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by

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“He had believed that he had drunk the cup of humiliation to the dregs. Now he was to find that powerlessness had as many grades as power; that defeat could become as vertiginous as victory, and that its depths were bottomless”.

Arthur Koestler, **Darkness at Noon**, (1940) at 204-205.

## 1. Introduction.

It's a real honour to be here today and to contribute to this important event on the future of legal capacity law and policy in Europe.

This is an inaugural seminar of the European Foundation Centre's consortium on disability and human rights. Bringing together the world of philanthropy and disability is important – not least because it offers the promise of harnessing the vast experience of philanthropies in supporting social change across a broad range of fields. It is gratifying to see this inaugural seminar focus on *the key* challenge in Europe – and indeed throughout the world.

I was asked to set up the debate, outline its contours, show where the fault lines lie and then allow others to focus on Article 12 itself and its specific requirements. So I will keep this non-technical and try and draw out why this reform debate is so important – in both practical terms and also symbolically.

There is now a wealth of legal and policy instruments in the field including the pioneering Recommendation (99)4 of the Council of Europe in 1999, the important Hague Convention on Vulnerable Adults which seeks to minimize conflicts of laws in this field but on the basis of common understandings of what legal capacity means, and of course Article 12 of the UN Convention on the Rights of Persons with Disabilities. We have had the milestone decision of the European Court of Human Rights in *Shtukaturov v Russia* in 2008 which effectively took sides in favour of a new paradigm on legal capacity by saying that “the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation”. That was followed up by an important *amicus brief* on a legal

capacity issue lodged by the European Group of National Human Rights Institutions (basically the combination of European human rights commissions and ombudsmen) which is in your materials for today [*DD v Lithuania*]. Incidentally this was the first time ever that NHRIs ever intervened as a body before the European Court. And of course there is the important International Disability Alliance Legal Opinion on Article 12.

However, this is an ideas paper and not a legal analysis. I am extremely grateful for the opportunity to stand back and try to give expression to my own evolving understating of what is at stake.

The stakes are formidably high. If you are deemed legally incapable then your legal personhood is stripped away – your destiny is placed in the hands of others. You become like the fictional character in Koestler’s famous novel about powerlessness in the face of arbitrariness in a police State – except in this instance power is ostensibly exercised ‘for your own good’. You might have thought that such incapacity laws and policies would be put on the defensive in our liberal–democracies which are characterized by a deep commitment to personhood. You would be wrong – and probably surprised at the ease with which people can be made legally incapable in the laws of most countries. I have called them the ‘legally disappeared’. This is something that seems to cross every culture, every political and economic system.

Article 12 seeks to roll all that back. It goes to what Professor Conor Gearty calls the ‘visibility’ of persons with disabilities in society – and in law. It is a ‘visibility project’ of the highest order.

## **2. Getting Beyond the traditional Non-Discrimination agenda to encompass Visions of ‘Human Personhood’.**

We have got to this point in part because Europe has come a long way since the 1990s in disability. I think it would be fair to say that Europe’s disability law reform agenda has now matured and is moving far beyond non-discrimination to

encompass profound issues of human personhood and citizenship. We are now at the point that we can talk about more than non-discrimination.

Or, to put this another way, the equality ideal that animates non-discrimination law is now crossing over into fields of law that had hitherto remained disconnected.

I cannot let the occasion go without mentioning that two of the founding fathers of that development are here today – Miguel Angel Cabra de Luna and Hywell Ceri Jones. Much of the success of the last 15 or so years at EU level is due to their often unseen work. Rest assured that much of the credit for putting in place a positive dynamic of change at European level is down to their vision and dogged persistence. And in their capacity in the world of philanthropy in the EFC they have been instrumental in arranging today's event. Thank you so much for your wonderful work and support.

We are also here because of the adoption of the UN Convention on the Rights of Persons with disabilities. I have called this a Declaration of Independence for 650 million persons with disabilities worldwide – what the UN calls the 'world's largest 'minority.' The Convention is quickly becoming a real driver of change – of hard law reform – throughout the world.

You are all no doubt aware that the EU will ratify – or affirm – the Convention – soon. The stage is therefore set not merely for reform within our Member States (where the bulk of legal competence for change still remains) but also at EU level. The legal capacity issue is an issue for our Member States. Having said that, it is obviously important to work towards unified or coherent approaches. This is fully in keeping with the commitment made by the EU Presidency in Berlin in 2007 to seek a common approach to core challenges in implementing the Convention.

And most importantly we are here because much remains to be done. The gap – maybe the inevitable gap – between the 'myth system' of law and the UN

Convention and the 'operation system' of our laws and policies need to be rationally addressed and closed. How we close these gaps – how open and responsive the process is – is as important as closing the gaps themselves.

In its own way Article 12 is the vehicle that enables us to complete the non-discrimination journey which protects people against the behaviour of third parties by **giving voice back to people to direct their own lives.**

### **3. Legal Capacity Debate taps into our Legacy Values.**

Ladies and gentlemen, the debate about legal capacity and the reforms called for by Article 12 is crucial. The revolution contained in Article 12 is emblematic of the paradigm shift that has been taking place in the disability field over the past 15 years or so at European level. And it cuts to the core of the Convention.

Allow me to make one or two preliminary points before getting to the core of today's subject. It is said that while lawyers may spend years sharpening their minds that they usually do so at the expense of narrowing them. There is something to this – but it has more to do with the inherent compartmentalization of the field rather than personal failings. Reflect on this for moment. Those who have been active in the field have been divided between

- (1) those (like me) who are American influenced and trained on the philosophy of equal opportunities,
- (2) those who focus on traditional civil liberties issues especially with respect to mental health law and the civil commitment of persons with mental disabilities, and
- (3) those who focus on intellectual disability and associated issues like legal capacity and deinstitutionalization.

Its quite remarkable to me how these three fields did not traditionally interact despite their obvious commonalities. They orbited one another but were seldom conscious of the forces that held them together.

One result of this compartmentalization was that the legal capacity was seen as a technical issue – marginalized to the fringes of disability law and calling for technical solutions. Not any more. If the Convention has done one thing it has enabled a common language to emerge across all three fields – producing a unified field theory, if you will, of disability law.

This is as it should be. For one thing, the debate about legal capacity does not just affect those with intellectual disabilities – it also affects those who, through sensory and physical impairments, are often deemed incapable because of the difficulty of expressing their own wishes. This is not the same thing as incapacity but it often conflated into it.

It is the addition of the equality of opportunities perspective that utterly transforms the field of legal capacity. It lifts it from the ghetto of technical niceties and elevates it to centre stage within an integrated disability reform agenda.

Why and how? Some see Article 12 as a ‘revolution’. To me, to understand the ‘revolution’ in Article 12, you have to peel away law and reveal some basic values, some basic premises.

In truth, there is no revolution since these basic values are (or were **supposedly**) universal – they have been with European civilization for centuries and are well reflected in human rights instruments at both the global and European levels for the past 50 years or so. They now form part of our cosmopolitan world value system – based on universal human rights.

What is happening is that these values are at last becoming real in the context of disability – thus breaking down barriers into the no-go area of legal capacity

which was considered a technical outlier of the law rather than a core foundation of human personhood.

#### 4. Core Legacy Values: Dignity and Autonomy.

I speak of the core values of dignity and autonomy. I stress, these are not revolutionary – they are actually our legacy values. But of course, it is their application to disability that is revolutionary if only because they were somehow discounted in the past – or felt not to apply with full force – in the disability field.

Standing back from the technical debate, what we are witnessing now is a realization that these values matter with just as much force in the disability sector. The question why they were discounted in the disability field for so long is deeply interesting and tells us much about how contradictions can be too easily accepted in culture – in all cultures. The task of revealing the effects of this exclusion also consumes much effort. But plotting what the disability field would and should look like if this is reversed is now where most of our creative energies are rightly focused.

Spare a moment to reflect on the essence of these values – on their **complementarity** as well as on some of the **inherent tensions**.

Take dignity, the notion that all human beings are ends in themselves and not means to other ends. And reflect for a moment on how persons with disabilities were viewed traditionally as ‘objects’ to be pitied or managed or worse – and not as ‘subjects’ deserving equal respect. This cultural default has predisposed us to tolerate intrusions into personhood in the field of disability that would not be accepted by others.

Take autonomy – at once an *a priori assumption* and also a *practical goal* of our liberal-democracies. Our European civilization compels us to the view that it is not for Government to dictate our ends – it is for us to decide our own ends – our own personal destinies – and it is then the job of Government to facilitate

freedom. The Greeks would call this our 'Telos'. Kant assumed that the human spirit had this innate predisposition. Hegel saw it as the spirit of personhood and freedom working itself pure in an impure world. Rawls saw this as 'right' in the sense that the rightful aim of Government was to respect, create space for and facilitate our own individual conceptions of the 'good'. We all see it as common sense.

Unpack this further and you end up with the view that we – as individuals – through our own choices (whatever they maybe **and we do have the right to assume moral risks**) – create our own legal universe. That is to say, the primary role of law is to allow and **enable such life choices to be made** by erecting a zone of freedom and to **protect us** in their pursuit. These choices – emanating from our autonomy - could be extremely intimate, they could relate to our human associations, our social world, our economic engagement, our personal and other property. People don't come pre-packaged into property, medical treatments and sex!

This isn't just about making one's own choices about how to live. Its also about **resisting the choices others seek to make for us**. Autonomy can be used positively to expand our zone of freedom. It can also be used as a shield to fend off others who purport to know better. You don't have to be Frederick Hayek to see the value of this.

## **5. Facilitating Freedom – Protecting Citizens – Can they be Reconciled?**

However, let us note an inherent or seeming contradiction before we move on.

I said the **primary role** of the State was to **facilitate freedom** on the one hand and to **protect us** in the exercise of that freedom on the other. This is what 'critical legal scholars' call the 'fundamental contradiction' between valuing freedom on the one hand - and then using the very ideal of freedom to undo itself by justifying intervention and protective measures on the other hand.

Now, from the rarefied perspective of liberal legal and political theory, this is not a contradiction – just a natural implication of a commitment to freedom. Just as the ideal of autonomy fends off unwarranted intrusion on the one hand – **it also calls for it** on the other hand. After all, Locke called for ‘wise constraints that set us free’. Those ‘constraints’, those protective interventions could be motivated by using the ‘*parens patriae*’ power - .i.e., intervening for the sake of the person. Or they could be animated by the ‘police power’ – i.e., intervening to protect people (and the pursuit of their freedoms) against others.

In a way, Article 16 of the Convention sets out *a legitimate expectation of intervention* to protect one from violence, exploitation and abuse. Of course, this primarily means intervening to police the actions of *others*. However, one of the arguments shoring up anachronistic legal capacity laws is the fear that by expanding autonomy we simply expose persons with disabilities to more dangers. In a sense Article 16 intimates a sense of vulnerability that law enforcement agencies should be more alive to than in the past. This is, of course, **not the same as saying that vulnerability equals incapacity**. But it is to say that heightened vulnerability (or a perception of heightened vulnerability) was the window through which an excessively paternalistic impulse led to findings of incapacity that were not truly warranted in the past.

Let me cut to the bone. Its probably fair to say that many (most!) protective measures in the past were not primarily motivated out of a sense of vindicating the moral worth of persons with disabilities. It is quite striking, for example, that many of the early guardianship laws were enacted to protect assets or property rather than people. True, there is a deep connection between property and personhood. But most interventions in the past were not really motivated out of a desire to enhance personhood – just to control assets. Now, there is nothing wrong with seeking to protect assets against the greed and depredations of others. I suppose the real point is that this approach only protected one slice of personhood and seemed to send the signal that the law was more interested in property than people.

And rampant paternalism grossly distorted the protective impulse. Indeed, one perverse result of intervening to protect one against others had been institutionalisation – i.e., placing people in institutions **where their exposure to violence, exploitation and abuse was even worse!** And reflect for a moment on the social construct of ‘vulnerability.’ People don’t come ready-made as vulnerable. Their vulnerability is as much a social creation in the sense that it is brought about by social arrangements that are not sensitive to circumstances.

Now let me honestly pose a difficult question. Is this paternalism an ineradicable feature of legal capacity laws? Should one ever admit to even a kernel of legitimacy in the impulse of the State to protect since, historically speaking, the ensuing measures nearly always ended up objectifying people and exposing them to abuse? In other words, isn’t there a slippery slope at play here? Once we admit of the legitimacy of the interventionist impulse do we not provide a coach and four through which personhood will be systematically denied?

This is undoubtedly a consequentialist argument against even recognizing the concept of incapacity – and it builds on centuries of experience. I suppose the hard question is what do we make of this experience? Do we use it to deny the very existence of incapacity – on a theory that such a concession will always be abused? Or do we try and **cabin and reinvent the notion of incapacity** in a way that finds a better balance between **freedom** and **protection**. I think this question goes to the heart of the debate about the meaning of Article 12.2.

Well, to say the least, the balance between autonomy and protection (if there ever can be one) certainly wasn’t present in our inherited laws on legal capacity. An excess of paternalism and an overly protective attitude led us to draw the line too much against the autonomy of persons with disabilities in the past.

The stakes are extremely high both for individuals and for society. If an individual is stripped of his/her legal capacity then your chance to create your own legal universe – to live the life you want to pursue and to resist intervention

- is gone and placed in the hands of others. You become an 'object' not a 'subject'
- ok, maybe an object that is 'safeguarded' – but still an 'object'.

I would also say the stakes are also high for society because if the imbalance is allowed to persist then it detracts from the value of our collective commitment to freedom – it reveals its partiality – it reveals how the core values count but then count for less in the field of disability. No self-respecting liberal-democracy that takes its legacy values seriously can allow this to persist.

It probably appears clear to you by now that one side of the liberal-democratic ethic – the impulse to protect against others and even against oneself – was predominant in our traditional laws on capacity.

Now, the beauty of the insertion of the value of equality in traditional fields like legal capacity is that it enables us to begin see the imbalance for what it is - and to redress it.

## **6. Two traditional Approaches to Legal Capacity, Status & Outcomes.**

How did the imbalance manifest itself and how do we break free from the past?

In an effort to clarify what sometimes seems like a bewildering field let me briefly distinguish between the different approaches to legal capacity.

The first was the so-called **status approach**. That is to say, if you were labeled disabled or had a particular intellectual disability it was simply assumed – often by operation of law – that you lacked legal capacity. This status then was sufficient to strip you of legal capacity – of human personhood. Someone else – or some other entity – made decisions for you.

The status-based assumptions rested on a binary view of capacity – you either had it *in toto* or you lacked it *in toto*. It doesn't take much to see how this rested on stereotypes about disability which, by definition, lacked the finesse to be able

to assess each individual's circumstances. And it doesn't take much to understand that capacity is **not a binary concept** – I can have variable levels of capacity to make different kinds of decisions. And of course, with respect to areas in which I have reduced capacity, why should the first interventionist impulse on the part of the State be to take my capacity away and allow others to make decisions for me even when they are corralled to make those decisions in 'my best interests' – a concept that actually finds a better home in the context of children. No, if the underlying values of dignity and autonomy are taken seriously, then the first impulse of the State should be to shore up my capacity, to enhance residual capacity even in (or perhaps especially in) old age and to assist me to make and express decisions for myself.

To complete the picture, the second approach to capacity was – is- the co-called **outcomes approach**. That is to say, while we may not make assumption about the lack of capacity based on one's status as, say, a person with an intellectual disability, we can certainly make them by inference from bad decisions or a pattern of bad decisions or a flawed process of decision-making. But wait a minute! We all make bad decisions. Indeed, we all probably make bad decisions all the time in certain aspects of our lives. It actually helps define who we are! As for a bad process of decision-making, one is tempted to ask should a large sector of the electorate be deemed incapable of voting just because they keep returning 'bad' political parties (whatever that is) to power. Don't laugh - Joseph Schumpeter actually called for this in the 1930s!

Nobody seriously suggests an **outcomes** approach now. And the reason is simple. We all have the right to make our own mistakes. All life is an experiment – sometimes we never learn. Sometimes we suffer the consequences. And generally speaking, the loss is allowed to lie where it falls. In a way, it's how we learn and grow.

Why is intellectual capacity so different? Well, you might counter it is different precisely because the disability is intellectual which means a reduced capacity to process information and make knowing choices. Yet, just because some of us

are assumed to have full capacity doesn't mean that we use this capacity to rationally sift information and make cold analytic choices. Life just isn't like that for the vast majority – why does it have to be like that for the minority?

In other words, there is a profound contradiction between tolerating extremely poor choices and decision-making in non-disabled people on the one hand and then raising the bar exceedingly high for persons with disabilities – so high that most non-disabled people would have difficulty surmounting it!!!

So if a **status-based** approach is objectionable because it rests ultimately on proxies and stereotypes and if a **results-based** approach is objectionable because of the inherent contradiction between allowing the majority to make bad mistakes without intervention and disallowing a minority to make the same mistakes and overplaying the protective role of law, then what is left?

## 7. **Equality and the Functional Approach.**

The bridge here is the equality idea – how it gives life to notions of dignity and autonomy in the specific context of disability. This is new. It is what the Convention brings to the broad disability field. And it clearly animates Article 12.

Presuming for the moment that it can be successfully purged of paternalism (which of course begs the core question!!!)- the protective impulse of our liberal-democratic systems is ethically sound – one can even explain it as a necessary inference of our commitment to freedom. But even if sound – and this is the crucial qualifier – it has been vastly overplayed in the context of disability. If you are denied the right to make decisions for yourself then is it any surprise that the skills needed to do this become under-developed. The absence of these skills is then pointed to as a justification for overbroad incapacity laws. But the argument is plainly circular. Surely the correct response is to impart skills where needed and ease people into taking charge of their own lives.

When we talk of honouring the legal capacity of persons on an 'equal basis with others' – as Article 12.2 does – we mean just that. We don't intervene in the decision-making capacity of non-disabled people because of their status as an Irishman or a Belgian. As Maitland said the history of freedom is mainly a march 'from status to contract' – which assumes autonomy and a capacity to enter into reciprocal bonds and obligations. We don't intervene because 51% of the population 'plainly' voted for the wrong party (whatever that is) and we don't intervene because I happen to still support Manchester United rather than Barcelona!

Equality of respect means extending to persons with disabilities the same expansive latitude allowed to others to shape their own lives and make their own mistakes. We may disapprove but disapproval as such is no warrant to intervene! It seems that John Stuart Mill has yet to arrive in the disability field.

Now, all people – and not just persons with intellectual disabilities – may have functional limitations. But actually, these limitations are generally constitutive of who we are as people. It gives us identity – its does not detract from our identity. It is only where these functional limitations reach extremes is there is some colourable warrant for intervention and even then the intervention should not take the form of denying or detracting from capacity. Yes, but what shape should we put on this intervention – and should it be called an intervention?

#### **8. Social Solidarity Points to Assisted Decision-Making.**

Now its time to add another value to those of dignity, autonomy and equality. It is well known to us in Europe. This is the value of social solidarity.

Some see this as the defining value of Europe. Some see it as defining European essentialism as against, say, American essentialism. I don't. I simply see it as a natural entailment of freedom. Every society rests on some implicit terms of social co-existence. My freedom is never pursued in complete isolation. To a

certain extent I rely on others to achieve my ends – and to a certain extent I rely on social supports to exercise my formal freedoms.

In a profound way this is true of all citizens. There is a political economy of individual freedom that cannot be ignored – and here, by the way, is where I part company with Hayek. Its only more obviously true with persons with disabilities.

Why do I inject the value of solidarity into the mix? Its because if we are serious about respecting the autonomy of persons with disabilities on an “equal basis with others” (Art 12.2) then we need to take the next logical step of putting in place practical supports for what is called ‘assisted decision’ making. If we adopt the function approach to capacity then our first impulse upon discovering some lack of functional capacity should not be to remove it but to support it. This is what Article 12.3 gets at. In the context of ageing this is what is meant by the phrase ‘adding life to years’.

Now, you will say, ‘hey that costs.’ And so we inevitably stray into the zone of economic, social and cultural rights and the perennial problem of reconciling their ‘progressive achievement’ with resource constraints. To me, we miss the point if we view the issue exclusively through the lens of economic, social and cultural rights as ends in themselves. Properly framed, this is about minimum social supports to give reality to individual choice and autonomy – something most people take for granted even in a recession! So to me the question is not ‘how much does State X value economic, social and cultural rights’. To me the question is ‘how much does State X value freedom and autonomy and what supports is it willing to put in place to ensure that all citizens can exercise their basic rights equally’.

Is cost a barrier? Sure. But reflect on this. Moldova, one of Europe’s poorest countries is in the process of adopting a national disability strategy which is configured in the right direction. If poverty were an excuse for delay then Moldova would never have done this. The fact that it has shows that what

matters is the dynamic of change – the steady roll-out of programmes to facilitate people making their own decisions.

Indeed, the cost must be meaningfully compared with current guardianship systems. It may well be the case that by giving voice back to people that some things they presently have, they don't want and can forego. And the elaborate guardianship systems – and associated institutionalisation – are themselves quite costly to administer. I do not want to give the impression that cost savings is the basic premise on which to rest the case of assisted decision making. The case is as much moral as it is economic. But a job of work needs to be done at European level to demystify the cost implications – to peel away encrusted assumptions and prejudices. I believe the Swedish example of PO-Skane of which we will hear more today is most instructive in this regard.

Now, there is an inherent danger with assisted decision making and let's be aware of it. Assisted decision making might cross the elusive line to become – in effect – substitute decision making. I am no expert in how to configure effective 'assisted decision making' regimes. But lack of knowledge about how it can be done, or a fear about how to police the line between assisted and substitute decision making is no excuse for not moving in the right direction. There are plenty of countries out there – or States or Provinces within countries such as Canada, Australia and Sweden – that have very practical experience in doing this over many years. Let's get the information and skills flowing to make sure we can embed best practice here in Europe. Incidentally, the Conference of States Parties under the UN Convention could be an excellent platform for transferring this know-how.

It is surely right to be concerned about dangers to vulnerable people. And in a way, Article 16 of the Convention against violence, exploitation and abuse requires States to be alert to these dangers. This tension between expanding autonomy to make one's own decisions – **as well as one's own mistakes** – and protecting people against personal disasters will not go away.

Yet surely the fundamental point in the march toward reform is that the massive dignity of risk that is afforded to others is denied to persons with disabilities by relying on the very possibility of danger to justify stripping one of legal capacity. There surely is a better way of reconciling these equally legitimate goals of State. The impulse to protect is fine so long as it is not unduly conflated by paternalism. Ways can and should be found to both **protect** and **enable** – without stripping people of legal capacity.

## 9. Conclusions.

What are my conclusions? I have not descended into hard law – into Article 12. That is for Gabor and others.

But I hope I have explained why the issue of legal capacity is crucial. And I hope I have clarified the values that are animating change – values that are deeply embedded in Article 12.

Ladies and gentlemen, we can have wonderful equal opportunity laws that break down arbitrary barriers. We can put in place excellent social support mechanisms and place a floor of provision under all. We can protect people against all sorts of depredations. Yet if we don't take the next logical step of enabling persons with disabilities to take charge – and remain in charge - of their own lives then the kind of freedom we impart could best be described as 'managed freedom'. The message of Koestler is that Europe is not built on a philosophy of 'managed freedom.' *Respublica Europa* calls for public freedom – the right to belong and the right to be recognized as a human being. Its as fundamental as that.

And it is this sense of public freedom – of autonomy and equal dignity of risk - that is now forcing us to roll back protectionism and paternalism.

At some stage we will have to confront the issue of reservations. As is well known, any reservation that defeats the object and purpose of a treaty is not

valid. To me, it seems plain that a reservation that preserves space for a State Party to maintain plenary guardianship laws is unacceptable. And a reservation that allows a State Party not to introduce a programme of assisted decision making is not acceptable. But I suppose the Achilles heel of this jurisprudence is that it is unclear (to say the least) whether a treaty-monitoring body (like the new UN Committee on the Rights of Persons with Disabilities) has the legal authority to pronounce of reservations. And even if it has, it is also unclear what legal implications flow from a declaration of invalidity. But the beauty of our European Constitutional order is that it would be heard to reserve to Article 12 (in the manner indicated) and still remain faithful to Article 8 of the European Convention on Human Rights. I think this underscores the critical importance of regional mechanisms in the implementation of the CRPD. No doubt the strategic litigation before the ECtHR will continue and will hopefully bring greater clarity. No doubt when the CRPD is confirmed by the EC it will become cognizable by the European Court of Justice in part because it will have quasi-constitutional status situated somewhere between the Treaties and secondary EC law.

Of course the Strasbourg Court will probably not reach the issue of assisted decision making since this gets it into the field of positive obligations where its natural reflex is to be cautious. However, the natural reflex of the European Committee of Social Rights would lead in this direction and I can see Collective Complaints pointing in this direction in the future.

If I have any proposals to make today it would be to the effect that the EC could do an important job by stimulating research that points to the feasibility of the new paradigm in Europe. A part of this should include meaningful cost-benefit analysis building on experience elsewhere (especially in Sweden) and factoring in the real costs of the existing paradigm. There will be transition costs and there will be ongoing costs. But we have yet to rationally weigh these up against the cost efficiencies as well as the other benefits. We are in a recession and the simple (unchallenged) assumption will be that the costs of the new paradigm are

prohibitive. This needs to be rationally unpacked and demystified. This is real added value at EC level.

Another proposal might well be to revisit the programme of the Europa Rechts Academie (ERA) which is the primary vehicle of the EC to train the judiciary. The ERA does a tremendous job. It would be surely proper to task it to train the judiciary on the CRPD since once we confirm it at EC level it will have a quasi-constitutional status for us.

I started by referring to Professor Gearty's characterization of the role of human rights as a 'visibility project'. Many here today will recall the famous 1995 European Day Publication that exposed the invisibility of persons with disabilities in EU treaty law. Thanks largely to the EDF, the European Parliament and a very receptive European Commission, that invisibility in treaty law and in secondary legislation as been massively eroded. New gateways have been forged into the economic and social space of Europe.

Its time now to move on now – to uncloak the invisibility of the human personhood of persons with disabilities through overbroad incapacity laws that come from an older paradigm. Its time to move on from 'managed freedom' which never sat well with our core European human values and toward supported freedom which plays to our highest instincts of social solidarity. Let the debate begin.

## **Article 12**

### **Equal recognition before the law**

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.