that people with intellectual impairments in institutional residential settings in European countries are a hard to reach group. As the following findings evidence, English and Irish organisations in particular acknowledge that they rely on other people to make contact with them.

According to the English organisation EO1: “we don’t go out and say ‘we need to take a case about... people living in institutions’, and then look for a case that meets that criteria”. The English organisation EO2 stated: “so... I suppose basically that we are relying on people to bring this to our attention, yes”. The organisation IrishO1 illustrated: “we are very much dependent on members of the public coming to us and presenting the issue; however it comes to us, it does not matter to us. But you are dependent on somebody bringing forward the issue in terms of litigation”. As the IrishO2 stated: “we simply haven’t been approached to take any cases for people with intellectual disabilities... people don’t really approach us to do that”.

6.3.2 Difficulties in communicating with people with intellectual impairments

The supranational organisation organisation SONSL3 acknowledged that: “we definitively understand that this [communication with people with intellectual impairments] will be an issue that we will have to face if we bring a [strategic]

⁴⁷³ Presented in the previous section.

case... but we have not yet figured out exactly how we will overcome these communication issues”.

6.3.3 Potential litigants who refuse a litigation approach

The organisation IrishO1 stated that many people do not want litigation: “there are ultimately few people who actually want to go to court”. This organisation explained that, for instance, some people perceive litigation “as an aggressive way of resolving a matter”. The organisation also clarified that, instead of litigation, certain people “want to do a bit more of a mediate-negotiate type process”.

6.3.4 Limitations imposed by potential litigants’ geographical location

According to the English organisation EO1, a potential litigant’s geographical location is indeed a barrier to strategic litigation: “due to our small size, the funding set that we have, it is very difficult for us to take cases that are quite far away”.

6.3.5 Volume of enquiries complicating the selection of strategic cases

According to the English organisation EO1, an additional obstacle is represented by the volume of enquiries: “so the volume of referrals we get through makes it quite difficult for us to identify strategic cases”.

6.3.6 Challenges associated with legal costs

Challenges associated with the legal costs of strategic litigation were raised by English and Irish organisations. Within this context, the English organisation EO2 mentioned the obstacle of budget reductions:

I suppose another barrier for us taking these cases in the future is, you know, that we are experiencing massive budget reductions, yes. So, you know, at the moment basically we are limited in the amount of cases we can take.

The English organisation for people with intellectual impairments EONSL1 raised the barrier of legal costs: “there is the issue of funding a case... we haven’t got the resources to fund a case from our own resources, so we can only do it really if the individual is in a position to get legal aid”. In addition, the organisation IrishO1 highlighted legal costs as an obstacle for strategic litigation:

There is the prospect that they [the litigants] may have a cost order made against them. The situation in Ireland is a bit different from the UK as I

understand, because if you lose your case in Ireland... You could expose somebody to a huge financial... penalty for taking a case.

6.3.7 Lack of human resources

For the English organisation for people with intellectual impairments EONSL1, there is the obstacle of the lack of human resources: “we haven’t got an in house lawyer”. This barrier was also raised by the Spanish organisation SO1: “we do not work as much as we would like because of the lack of resources... fundamentally of people”.

6.3.8 Problems in getting expert evidence

Both English and Irish lawyers spoke about the problem represented by the expensive financial costs of getting expert evidence with regard to legal cases involving people with intellectual impairments (including those in institutional residential settings). EL1 explained that there are basically two reasons why it is extremely difficult to obtain such expert evidence. First, there are really very few experts who can elaborate a report for court proceedings, because in order to do this an expert must have “expertise which can be difficult to secure in the area of [intellectual] impairments”. Second, the English “Legal Services Commission just cut the funding for experts, really quite dramatically, which means a significant number or quite a few of the experts who were previously involved aren’t... are now declining to... accept instructions if they are not paid enough”. IrishL1 stated that it is expensive to get expert evidence, not only in terms of time, but also in terms of money:

I mean, this can be expensive in terms of time and money... for example in education... we had to import experts... experts psychologists, educational psychologists, and sometimes a psychiatrist, sometimes a paediatrician... and we've got to go outside of Ireland to get those people. And we don't find those experts willing to provide their services on a pro-bono basis, they charge for it, and [it may be that] the clients don't have the money to pay for it, so we end up paying for it, you can end up spending a lot of money, of your own money, trying to support this litigation. And you can't keep doing that indefinitely.

6.3.9 Barrier of employing international law when arguing strategic cases

At least two lawyers working in the three national legal systems (EL1, SL1) stated that in their respective jurisdictions, there is a lack of awareness by the Judiciary with regard to the CRPD. According to English lawyer EL1: "when I use anything other than the European Convention on Human Rights [ECHR], judges are not normally hugely excited by, for instance, the UN Convention on the Rights of Persons with Disabilities [CRPD] or other UN Conventions". Spanish lawyer SL1 stated: "I still can go to a Court in a bordering territory, [I can] mention the New York Convention [CRPD] and they [the judges] do not know what I am talking about". However, when the researcher checked with the participants the information they had shared during the interviews that would appear in the final version of the thesis, SL1 stated that awareness about the CRPD by Spanish judges has improved since then: "[now] judges know more about the New York Convention [CRPD]".⁴⁷⁴

⁴⁷⁴ Information received from SL1 through an email dated 17 February 2016.

The English organisation for people with intellectual impairments EONSL1 explained that they prefer to use British law when litigating, because European and international law are not particularly helpful for strategic litigation: “yes, I would say in general, but this is a generalisation, we’ve not found European or international law particularly helpful”.

6.3.10 Separation of powers as argued by the State

An Irish lawyer (IrishL1) developed further the argument of separation of powers:

The biggest barrier that we have found... [for developing strategic litigation] is a legal barrier, which the State has been successfully arguing in more recent times, that... a separation of powers argument... well, they [the State] basically say that the Courts are litigating in the area of the Executive by determining the type of education, or whether people are capable of being educated or not... it is quite political, I think.

The argument of separation of powers, which generally means separation between the judiciary and the executive, can therefore lead to a major barrier to strategic litigation in Ireland. In other words, courts can accept the State’s argumentation that it is not a faculty of the judiciary that can decide on matters such as the type of education that a person should receive.

6.3.11 Difficulties in putting forward strategic litigation for challenging institutionalisation

The English organisation for people with intellectual impairments EONSL1 highlighted that in the area of independent living, there is a lack of relevant European case-law and that this absence of case-law makes it difficult to argue strategic cases for challenging the institutionalisation of people with intellectual impairments in Europe:

I read and read quite a lot of court judgements, some of them are more easy to understand than others... I am not aware of... any judgement that I would regard as seminal, a fundamental judgement that would say that means that we can now use that in a strategic way, to... get people out of residential institutional care to supported living.

EL2 acknowledged that independent living is a potential area for strategic litigation in England: "I think that there are a number of areas which are... which are right for strategic litigation, and independent living is absolutely one of those". In the case of one Spanish lawyer (SL1), he did not share the same enthusiasm about using strategic litigation in the area of independent living. He recognised that in Spain, a legal fight for independent living would be possible. However, he expressed concerns about the financial implications of such a right:

Well, I believe that with the resources that we have at the moment, we can fight in many cases for independent living... Of course, to speak about independent living at a legal level... well, yes, this is very nice; but the problem is not that one, afterwards the problem is fundamentally financial.

6.4 Barriers deterring potential strategic litigators from engaging in strategic litigation

The following supranational and national organisations, as well as one lawyer, did not have experience with strategic litigation: EONSL2, IONSL1, IONSL2, SPNSL1, SPNSL2, IrishL2, SONSL1,⁴⁷⁵ SONSL2, and SONSL4. These organisations and this one lawyer, who had not performed strategic litigation, mentioned barriers preventing them from being involved with strategic litigation. In some cases, these barriers replicate those mentioned by organisations and/or lawyers already involved with strategic litigation in the three national jurisdictions, whose insights were introduced in the previous section.

Interesting insights regarding the matter of the prospect of these stakeholders eventually being involved in relevant strategic litigation were provided by the Irish and Spanish organisations for people with intellectual impairments IONSL1 and SPNSL1. The Irish organisation for people with intellectual impairments IONSL1 sees the area of legal capacity as an interesting area for new strategic litigation in Ireland, provided that the Irish law on capacity issues is not changed: “there probably could be a possibility of doing some work around mental capacity, but hopefully, soon the law will be changed, so... but if it doesn’t happen, that could be an area for [strategic] litigation to come through”. The Spanish organisation for people with intellectual impairments SPNSL1 explained how strategic litigation could be helpful in the area of inclusive education:

Where for example indeed it could be useful... [is in the area of] inclusive education. In other words, in Spain, education... the development of

⁴⁷⁵ Supranational organisation of disabled people (including those with intellectual impairments).

inclusive education is fairly developed, but indeed in the last years, a certain regression can be noticed. To... through a tendency to models of segregated education, and much of the time this is being done against the opinion or the ideas of families themselves... And it is true that until now, internal resources, the educational systems themselves, have been employed, in other words, [for] demands through the educational structures, the Autonomous Communities, through the development of claims, administrative procedure... but not strictly [through] litigation in the media.

The previous findings are illustrative in terms of the potential involvement of these key stakeholders in strategic litigation. However, currently they are inexperienced in strategic litigation, and the findings reveal the following barriers that they face that contribute to explaining their lack of involvement with strategic litigation: the barrier of preparatory work in terms of the CRPD; a lack of knowledge and good practice with regard to strategic litigation; strategic litigation being seen by organisations as a confrontational approach; potential litigants refusing a litigation approach; challenges associated with legal costs; strategic litigation as a long process; difficulties in putting forward strategic litigation to challenge institutionalisation; a lack of legal staff; a lack of statutory rights and class actions as an obstacle for strategic litigation; the need for a number of judgments to amount to strategic litigation; and the Spanish State of Autonomies as an obstacle for strategic litigation.

Within this context, two supranational organisations (SONSL1,⁴⁷⁶ SONSL4) explained that they consider strategic litigation as an option and that they could work with strategic litigation in the future. According to SONSL1:

We recognise that strategic litigation is one of the... tools that we need to use... We have not yet actively... sought cases to pursue particular

⁴⁷⁶ Supranational organisation of disabled people (including those with intellectual impairments).

issues as it is. But we are just in the process of... building that into our strategy so that it will be one of the... you know, tools that we will use in the future. But we have not yet... done that.

In this context, this organisation sees Eastern Europe as a promising area for new relevant strategic litigation: “there is a large... a large number of people in institutions, particularly in Eastern Europe, so... you know, that seems like it could be a place to be looking, but that’s really speculation on my part... at this point”.

SONSL4 explained that, as an organisation, in order to pursue strategic litigation properly they would need to have a specific project, as well as acquiring relevant experience: “I don’t think it’s excluded, you know, but we would need to have a specific project where we would get focused on that and we would need to gain a lot... a lot of experience in that”.

6.4.1 Barrier of preparatory work in terms of the Convention on the Rights of Persons with Disabilities

The supranational organisation SONSL1 (of disabled people, including those with intellectual impairments) remarked that before putting strategic litigation in place, several issues need be addressed in accordance with the CRPD:

So there are a whole range of issues that our members need to learn about, before strategic litigation... is... becomes the focus.

6.4.2 Lack of knowledge and good practice with regard to strategic litigation

The English organisation for people with intellectual impairments EONSL2 referred to the lack of internal expertise: “well, I think mainly... we don’t currently use strategic litigation ourselves... because we don’t have the expertise... within the organisation to... to pursue something like that”. The organisation for people with intellectual impairments IONSL1 highlighted that the concept of strategic litigation “is a new concept that is developing in... Ireland”. A participant providing information on behalf of the Spanish organisation for people with intellectual impairments SPNSL1 revealed that when he was first approached for an interview for this thesis, he was not aware of the concept of strategic litigation: “I can assure you that I was not aware of it”.

According to the organisation SONSL2, there is poor knowledge of strategic litigation, and a need for good practice:

I think the main problem is knowing how to do it [strategic litigation]... Or not knowing. Not knowing how to do it, who to go to. In the end, there is not enough good practice that people can use.

6.4.3 Strategic litigation seen by organisations as a confrontational approach

Strategic litigation represents a confrontational approach for the supranational organisation SONSL2. This organisation illustrated how to see strategic litigation as a confrontational approach can represent a barrier to strategic litigation.

SONSL2 explained that instead of working with strategic litigation, many organisations are inclined to engage in non-confrontational approaches, because otherwise they may encounter conflicts with the funders of their work:

[About other individuals or organisations] They mainly use a different approach to try to... sort of not... they don't use confrontational approaches, I think in most cases, like legislation... they would try to kind of strike some sort of deal with the local authorities to... you know, to get some funding to develop services in the community, and then to take some people out of institutions in... into those services, rather than taking, you know, taking local authorities or whoever to court... These organisations, they are really hesitant to take... you know, a confrontational approach because they get the funding for the services they provide from the local government or... mainly it is the local government, you know, so they risk losing their funding if they are seen, you know... as troublemakers, you know, so that's... that's... I mean, and that's the problem in advocacy as well, and I assume it would be the same problem with... litigation. So you would almost need somebody... you know, you would need somebody independent, somebody who doesn't have anything to lose by... you know, by going to the courts.

6.4.4 Potential litigants who refuse a litigation approach

The supranational organisation SONSL4 pointed out that some victims do not feel comfortable with strategic litigation:

[The organisation] came across some people who would have been good cases for strategic litigation, but refused, you know, to be under the light of... how to say... such as... even though if there were all the

guarantees, anonymity and all that, it was just they didn't... they didn't feel comfortable with... with such a process.

6.4.5 Challenges associated with legal costs

The matter of the costs involved in strategic litigation was raised by the English and Irish organisations for people with intellectual impairments EONSL2 and IONSL1. According to the organisation EONSL2:

In terms of cost, we are very much restricted in our funding at the moment. So, we had... we wouldn't be able to justify any... any additional cost that... would bring... that we would bring to our funders, because they fund us for very specific things.

The organisation IONSL1 highlighted: "but, you know, if you have to... people are a vulnerable group, they don't have a lot of money, we wouldn't have a lot of money... ourselves, so you know... and people... it is a very expensive matter going to court".

According to the supranational organisation SONSL1 (of disabled people, including those with intellectual impairments):

Litigation is a pretty expensive process, especially, you know, when you look at working on an interpretation of the Convention [CRPD], any... any complaints that go to the Committee on the Rights of Persons with Disabilities have to go through all of the national processes first.

6.4.6 Strategic litigation as a long process

According to the Spanish organisation for people with intellectual impairments SPNSL2: “the problems that I see [with regards to strategic litigation], but this is personal, is that the timing is very long, therefore all the time that you employ in a strategic litigation, let’s say that... finally delays the matter very much”.

A similar insight was provided by the supranational organisation SONSL1 (of disabled people, including those with intellectual impairments): strategic litigation is a long process and it needs “a well-prepared... disability movement to be able to support that”.

6.4.7 Difficulties in putting forward strategic litigation to challenge institutionalisation

In the area of strategic litigation with regard to independent living, the supranational organisation SONSL2 stated that there is a lack of relevant European case-law, and that this represents an obstacle in terms of arguing relevant strategic litigation: “I am not... I am not really aware of any cases in Europe where, you know, people have used... litigation, or strategic litigation, to get [out] of institutions”. This organisation also explained that specifically in the case of England, one problem is that there is not a right to independent living, there are just policies. And according to this organisation, policies are not enough for pursuing strategic cases: “I know here in the UK [United Kingdom], they don’t have the right to independent living, they have... they just have policies that... can’t use those really to go to... Court”. The lack of case-law and a right to independent living (at least in England) can therefore act as a barrier not only for

arguing strategic cases in the area, but also because there are so few reported cases at this level that potential stakeholders working with strategic litigation may not even think about using the mechanism.

6.4.8 Lack of legal staff

The supranational organisation SONSL2 stated: “we don’t have... any legal staff working in the organisation”.

6.4.9 Lack of statutory rights and class actions as an obstacle to strategic litigation

According to the Irish organisation for people with intellectual impairments IONSL1, the limitation of statutory rights and the lack of class actions in Ireland constitute obstacles to developing strategic litigation:

Because we don’t have... like in England, you have people having statutory rights to things so... so if you don’t have statutory rights it is very difficult to bring... you know, a case... But it’s very difficult, if you just have... if your only way to take a case... we don’t have class actions, individuals have to take cases perhaps to be... you know, it’s usually judicial review.

6.4.10 Need for a number of judgments to amount to strategic litigation

The Spanish organisation for people with intellectual impairments SPNSL2 stressed that in Spain, the number of judgments needed to amount to jurisprudence with a significant impact makes the process of strategic litigation even longer and acts as a barrier to strategic litigation:

Here in Spain, it is necessary to have more than one judgement from certain... from certain type of courts, in order to amount to jurisprudence with a significant impact. Therefore, the process of obtaining more than one judgement... [and] proceedings which may last for years... well, this seems complicated to me.

6.4.11 Spanish State of Autonomies as an obstacle to strategic litigation

The Spanish organisation for people with intellectual impairments SPNSL2 revealed that the Spanish State of Autonomies is an obstacle to strategic litigation:

I believe that our State of Autonomies is an obstacle, right? ... The Autonomic State... that each Autonomous Community [can] have its own regulations... Well, if at a general level we already said that the Convention [CRPD] did not [have] impact, I do not want to tell you anymore, at the level of each Autonomous Community.

6.5 Conclusion

The empirical findings presented in this chapter revealed a number of diverse and major barriers that are faced by people with intellectual impairments living in institutional residential settings in European countries in accessing justice and strategic litigation, as well as by current and potential strategic litigators in the area. Looking at these barriers from the perspective of the social model of disability allows us to understand that these barriers are socially created (put differently, that barriers to strategic litigation are “artificial”), meaning that they can be removed or reduced. The identification of such barriers (and this chapter has identified some examples of these barriers) is the first action towards their removal or reduction.

The diverse barriers to accessing justice identified through the qualitative interviews hinder or prevent access to justice and strategic litigation by people with intellectual impairments living in institutional residential settings in European countries. These empirical findings confirm the legal documentary analysis findings presented in the previous chapter. This also demonstrates that, in the area of access to justice and strategic litigation, for many people who are part of the group under analysis, there is little or no recognition (and poor or a lack of human rights enforcement). This idea is of fundamental importance: according to interview findings, the group that is the subject of this thesis is poorly recognised, or not recognised at all, with regard to accessing justice and strategic litigation. Poor or a lack of recognition regarding access to justice and strategic litigation for this group in turn leads to poor or a lack of justice in terms of people with intellectual impairments' enforcement of their human rights. As the result of a poor or a lack of recognition through enforcement, this group thereby suffer injustice, which requires a remedy.

Overall, the departure scenario for strategic litigation (which is to be approached in the broader context of access to justice, meaning that access to justice is a

condition for strategic litigation) is one where people with intellectual impairments living in European institutional residential settings encounter major obstacles in accessing strategic litigation (as, in broader terms, they encounter fundamental obstacles for accessing justice). Strategic litigators, in turn, face the fundamental obstacle of making contact with the group under consideration.

There are additional obstacles that litigators face in selecting (or even finding) strategic cases. For instance, these obstacles take the form of budget reductions, or potential litigants' refusal to pursue litigation. The findings also demonstrate the challenges that litigators encounter when employing international law to argue strategic cases. Moreover, the findings also assist in understanding why some key stakeholders, who have been working in the field of intellectual impairments, have not yet worked with strategic litigation. Some of the reasons that the latter group of key stakeholders gave for not yet being involved in strategic litigation, for instance the very expensive legal costs that strategic litigation involves and the barriers encountered to strategic litigation, were also mentioned by key stakeholders who already have had experience of strategic litigation.

Overall, the diverse barriers to strategic litigation presented in this chapter assist in understanding some of the difficulties encountered by NGOs and law firms that have pursued, or potentially could pursue, strategic litigation. Unless these barriers are overcome or at least reduced, it will not be possible to achieve a social change for people with intellectual impairments through strategic litigation. This is because the various barriers to strategic litigation affect the access of people with intellectual impairments to strategic litigation (in the form of potential litigants) and the work of strategic litigators. Having identified some of the major barriers to strategic litigation, the following chapter will address some possible ways of overcoming and/or reducing these barriers.

Chapter 7

SOME WAYS FOR OVERCOMING AND/OR REDUCING BARRIERS FOR STRATEGIC LITIGATION AND MAXIMISING ITS IMPACT

7.1 Introduction

This chapter aims to address some possible ways of overcoming and/or reducing the identified barriers to strategic litigation, thereby contributing to maximising this strategy's impact. As in the case of the previous chapter, the focus in this chapter will be on presenting and analysing the interview findings that result from this thesis. To this end, to begin with, the chapter will present the interview findings with regard to the impact of strategic litigation in the area of disability and human rights (including the human rights of people with intellectual impairments in institutional residential settings in European countries). Afterwards, the chapter will suggest some options for tackling the barriers to access to justice and strategic litigation encountered by people with intellectual impairments in institutional residential settings in Europe. The chapter will then present some possible alternatives to addressing the barriers faced by current/recent strategic litigators in the area. Finally, the chapter will propose some ways of tackling the barriers faced by potential strategic litigators in the area. In addition, the chapter includes a final section, which explores how additional strategies (such as advocacy, the media, as well as monitoring and human rights reporting) can contribute to tackling the barriers to strategic litigation and maximising its impact.

7.2 Interview findings with regard to the impact of strategic litigation

A Spanish lawyer (SL1) illustrated how strategic litigation can achieve a change in criteria for interpreting the law:

Well, what happens is that it is a work... let's say that some cases do not have such an immediate impact, OK? ... I mean that we do small things, small things. Years ago I started with the right to vote, OK? Then, slowly you are achieving a change in criteria, not so much a change in legislation, but indeed a bit of a change in criteria... But I do not see directly strategic litigation... instead day-to-day work, I do not know, I do not know.

Another Spanish lawyer (SL2) stated that strategic litigation can lead to a legal precedent: "If a very clear judgment is reached, a precedent has been achieved that can be claimed by those who are in the same situation for a long time".

IrishL1 stated that he had achieved ground-breaking results with strategic litigation in the field of education: For the first time there was an obligation on the State "to provide education for all persons with profound intellectual disabilities", and "the definition of education was given a broad interpretation". Clearly, this obligation on the State, as well as the new interpretation of the concept of education, have established a legal precedent that will have an impact on all people with intellectual impairments, including those living in institutional residential settings.

The supranational organisation IO1a described a case of an ongoing relationship between a lawyer and client after litigation:

I mean I know one case [IO1 second strategic case] where our legal monitor there became quite involved with the client and actually still even now... when the case is over... is still in touch with him and actually he was able to move out of the institution and she has sort of remained the support person for him, and especially in terms of helping with communication for a lot of people, because apparently other people had a hard time understanding him and she understands him so you know, she has become a sort of intermediary for him... and for others things she is needed so... You know our attorneys are pretty committed to clients so they tend to work pretty closely with them... and build relationships with them.

The supranational organisation IO2 stressed that it is not easy to have an impact after a judgment: “even after you have a judgment it is very difficult to have an impact”.

The previous interview finding suggests that it can be difficult to achieve an impact with strategic litigation. However, the rest of findings presented in this section suggest that when strategic litigation has an impact, it offers prospects for achieving landmark outcomes. These outcomes, according to the interview findings, can take different forms: a legal precedent; a variation in the criteria for interpreting the law; and the empowerment of a litigant, through the ongoing support of his/her lawyer, after litigation. Although limited to a number of participants, this section’s findings are rather promising with regard to the possible impact of strategic litigation. The rest of the chapter will be focused on different options for maximising this impact, and therefore overcoming the various barriers to strategic litigation.

7.3 Tackling barriers to access to justice and strategic litigation

This section will suggest that training is the way forward for tackling the barriers to access to justice and strategic litigation,⁴⁷⁷ which are encountered by people with intellectual impairments in institutional residential settings in European countries. The section will propose that training is offered not only to people with intellectual impairments themselves, but also to key professionals working in the area of access to justice and strategic litigation. Finally, the section will present interview findings with regard to relevant work on partnership.

7.3.1 Training people with intellectual impairments who have been/are potential victims of human rights violations in institutional residential settings

The interview findings reveal that English, Irish and Spanish organisations, as well as one supranational organisation, have provided training to people with intellectual impairments (including those in institutional residential settings), covering various issues in different ways.

An English organisation for people with intellectual impairments (EONSL1) has been developing work around people with intellectual impairments who are

⁴⁷⁷ Exposed in the previous chapter.

victims of crime: “we did some work, quite a while ago now, where people with a learning disability were victims of crime, they may have been... been abused or whatever, they may have been in an institutional [residential] setting, they may not have been in an institutional setting”.

The English organisation for people with intellectual impairments EONSL2 has been developing work around workshops and training, as well as a helpline:

What we have done in the past, in terms of people in more institutional [residential] settings, is deliver workshops and training to groups of people. These have been on different subjects. Our three main areas have been on keeping safe, like general things like... using public transport, contacting the police, issues like that; we’ve also done sessions on abuse and bullying, which gave people detail about recognising what abuse is, and again how to report abuse to... the police or to... to someone else, someone you choose so... or whoever that might be, and then we also do a session into hate crime, which covers what hate crime is, and again, how to kind of go about reporting issues and... where you can get help with it.

With the aim of addressing people with intellectual impairments’ fear of reporting, as well as their distrust with regard to official entities, the same organisation for people with intellectual impairments (EONSL2) promotes the concept of “having more of a circle of trust for people, so that they [people with intellectual impairments] don’t necessarily have to engage directly with official channels themselves”. This idea can be very significant, because not only can having a “circle of trust” contribute to reducing a person with intellectual impairments’ fear of reporting human rights violations to the authorities, but also the victim can share the reality of the human rights violations with his/her trusted people –who afterwards can support him/her in getting in contact with the relevant authorities.

An Irish organisation for people with intellectual impairments (IONSL2) has been developing work around raising awareness about rights: “we try to raise awareness... on these issues [international treaties, particularly, the CRPD] with our members... make them aware of their rights”.

The Spanish organisation for people with intellectual impairments SPNSL1 has been “training people with Down syndrome so they can learn which steps they should follow, how they should react... the development of abilities”.

As a way of overcoming and/or reducing the problem associated with people with intellectual impairments’ poor or lack of awareness of their own human rights and legislation, the supranational organisation SONSL2 stated that their organisation has been trying to put peer support work in place, with the purpose of bridging the gap between the institutional residential setting and the outside:

You know, people... people with disabilities... going into institutions... people who have lived in institutions and come out, going into institutions to talk to people who live there, to talk them about their rights, you know, etc. This is something that has been done... here... here in the UK or in Scotland...

Overall, the findings presented in this section reveal the work developed in the three national legal systems studied in this thesis (England, Ireland and Spain) by national organisations, as well as relevant work conducted in Scotland by a supranational organisation.

7.3.2 Training key professionals in the area

For instance, the Spanish organisation for people with intellectual impairments (SPNSL1) has been developing work with the main goal of achieving “the elimination of the incapacitation, as a legal figure”. In more detail, this work has revolved around the CRPD and key professionals such as prosecutors or notaries: work “of mediation, [has been done] with instances close to... the prosecution, or with some institutions... with the [leading Spanish foundation for notaries]”.

7.3.3 Working in partnership

Overall, the national organisations reported working in partnership. This reveals a linkage not only between national organisations, but also between national and supranational organisations. The following are examples of working in partnership: the English organisation for people with intellectual impairments EONSL1 with a leading English organisation and the English organisation for people with intellectual impairments EONSL2; the English organisation EONSL2 with the English organisation EONSL1, and “professional organisations like the police... the prosecution service, and the Home Office... [like the] Justice, and other organisations who work in the hate crime field, and the disability hate crime network”; the Irish organisation for people with intellectual impairments IONSL1 with the supranational organisation SONSL4; the Irish organisation for people with intellectual impairments IONSL2 with the Irish Law Reform Commission; the Spanish organisation for people with intellectual impairments SPNSL1 with a leading Spanish foundation for notaries, and the Spanish organisation SO1; the Spanish organisation for people with intellectual impairments SPNSL2 with a

leading supranational human rights organisation for people with intellectual impairments, and the supranational organisation SONSL4.

Within the context of working in partnership, a Spanish organisation for people with intellectual impairments (SPNSL2) has put a legal network in place, as well as developing research on people with intellectual impairments who have been involved in criminal proceedings: “now [the SPNSL2] has a legal network, but well, in the context of that network, we have elaborated a document, or a report, which explores the incidence of intellectual disability in criminal proceedings”.

7.4 Tackling barriers faced by current/recent strategic litigators in the area

This section will suggest the following ways of tackling the barriers faced by organisations, as well as lawyers, who are working in the three national legal systems with strategic litigation: litigators training people with intellectual impairments as peer support workers in the field of strategic litigation; linkages amongst stakeholders; monitoring the cases submitted to European and international instances for strategic litigation, and presenting cases in these instances; approaching strategic litigation with flexibility and creativity; and stakeholders conducting strategic litigation through mechanisms that do not require a particular victim.

7.4.1 Litigators training people with intellectual impairments as peer support workers in the field of strategic litigation

This suggestion builds on one of the ideas resulting from the interview findings proposed in the previous section, namely that the supranational organisation SONSL2 has been developing peer support work with people with intellectual impairments in institutional residential settings. Therefore, this sub-section is focused on the same idea of peer support work, but in terms of training peers with intellectual impairments regarding the possibility of recourse to strategic litigation. In other words, this means that people with intellectual impairments who have experience of living in an institutional residential setting could access these settings to speak with their peers about the possibility of being potential litigants. Within this context, peer support workers should be trained about the prospects of strategic litigation. Therefore, these peer support workers will be in a position to speak to their peers about the human rights of people with intellectual impairments in institutional residential settings, as well as strategic litigation being one of the ways of obtaining justice. Therefore they will be able to contribute to changing the reality of a group of people in a similar situation.

7.4.2 Linkage amongst stakeholders

Strategic litigators can improve their chances of selecting good cases for relevant strategic litigation by linking with other key stakeholders in the area. The findings reveal that an English organisation (EO2) has been linking/liaising with stakeholders such as user groups, solicitors and social workers, in order to find possible strategic cases:

So, what we are trying to do basically, is look at user groups in here... working in the Court of Protection basically, yes. So these groups are solicitors, like I said Councils basically, and other people who work in social work... Whatever, yes... You know, when they come across issues. I am not sure that we will address all the issues... yes, but I think

that we need to go out and see what we can do and what we are looking for, yes.

This can be an indirect way of reaching the group of people with intellectual impairments in institutional residential settings, and it adds to the literature discussed in Chapter 5.

This finding also allows for thinking more widely about the matter of linkages amongst stakeholders. Hence, national organisations can benefit from supranational organisations' knowledge and expertise about how to pursue strategic litigation, and supranational organisations can benefit from the contacts in the field and the domestic experience of national organisations. Moreover, it is possible to think about linkages between national and supranational organisations, and lawyers working in the three national jurisdictions: in such a way, organisations without expert legal knowledge may not be aware that they can bring cases (or how to bring them), and can benefit from lawyers' knowledge and expertise; in turn, lawyers can benefit from organisations' contacts and experience in the area, and in so doing they will be in a better position to make contact with potential litigants with intellectual impairments.

7.4.3 Monitoring cases submitted to European and international instances for strategic litigation, and presenting cases in these instances

As a way of improving their chances of successfully identifying potential strategic cases, stakeholders can monitor the legal cases submitted to European and international instances for strategic litigation. Amongst these instances, and for the reasons discussed when analysing the literature in Chapter 5, the European Court of Human Rights (ECtHR), the European Committee of Social Rights, the

European Union Ombudsman, the European Parliament Committee on Petitions, and the CRPD Committee, could be particularly attractive.

Presenting strategic cases in the previous instances can be particularly important, in terms of the maximisation of the impact of strategic litigation. The reason behind this is that strategic cases that are decided by these instances can have a potential impact in countries other than the one in which the litigation originated. This means that a strategic judgement can be employed by organisations and lawyers, amongst other stakeholders, from different European countries. The supranational organisation IO1a raised the issue of the impact of cases litigated in the context of the ECtHR: “we have done litigation at the European Court of Human Rights, that has impact anywhere in Europe when we get the judgement”.

7.4.4 Approaching strategic litigation with flexibility and creativity

It may be the case that, when a strategic litigator evaluates the potential of a case, he/she has already identified a potential client. If this is the case, the strategic litigator will examine this potential client under the set of criteria suggested in suggested in Chapters 5 (literature analysis) and 6 (interview findings). There is, however, the possibility of approaching strategic litigation around a client’s particular context (rather than vice versa), which means thinking about strategic litigation with flexibility and creativity. This can be achieved in various ways.

The first way is to approach with flexibility the set of criteria being considered for the selection of a case. Being flexible will allow for accommodating the situation of a potential client with intellectual impairments in an institutional residential setting, with regard to the stakeholder’s criteria. For example, if a given stakeholder considers geographical limitations to be a part of his/her criteria for selecting cases, this particular criterion may be overlooked, when necessary. The

supranational organisation IO2 described how they are very flexible with their selection criteria when there is a case involving disability (including those individuals with intellectual impairments):

Now, when it comes to disability cases, we apply the criteria with much more flexibility. Because it's rare for these cases to get to Court; so it's not like we have like a million cases to choose from, we have quite a few cases that we can choose from. So we are less rigorous, I guess, in our case selection when it comes to people with intellectual disability, or with a disability of any kind.

The second way is through the employment of legal arguments as well as intervention, once again, around a potential client's particular context. In such a way, the supranational organisation IO2 explained:

We have... In the vast majority of cases I can think about, [strategic litigation] has not come about through any particular strategy or plan on behalf of the applicants or their lawyers; there was kind of people who complained, and then the case has been made more strategic through careful legal arguments and intervention.

These last two findings therefore suggest that stakeholders can explore their potential to be more strategic, in identifying cases that could be made strategic taking into account a client's needs or context, as opposed to just trying to find a client who fits within a very strict set of criteria that have been established previously. In particular, when thinking about strategic legal cases for the group under scrutiny, the idea of approaching the selection of strategic cases with flexibility and creativity is crucial. This is due to the particular difficulties that strategic litigators face in finding clients with intellectual impairments who are victims of human rights violations in institutional residential settings.

7.4.5 Stakeholders conducting strategic litigation under mechanisms which do not require a particular victim

The supranational organisation IO1b raised the issue of strategic litigation under the European Social Charter: “we could overcome those access to justice barriers which I mentioned, simply because we didn’t need any real victim, right, it was a collective complaint procedure where we could just represent... not represent anyone, just deal with the issue”. This finding regarding “victimless cases” confirms the literature presented in Chapter 5, and acquires particular relevance in terms of (once again) the obstacle that litigators face in making contact with people with intellectual impairments in institutional residential settings.

7.5 Tackling the barriers faced by potential strategic litigators in the area

The purpose of this section is to suggest ways of overcoming and/or reducing the barriers that prevent potential strategic litigators from engaging with strategic litigation and working towards its impact. The Section will present two alternatives: linkages with key strategic litigators; and the employment of “external” strategic litigation as a tool for key stakeholders who are not practising strategic litigation in their own work.

7.5.1 Linkages with key strategic litigators

A rather small number (two out of nine) of the participants without experience in strategic litigation stated that they have been involved in some sort of

collaboration with other organisations that already develop strategic litigation. This collaboration has taken the shape of preparing factums or supporting strategic cases (as in the experience of a supranational organisation), or explaining to other organisation/s how strategic litigation can be interesting for the organisation not pursuing strategic litigation, which includes informing them of ways in which the results achieved through strategic litigation can be useful, as well as what type of cases can be interesting for strategic litigation (as mentioned by another supranational organisation).

The supranational organisation SONSL1 (of disabled people, including those with intellectual impairments) explained:

So far, the only thing that we have done has been to... prepare factums and to support cases that other organisations have taken on.

The supranational organisation SONSL4 has been collaborating with other non-governmental organisations (NGOs) that are already involved in strategic litigation, in terms of an informal collaboration, which consists of informing these other NGOs of how strategic litigation would be interesting for the supranational organisation SONSL4:

So, it's true that we have chosen the strategy, in the past year, to leave strategic litigation to other organisations that have more experience in this field, and we have rather tried to collaborate with them, in let's say a given feedback on how strategic litigation... I mean, how this was... would be interesting for us, and how we can use the results and what sort of case could be interesting to bring to court, some more in this informal... informal collaboration with other NGOs.

7.5.2 Employment of “external” strategic litigation as a tool for organisation’s own work

The employment of “external” strategic litigation or the litigation already pursued by a different key stakeholder can be an interesting way of maximising or enhancing the impact of strategic litigation. The alternative suggested in this sub-section would allow stakeholders who otherwise would not be involved with strategic litigation at all to work towards enhancing the impact of strategic litigation. In other words, stakeholders can employ this “external” strategic litigation as a helpful tool/supporting material for their own work (for example, in terms of advocacy). By doing this, they will be maximising the impact of the strategic litigation that they employ. In such a way, the supranational organisation SONSL4 discussed how they employ the strategic litigation pursued and litigated by other organisations as a helpful tool for their own work:

Now, what we have experienced... so we discussed and we are very happy that we have colleagues in other organisations who are... doing strategic litigation and we see how we can use that in our work. We believe, because we are more... [develop more] representation and advocacy, that this [strategic litigation] is not our first priority, in the way we lobby for... and we advocate for the rights of persons with intellectual disability.

Clearly, the possibility suggested in this sub-section differs from being involved in strategic litigation as a litigator. But definitively, it will contribute to maximising the impact of strategic litigation directed to address the human rights violations happening in institutional residential settings for persons with intellectual impairments.

7.6 Additional strategies to help to tackle barriers to strategic litigation and maximise its impact

To varying extents, the strategies of advocacy, media coverage, as well as monitoring and human rights reporting can support the goals of strategic litigation and contribute to tackling the barriers to strategic litigation and maximising its impact.

7.6.1 Advocacy

The interview findings show that advocacy is employed by national and supranational organisations in different ways as a strategy alongside strategic litigation. The English organisation EO2 clarified that:

In regards to advocacy, in what way do you mean advocacy, I suppose we provide legal advocacy in that way, we support cases legally, we will provide... solicitor's counsel, whatever, yes. And if an individual requires advocates there, we will, you know, in order for them to speak with us, basically, we will take that as a reasonable adjustment and make that adjustment, so that's what happens, yes.

Therefore, from the previous insight, it is particularly interesting to think about advocacy in terms of an individual with intellectual impairments having an advocate, a circumstance that can contribute to tackling, in particular, the barriers to access to justice and strategic litigation experienced by the group under consideration (for example, the barrier of problems with access to communication and information).

The supranational organisation IO1a employs advocacy as an integral part of its overall strategy, which is designed towards working with a strategic judgement with the goal of maximising its impact:

We plan ahead when we know there is going to be a judgement about what we are going to do, to do advocacy around it, to get legal changes, how it is going to sit in with other law reform efforts that are going on in the country, and you know, we try to plan a strategy ahead of the time when we get the judgement.

7.6.2 Monitoring and human rights reporting

The use of monitoring and human rights reporting can support the goals of strategic litigation through the identification of potential issues or topics for strategic litigation, which in turn can lead to shaping a good strategic case. For this purpose, not only is “internal” monitoring and human rights reporting useful, the results achieved by “external” monitoring and human rights reporting can also be helpful. Put differently, “internal” monitoring and human rights reporting is understood to mean the relevant work on this strategy developed by the same stakeholder who pursues strategic litigation. In turn, “external” monitoring and human rights reporting is understood to mean the work on monitoring and human rights reporting that is developed by a different stakeholder other than the one conducting the strategic litigation.

Indeed various participants (IrishO1, IrishO2, and IO1b) stated that there is a positive connection between monitoring and human rights reporting, and the selection of issues for strategic litigation. For instance, according to the supranational organisation IO1b: “there is more of a connection between monitoring and the identification of issues, rather than between monitoring and human rights reporting and the identification of a case”. For this last organisation,

there is a tension between monitoring and human rights reporting, and the identification of strategic legal cases:

There is a big difference between actually doing monitoring, to assess a human rights situation in a particular institution or in a locality, and looking for clients [selecting cases], and often those two things can sort of contradict, so there is a tension between those different things.

7.6.3 Media coverage

The use of the media, linked to strategic litigation, can have diverse positive effects. For example, stakeholders can use the media not only with the purpose of enhancing the impact of a strategic judgement, but also with the goal of achieving awareness of an ongoing strategic case by the public.

The English organisation EO1 stressed that although their main focus is on using the law, occasionally they employ the media as well: “quite often in cases you can get a good public relations campaign behind you; if you can get public support behind you, it will help in your overall court case”.

The organisation IrishO1 employs the media alongside strategic litigation:

So we would always do our litigation by usually... by bringing it forward to the public state... Whatever it is... forwarded by a newspaper article... but that's usually important in terms of getting the public aware of the human rights issues, putting pressure on Governments, if it is an issue that needs law reform, through the use of the media you obviously try to advocate for law reform and raise issues like that, so would use whatever channels are available to raise those sort of issues in the public settings.

A similar approach to the Irish organisation IrishO1 is adopted by the organisation IrishO2,

Well, that is [the] big difference in what we do, and what a solicitor private practice would do. Most of what we do is taking cases that are likely... to change the law. You know, we would see that in a wider context... That is necessary to create public awareness on the issue, convince the public of the need for change, and convince the political system to make a change.... But we put a lot of efforts into briefing the media about our cases... Explaining what the issues are... So, you know, when we approach a case like this, we don't do it simply in legal terms. We try to create public awareness around the issue, and to meet any potential objections that the public may have, and to explain the situation to them. So, quite a lot of work has gone into that.

7.7 Conclusion

This chapter's empirical findings have suggested some ways of tackling some of the barriers to strategic litigation and maximising its impact. Approached from the perspective of the social model of disability, the different suggestions included in this chapter aim to contribute towards the effective removal of barriers to strategic litigation. Having identified some of the major barriers to strategic litigation in the previous chapter, the current chapter has proposed different options for overcoming or reducing these barriers.

Under the theoretical frame adopted in this thesis regarding justice (and access to justice), in the first place, this chapter's suggestions will allow to work on major barriers which are faced by people with learning difficulties in institutional residential settings in Europe, and by doing so, their access to justice will be

improved. Moreover, in order to work towards the recognition of people with intellectual impairments in institutional residential settings, or at least towards achieving greater recognition through human rights enforcement for them, one option is to replicate the examples of positive work in the area of access to justice (and strategic litigation) mentioned by various participants. More specifically, these examples of positive work developed by organisations, in order to overcome some of the barriers to accessing justice and strategic litigation, could be useful for other organisations, which could work in the same positive direction. In particular the suggestions proposed in this chapter for improving this group's access to justice (and strategic litigation) will make it possible to achieve greater recognition through enforcement of the human rights of people with intellectual impairments in institutional residential settings.

The chapter also included various suggestions that current/recent strategic litigators, as well as potential ones, could put in place. These include a range of different suggestions, which result from the experiences of current/potential key stakeholders in the area of strategic litigation. Amongst these is the employment of other/additional strategies, namely advocacy, the media, and human rights monitoring and reporting. The suggestions proposed in this chapter will allow the different stakeholders working with strategic litigation to work towards overcoming or reducing the different barriers that they find in their work, thereby contributing to the development of strategic litigation. By doing so, this will make it more possible for strategic litigation to act as a catalyst for social change in the case of people with intellectual impairments in institutional residential settings in Europe, either by reforming the text of the law or public policy, changing its implementation, influencing public opinion, or recognising the wrong.

In the context of this state of affairs, the following chapter will evaluate the actual potential of strategic litigation at national and supranational levels, as well as offering recommendations regarding working towards realising the potential of national and supranational strategic litigation.

Chapter 8

THE POTENTIAL OF STRATEGIC LITIGATION FOR RECOGNISING AND ENFORCING THE HUMAN RIGHTS OF PEOPLE WITH INTELLECTUAL IMPAIRMENTS IN INSTITUTIONAL RESIDENTIAL SETTINGS

8.1 Introduction

This thesis set out to explore the potential of strategic litigation for recognising and enforcing the rights of people with intellectual impairments in institutional residential settings in European countries. In particular, the thesis has explored how strategic litigation works for this particular group in very specific circumstances. Within this context, the thesis has looked at the relevant strategic litigation at a national (England, Ireland and Spain), European and United Nations (UN) level.

Justice as recognition and enforcement is such a fundamental idea: thinking about people with intellectual impairments as a group suffering injustice, who are thereby entitled to be recognised and are entitled to a remedy; and moreover, thinking about this group's actual enforcement of their human rights, are the initial points of departure when thinking about strategic litigation for this group.

This subject is relevant because there is a gap in the literature, not only with regard to how this group really accesses strategic litigation, but also about how the process of strategic litigation works in the case of people with intellectual impairments in institutional residential settings in European countries.

Towards fulfilling the thesis' main purpose, it was necessary to explore various subsidiary research questions, which enquired about the following: the human rights of people with intellectual impairments in institutional residential settings in European countries, and how have they been violated; the access to justice experienced by the group of people under consideration; the matter of how strategic litigation has been employed to recognise and enforce this group's rights, in national, European and global instances; the barriers to strategic litigation; and some of the possible ways to overcome and/or reduce these barriers. The purpose of these subsidiary research questions was to explore the problem under analysis in a cumulative way, in order to provide a final answer to the thesis' main research question.

This chapter will be dedicated to this last purpose. The evidence in this thesis demonstrates that it is very difficult to achieve an impact with the relevant strategic litigation. However, when an impact is achieved, strategic litigation produces ground-breaking results, or establishes a precedent. Therefore, and overall, strategic litigation has the potential to produce ground-breaking results, or to establish a precedent, with regard to the group under consideration. However, this impact can only be achieved if certain barriers are overcome and/or reduced. In other words, this impact will be achieved if certain measures and/or actions are put in place.

However, a universal answer to which barriers are to be overcome and/or reduced (or to which measures and/or actions are to be implemented), is not an adequate response to the problem. Once again, this thesis' fundamental aim was to explore how strategic litigation works for a particular group in very specific circumstances. In so doing, the research for this thesis drew heavily on qualitative interviews, a method that made it possible to examine the experiences of key stakeholders working at the national and supranational levels in the area of relevant strategic litigation. In particular, through including the voices of key stakeholders working for some leading disability and human rights organisations, the thesis has aimed to contribute to an emancipatory aim.

As the previous chapters in this thesis demonstrate, particularly those which include discussion of the perspectives of interviewees (alongside the literature), there are a range of factors that shape the state of the relevant strategic litigation at the national (England, Ireland and Spain), regional (European) and global levels. Consequently, the point of departure for an analysis of the potential for increased or more effective use of the relevant strategic litigation in the future, as well as the various ways of realising this potential, is to understand the delicate balance between the various factors that play a role at the national as well as the supranational level.

This chapter will attempt to explore this balance. It will be divided into two main sections: Section 8.2 will draw conclusions about the potential of national and supranational strategic litigation, and Section 8.3 will suggest various recommendations that could contribute to realising the potential of national and supranational strategic litigation.

8.2 Assessing the potential of national and supranational strategic litigation

This section will analyse the potential of national strategic litigation, with a focus on the three selected national jurisdictions for this thesis: England, Ireland and Spain. In addition, the section will assess the potential of strategic litigation in the context of supranational instances where strategic litigation can be taken forward. To this end, the section will include various instances at the level of the Council of Europe (CoE), the European Union (EU) and the United Nations (UN), which have been selected for analysis in this thesis.

8.2.1 National strategic litigation

a) England

According to the literature, the number of relevant strategic cases regarding the group under consideration is very small.⁴⁷⁸ Participants reported various barriers to access to justice (and strategic litigation) faced by people with intellectual impairments in institutional residential settings in England. In the first place, many people with intellectual impairments have a fear of reporting human rights violations. Secondly, lawyers' low or zero remuneration for working in the area of intellectual impairments was reported. Thirdly, there is the inadequacy of the judicial system for offering evidence. Fourthly, lengthy legal proceedings, such as those decided by the English Court of Protection, for instance, have a negative impact on litigants with intellectual impairments involved in strategic litigation. The interview findings did not reveal a problem with legal capacity in comparison with the jurisdictions of Ireland and Spain –which will be explained shortly. Some examples of positive work were identified through the interviews. In particular, work has been developed around people with intellectual impairments who are victims of crime, including those residing in institutional settings. In addition, the study identified work around workshops and training, and a helpline. Furthermore, peer support work towards overcoming the gap between the institutional residential setting and the outside was found to have been developed locally by one supranational organisation. The interview findings also revealed linkages between certain English participants.

Current strategic litigators in the area of disability and human rights mentioned a number of barriers that they face that make the development of strategic litigation

⁴⁷⁸ This literature was presented in chapter 5, section 5.3.1.

difficult. Of particular significance was the problem of making contact with people with intellectual impairments in institutional residential settings. Both English national organisations working with strategic litigation interviewed for this thesis made it clear that they do not actively search for clients with intellectual impairments in institutional residential settings. The limitations imposed by the potential litigant's geographical location were reported to be a barrier by one English strategic litigator, who also explained how the volume of enquiries makes the selection of strategic cases difficult. Challenges associated with legal costs were also mentioned by the English participants. One of them mentioned that budget reductions were limiting his organisation with regard to the number of strategic cases that they can take on. Another participant explained how his organisation can only take on strategic cases involving litigants with access to legal aid. Another barrier is constituted by a lack of human resources with expertise in the area of strategic litigation. One English lawyer raised the problem of getting expert evidence, not only in terms of finding experts with the right expertise but also regarding accessing funding (particularly from the Legal Services Commission) for covering these experts' fees. Another barrier is that of employing international law when arguing strategic cases, for instance the CRPD, in terms of awareness of the English judiciary. An additional barrier for strategic litigators, in the case of strategic cases challenging institutionalisation, is the lack of European case-law to support this litigation. In terms of work being done to address these last barriers, the interview findings revealed that at least one national organisation has been linking/liasing with stakeholders such as user groups, solicitors and social workers, in order to identify possible strategic cases. Examples were also found of English organisations employing advocacy to enhance the goals of strategic litigation (through the provision of an advocate), as well as of the media supporting a court case.

With regard to potential strategic litigators, they mentioned various barriers: first, a lack of knowledge and good practice with regard to strategic litigation; second, strategic litigation being an expensive process; and third, difficulties in putting forward strategic cases to challenge institutionalisation, because of the lack of a

right to independent living in England, which (according to a participant) would facilitate putting forward strategic litigation in the area.

Overall, the barriers to accessing justice (and strategic litigation) portray a picture in which people with intellectual impairments in institutional residential settings in England have significant problems in accessing justice (and strategic litigation). As mentioned previously, some examples of positive work to address these barriers were identified. However, certain barriers (for instance, lawyers' low or zero remuneration) have still not been addressed. Also, a number of additional barriers were reported by current, recent and potential, strategic litigators in the area of disability and human rights.

b) Ireland

According to the literature, and similarly to the English case, the number of relevant strategic cases regarding the group under consideration is very small. National participants reported various barriers to access to justice (and strategic litigation) for people with intellectual impairments in institutional residential settings in Ireland. The first barrier raised by an Irish organisation was Ireland's lack of modern capacity legislation. However, after conducting the interviews for this thesis, the Assisted Decision-Making (Capacity) Bill was approved in 2013, and very recently, Ireland approved the Assisted Decision-Making (Capacity) Act 2015. The second barrier reported was the poor or lack of awareness among many people with intellectual impairments regarding their rights, as well as a lack of relevant publications on the matter in Ireland. The third barrier was constituted by inaccessible information being provided to people with intellectual impairments in court. The fourth barrier was lawyers' low or zero remuneration, when they work in legal cases concerning persons with intellectual impairments. The fifth barrier identified was the Irish judiciary's lack of awareness regarding people with intellectual impairments. The sixth barrier was the inadequacy of the judicial

systems in terms of how they accommodate the needs of litigants with intellectual impairments when giving evidence. The seventh barrier was constituted by lengthy legal proceedings. Work to improve some of these barriers was identified through the interview findings: one Irish organisation has been developing work around raising awareness about rights; and a linkage was found amongst national participants, as well as between one national participant and one participant working at the supranational level.

Current strategic litigators mentioned the following barriers. The first was the barrier of making contact with people with intellectual impairments. Both Irish organisations with experience in strategic litigation that gave interviews for this study mentioned that they depend on people (including those with intellectual impairments in institutional residential settings) approaching them. Another barrier mentioned was the refusal of a litigation approach by potential litigants. Challenges associated with legal costs were reported in the form of prospective cost orders being made against litigants (including those with intellectual impairments). Problems in getting expert evidence were also identified. An additional barrier is the separation of powers as argued by the State, if it is the case that a court accepts that it is not a matter for the court to decide on certain issues being strategically litigated. The interview findings also revealed that some national strategic litigators employ other strategies to support the goals of strategic litigation. Two of those identified were: a positive connection between monitoring and human rights reporting, with regard to the selection of issues for strategic litigation; and the use of the media alongside strategic litigation.

In terms of the barriers faced by potential strategic litigators, one Irish advocacy organisation that is not involved with strategic litigation mentioned the barrier of a lack of knowledge and good practice with regard to strategic litigation. This same organisation raised the issue of the problem of a lack of statutory rights and class actions, as well as highlighting that strategic litigation constitutes an expensive process.

In summary, in Ireland there are a few relevant strategic cases that clearly show the interesting potential of strategic litigation for tackling the human rights violations experienced by people with intellectual impairments in institutional residential settings. This is to be appreciated in the context of a number of barriers that this group faces in accessing justice (and strategic litigation); most of these remained unaddressed at the time of the interviews. Litigators (either strategic litigators already involved with strategic litigation, or potential litigators in the area) mentioned various additional barriers to strategic litigation in Ireland. For instance, interviewees who were pursuing strategic litigation stated that there is no barrier in terms of a lack of human resources for strategic litigation in comparison to the jurisdictions of England and Spain (which will be exposed shortly).

c) Spain

The interview findings revealed that at least one national organisation has been involved in a relevant strategic case. There is practically no Spanish literature about strategic litigation, not only regarding strategic litigation for tackling human rights violations in institutional residential settings for people with intellectual impairments, but regarding strategic litigation in general. Also, through the literature it was possible to confirm that Spain lacks policies with regard to strategic litigation.

The interview findings revealed that the following barriers to accessing justice are experienced by people with intellectual impairments in institutional residential settings in Spain. This country lacks modern capacity legislation; therefore, the problem of guardianship represents the first barrier to access to justice (and strategic litigation). In particular, in this country there is a “tutelage system”, which replaces a person’s will. Within this context, the thesis identified problems in terms of how the Spanish judicial proceedings assess a person’s capacity, as the intervention of a lawyer is not required. According to one Spanish lawyer, the

second barrier is inaccessible information and inaction by the Spanish judiciary in complying with the CRPD. An additional barrier is lawyers' low or zero remuneration when working in the area of intellectual impairments. The inadequacy of the judicial systems in offering evidence was also reported with regard to Spain. A lack of expert prosecutors and specialist courts is another barrier that came across in the interviews. For instance, a lack of specialist courts in the Basque Country (North of Spain) was mentioned by a Spanish lawyer. Additional difficulties associated with the mobility of judges, particularly in the Basque Country, was reported by a Spanish lawyer as a barrier to litigation (including strategic litigation). Some examples of positive work that is being done to address some of these barriers were identified. First, one Spanish organisation was developing training focused on the "development of abilities" of people with Down syndrome. Second, the same organisation was working with regard to the CRPD, and with key professionals such as prosecutors or notaries. Third, another Spanish organisation was establishing a legal network and developing research about the impact of intellectual impairments on criminal proceedings. Fourth, examples of work in partnership were identified, not only between two national organisations [one being the leading Spanish foundation for notaries], but also between one national organisation and supranational organisations.

Current/recent strategic litigators working in the Spanish jurisdiction in the field of disability and human rights mentioned the following barriers. The barrier of a lack of human resources was raised by a Spanish litigator, who acknowledged that her organisation is not doing more work in the area because of this barrier. The barrier of employing the CRPD when arguing strategic cases, particularly in courts situated in bordering territories, came across in an interview with a Spanish lawyer.

Potential strategic litigators, in turn, mentioned the following barriers. The lack of knowledge and good practice with regard to strategic litigation. Strategic litigation constituting a long process. The fact that in Spain, a certain number of sentences are required to amount to a significant jurisprudence that afterwards could impact

on a group and be considered as strategic. And that the Spanish State of Autonomies is an obstacle to strategic litigation.

Together these findings reveal that strategic litigation (overall) in Spain is much less formally developed in comparison with the jurisdictions of England and Ireland. Departing from this basis, the interview findings show various barriers to access to justice (and strategic litigation) experienced by people with intellectual impairments in institutional residential settings. As in the case of the other jurisdictions, many of these barriers remain unaddressed despite the various examples of positive work that were identified in the area. In terms of barriers experienced by strategic litigators in this jurisdiction, for example the barrier of a lack of human resources, this is in line with the overall situation identified in this jurisdiction, in terms of strategic litigation and its development in the literature.

8.2.2 Supranational strategic litigation

At the level of the Council of Europe (CoE) and the European Union (EU), the number of strategic cases pursued on behalf of the group under consideration, identified through the literature, is very small. The interview findings confirmed this. No case was identified on behalf of people with intellectual impairments in institutional residential settings, in the context of the United Nations (UN) CRPD Committee on the Rights of Persons with Disabilities.

a) European Court of Human Rights

In the context of the CoE, the literature reveals particular procedural barriers to accessing the European Court of Human Rights (ECtHR). The literature also shows how this situation with regard to procedural barriers has improved since

the landmark strategic case *Câmpeanu v Romania*. The literature additionally evidences how strategic litigation conducted in this instance, and particularly through third party interventions, has been increasing. Finally, the literature enables an understanding of the range of diverse factors (such as the length of proceedings) that strategic litigators must consider when evaluating strategic litigation under the ECtHR. The interview findings reveal that at least one supranational organisation stressed the importance of monitoring (and presenting) the cases communicated to the ECtHR. Indeed presenting cases under this instance can be particularly important in terms of the impact of a case, as a judgment issued by the ECtHR could have an additional impact on European countries in general, as opposed to only having an impact in the given national jurisdiction.

b) European Committee of Social Rights

According to the literature, a crucial element when thinking about strategic litigation under the European Committee of Social Rights is that there are many member States that have not accepted this mechanism. At the same time, the literature findings reveal how the European Committee of Social Rights can be particularly important for litigation tackling human rights violations in institutional settings, as the strategic litigation under this Committee does not presuppose a need for a particular victim of human rights violations. This literature finding was confirmed through the interviews: one supranational organisation indeed stressed the importance of conducting litigation under mechanisms that do not require a particular victim, as is the case for the CoE's European Committee of Social Rights. Moreover, the literature findings demonstrated other factors that must be taken into consideration, for example that the present mechanism only allows strategic litigation with a focus on economic, social and cultural rights.

c) European Union Ombudsman

The evidence in this thesis proves that there is a need for research on the potential of certain instances for strategic litigation. The case of the European Union Ombudsman falls into this category. In fact, this possible instance for strategic litigation did not emerge in the interview findings. This thesis can be considered as a first step in this direction, and amongst its literature findings, it reveals that complaints have been brought to this mechanism, in terms of the employment of structural funds in certain European countries.

d) European Parliament Committee on Petitions

The case of the European Parliament Committee on Petitions has similarities with the case of the European Union Ombudsman, in terms of the particular need for research on its actual potential for relevant strategic litigation. Also, as with the previous instance (European Union Ombudsman), the interview participants for this thesis did not mention the possibility of the European Parliament Committee on Petitions in their accounts. However, the literature findings from this thesis document that this mechanism has been employed for tackling the issue of the misuse of structural funds on at least one occasion.

e) Committee on the Rights of Persons with Disabilities

With regard to the CRPD Committee on the Right of Persons with Disabilities, the literature presented in Chapter 2 shows an important supranational enabler for relevant strategic litigation, which is the need for strategic litigation clarifying the CRPD. In line with the previous literature finding, the interview findings reveal that

one supranational organisation has a project on litigation in the context of the CRPD's Optional Protocol/Committee on the Rights of Persons with Disabilities. The literature findings presented in Chapter 5 evidence that an important factor to take into account is the need to exhaust all of the available domestic remedies. With regard to this last factor, at least one participant working at the supranational level highlighted that this makes strategic litigation under the CRPD Committee on the Rights of Persons with Disabilities particularly difficult, in terms of financial matters. Another interesting factor that the literature reveals is constituted by the promising procedural rules for accessing this Committee, when this is looked at from the perspective of people with intellectual impairments in institutional residential settings. These factors are just examples, and, as in the case of the previous mechanisms or instances for strategic litigation, these have to be balanced under the particular circumstances of each potential strategic case.

8.3 Recommendations for realising the potential of national and supranational strategic litigation

The purpose of this section is to offer recommendations for realising the potential of national and supranational strategic litigation. The recommendations take the form of training, law and/or policy reform, further research in the area, as well as additional suggestions for improving the potential of strategic litigation for people with intellectual impairments in institutional residential settings.

8.3.1 Common recommendations for both national and supranational strategic litigation

The first recommendation for strategic litigators is to approach national and supranational strategic litigation with flexibility and creativity. Through being flexible with the criteria set up for selecting strategic cases, as well as thinking

creatively about legal arguments and intervention in terms of strategic cases, litigators will improve their chances of finding and pursuing a good strategic case.

Linkages between national and supranational organisations that are involved with strategic litigation and/or with intellectual impairments can improve the chances of stakeholders finding and pursuing strategic national and supranational cases. National organisations can benefit from supranational organisations' knowledge and expertise regarding how to pursue strategic litigation, whilst supranational organisations can benefit from the contacts in the field and domestic experience of national organisations. Moreover, it is possible to think about linkages between supranational and national organisations, and lawyers working in the three national legal systems: in such a way, organisations without expert legal knowledge may not be aware that they can bring cases (or of how to bring them), and can benefit from lawyers' knowledge and expertise; in turn, lawyers can benefit from organisations' contacts and experience in the area, and therefore be in a better position to make contact with potential litigants with intellectual impairments.

The third recommendation is to employ additional strategies to support the goals of national and supranational strategic litigation. In such a way, strategic litigators can, firstly, employ monitoring and human rights to improve their chances of selecting sound issues, which afterwards can guide the search for good strategic cases. Second, for instance, they can employ advocacy as an integral part of an overall strategy, designed towards working with a strategic judgment, with the goal of maximising its impact. Finally, they can use the media to support the goals of strategic litigation, for example by raising awareness of strategic cases amongst the public.

Finally, stakeholders can use "external" national and supranational strategic litigation as a tool for their own work. Put differently, this means employing strategic judgments that have already been litigated in the context of the

stakeholder's own work. Undoubtedly, this will contribute to maximising the impact of national and supranational strategic litigation.

8.3.2 Particular recommendations for national strategic litigation

a) England

Additional training of people with intellectual impairments who have been/are potential victims of human rights violations in institutional residential settings, in terms of their human rights awareness as well as with regard to the matter of making complaints, will empower this group to report human rights violations. Ideally, this training should be offered by peer support workers. Another recommendation is to train people with intellectual impairments who have been/are potential victims of human rights violations in institutional residential settings, in terms of the possibilities offered by strategic litigation, as an option for seeking justice and redress. Ideally, this training should be offered by peer support workers. In addition, it is advisable to set up training directed at key professionals working in the area of access to justice. With regard to law reform, this is necessary in terms of the inadequacy of judicial systems in offering evidence. An interesting possibility would be the English Equality and Human Rights Commission (EHRC) bringing cases on behalf of a group of people. Finally, there is a need for litigators to pursue strategic litigation in the area of independent living.

b) Ireland

There is a need for additional training for people with intellectual impairments who have been/are potential victims of human rights violations in institutional

residential settings, in terms of their human rights awareness as well as with regard to the matter of making complaints. Ideally, this training should be offered by peer support workers. Also litigators can train people with intellectual impairments who have been/are potential victims of human rights violations in institutional residential settings, in terms of the possibilities offered by strategic litigation, as an option for seeking justice and redress. Ideally, this training should be offered by peer support workers. In addition to people with intellectual impairments, training should be directed at key professionals working in the area of access to justice. Law reform is needed in terms of the inadequacy of judicial systems in offering evidence, statutory rights and class actions, and with regard to the matter of cost orders. Further research on the human rights of people with intellectual impairments in institutional residential settings is necessary.

c) Spain

Training of people with intellectual impairments who have been/are potential victims of human rights violations in institutional residential settings, in terms of their human rights awareness as well as with regard to the matter of making complaints, is required. Ideally, this training should be offered by peer support workers. Additionally, it is advisable to offer training to people with intellectual impairments who have been/are potential victims of human rights violations in institutional residential settings, in terms of the possibilities offered by strategic litigation, as an option for seeking justice and redress. Ideally, this training should be offered by peer support workers. With regard to training, additional training directed at key professionals working in the area of access to justice would improve the overall situation in terms of access to justice (and strategic litigation) for people with intellectual impairments in institutional residential settings. The thesis has identified a need for law reform in terms of the inadequacy of judicial systems in offering evidence, as well as in terms of the matter of legal capacity. Policy reform, in terms of including strategic litigation, is also necessary. Further research on strategic litigation in Spain, not only with regard to people with intellectual impairments in institutional residential settings, but also regarding

strategic litigation overall, is desirable. Lastly, litigators may pursue strategic litigation in the area of inclusive education.

8.3.3 Particular recommendations for supranational strategic litigation

a) European Court of Human Rights

To monitor the cases communicated to the ECtHR is an interesting strategy in terms of litigators becoming aware of possible strategic cases. Strategic litigators may consider presenting cases under this instance, particularly when civil and political rights are at stake. Presenting cases under this instance can be particularly important in terms of the impact of a case, as the judgment can have an impact on European countries in general, as opposed to just having an impact on the national jurisdiction.

b) European Committee of Social Rights

Conducting strategic litigation under mechanisms that do not require a particular victim, such as the European Committee of Social Rights, can be a powerful way of avoiding issues associated with the problem of making contact with people with intellectual impairments in institutional residential settings. Strategic litigators may consider undertaking lobbying, so that countries who have not accepted this mechanism consider doing so. To monitor the cases communicated to the European Committee of Social Rights is an interesting way of becoming aware

of potential strategic cases. Strategic litigators may consider presenting cases under this instance, particularly when economic, social and cultural rights are at stake. Presenting cases under this instance can be particularly important in terms of the impact of a case, as the judgment can have an impact on European countries in general, as opposed to only having an impact on the national jurisdiction.

c) European Union Ombudsman

Conducting strategic litigation under mechanisms that do not necessarily require a particular victim, such as the European Union Ombudsman, can be a powerful way of avoiding issues associated with the problem of making contact with people with intellectual impairments in institutional residential settings. To monitor the cases communicated to the European Union Ombudsman is an interesting way of litigators becoming aware of potential strategic cases. Strategic litigators may consider presenting cases under this instance, particularly in terms of the misuse of structural funds with regard to European countries. Presenting cases under this instance can be particularly important in terms of the impact of a case, as the judgment can have an impact on European countries in general, as opposed to only having an impact on the national jurisdiction.

d) European Parliament Committee on Petitions

Conducting strategic litigation under mechanisms that do not necessarily require a particular victim, such as the European Parliament Committee on Petitions, can be a powerful way of avoiding issues associated with the problem of making contact with people with intellectual impairments in institutional residential settings. To monitor the cases communicated to the European Parliament

Committee on Petitions is an interesting way of litigators becoming aware of potential strategic cases. Strategic litigators may consider presenting cases under this instance, particularly in terms of the misuse of structural funds with regard to European countries. To present cases under this instance can be particularly important in terms of the impact of a case, as the judgment can have an impact on European countries in general, as opposed to only having an impact on the national jurisdiction.

e) Committee on the Rights of Persons with Disabilities

To monitor the cases communicated to the CRPD Committee on the Rights of Persons with Disabilities is an interesting way of becoming aware of potential strategic cases. Strategic litigators can pursue strategic litigation under this instance, with the aim of clarifying the CRPD; to this end, areas such as the treatment of persons with intellectual impairments in institutional residential settings are particularly necessary and relevant. Strategic litigators may consider this Committee's promising procedural rules as a factor in favour of litigating under this Committee. Presenting cases under this instance can be particularly important in terms of the impact of a case, as the judgment can have an impact on European countries in general, as opposed to only having an impact on the national jurisdiction.

8.4 Conclusion

This thesis does not intend to defend the notion that strategic litigation is the answer to everything, nor does it aim to provide a universal model or suggestion around strategic litigation. Rather, the thesis aimed to expose some of the difficulties in making strategic litigation work, as well as the potential of this strategy when it does work. This has been achieved by always looking at the

problem from the perspective of various national and supranational instances for strategic litigation. A fundamental conclusion is that to assess the potential of strategic litigation, as well as its realisation, depends on a balance of various factors as well as consideration of various national and supranational instances for strategic litigation.

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List of Abbreviations

AAIDD	American Association on Intellectual and Developmental Disabilities
AEH	Action Europeenne de Handicapés
CAT	UN Committee against Torture
CERMI	Spanish Committee of Representatives of Persons with Disabilities
CLR	Centre for Legal Resources
CoE	Council of Europe
CPT	The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRPD	United Nations Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
DLS	Disability Law Service
DRI	Disability Rights International
ECCL	European Coalition for Community Living
ECHR	European Convention on Human Rights

ECtHR	European Court of Human Rights
EDF	European Disability Forum
EHRC	Equality and Human Rights Commission
EPSA	European Platform of Self-Advocates
ERRC	The European Roma Rights Center
EU	European Union
EU CFR	EU Charter of Fundamental Rights
FLAC	Free Legal Advice Centres
FRA	European Union Agency for Fundamental Rights
HRA 1998	Human Rights Act 1998
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDA	International Disability Alliance
IFHR	International Federation of Human Rights
IHR&EC	Irish Human Rights and Equality Commission
IHRFG	International Human Rights Funders Group

LSC	Legal Services Commission
MDAC	Mental Disability Advocacy Centre
MPG	Migration Policy Group
NCL	National Consumers' League
NGO	Non-governmental organisation
NI	Law Centre
OPCAT	Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)
PMH	Poiana Mare Neuropsychiatric Hospital
SHINE	Association for Social Affirmation of People with Mental Disabilities
SPT	Subcommittee on Prevention of Torture
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UPIAS	Union of the Physically Impaired Against Segregation
US	United States of America

Appendix A

English socio-legal context

A.1 People with intellectual impairments in institutional residential settings

In the United Kingdom (which includes England) there are currently only a few large-scale institutional residential settings that are segregated from the rest of the society.⁴⁷⁹ However, according to findings reported in a report elaborated by the European Union Agency for Fundamental Rights (FRA), “smaller residential homes that retain institutional features remain”.⁴⁸⁰ There is a general lack of statistics in the United Kingdom with regard to people with intellectual impairments in institutional residential settings. According to the Academic Network of European Disability experts (ANED),

It is not easy to compile reliable data on the number of disabled people living in institutions (partly because the definition of ‘institution’ is open to wide interpretation and partly because it is not easy to disaggregate disabled people, especially in the institutional placement of children and older people). Within the UK there are additional difficulties in obtaining comparable data for England, Scotland, Wales and Northern Ireland.⁴⁸¹

⁴⁷⁹ S. Woodin, M. Priestley and S. Prideaux, “ANED country report on the implementation of policies supporting independent living for disabled people, Country: United Kingdom”, report for the Academic Network of European Disability experts (ANED), VT/2007/005, 2009, p. 6 and House of Lords - House of Commons - Joint Committee on Human Rights, “A Life Like Any Other? Human Rights of Adults with Learning Disabilities, Seventh Report of Session 2007-08”, HL Paper 40-I, HC 73-I, p. 11.

⁴⁸⁰ S. Woodin, “Research Project on the Rights of People with Intellectual Disabilities And People with Mental Health Problems, Desk Report, Country: United Kingdom”, report for the European Union Agency for Fundamental Rights (FRA), p. 2.

⁴⁸¹ S. Woodin, M. Priestley and S. Prideaux (2009), *op. cit.*, p. 6.

Amongst the few examples of numbers that can be found, a report published in 2004 stated that there were 20,654 residents in institutional residential settings in the United Kingdom.⁴⁸² A different report stated that there were 129,548 disabled people living in residential establishments in the United Kingdom, and that out of this last number, 48,781 individuals were living in institutional residential settings that have more than thirty places.⁴⁸³ Specifically with regard to people with intellectual impairments, the same study found that 46,877 individuals were living in institutional residential settings, and that this was the largest number of people in comparison to other groups of disabled people.⁴⁸⁴ Finally, and comparing the case of the United Kingdom with the cases of other jurisdictions, this study reported that 215 people were in residential care per 100,000 of the population.⁴⁸⁵ According to ANED “[t]hese estimates present a relatively positive picture of institutionalisation in the UK compared to other European countries (with 12 countries having a large institution placement rate of more than double that of the UK)”.⁴⁸⁶ More recently, the England Commissioner Census presents data about “patients with learning disabilities receiving inpatient care commissioned by the NHS in England”; within this context. This Census reveals that, “2,565 patients were in hospital at the end of

⁴⁸² G. Freyhoff, C. Parker, M. Coué and N. Greig (eds), “Included in Society. Results and Recommendations of the European Research Initiative on Community-Based Residential Alternatives for Disabled People”, 2004 <<http://publicpolicy.ceu.edu/sites/default/files/publications/included-in-society-results-and-recommendations-2004.pdf>> last accessed 22 February 2016, p. 31.

⁴⁸³ J. Mansell, M. Knapp, J. Beadle-Brown and J. Beecham, “Deinstitutionalisation and community living. Outcomes and costs: report of a European study”, 2007 <http://www.kent.ac.uk/tizard/research/DECL_network/Project_reports.html> last accessed 21 February 2016, p. 26.

⁴⁸⁴ *Ibid.*, p. 29.

⁴⁸⁵ *Ibid.*, p. 32.

⁴⁸⁶ S. Woodin, M. Priestley and S. Prideaux (2009), *op. cit.*, p. 7.

the reporting period”.⁴⁸⁷ The regulatory body in England for residential care is the Care Quality Commission.⁴⁸⁸

A.2 Legal context

England (one of the jurisdictions constituting the United Kingdom) has adopted a common law system, and therefore, legal rights are found within a complex legal structure, which includes the Parliament’s legislation (primary and secondary) as well as the legal cases or judicial statements that actually shape the common law.⁴⁸⁹ The incorporation of the rights recognised by the European Convention on Human Rights (ECHR) at national level constitutes an exception, as the United Kingdom “has declined to provide for rights of individual application to international human rights or direct application in domestic courts”.⁴⁹⁰ Therefore, although the United Kingdom has ratified other major international human rights instruments, this does not mean that the rights recognised by these instruments are a part of this jurisdiction’s domestic law. In this context, and at a United Nations (UN) level, for example, the United Kingdom has ratified the Convention on the Rights of Persons with Disabilities (CRPD),⁴⁹¹ the International Convention on Civil and Political Rights (ICCPR),⁴⁹² and the Convention against

⁴⁸⁷ Health & Social Care Information Centre, Learning Disability Services Monthly Statistics. England Commissioner Census (Assuring Transformation) – November 2015. Experimental Statistics, 23 December 2015 < <http://www.hscic.gov.uk/catalogue/PUB19637/ldsm-nov-15-exec.pdf>> accessed 25 February 2016.

⁴⁸⁸ <<http://www.cqc.org.uk/>> accessed 28 May 2016.

⁴⁸⁹ G. Slapper and D. Kelly, *The English Legal System 2010-11* (London: Routledge, 2010), p. 77.

⁴⁹⁰ European network of legal experts in the non-discrimination field, “Report on Measures to Combat Discrimination – Directives 2000/43/EC and 2000/78/EC, Country Report 2009 – United Kingdom, Aileen McColgan, State of affairs up to 08 April 2010”, p. 44.

⁴⁹¹ <<http://www.un.org/disabilities/countries.asp?navid=17&pid=166>> last accessed 25 February 2016.

⁴⁹² <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> last accessed 25 February 2016.

Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁴⁹³. At a European level, the United Kingdom has ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European convention against torture),⁴⁹⁴ but has not signed the European Social Charter's Additional Protocol Providing for a System of Collective Complaints.⁴⁹⁵ England (as part of the United Kingdom) is a founder State of the Council of Europe (Coe). It became a member on 5 May 1949.⁴⁹⁶ With regard to the European Union (EU), England (as part of the United Kingdom) has been a member since 1973.⁴⁹⁷ Following Slapper and Kelly, in England the courts are divided according to a fundamental distinction between criminal and civil cases.⁴⁹⁸ Slapper and Kelly illustrate that there are several differences between criminal and civil cases. For instance, “[c]riminal cases are brought by the State against individual or corporate defendants, whereas civil cases are brought by one citizen or body against another such party”. Slapper and Kelly also clarify that a criminal case will follow a different process than a civil one. Therefore, in England, there are criminal courts as well as civil courts. The criminal courts have a structure that begins with the trial courts (which are the magistrate’s courts and crown courts), continues with courts dealing with criminal appeals (such as The Court of Appeal -Criminal Division), and finishes with The Supreme Court of the United Kingdom. The civil courts also have a structure based on the magistrates’ courts and county courts; with regard to appeals, for

493 https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en last accessed 25 February 2016.

494 <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=&DF=&CL=ENG> last accessed 25 February 2016.

495 http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/UK_en.pdf last accessed 25 February 2016.

496 <http://www.coe.int/en/web/portal/united-kingdom-member-state> last accessed 25 February 2016.

497 http://europa.eu/about-eu/countries/member-countries/unitedkingdom/index_en.htm last accessed 25 February 2016.

498 G. Slapper and D. Kelly (2010), op. cit., p. 157.

instance, these will be resolved by [t]he High Court, by [t]he Court of Appeal (Civil Division), and ultimately by [t]he Supreme Court of the United Kingdom.

Appendix B

Irish socio-legal context

B.1 People with intellectual impairments in institutional residential settings

With regard to people with intellectual impairments in institutional residential settings, various reports stress that this group of people is “largely institutionalised”⁴⁹⁹ in Ireland, and that their move to the community “remains a policy challenge”.⁵⁰⁰ A report by the Health Service Executive states that 4,000 disabled people live in congregated settings (defined as “living arrangements where ten or more people share a single living unit or where the living arrangements are campus-based”).⁵⁰¹ From this last number, the report clarifies that 3,802 have an “intellectual disability”.⁵⁰² This last report compares its data with the National Intellectual Disability Database, showing that people with intellectual impairments who are living in congregated settings “are typically older and have higher levels of impairments than people with intellectual disabilities generally”.⁵⁰³ In addition, this last report provides data regarding the length of permanence in settings, ranging from less than one year for 1% of the people in

⁴⁹⁹ E. Flynn and A. Power, “Fundamental Rights Agency (FRA) Research Project on the Rights of People with Intellectual Disabilities And People with Mental Health Problems”, Centre for Disability Law and Policy, National University of Ireland, Galway, 2010, p. 3.

⁵⁰⁰ Centre for Disability Law & Policy, National University of Ireland (Galway), “ANED country report on the implementation of policies supporting independent living for disabled people, Country: Ireland, report for the Academic Network of European Disability experts (ANED)”, VT/2007/005, 2009, p. 13.

⁵⁰¹ Health Service Executive (2011), “Time to Move on From Congregated Settings A Strategy for Community Inclusion. Report of the Working Group on Congregated Settings”, pp. 9 and 38.

⁵⁰² *Ibid.* p. 49.

⁵⁰³ *Ibid.* p. 49.

these settings, to over fifteen years for 73% of residents.⁵⁰⁴ The last Annual Report of the National Intellectual Disability Database Committee states:

7,886 (28.7%) were in receipt of full-time residential services, a decrease of 1.1% on the 2013 figure. This is the eleventh consecutive year in which the data indicate that more people live in community group homes than in residential centres (Figure 5). The majority (82%) of full-time residents had a moderate, severe or profound level of intellectual disability, were aged 35 years or over (84%), and lived in a community group home (54%) or residential centre (30%). It is recognised that this group may require greater residential supports and have increased medical needs as they age.⁵⁰⁵

There is no data regarding how many complaints have been presented by people with intellectual impairments in psychiatric/social care/congregated settings when it is the case that institutions deal internally with these complaints.⁵⁰⁶ As Flynn and Power explain, although individual authorities such as the Health Information and Quality Authority⁵⁰⁷ or the Ombudsman⁵⁰⁸ release annual reports with numbers of complaints, these numbers do not reflect how many complaints were received from people with intellectual impairments.⁵⁰⁹ It is important to stress that this lack of statistical information goes against the requirements of Article 31

⁵⁰⁴ Ibid. p. 51.

⁵⁰⁵ C. Kelly, "HRB Statistics Series 28 Annual Report of the National Intellectual Disability Database Committee 2014", 2015, p. 19.

⁵⁰⁶ E. Flynn and A. Power (2010) op. cit., p. 43.

⁵⁰⁷ <<http://www.hiqa.ie/>> last accessed 25 February 2016.

⁵⁰⁸ <<http://www.ombudsman.gov.ie/en/>> last accessed 25 February 2016.

⁵⁰⁹ E. Flynn and A. Power (2010), op. cit., p. 43.

of the Convention on the Rights of Persons with Disabilities (CRPD).⁵¹⁰ In Ireland, the Health Information and Quality Authority regulates residential care.⁵¹¹

B.2 Legal context

Ireland was ruled by the United Kingdom for much of its existence,⁵¹² and currently, Ireland's legal system is governed by the common law system.⁵¹³ Ireland's first Constitution was enacted in 1922 (the 1922 Constitution). In 1937, a new Constitution was enacted (the 1937 Constitution); this Constitution has been amended numerous times and is currently under review.⁵¹⁴ Irish legislation can be divided into primary and secondary. The Acts of the Oireachtas (Parliament) shape the primary legislation, and the statutory instruments form the secondary legislation. According to Article 29.6 of the 1937 Constitution "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas". Therefore, Ireland can be considered a "dualist" State, as an international agreement will be part of Irish domestic law if the Oireachtas enacts an Act. The only example of an international instrument that is part of Irish domestic law is the European Convention on Human Rights (ECHR).⁵¹⁵ This Convention was incorporated into domestic law through the

⁵¹⁰ This mention to the CRPD must be read in the context that Ireland still did not ratify this instrument, as has been explained. Nevertheless, as clarified by Flynn and Power, Ireland is in the process of reforming relevant legislation before ratification (E. Flynn and A. Power -2010- op. cit., p. 2).

⁵¹¹ <<https://www.hiqa.ie/>> accessed 28 May 2016.

⁵¹² A. Osborne, "Ireland Selected Legal Research Sources", Alvin E Evans Law Library, University of Kentucky College of Law, 2009.

⁵¹³ For an introduction to Ireland's legal system, see R. Byrne and P. McCutcheon, *The Irish Legal System*, 5th ed. (Bloomsbury Professional: Haywards Heath, 2009).

⁵¹⁴ A useful reference work for the Irish Constitution is G. Hogan, G. Whyte & J. M. Kelly, *The Irish Constitution* (Butterworth: Dublin, 2002). Also see: <<https://www.constitution.ie/Constitution.aspx>> last accessed 25 February 2016.

⁵¹⁵ Ireland ratified this Convention on 25 February 1953 <<http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>>

European Convention on Human Rights Act 2003, an instrument that “brought about a form of incorporation of the European human rights convention using the interpretative model of incorporation at a sub-constitutional level”.⁵¹⁶ However, although Ireland is part of other major international human rights instruments, these are not regarded as part of Irish Law. This is what happened with, for instance, the International Convention on Civil and Political Rights (ICCPR);⁵¹⁷ the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);⁵¹⁸ the CRPD (an instrument that has been signed, but not ratified, by Ireland,⁵¹⁹ who in addition, did not sign the CRPD Optional Protocol⁵²⁰); the European convention against torture;⁵²¹ and the European Social Charter’s Additional Protocol Providing for a System of

last accessed 25 February 2016. On the European human rights convention and the Irish case, as for example see: U. Kilkelly (2009) (ed), *The ECHR and Irish Law*, 2nd ed. (Jordan: Bristol).

⁵¹⁶ D. O’Connell, D. Griffin and P. Kenna, “Thematic Legal Study on National Human Rights Institutions and Human Rights Organisations Ireland”, European Union Agency for Fundamental Rights (FRA), Galway, 2008, p. 12. In addition, the following book can be consulted on the European Convention on Human Rights Act 2003: F. de Londras and C. Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Round Hall: Dublin, 2010).

⁵¹⁷ Ireland ratified this Convention on 8 Dec 1989 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> last accessed 25 February 2016.

⁵¹⁸ Ireland ratified this Convention on 11 April 2002 <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> last accessed 25 February 2016.

⁵¹⁹ Ireland did not ratify either the UN disability convention or its Optional Protocol <<http://www.un.org/disabilities/countries.asp?navid=12&pid=166> last accessed 25 February 2016>. With regard to this Convention, it is interesting to see the following document (issued in September 2008) by the Irish Human Rights Commission: Response of the Irish Human Rights Commission to the Request of the Office of the High Commissioner for Human Rights for Information on: a) Legal Measures for Ratification of the Convention on the Rights of Persons with Disabilities and Optional Protocol; b) Legal Measures for Implementation of the Convention and Optional Protocol; c) Legal Measures on National Monitoring, Particularly in Relation to Article 33 of the Convention; d) Any Other Information Relating to Paragraph 16 of Human Rights Council Resolution 7/9 Entitled “Human rights of persons with disabilities”.

⁵²⁰ <<http://www.un.org/disabilities/countries.asp?navid=12&pid=166>> last accessed 25 February 2016.

⁵²¹ Ireland ratified this Convention on 14 March 1988 <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=126&CM=8&DF=18/07/2011&CL=ENG>> last accessed 25 February 2016.

Collective Complaints.⁵²² The lack of effective incorporation of international rights into its policies and programmes by Ireland's state agencies was one of the causes of concern discussed in a report commissioned by the European Union Agency for Fundamental Rights (FRA):

The issue of the failure of state agencies to incorporate [...] international rights into policies and programmes is a continuing source of concern and reflects a general practice – grounded on a particular understanding of 'dualism' in the Irish Constitution 1937 – of not incorporating ratified international agreements into domestic law. This understanding sees international agreement [agreements -sic] remain un-ratified until national law is actually compliant with the requirements of such instruments. To try to avoid such delays the Commission [the Irish Human Rights Commission] regularly urges the government to make interim changes to national provisions in order that they may be brought closer to compliance and thereby rendering ratification more acceptable.⁵²³

Ireland is a founder State of the Council of Europe (Coe). It became a member on 5 May 1949.⁵²⁴ In terms of the European Union (EU), Ireland has been a member since 1973.⁵²⁵ In terms of the Irish national court system, the Irish Department of Justice explains that the 1922 Constitution "provided for the setting up of new courts", which were finally established in 1924.⁵²⁶ The 1937

⁵²² It has to be clarified that Ireland has not yet made a declaration enabling national NGOs to submit collective complaints: see <http://www.coe.int/t/dghl/monitoring/socialcharter/countryfactsheets/Ireland_en.pdf> last accessed 25 February 2016.

⁵²³ D. O'Connell, D. Griffin and P. Kenna (2008), op. cit., pp. 28-29.

⁵²⁴ <<http://www.coe.int/en/web/portal/ireland>> last accessed 25 February 2016.

⁵²⁵ <http://europa.eu/about-eu/countries/member-countries/ireland/index_en.htm> last accessed 25 February 2016.

⁵²⁶ Department of Justice, Equality and Law Reform, "Irish Judicial System", 1998, p. 3.

Constitution replaced the 1922 Constitution and the current courts have been set up following the dispositions of the 1937 Constitution. Nevertheless, the current courts are similar to those set up after the 1922 Constitution. On this basis, the 1937 Constitution provides that there should be Courts of First Instance and a Court of Final Appeal (to be recognised as the Supreme Court). Additionally, the 1937 Constitution establishes that “the Courts of First Instance shall include a High Court with full original jurisdiction and courts with local and limited jurisdiction (these courts are represented by the Circuit Court and the District Court)”.

Appendix C

Spanish socio-legal context

C.1 People with intellectual impairments in institutional residential settings

No data regarding people living in institutional residential settings is offered by the Database of Persons with Disability (Base de Datos Estatal de Personas con Discapacidad), updated to 31 December 2006.⁵²⁷ A more recent Spanish survey (Survey of Disability, Personal Autonomy and situations of dependence, 2008 - Encuesta de Discapacidad, Autonomía Personal y situaciones de Dependencia, 2008) provided data on the number of disabled people residing in centres, stating that there are 269,139 persons with a disability residing in centres (however, it appears that this number includes people living in the community), and that out of this total number of persons, 216,200 reside in residential centres for old people, 35,900 reside in centres for persons with a disability, and 17,100 reside in psychiatric and geriatric hospitals.⁵²⁸ The survey also clarifies that, in general, there is a larger percentage of women residing in centres and that 59.4% of all of the people have a mental deficiency.⁵²⁹ With regard to Spain, the European report “Included in Society” published data regarding 15 institutions (for whom data on the number of residents was available).⁵³⁰ Table 2 reports that 11,535

527 This is being updated (http://www.imserso.es/imserso_01/documentacion/estadisticas/bd_estatal_pcd/index.htm -last accessed 25 February 2016).

528 Boletín Informativo del Instituto Nacional de Estadística, “Panorámica de la Discapacidad en España – Encuesta de Discapacidad, Autonomía Personal y situaciones de Dependencia”, 2008 [Informative Bulletin of the National Institute of Statistics (2008), *A panorama of disability in Spain – Survey of Disability, personal autonomy and situations of dependence*].

529 Ibid.

530 G. Freyhoff, C. Parker, M. Coué and N. Greig (eds), “Included in Society. Results and Recommendations of the European Research Initiative on Community-Based Residential Alternatives for Disabled People”, 2004

persons, including people with all types of disabilities, live in institutions in Spain.⁵³¹ According to this same study, the 15 aforementioned institutions are dedicated to people with intellectual impairments ('intellectual disability').⁵³² More recently, the CERMI called for a survey of people in social institutions [institutional residential settings], which should cover not only the quantitative aspect but also these persons' human rights.⁵³³ The inspection of residential care for people with intellectual impairments in Spain differs amongst Autonomous Communities. For instance, last February, the Autonomous Government of Navarra approved an inspection plan, allowing the relevant authorities to access institutional residential settings for people with intellectual impairments without prior notice.⁵³⁴

C.2 Legal context

Gutiérrez Barrenengoa states that the Spanish legal system follows the continental model.⁵³⁵ In this system, the legal norm that is superior in the legal hierarchy is the Spanish Constitution from 1978. According to Spanish Constitution's Article 1, Spain is a social and democratic State under the rule of law (Estado social y democrático de Derecho). Article 2 of this legal norm

<<http://publicpolicy.ceu.edu/sites/default/files/publications/included-in-society-results-and-recommendations-2004.pdf>> last accessed 22 February 2016, p. 30.

⁵³¹ Ibid., p. 31.

⁵³² Ibid., p. 33.

⁵³³ CERMI, "Derechos Humanos y Discapacidad. 5th ed. Informe España 2010", Ediciones Cinca, 2011, p. 42.

⁵³⁴ <http://www.navarra.es/home_es/Actualidad/BON/Boletines/2016/27/Anuncio-1/> accessed 28 May 2016.

⁵³⁵ A. Gutiérrez Barrenengoa, "El sistema jurídico español y sus fuentes - El Poder Judicial en España y su organización - Abogados y procuradores" [The Spanish legal system and its sources. The Judiciary power in Spain and its organisation. Lawyers and 'procuradores' are the representatives in a judicial process; as a general rule, the difference is that the lawyer conducts a defence, while the 'procurador' only represents] <http://static.luiss.it/erasmuslaw/spagna/spagna_sistema.htm> last accessed 25 February 2016.

recognises and guarantees the right to autonomy of the nationalities and regions integrating the Spanish Nation. With respect to human rights violations, Article 53.2 of the Spanish Constitution establishes that every citizen will be entitled to claim the tutelage of the rights and liberties recognised in Article 14 and Section 1.º of Chapter II, before ordinary Tribunals, through a procedure based on the principles of preference and summary treatment (sumariedad), and in its case, through the action of “amparo” (an action for the protection of constitutional rights and guarantees) before the Constitutional Tribunal. In the legal hierarchy, below the Spanish Constitution there are the law and international treaties (which have priority with respect to the law). The law emanates from the organs of legislative power (poder legislativo). These organs are the General Courts (Cortes Generales) and the Legislative Assemblies of the Autonomous Communities (Asambleas Legislativas de las Comunidades Autónomas). With regard to international treaties, and according to Article 96.1 of the Spanish Constitution, once treaties are officially published [in the Spanish Official Bulletin –Boletín Oficial del Estado, BOE],⁵³⁶ these are part of the national legal system. As examples, Spain ratified the following relevant international and regional legal instruments: the International Convention on Civil and Political Rights (ICCPR);⁵³⁷ the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);⁵³⁸ the Convention on the Rights

536 <http://www.boe.es/diario_boe/preguntas_frecuentes/boe_contenido.php> last accessed 25 February 2016.

537 Spain ratified this Covenant on 27 Apr 1977 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> last accessed 25 February 2016. With regard to the Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966), Spain [signed its accession] on 25 Jan 1985 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en> last accessed 25 February 2016.

538 Spain ratified this instrument on 21 Oct 1987 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en> last accessed 25 February 2016. With regard to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 18 December 2002), Spain ratified this instrument on 4 Apr 2006 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en> last accessed 25 February 2016.

of Persons with Disabilities (CRPD);⁵³⁹ and the European Convention on Human Rights (ECHR)⁵⁴⁰. Spain did not sign or ratify the Additional Protocol of 1995 Providing for a System of Collective Complaints.⁵⁴¹ Spain was one of the first countries to ratify both the CRPD and its Optional Protocol.⁵⁴² According to Article 10.2 of the Spanish Constitution, the norms with regard to fundamental rights (*derechos fundamentales*)⁵⁴³ and liberties recognised in the Spanish Constitution will be interpreted in conformity with the Universal Declaration of Human Rights (UDHR) and the treaties and international agreements on the same matters that have been ratified by Spain. Spain became a member of the Council of Europe (CoE) on 24 November 1977,⁵⁴⁴ and it has been a member of the European Union (EU) since 1986.⁵⁴⁵ As a result of the continental model, and also following Gutiérrez Barrenengoa, the Judiciary in Spain is organised in a hierarchy.⁵⁴⁶ Title VI of the CE addresses the power of the judiciary (*poder judicial*). According to the Organic Law of the Judiciary Power of 1 July 1985 (*Ley Orgánica del Poder Judicial de 1 de Julio de 1985*), Justice is administered

539 Spain ratified this Convention on 3 Dec 2007 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en> last accessed 25 February 2016. With regard to the Optional Protocol to the CRPD, Spain ratified this Optional Protocol on 3 Dec 2007 <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15-a&chapter=4&lang=en> last accessed 25 February 2016.

540 <<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG>> last accessed 25 February 2016.

541 <http://www.coe.int/t/dghl/monitoring/socialcharter/presentation/SignaturesRatifications_en.pdf> last accessed 25 February 2016.

542 <<http://www.un.org/disabilities/countries.asp?navid=17&pid=166>> last accessed 25 February 2016.

543 Rights recognised in Title I, Chapter II, Section 1 of the CE.

544 <<http://www.coe.int/en/web/portal/spain>> last accessed 25 February 2016.

545 <http://europa.eu/about-eu/countries/member-countries/spain/index_en.htm> last accessed 25 February 2016.

546 A. Gutiérrez Barrenengoa, *op. cit.*

through Tribunals (Tribunales) or Juzgados (Courts). According to Gutiérrez Barrenengoa, the difference between Tribunals and Courts is that Courts have only one judge or magistrate.⁵⁴⁷ Diagrams illustrating the Spanish Judiciary's hierarchy (which ends at the top with the Supreme Tribunal –Tribunal Supremo) can be found in various sources.⁵⁴⁸

With regard to human rights violations, Article 53.2 of the Spanish Constitution establishes that every citizen will be entitled to claim the tutelage of the rights and liberties recognised in Article 14 and Section 1.º of Chapter II, before ordinary Tribunals, through a procedure based on the principles of preference and summary treatment (sumariedad), and in its case, through the action of “amparo” (an action for protection of constitutional rights/guarantees) before the Constitutional Tribunal (Tribunal Constitucional). In general terms, this means that depending on the nature of the human right/s violation/s, a person with intellectual impairments in an institutional residential setting could for instance, provided that the human right/s violation/s is of a criminal nature, seek justice in the context of the Criminal Justice System. This means that Articles 101, 102, 259, 260, and 270 of the Criminal Judgment Act (Ley de Enjuiciamiento Criminal) will be applicable.⁵⁴⁹ To begin with, and as pointed out by the Spanish report submitted in accordance with Article 35 of the CRPD, in the case of [criminal] complaints presented by relatives or members of the public, the inspectorate deals urgently (within 48 hours) with these complaints; in addition, this report mentions that “there are also special coordination arrangements with the public prosecutor's office concerning disability”.⁵⁵⁰

⁵⁴⁷ Ibid.

⁵⁴⁸ See, for instance, “Descripción del Sistema Judicial Español” [Description of the Spanish Judiciary System], noviembre 2003, p. 6; E. Merino-Blanco, *Spanish Law and Legal System*, 2nd ed. (London: Sweet & Maxwell, 2006) p. 145.

⁵⁴⁹ These Articles are explained in the Spanish report submitted in accordance with Article 35 of the Convention on the Rights of Persons with Disabilities (CRPD) - *Report submitted by Spain in accordance with Article 35 of the CRPD* (2010), p. 14.

⁵⁵⁰ *Report submitted by Spain in accordance with Article 35 of the CRPD* (2010), p. 16.

Appendix D

Supranational organisations of/for disabled people, concerned with intellectual impairment, but not involved directly in strategic litigation – List of topics for interviews

D.1 Work developed by the organisation of/for disabled people, with regard to access to justice for people with intellectual impairments (including those living in institutions)

D.1.1 Whether and where the organisation of/for disabled people has been involved in any work relating to access to justice for people with intellectual impairments.

a) Whether and where the organisation of/for disabled people has been involved in any work relating to access to justice for people with intellectual impairments living in institutional settings.

D.1.2 If so, what insights has this given rise to about gathering information about the extent of the barriers and/or on trying to remove them?

D.2 Thoughts on relevant case-law

D.2.1 Awareness of international, European and/or national case-law that is relevant for people with intellectual impairments placed in institutional living.

D.2.2 Explanation of the possible use of relevant case-law in the context of the work developed by the organisation of/for disabled people.

D.3 Thoughts about the importance of strategic litigation

D.3.1 Awareness of the organisation of/for disabled people regarding litigation as a possible strategy.

D.3.2 Awareness of the organisation of/for disabled people regarding relevant litigation that has been brought as part of a strategy (with which

they will probably not have been involved) for people with intellectual impairments and to promote independent/community living.

a) If so, examples of specific cases.

D.3.3 How effective they think relevant litigation (with which they will probably not have been involved) has been in improving the rights of people with intellectual impairments (what difference, if any, has it made).

D.4 Thoughts about the organisation of/for disabled people's involvement in strategic litigation

D.4.1 Why they themselves have not adopted strategic litigation as a major strategy.

D.4.2 Whether they might be considering it in the future.

a) If so, where they might be considering working with strategic litigation in the future.

Appendix E

Research project into litigation as a strategy for people with intellectual impairments who are placed in institutional living - Participant information sheet

This is a self-funded research project, being conducted by Ana Laura Aiello, as part of her PhD at the University of Leeds (School of Law and Centre for Disability Studies).

There is ample evidence that persons with intellectual impairments in Europe, who are placed in institutional living, are victims of a wide variety of human rights violations. International human rights law offers disabled persons, at least on paper, a powerful framework of protection. In national legislation, the extent to which the law purports to afford protection to persons with intellectual impairments varies. Under both international human rights law and national legislation, the gap between written human rights law and the situation in reality is enormous. There are different strategies that can be used to close this gap and achieve an effective respect for human rights in practice rather than only on paper, with strategic litigation being one of them. This project aims to explore the possibilities which litigation has to offer as a means of closing the gap. It focuses on Europe, and more specifically, on three European countries (Ireland, Spain and the United Kingdom –England and Wales).

The insights that you might be able to provide will be invaluable. In particular, your thoughts on the following types of topic are likely to be of great relevance: your communication with the client; your use of relevant international law or case-law when litigating; and the remuneration for this type of litigation. In addition to this interview, interviews will be conducted with: supranational organisations; national organisations, national human rights institutions and/or equality bodies; other national lawyers; independent experts; and people with intellectual impairments or their supporters.

If you do decide to take part in this study, you will need to sign a consent form. You will be asked to participate in a telephone interview, with a maximum duration of 1.5 hours. The questioning style will be that of an in-depth discussion and it will allow you to provide open as well as closed answers. If you have any specific requirements, or need disability-related adjustments to the manner of conducting the interview, please do let me know.

Your collaboration is entirely voluntary and you are free to withdraw from the interview or the project at any time.

The information provided by you during the interview will be used only for the purposes of the research. The results of this research project will be written up in the form of a PhD thesis. In order to ensure the confidentiality of the information, the actual names of organisations will not be included and the names of individuals and places will be changed.

The interview will be recorded and transcribed, and the transcript will be retained for analysis. Before any information based on the transcript is published, I will check whether you are happy with the information as included in the document to be published.

Many thanks for reading this information sheet. If you are willing to take part in the project, or would like to clarify any aspect of this document, please contact me using the contact details provided below.

With very best wishes,

Ana Laura Aiello.

Contact for further information: Ana Laura Aiello

Address:

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Appendix F

Research project into litigation as a strategy for people with intellectual impairments who are placed in institutional living - Consent form

Title of Research Project: 'Litigation as a strategy for people with intellectual impairments who are placed in institutional living in Ireland, Spain and the United Kingdom (England and Wales)'

Name of Researcher: Ana Laura Aiello

Initial the box if you agree with the statement to the left

1 I confirm that I have read and understand the information sheet explaining the above research project and I have had the opportunity to ask questions about the project.

2 I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason and without there being any negative consequences. In addition, should I not wish to answer any particular question or questions, I am free to decline. Contact number of the researcher: + 44 7772308744.

3 I understand that my responses will be kept strictly confidential.

I understand that the researcher will contact me to check if I am happy with the information of mine that will appear in the report or reports that result from the research.

- 4 I agree for the data collected from me to be used in future research.
- 5 I agree to take part in the above research project and will inform the researcher should my contact details change.

Name of participant Date Signature
(or legal representative)

Name of person taking consent Date Signature
(if different from researcher)

Researcher Date Signature

Copies:

Once this has been signed by all parties the participant will be sent a copy of the consent form with all the signatures.

Appendix G

Letter of ethical approval granted by the University of Leeds' AREA Faculty Research Ethics Committee

Research Support

3 Cavendish Road

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Ana Aiello

School of Law

University of Leeds

Leeds, LS2 9JT

AREA Faculty Research Ethics Committee

University of Leeds

Dear Ana

**Title of study: Persons with intellectual impairments in Europe:
 how effective is strategic litigation for addressing
 human rights violations arising from
 institutionalisation?**

Ethics reference: AREA 10-083

I am pleased to inform you that the above research application has been reviewed by the ESSL, Environment and LUBS (AREA) Faculty Research Ethics Committee and following receipt of the amendments requested, I can

confirm a favourable ethical opinion on the basis described in the application form and supporting documentation as of the date of this letter.

The following documentation was considered:

<i>Document</i>	<i>Version</i>	<i>Date</i>
AREA 10-083 ethics letter 19 APRIL.doc	1	19/04/11
AREA 10-083 modified appendix 13.docm	1	19/04/11
AREA 10-083 answer ethics committee AIELLO.docx	1	14/03/11
appendix 1.docx	2	14/03/11
appendix 2.docx	2	14/03/11
appendix 3.docx	2	14/03/11
appendix 4.docx	2	14/03/11
appendix 5.docx	1	14/03/11
appendix 6.docx	1	14/03/11
appendix 7.docx	1	14/03/11
appendix 8.docx	1	14/03/11
appendix 9.docx	1	14/03/11
appendix 10.docx	1	14/03/11
appendix 11.docx	1	14/03/11
appendix 12.docx	1	14/03/11
appendix 14.docx	1	14/03/11
AREA 10-083 Ethical_Review_Form_V31 AIELLO.doc	1	08/02/11
AREA 10-083 supporting note from MP.txt (email)	1	09/02/11

Please notify the committee if you intend to make any amendments to the original research as submitted at date of this approval. This includes

recruitment methodology and all changes must be ethically approved prior to implementation.

Please note: You are expected to keep a record of all your approved documentation, as well as documents such as sample consent forms, and other documents relating to the study. This should be kept in your study file, which should be readily available for audit purposes. You will be given a two week notice period if your project is to be audited.

Yours sincerely

Jennifer Blaikie

Research Ethics Administrator

Research Support

On behalf of Dr Anthea Hucklesby

Chair, AREA Faculty Research Ethics Committee

CC: Student's supervisor(s)

Appendix H

Table with participants' acronyms

PHASE 1	ACRONYMS
Supranational organisation 1	IO1 (two interviews/participants: IO1a and IO1b)
Supranational organisation 2	IO2
PHASE 2	ACRONYMS
English organisation 1	EO1
English organisation 2	EO2
Irish organisation 1	IrishO1
Irish organisation 2	IrishO2
Spanish organisation 1	SO1
Spanish organisation 2	SO2
PHASE 3	ACRONYMS
English lawyer 1	EL1
English lawyer 2	EL2
Irish lawyer 1	IrishL1
Irish lawyer 2	IrishL2
Spanish lawyer 1	SL1
Spanish lawyer 2	SL2
PHASE 4	ACRONYMS
Supranational organisation [of disabled people, including those with intellectual impairments] not directly involved in strategic litigation 1	SONSL1

Supranational organisation not directly involved in strategic litigation 2	SONSL2
Supranational organisation not directly involved in strategic litigation 3	SONSL3
Supranational organisation not directly involved in strategic litigation 4	SONSL4
PHASE 5	ACRONYMS
English national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 1	EONSL1
English national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 2	EONSL2
Irish national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 1	IONSL1
Irish national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 2	IONSL2
Spanish national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 1	SPNSL1

Spanish national advocacy organisation for people with learning difficulties who is not involved directly in strategic litigation 2	SPNSL2
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