Connecting the Right of Collective Legal Capacity by Indigenous Peoples with the Right of Individual Legal Capacity by Persons with Disabilities

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Abstract

This Article explores the juridical implications of indigenous peoples' right to legal capacity in the Inter-American system for cases involving the same right of persons with disabilities within that system and beyond. It explicates the Inter-American Court of Human Rights' (IACtHR) three-factor test in *Saramaka People v Suriname* and analogizes its reasoning with rationales underpinning the right to legal capacity under the United Nations Convention on the Rights of Persons with Disabilities (CRPD). It then demonstrates how the IACtHR can apply a *Saramaka*-style test to future cases brought by persons with disabilities challenging legal capacity restrictions. The Article further argues that the European Court of Human Rights (ECtHR) should also apply this rule to align its legal capacity jurisprudence with the CRPD's mandates. Finally, it suggests that the Committee on the Rights of Persons with Disabilities (CRPD Committee) ought to consider this rule when resolving individual communications and thereby guide courts.

Keywords

legal capacity – persons with disabilities – indigenous peoples – Convention on the Rights of Persons with Disabilities (CRPD) – Inter-American Court of Human Rights (IACtHR) – European Court of Human Rights (ECtHR) – Committee on the Rights of Persons with Disabilities (CRPD Committee)

1 Introduction

Numerous jurisdictions distinguish between legal personality and legal capacity. Under such a scheme, national or subnational legal systems recognise that all individuals by virtue of being human inherently possess legal personality, but maintain that in practice some individuals lack the capacity to exercise their rights.[1] Viewed benignly, this legal 'personality-capacity distinction' is merely an administrative device that enables States to regulate which legally recognized persons may exercise their rights, and to what extent, and through what modality they may do so. In practice, the distinction recognises and at times facilitates the exercise of rights by some groups, while at times calcifying and legitimising paternalistic attitudes about other groups' claims on fulfilling these same rights—including fundamental ones such as voting[2] and parenting.[3]

Historically, and with consistency, such 'neutral' legal and administrative barriers to legal capacity have dramatically and adversely affected both individuals and entire population groups already experiencing socio-legal marginalisation. For example, many indigenous communities have been prevented from collectively managing property because the legal systems of the States in which they live presume such rights may only be exercised by individuals. Similarly, most State legal systems place persons with various disabilities under plenary guardianship and eviscerate their legal capacity on the ground that they cannot, on their own, express their will and preferences. Due to the

1 Hoffman and Könczei, 'Legal Regulations Relating to the Passive and Active Legal Capacity of Persons with Intellectual and Psychosocial Disabilities in Light of the Convention on the Rights of Persons with Disabilities and the Impending Reform of the Hungarian Civil Code' (2010) 33 *Loyola of Los Angeles International and Comparative Law Review* 143 (discussing distinctions between legal personality and capacity in four European countries).

2 Fiala-Butora, Lord and Stein, 'The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities' (2014) 55 *Harvard International Law Journal* 71.

3 Powell and Stein, 'Persons with Disabilities and Their Sexual, Reproductive, and Parenting Rights: An International and Comparative Analysis' (2016) 11 *Frontiers of Law in China* 53.

gatekeeper role played by legal capacity in enjoying the full gamut of human rights, the personality-capacity distinction actively undermines human rights protections for specific groups who are perceived as deviating from the mainstream.

Despite these grim precedents, recent advances in international human rights law have provided two groups, indigenous peoples and persons with disabilities, with new opportunities to overcome barriers to exercising their rights. Notably, the Inter-American Court on Human Rights (IACtHR) in several decisions has interpreted the American Convention on Human Rights (ACHR) to vindicate indigenous and tribal groups' collective exercise of rights in keeping with their traditional, communal practices. Likewise, the Convention on the Rights of Persons with Disabilities (CRPD) specifically affirms the right of persons with disabilities to exercise legal capacity both on their own and with the support of others.[4] CRPD Article 12 has thereby catalysed a radical rethinking of longstanding guardianship regimes and other forms of legal capacity restrictions in a number of jurisdictions.[5] These indigenous and disability rights advances elucidate how legal personality and legal capacity are in fact inextricably linked. Indeed, they challenge received wisdom regarding both the personality-capacity distinction as well as pervading Enlightenment notions of autonomy that negate the extent to which all individuals ultimately rely on support to exercise their rights, rendering legal capacity inherently relational and contextual.[6]

The CRPD's legal capacity-related innovations likely would not have emerged during (and survived) the treaty negotiations without the sustained participation of persons with disabilities and their representative organisations (DPOs). By opening the doors to greater stakeholder participation, the negotiators broke with traditional pathways of norm generation and transmission dominated by States. This gateway infused powerful new ideas into the negotiations, allowing the treaty to respond to pressing human rights challenges, including pervasive disability-based legal capacity restrictions. It also generated unprecedented buy-in from civil society actors, especially DPOs, whose post-adoption

4 United Nations Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3 (adopted 13 December 2006) (entered into force 3 May 2008) at art 12.

5 Report of the Special Rapporteur on the rights of persons with disabilities, 12 December 2017, A/HRC/37/56, at para 38, <https://undocs.org/A/HRC/37/56> accessed 30 August 2020 (identifying legal capacity reform processes underway or completed in 32 countries).

6 Lord and Stein, 'Contingent Participation and Coercive Care: Feminist and Communitarian Theories of Disability and Legal Capacity' (2013), in McSherry et al. (eds) *Coercive Care: Rights, Law and Policy* 31.

advocacy with States helped to propel the most rapid ratification rate of any United Nations human rights treaty.

A synergistic phenomenon regards judges' increasing efforts to enrich their deliberations by consulting non-controlling decisions from other jurisdictions. Often referred to as 'borrowing' or 'dialogue', certain adjudicative bodies, especially regional human rights tribunals, have actively sought precedents outside their own systems. Although many early instances of judicial borrowing travelled well-worn paths of hierarchical geopolitical and socio-legal normative dissemination—for example, from jurisdictions in the Global North to those in the Global South—over time this adjudicatory opening has increasingly witnessed a reversed course, with judicial innovations to emerging human rights challenges travelling from jurisdictions in the Global South to those in the Global North. Such 'upstream' transmissions may well prove crucial in resolving the human rights implications of legal and administrative barriers to legal capacity that pervade highly instantiated national legal systems characteristic of many developed countries.

In terms of innovating judicial approaches to legal capacity claims by persons with disabilities, this Article argues that the IACtHR is a potentially influential source. The IACtHR was emphatic in eviscerating the personality-capacity distinction that had prevented the Saramaka and other groups from exercising their rights equally. By contrast, in cases involving persons with disabilities similarly barred, the European Court of Human Rights (ECtHR) has only circumspectly acknowledged the fundamental shift signalled in the CRPD toward the relational notions of autonomy that underpin supported decision-making. This Article therefore explicates the linkage between relational autonomy and supported decision-making, to explore how the IACtHR might apply reasoning from its indigenous legal capacity rights exercise jurisprudence to future cases involving legal capacity restrictions affecting persons with disabilities, and finally to postulate how the IACtHR's heuristic for removing rights exercise barriers for indigenous and tribal groups might influence how the ECtHR, as well as the Committee on the Rights of Persons with Disabilities (CRPD Committee), might approach future challenges to legal capacity restrictions by persons with disabilities.

This Article first explains the IACtHR's pioneering jurisprudence on indigenous peoples' right to legal capacity under ACHR Article 3 and explicates the three-factor test it applied in *Saramaka People v Suriname*. Next, it compares the IACtHR's reasoning in its ACHR Article 3 decisions with rationales underpinning the right to legal capacity under the CRPD. It then demonstrates how the IACtHR can apply a *Saramaka*-style test to future cases brought by persons with disabilities challenging legal capacity restrictions by analogising the

IACtHR's reasoning for interpreting ACHR Article 3 broadly to protect indigenous peoples' legal capacity right. The Article further argues that the ECtHR should apply this rule to align its legal capacity jurisprudence with the CRPD's mandates, and also that the CRPD Committee ought to consider this rule in its individual communications in order to guide regional courts facing these questions. The Article concludes briefly by reflecting on the value of cross-movement dialogue.

2 Removing Barriers to Indigenous Peoples' Legal Capacity

Frequently described as the 'right to have rights,' the right to legal personality plays gatekeeper to human rights protections and is expressly included in landmark international human rights instruments.[7] However, these instruments treat legal capacity differently.[8] Traditionally, legal capacity has denoted an objectively measurable trait rather than a conferrable legal right, and therefore common-sense grounds for regulating the universe of legally-recognised actors.[9] Thus, courts routinely restrict individuals' legal capacity based on factual findings regarding their limited understanding of their actions, but without accounting for the human rights implications of those restrictions.[10]

Conforming to the traditional distinction evident in both international and comparative law, the ACHR, the Inter-American human rights system's foundational enforceable treaty, expressly establishes the right of all persons to legal personality, while failing to mention legal capacity. Indeed, ACHR Article 3 ('Everyone shall have the right to recognition everywhere as a person before the law.')[11] is nearly identical to Article 16 of the International Covenant on Civil and Political Rights (ICCPR) ('Every person has the right to recognition as a person before the law.'), adopted three years earlier.[12] Numerous scholars and

7 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2d edn (N. P. Engel 2005) at 369 ('Without this right, the individual could be degraded to a mere legal object … and thus be deprived of all other rights.').

8 Ibid, 370 ('*Art 16 does not protect the capacity to act.*') (emphasis original).

9 Office of the United Nations High Commissioner for Human Rights: Legal Capacity [OHCHR Background Document], 6th sess, Ad Hoc Committee (2008) at para 9, reprinted in van Laar and Tofan (eds), 2 *Disabilities and Human Rights: Documents* 143 (describing the 'capacity to act' to include the capability to establish rights and duties by way of one's own conduct, including to enter into binding contracts, to inherit property, to sue, to adopt a child, to marry, and to found a family).

10 Ibid, para 38.

11 Article 3 American Convention on Human Rights 1969, 1144 UNTS 123.

12 Article 16 International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

commentators have interpreted ICCPR Article 16 as limited to legal personality.[13] Moreover, just as the ICCPR's *travaux preparatoires* suggest that Article 16 not be interpreted as inclusive of legal capacity, so too do the ACHR's negotiation archives, where the minutes show that State representatives understood the ACHR Article 3 right to legal personality as not barring capacity restrictions.[14] The domestic legal systems of many States parties to the ACHR and also subject to IACtHR jurisdiction similarly recognise a right to legal personality of all persons, but not to legal capacity.

Indigenous peoples have long fought for collective recognition of their legal personality in order to protect their communal societies that defy individual rights presumptions underpinning domestic legal frameworks.[15] When doing so, they have encountered challenges to their ability to assert collective claims of human rights abuses rather than traditionally recognised aggregated individual claims. Even where domestic legal frameworks recognize the legal personality of these communities, in many cases they have not allowed for the exercise of rights in a collective fashion. For example, whereas some States recognise certain indigenous groups' rights to use and to be consulted on State interference with the use of their territory, they nonetheless curtail these same groups' ability to enforce their land use rights collectively through the courts by asserting that they lack collective legal capacity.

In its early indigenous rights decisions, the IACtHR treated such claims as access to justice violations under ACHR Article 25. This pattern was consistent with the Court's early, narrow interpretation of ACHR Article 3, as evident in its cases involving children and forced disappearances. The IACtHR, for instance, held that Article 3 did not protect the legal capacity of children, since relevant international law permitted restrictions on children's legal capacity where they have functional capacity limitations.[16] For the Court, children's 'weakness, immaturity or inexperience' necessitated adults to exercise legal capacity on their behalf.[17] The IACtHR similarly construed ACHR Article 3 narrowly in its early forced disappearance cases. For example, in *Bámaca Velásquez v*

13 Nowak, (n 7) at 370.

14 Organization of American States, *Actas y Documentos: Conferencia Especializada Interamericana sobre Derechos Humanos* [Minutes and Working Papers: Specialized Inter-American Conference on Human Rights], OEA/Ser.K/XVI/1.2, 7–22 November 1969 at 158, <http://www.oas.org/es/cidh/mandato/Basicos/Actas-Conferencia-Interamericana-Derechos-Humanos-1969.pdf> accessed 30 August 2020.

15 Buchanan, 'Role of Collective Rights in the Theory of Indigenous Peoples' Rights' (1993) 3 *Transnational Law & Contemporary Problems* 89.

16 OC-17/02, *Juridical Condition and Human Rights of the Child* IACtHR Series A 17 (2002) at para 41 ('Children do not have [legal] capacity, or lack this capacity to a large extent.').

17 Ibid, para 60.

Guatemala the Court analogized disappearances to killings, which do not give rise to discrete Article 3 claims despite effectively eliminating a person's legal personality.[18] It declined repeated subsequent invitations to find an Article 3 violation in forced disappearance cases.[19]

The IACtHR tacked towards a more expansive interpretation of ACHR Article 3 beginning with *Yakye Axa Indigenous Community v Paraguay*, where it acknowledged how unjustified legal capacity restrictions infringed on the right to legal personality, at least in the case of indigenous groups.[20] The Court's inquiry centred on the Yakye Axa's right to effective access to justice under ACHR Article 25 rather than ACHR Article 3, because the Paraguayan Constitution allowed for collective recognition of indigenous communities.[21] Nevertheless, the Court recognised legal personality's gatekeeper function and signalled its departure from the traditional personality-capacity distinction. More than a 'legal formality,' it reasoned, legal capacity 'is the legal mechanism granting [indigenous groups] the necessary status to enjoy certain fundamental rights, such as the right to hold title to communal property and to demand protection against any breach thereof'.[22]

The IACtHR built upon *Yakye Axa* in *Saramaka People v Suriname*, which turned on whether ACHR Article 3 protected indigenous and tribal groups' right to collective exercise of rights.[23] The Court understood that the other ACHR rights it had upheld in earlier indigenous rights cases would mean little without an express recognition of the threshold right to exercise legal capacity.[24] While Suriname afforded individual Saramakans leaseholds on state-owned lands, Surinamese law did not permit the Saramaka people as a

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18 *Bámaca Velásquez v Guatemala* IACtHR Series C 91 (2002) paras 179–80.

19 *La Cantuta v Peru* IACtHR Series C 162 (2006) para 120; *Ticona Estrada et al. v Bolivia* IACtHR Series C 191 (2008) para 63.

20 *Yakye Axa Indigenous Community v Paraguay* IACtHR Series C 125 (2005) paras 82–83.

21 Ibid, para 84. Indeed, the Court's repeated references to *personería jurídica*, instead of the *personalidad jurídica* referred to in ACHR Article 3, reinforces the Court's narrower focus on the content of domestic norms.

22 *Yakye Axa Indigenous Community v Paraguay* IACtHR Series C 125 (2005) paras 82–83.

23 IACtHR Series C 172 (2007) paras 166–67. See also Pasqualacci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 *Human Rights Law Review* 281 (describing the Court's positivistic approach towards indigenous peoples' rights).

24 Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OAS Doc OEA/Ser.L/V/II, Doc. 56/09, 30 December 2009 at para 372, <https:// www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> accessed 30 August 2020 (stating that collective exercise of legal capacity 'is a precondition … to guarantee their communal property' and that the *Saramaka* Court 'derived

collective to hold title to land.[25] Although the IACtHR had previously held that the right to property under ACHR Article 21 may be held collectively,[26] in *Saramaka* it held for the first time that ACHR Article 3 may also be collectively exercised. The Court concluded that Suriname's failure to recognize 'the Saramaka people as a juridical entity capable of using and enjoying communal property as a tribal group' and 'as a juridical entity capable of seeking equal access to judicial protection' violated their collective right to legal personality under Article 3.[27]

Saliently, the IACtHR marshalled three compelling reasons for disbanding the personality-capacity distinction it had previously honoured, at least in cases involving indigenous or tribal groups. First, the Court found that Surinamese law's recognition of individual group members' legal personality failed to consider the uniquely collective manner in which those group members choose to exercise their rights.[28] The Saramaka people have a distinct political structure and self-govern in accordance with their orally passed down laws, customs, and traditions.[29] As far the Saramaka's exercise of land rights, since their 1762 treaty with the Dutch colonial government, twelve matrilineal clans (*lô*'s) have been the primary landholding group within Saramakan society.[30] Rather than allowing individuals to own discrete tracts within the traditional Saramakan territory, the *lô*'s apportion land use rights among extended family groups and individual *lô* members, determining which members may use certain tracts and the scope of that use in accordance with Saramakan laws.[31] For example, although a *lô* may autonomously steward certain parcels of Saramakan territory within its purview, it may not transfer land rights to non-Saramakans.[32] Thus, the IACtHR found the Saramaka people's collective manner of exercising land rights—collectively owning territory, limiting land use to Saramakans, and vesting only trustee-like powers in the *lô*'s and usage rights in members—was unique within Surinamese society, which instead operated

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from the collective nature of indigenous title to property the need for collective capacity to access the judicial or administrative mechanisms to defend that right').

25 *Saramaka*, para 159.

26 *Sawhoyamaxa Indigenous Community v Paraguay* IACtHR Series C 146 (2006) para 120.

27 *Saramaka*, para 167; *Sawhoyamaxa*, para 188 ('[The] right to recognition of personality before the law represents a parameter to determine whether a person is entitled to any given rights *and* whether such person can *enforce* such rights[.]') (emphasis added).

28 *Saramaka*, para 168.

29 Ibid, para 81.

30 Ibid, para 80.

31 Ibid, para 100.

32 Ibid, para 100.

on liberal, Western notions of individual-based apportionment and regulation of land rights.

Next, the IACtHR found that if Surinamese law were to recognise the Saramaka people's collective legal personality, the state would effectively prevent unauthorised individuals from interfering with the Saramaka people's unique manner of exercising rights.[33] While individual Saramakans were permitted to hold title to land, under Surinamese law the Saramaka people did not own the territory despite the Dutch colonial government's treaty-based concession and the Saramakans' continuous occupation of that territory for centuries. Rather, Surinamese law relegated the Saramaka people's stake in their territory as a non-binding 'interest'.[34] The Surinamese government exercised virtually unchecked discretion as to whether to consult with the Saramaka people regarding land use concessions that authorized non-Saramakan individuals and entities to log and mine swathes of Saramakan territory. As a result, third parties routinely interfered with the Saramakans' traditional land use by asserting Surinamese government-issued concessions, with military backing. The Saramaka people only learned of these concessions from in-person encounters with third parties arriving on site to extract resources. Thus, the Court was concerned by how Suriname made irreparable decisions about the use of Saramakan territory without Saramaka knowledge or consent.

Third, the IACtHR found that some form of collective legal personality would not only remedy the state's unauthorised representation concern, but it would enable the Saramaka to defend their communal rights against non-Saramakan incursions.[35] In contrast with earlier indigenous collective property cases, the Court traced violations of the ACHR Article 21 and 25 rights to property and to effective judicial protection back to the Saramaka people's inability to exercise legal capacity collectively.[36] Surinamese courts routinely privileged the land rights of non-Saramakan individuals and entities over the Saramaka people's land ownership claims, as Surinamese law barred the

33 Ibid, para 169.

34 Ibid, para 106.

35 Ibid, para 173.

36 Ibid, para 168 (finding that Suriname failed 'to take into account the manner in which members of indigenous and tribal peoples in general, and the Saramaka in particular, *enjoy and exercise a particular right*; that is, *the right to use and enjoy* property collectively') (emphasis added). This differs from *Yakye Axa*, where the Court found rights violations under Articles 8 and 25 where Paraguay had procedures in place for indigenous peoples to bring property claims and petitioners merely experienced unreasonable delays in resolving theirs. Paras 74–86.

Saramaka people from asserting such claims collectively in court.[37] Asserting claims individually would have violated the Saramaka's communal land use customs. Thus, these three practical, fact-specific considerations prompted the Court to look past the traditional doctrinal personality-capacity distinction to ensure the Saramaka people's enjoyment of ACHR rights in light of the practical effects of legal personality recognition absent legal capacity protections.

The normative expansion of legal capacity evident in *Saramaka* prompted the IACtHR to reconsider its traditional interpretation of ACHR Article 3 in forced disappearance cases.[38] While the Inter-American Human Rights Commission had routinely found Article 3 violations in forced disappearance cases, the Court had routinely rejected the Commission's arguments.[39] However, citing *Saramaka*, the Court described Article 3 to address both 'whether a person is entitled to any given rights *and* whether such person can enforce such rights'.[40] The Court also recognised that international bodies had similarly found right to legal personality violations in cases of forced disappearances, which supported its departure from previous precedent.[41] The IACtHR expressly recognised the expansion of its interpretation of Article 3 and held that this expansion required it to depart from its precedents and to recognise that forced disappearances may give rise to Article 3 violations.[42] Moreover, the Court interpreted Article 3 to create positive obligations on States parties.[43] The 'broader legal content of this right' requires States 'to guarantee to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditions that may secure for them the exercise of such right, pursuant to the principle of equality under the law'.[44]

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37 Association of Indigenous Village Leaders in Suriname et al., *A Report on the Situation of Indigenous and Tribal Peoples in Suriname and Comments on Suriname's 13th – 15th Periodic Reports* (CERD/C/SUR/13–15), 14 July 2015, at para 66, <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/SUR/INT_CERD_NGO_SUR_21114_E.pdf> accessed 30 August 2020.

38 *Anzualdo Castro v Peru* IACtHR Series C 202 (2009) paras 88–90, 93 and 101.

39 *Ticona Estrada*, paras 69–7; *Bámaca Velásquez*, paras 179–81; *La Cantuta*, para 121. In two other cases, the Court only declared the violation of ACHR Article 3 based on the State's concession to the alleged violation of this provision. *Trujillo Oroza v Bolivia* IACtHR Series C 64 (2000) para 41; *Benavides Cevallos v Ecuador* IACtHR Series C 38 (1998) para 43.

40 *Castro*, para 88 (emphasis added).

41 Ibid, paras 92–99.

42 Ibid, para 90.

43 Ibid, para 88.

44 Ibid, para 89 (quoting *Sawhoyamaxa*, para 166).

Like many indigenous and tribal groups, persons with disabilities have experienced paternalistic barriers to exercising their rights due to the personality-capacity distinction. Specifically, guardianship proceedings operationalize this distinction by allowing courts to transfer decision-making authority from one person to another. In many jurisdictions, courts may order these transfers by utilizing vague and variable criteria to find a person with disability 'incapacitated' or 'incompetent,' often either without or while overriding the consent of the person with disability.[45] These transfers are frequently justified on the perceived need to appoint a formal conduit either to enable the formation of legal relationships on behalf of the person with disability or to safeguard against their negative consequences.[46] Judges' perceptions of need, however, are susceptible to implicit bias,[47] especially considering that many judges lack personal experience with the types of disabilities that typically give rise to guardianship proceedings in the first place.

Society's tolerance for the transfers permitted by guardianship laws depends on a bright-line personality-capacity distinction. Were personality and capacity not severable, transfers would result in total loss of legal personality, rendering individuals with disabilities non-entities in the eyes of the law. But where capacity is understood to describe not a constructed legal status but an observable natural state, then impartial factfinders' 'incapacity' or 'incompetence' determinations can be compelled by psychometric measures. Thus, courts may consider guardians conduits or safeguards necessitated by external conditions beyond their control: instead of stripping persons with disabilities of a right to enter into legal relationships, they merely designate presumed capable surrogates to do so for them. The doctrinal distinction, therefore, converts targeted state interference with persons with disabilities' private lives into unavoidable administrative responses to objectively verifiable needs.

45 For example, New York state authorises judges to transfer legal capacity upon finding someone 'incapable to manage him or herself and/or his or her affairs by reason of intellectual disability' based on two physicians' reports. Article 17-A Surrogate's Court Procedure Act 1969, § 1750(1).

46 Fiala-Butora and Stein, 'The Law as a Source of Stigma or Empowerment: Legal Capacity and Persons with Intellectual Disabilities' in Scior and Werner (eds), *Intellectual Disability & Stigma: Stepping Out from the Margins* (2016) 195 at 197–198.

47 For example, Powell describes how judges' disability-related biases influence child custody determinations. 'Family Law, Parents with Disabilities, and the Americans with Disabilities Act' (2019) 57 *Family Court Review* 37.

Although guardians may steward their tremendous powers benevolently, commonplace legal capacity curtailments institutionalised by guardianship laws have in fact occasioned grievous human rights violations. Frequently justified as protective measures, legal capacity restrictions have exposed persons with disabilities to forced abortion and sterilisation,[48] forced medication,[49] involuntary hospitalisation,[50] involuntary institutionalisation,[51] disenfranchisement,[52] ineligibility for adoption[53] or marriage,[54] forfeiture of child custody rights,[55] among many others. Moreover, when ordering legal capacity restrictions, courts too frequently are influenced by stereotypes and misconceptions about disability and rely on either questionable evidence or scant procedural safeguards.[56] Too often, rather than 'protect' persons with

48 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 15 January 2008, A/HRC/7/3 at para 38, <https://undocs.org/A/HRC/7/3> accessed 30 August 2020.

49 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 1 February 2013, A/HRC/22/53 at para 64, <https://undocs.org/A/HRC/22/53> accessed 30 August 2020.

50 *Sýkora v The Czech Republic* Application No 23419/07, Merits and Just Satisfaction, 22 November 2012 at para 24 (noting that the employee of the City of Brno, which had been designated the applicant's guardian, had consented to his involuntary hospitalisation without ever having met him).

51 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 11 February 2005, E/CN.4/2005/51 at para 79, <https://undocs.org/E/CN.4/2005/51> accessed 30 August 2020.

52 *Kiss v Hungary* Application No 38832/06, Merits and Just Satisfaction, 20 August 2010 at para 4 (holding that disenfranchisement without an individualized judicial evaluation and solely based on a mental disability necessitating partial guardianship violated the applicant's right to vote).

53 *X v Croatia* Application No 11223/04, Merits and Just Satisfaction, 17 July 2008 at paras 78–80 (holding that denial of mother to participate in adoption proceeding because of her legal capacity restriction violated her rights to family and to private life).

54 *Delecolle v France* Application No 37646/13, Merits and Just Satisfaction, 25 October 2018 at paras 9 (noting a psychiatrist's opinion that the applicant had capacity to consent to marriage but was 'incapable of dealing with the consequences of his consent in terms of his property and finances'); *Lashin v Russia* Application No 33117/02, Merits and Just Satisfaction, 22 January 2013 at para 67 (finding that of twenty-five member States of the Council of Europe, thirteen States abrogate the right to marry of those under interdictions and six States do so for those with intellectual or psycho-social disabilities).

55 *Krušković v Croatia* Application No 46185/08, Merits and Just Satisfaction, 21 June 2011 at para 10 (finding that stripping applicant's custody of his child because of his interdiction violated his right to respect for private and family life).

56 Salzman, 'Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?' (2011) 4 *Saint Louis University Journal of Health Law & Policy* 279 at 300–05.

disabilities, these court orders lend the colour of law to State-sponsored human rights violations.

Early human rights instruments' failures to establish a right to legal capacity for persons with disabilities contributed to these gross human rights violations. Even disability-specific instruments were equally deficient, including the 1971 Declaration on the Rights of the Mentally Retarded, 1991 Protection of Persons with Mental Illness and the Improvement of Mental Health Care, and 1999 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities.[57] Initial drafts of the CRPD adopted similar formulations,[58] but DPOs strongly opposed them.[59] Trenchantly, DPOs participating in the CRPD negotiations understood how the traditional doctrinal distinction between recognising personality and exercising capacity in practice led to rights violations for persons with disabilities, especially those with intellectual or psychosocial disabilities. Thus, civil society endeavoured to create a bulwark against discriminatory and undue legal capacity restrictions by expressly bringing both personality recognition and capacity exercise under

57 Indeed, Article I(2)(b) of Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (CIADDIS) expressly allows for legal capacity restrictions. 1999, AG/RES 1608 (XXIX-O/99). However, the CIADDIS committee (CEDDIS) issued post-CRPD guidance disavowing the Article I(2)(b) exception. General Observation of the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities on the need to interpret Article I.2(B) in fine of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities in the context of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, OAS Doc OEA/Ser.L/XXIV.3.1, CEDDIS/RES.1 (I-E/11) rev.1, 28 April 2011 (on file with authors). Further, the CEDDIS requested the Organization of American States' General Assembly to request an advisory opinion from the Inter-American Court vis-à-vis the Inter-American Commission as to whether interdictions are permissible given its Observation. *Informe final de la Primera Reunión Extraordinaria del Comité para la Eliminación de Todas las Formas de Discriminación contra las Personas con Discapacidad, 4 y 5 de mayo de 2011* [Final Report of the First Extraordinary Meeting of the CEDDIS, 4–5 May 2011], OEA/ Ser.L/XXIV.3.1 CEDDIS/doc.14 (I-E/11), 12 May 2011 at 13, <https://scm.oas.org/pdfs/2011/CP26742SM.pdf> accessed 30 August 2020.

58 Article 25(3) Bangkok Draft – Proposed Elements of a Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities 2003, <https://www.un.org/esa/socdev/enable/rights/bangkokdraft.htm> accessed 30 August 2020 (providing that 'where a person with intellectual disability is not able to exercise this right, the legal guardian of that person shall be entitled to exercise the right on behalf of' and in the interests of, that person').

59 Dhanda, 'Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?', (2007) 34 *Syracuse Journal of International Law and Commerce* 429 at 439.

Article 12's umbrella.[60] Despite resistance from certain States,[61] the CRPD's final text accommodated DPOs' view that the treaty should firmly assert persons with disabilities' equal right to both legal personality and legal capacity. By contrast, the final text did not accommodate competing calls for enumerating justifications for legal capacity restrictions and categorically barring such restrictions.[62]

Post adoption, numerous activists and commentators have passionately advanced interpretations of Article 12 that militate radically overhauling traditional legal institutions that restrict legal capacity, such as guardianship.[63] Dubbing these 'substitute decision-making' regimes, the CRPD Committee in particular has vocally and consistently interpreted Article 12 to prohibit plenary legal capacity restrictions such as guardianship beginning with its earliest reviews of States parties' reports on implementation. In 2014, the CRPD Committee cemented this posture in its first General Comment on the CRPD's substantive provisions, forcefully exhorting States parties to replace traditional

60 For example, another draft noted civil society's concerns that others should not be permitted to 'interfere with the rights and freedoms of the person concerned'. Article 9(c) Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Report of the Second Session, 27 January 2004, A/AC.265/2004/WG/1 at n 33, <http://www.un.org/esa/socdev/enable/rights/ahcwgreport.htm> accessed 30 August 2020.

61 Kanter helpfully catalogues the various technical concerns raised by States parties whose domestic legal systems conferred gave various meanings to the term 'legal capacity'. 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities', 34 *Syracuse Journal of International Law and Commerce* 287 at 301–305 (2007).

62 Instead, the text adopts a middle course, favouring legal capacity protections 'on an equal basis with others,' ostensibly leaving open the possibility that legal capacity restrictions may be imposed without disability-based discrimination. Commentators asserting that CRPD recognizes a non-derogable right to legal capacity generally fail to parse the significance of this clause. Kanter and Tolub, 'The Fight for Personhood, Legal Capacity, and Equal Recognition under Law for People with Disabilities in Israel and Beyond' (2017) 39 *Cardozo Law Review* 557 at 576 (arguing that Article 12 was 'intended to extend legal capacity for all persons with disabilities' because the Committee included no 'limiting language'). Although beyond the scope of this Article, one could imagine disability-neutral or otherwise non-discriminatory grounds for restricting certain persons' legal capacity, such as harm prevention. Flynn and Arstein-Kerslake, 'State Intervention in the Lives of People with Disabilities: The Case for a Disability-Neutral Framework' (2017) 13(1) *International Journal of Law in Context* 39.

63 Some scholars have posited that the language of Article 12 may not be sufficient to ensure that persons with disabilities will exercise legal capacity on their own behalves as the drafters of the CRPD had intended. Dhanda, *supra* n 59 at 460–61 (warning that despite a clear preference for supported decision-making, Article 12 fails to expressly prohibit substitute decision-making and even contains language that might be used to justify substitute decision-making).

guardianship regimes with systems that promote supported decision-making, and thereby strengthening worldwide initiatives to restore the rights of persons with disabilities subject to legal capacity restrictions and to explore viable alternatives. The CRPD Committee's forceful interpretation of Article 12 to categorically bar legal capacity restrictions has contributed to keeping alive the debates that embroiled the CRPD negotiations.[64] Despite significant headwinds to rolling back restrictive guardianship laws and practices,[65] in many (but not all) instances activists have effectively leveraged Article 12 to catalyse significant legislative reforms,[66] inspire ambitious pilot projects,[67] and launch strategic litigation.[68]

Crucially, Article 12 does not reflexively respond to a need to prevent serious human rights violations. Rather, similar to the IACtHR's positivistic interpretation of ACHR Article 3, CRPD Article 12 obligates States parties to take positive steps towards facilitating persons with disabilities' legal capacity exercise by accommodating supported decision-making arrangements within their domestic legal frameworks. More than expressly protecting persons with disabilities' right to exercise legal capacity, Article 12(3) specifically obligates States parties 'to provide access by persons with disabilities to the support they may require in exercising their legal capacity', or engage in 'supported decision-making'. This support mandate is consistent with other CRPD provisions obligating States parties not only to remove barriers to persons with disabilities' enjoyment of rights but also to create enabling environments that ensure persons with disabilities have the necessary means to do so.[69]

Creating enabling environments, however, requires dismantling institutional barriers that form the bedrock of many modern legal systems. Most domestic legal frameworks reflect Enlightenment-era presumptions that individuals are atomistic, independent agents capable of acting and accepting

64 Freeman et al., 'Reversing hard won victories in the name of human rights: a critique of the General Comment on Article 12 of the UN Convention on the Rights of Persons with Disabilities' (2015) 2 *Lancet* 844.

65 Article 12 attracted the greatest number of reservations, understandings, and declarations by States parties, for instance.

66 E.g. Bulletin No 12441–17 of 5 March 2019 (Chile) (bill pending); Law No 1996 of 26 August 2019 (Colombia); Legislative Decree No 1384 of 3 September 2018 (Peru); Law No 26,994 of 7 October 2014 (Argentina).

67 E.g. Glen, 'Piloting Personhood: Reflections from the First Year of a Supported Decision-Making Pilot Project' (2017) 39 *Cardozo Law Review* 495.

68 E.g. Smith and Stein, 'Mexico' in Waddington and Lawson (eds), *The UN Convention on the Rights of Persons with Disabilities in Practice: A Comparative Analysis of the Role of Courts* (2018) 314 at 324 (describing *Amparo en Revisión* 159/2013).

69 Stein, 'Disability Human Rights' (2007) 95 *California Law Review* 75 at 91.

consequences.[70] However, this presumption diverges from the interdependent reality of most people, regardless of disability.[71] Indeed, disability rights scholarship has presented countervailing theories of autonomy in order to 'counter views of dependence and autonomy as mutually exclusive'.[72] Within liberal autonomy paradigms equating autonomy with independence, the reliance of many persons with disabilities on formal and informal support arrangements to participate fully in their communities contests their claims to autonomy. Rather than evidencing their absent autonomy, the interdependencies that persons with disabilities avail of to navigate built, barrier-rich environments simply represent 'components of their relational autonomy'.[73]

In contrast with atomistic notions of autonomy that posit the individual as an independent and unencumbered actor, relational autonomy theory posits support as 'the prerequisite for autonomy'.[74] Developed first in the context of feminist scholarship, and increasingly of interest to post-CRPD disability rights scholars,[75] relational autonomy theory emphasizes how individuals are 'socially constituted' agents inextricably intertwined with other individuals and social structures through connections, commitments and interdependencies. Rather than posit maximal autonomy as complete freedom from external constraints and contingencies, a relational approach accounts for how exogenous conditions may enhance autonomy beyond the autonomy of an unencumbered state. That is, because of humans' 'socially constituted' nature, they in fact 'define their principles and express their will or intent by making decisions based on their social connections, commitments and interdependencies'.[76] Thus, relational autonomy reinforces a crucial insight of Article 12, namely,

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70 Buckley, 'Relational theory and choice rhetoric in the Supreme Court of Canada' (2015) 29 *Canadian Journal of Family Law* 251 at 256–258.

71 England, 'Separative and Soluble Selves: Dichotomous Thinking in Economics' in Fineman and Dougherty (eds), *Feminism Confronts Homo Economicus* 32 (2005) at 32.

72 Salami and Lashewicz, 'More than Meets the Eye: Relational Autonomy and Decision-making by Adults with Developmental Disabilities' (2015) 32 *Windsor Yearbook on Access to Justice* 91 at 96.

73 Ibid.

74 Lord and Stein, (n 6) at 42.

75 Bach and Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010) at n 84, <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner> accessed 30 August 2020; Series, 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) 40 *International Journal of Law and Psychiatry* 80. Indeed, '[f]eminist critics helpfully point out that traditional understandings of autonomy promote the values of independence, self-sufficiency and separation, whilst undervaluing relations of interconnectedness'. Lord and Stein, (n 6) at 40–41.

76 Salami and Lashewicz, (n 72) at 94.

that persons with disabilities who historically may have been perceived incapable of autonomous action instead may simply manifest their autonomy differently from others.

By recasting the supports that persons with disabilities use every day in order to overcome environmental barriers as instruments of autonomous action in a relational construct, Article 12 provocatively '[c]onfront[s] the passivity that paternalistic and non-participatory models of disability typically evoke'.[77] Indeed, Article 12 invites reconsideration of the external supports that some persons with disabilities may receive not as evidence of autonomy limitations but as diverse forms of expressing autonomy amid the environmental barriers and constraints incidental to the disability experience. Thus, laws authorising legal capacity restrictions based on clinical determinations that certain persons with disabilities are incapable of making decisions when isolated from critical sources of support reflect the same liberal presumptions underpinning outmoded models of disability as intrinsic and not socially constructed. Laws and proceedings that do not weigh how persons with disabilities may navigate decision-making processes with the aid of trusted supporters implicitly discount the diverse ways that persons, with and without disabilities, express their autonomy.[78] Although systems of care, service, and support delivery may in certain cases compromise expressions of autonomy,[79] in other circumstances they can promote the kinds of embeddedness and relatedness that unleash individuals' potential and are integral to an equitable post-CRPD autonomy analysis.[80]

Just as the CRPD does not define 'disability', CRPD Article 12(3) does not define 'support'.[81] Numerous disability rights scholars have signalled a need for deeper research into the unique mechanisms by which persons with disabilities

77 Stein and Lord, 'Jacobus Tenbroek, Participatory Justice, and the Un Convention on the Rights of Persons with Disabilities' (2008) 13 *Texas Journal on Civil Liberties & Civil Rights* 167 at 179.

78 Bariffi and Smith, 'Same Old Game but with Some New Players: Assessing Argentina's National Mental Health Law in Light of the Rights to Liberty and Legal Capacity under the UN Convention on the Rights of Persons with Disabilities' (2013) 31 *Nordic Journal of Human Rights* 325.

79 Poignantly, Lynd describes how two productions by a popular theatre group of persons with intellectual disabilities in western Massachusetts empowered them to describe their service system as a 'chain of oppression'. 'Creating Knowledge through Theater: A Case Study with Developmentally Disabled Adults' (1992) 23 *The American Sociologist* 100 at 110.

80 Dowling et al., 'Managing relational autonomy in interactions: People with intellectual disabilities' (2019) 32 *Journal of Applied Research in Intellectual Disabilities* 1058.

81 The CRPD Committee suggests that the supports envisioned by Article 12(3) are open-ended. General Comment No 1, (n 111), para 17.

access and operationalise various types of support.[82] But the absence of empirical data on how persons with disabilities manifest their autonomy, and how their lived experiences may contribute to existing bodies of thought about relational autonomy, likely reveals the skewed priorities of disability researchers rather than a lack of evidence base for studying support mechanisms. Article 12(3)-consistent supports depend on the type and severity of a given decision, the quality and number of trusted supporters available to a person with disability, and the person with disability's support preferences. A cursory review of pilot projects designed to develop supported decision-making models suggests that such support might ostensibly include gathering basic information, synthesizing or processing complex information, providing a professional or lay opinion, walking through various courses of action and exploring alternative ones, communicating decisions to others, and taking the steps that may be necessary to give effect to an internalized decision.[83] Unsurprisingly, and consistent with relational autonomy theory, these forms of support describe strategies that both persons with and without disabilities employ in order to exercise rights. Article 12 finally updates the international human rights framework to recognise this dimension of human diversity. While the precise contours of Article 12-consistent supports continue to evolve, and while questions about how best to regulate supported exercise of legal capacity, at minimum Article 12(3) puts States parties on notice that many persons with disabilities express their autonomy in unique ways deserving of human rights protections.[84]

4 The IACtHR, *Saramaka*, and Future CRPD Article 12 Challenges

Similar to the IACtHR's pre-*Saramaka* indigenous rights case law, the IACtHR has handed down several disability rights decisions, but has yet to apply ACHR Article 3 to a legal capacity restriction imposed on a person with disability. However, evidence of pervasive human rights violations experienced by persons with disabilities, especially intellectual and psychosocial disabilities, throughout the region due at least in part to plenary legal capacity

82 E.g. Kohn, Blumenthal and Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship?' (2013) 117 *Penn State Law Review* 1111.

83 Glen, (n 67) at 510 n 80.

84 Stein, Mahomed, Patel and Sunkel (eds), 'Introduction' in *Mental Health, Legal Capacity, and Human Rights* (forthcoming 2021).

restrictions[85] makes it foreseeable that the IACtHR will have opportunities to do so. Indeed, a petition (now settled) presented by Disability Rights International and the Human Rights Office of the Archbishop of Guatemala on behalf of psychiatric patients at the National Mental Health Hospital in Guatemala City raised this very issue.[86] The petitioners alleged that the inhuman treatment and degrading conditions at the facility persisted in part because under Guatemalan law the patients' legal capacity was transferred to the hospital's director upon their admission to the facility, thereby preventing them from initiating legal proceedings that might have prompted corrective action or other remedies.[87] Should such a case arise,[88] the IACtHR should interpret ACHR Article 3 consistently with the CRPD in a manner that extends the underlying logic of its indigenous rights and recent forced disappearances precedents to persons with disabilities.

4.1 *Obligation to Progressively Interpret ACHR Article 3*

The IACtHR is bound by the terms of the ACHR to interpret its provisions consistently with developments in international human rights law, even those exogenous to the Inter-American Human Rights System. Specifically, Article 29 of the ACHR contains express directives for construing the ACHR's substantive provisions progressively, and the Court has long applied them to interpret the ACHR together with more normatively expansive sources of international law.[89] Although the expansiveness of the IACtHR's interpretations has drawn criticism,[90] and the Court may at times appear imprecise in its application of

85 Inter-American Commission on Human Rights, Thematic Hearing on the Sexual and Reproductive Rights of Persons with Disabilities in Colombia, 15 May 2014, <https://www.youtube.com/watch?v=yT5U4QHYq7A> accessed 30 August 2020.

86 Disability Rights International and the Human Rights Office of the Archbishop of Guatemala, *Precautionary Measures Petition – 334 patients at the Federico Mora Hospital, Guatemala*, 12 October 2012 at 4, <https://www.driadvocacy.org/wp-content/uploads/DRI-Guatemala-Precautionary-Measures-FINAL.pdf> accessed 30 August 2020.

87 Ibid.

88 Case 12.934, *Frank Guelfi and the Psychiatric Patients of the Santo Tomás Hospital v Panama*, Friendly Settlement, 4 June 2019.

89 *Yakye Axa*, para 127 (deeming 'it useful and appropriate to resort to other international treaties' to interpret the ACHR); Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service Of the Unity of International Law' (2010) 21 *European Journal of International Law* 585 (analysing the Court's application of international law instruments exogenous to the Inter-American system as a means to expand the content of environmental, humanitarian, and investors' rights under the ACHR).

90 Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101, 105–09 (criticising the Court for giving binding and non-binding international instruments equal weight).

the various subsections of Article 29,[91] it has unapologetically continued to progressively interpret the scope of the rights under the ACHR.[92]

Article 29(a) prohibits any interpretation of the ACHR that might restrict the enjoyment or exercise of the rights it recognises 'to a greater extent than is provided for [t]herein'.[93] As a result, the IACtHR interprets the ACHR 'to give it its full meaning' and 'to attain its appropriate effects'.[94] Because the ACHR's object and purpose is the 'effective protection' of rights, the Court has held that it 'should be interpreted in favor of the individual,' or petitioner.[95] These considerations constitute the Court's 'principle of effectiveness,' or *pro homine* principle, which justifies more expansive interpretation of the scope of individuals' rights and States parties' obligations under the ACHR.[96]

The IACtHR has emphasised this principle in decisions regarding the rights of populations it perceives to be 'vulnerable,' whose rights are entitled to 'special protection'.[97] As such, the Court has interpreted broadly the substantive content of rights recognised by the ACHR in cases involving marginalised groups.[98] Also, it has imposed positive obligations on States to ensure their effective enjoyment and exercise of these rights, even where such obligations are not expressly stated.[99] For example, the Court has consistently affirmed that

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91 *Sawhoyamaxa*, para 117 (citing broadly to Article 29 for the authority to interpret the ACHR together with the International Labor Organization Convention No 169 to which Paraguay was party); *Mapiripán Massacre v Colombia* IACtHR Series C 134 (2005) para 115 (citing overly narrowly to Article 29(b) for the authority to interpret the ACHR together with not only the Geneva Conventions to which Colombia was party but also domestic laws and *jus cogens* norms); *Juvenile Reeducation Institute v Paraguay* IACtHR Series C 112 (2004) para 161 (adopting the Committee on the Rights of the Child's interpretation of the word 'development' without citing to Article 29).

92 Neuman, (n 90) at 112–113.

93 Article 29(a) ACHR.

94 *Velásquez Rodríguez v Honduras* IACtHR Series C 1 (1987) para 30; Lixinski, n89 at 601 n9 (cataloging cases).

95 *Velásquez*, para 30; *19 Tradesmen v Colombia* IACtHR Series C 109 (2004) para 173; *Yakye Axa*, para 63 (requiring the State to ensure 'effective protection that takes into account … their situation of special vulnerability, their customary law, values, and customs').

96 Article 2 ACHR ('States Parties undertake to adopt … such legislative or other measures as may be necessary to give effect to [ACHR] rights or freedoms.'); *Ximenes-Lopes v Brazil* IACtHR Series C 149 (2006) paras 98–99.

97 *Ximenes-Lopes*, para 103 (citing *Sawhoyamaxa*, para 154, *inter alia*) ('any person who is in a vulnerable condition is entitled to special protection').

98 *Furlán and Family v Argentina* IACtHR Series C 246 (2012) at para 196 (stating that special measures are required to prevent unreasonable delays in judicial proceedings because persons with disabilities are a vulnerable group).

99 Ibid, para 267 (requiring States 'to create conditions of real equality').

persons with disabilities comprise a vulnerable group and has therefore broadly construed the substantive scope of their rights under the ACHR.[100]

Further, Article 29(b) prevents any interpretation of the ACHR that restricts 'the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party'.[101] Accordingly, the IACtHR has interpreted the ACHR to require the harmonisation of regional and international human rights protections.[102] The Court treats the ACHR as a 'living instrument' and extends its provisions to protect rights not expressly mentioned therein but recognised by other international norms.[103] The IACtHR also frequently interprets provisions of the ACHR to protect rights recognised by subsequent regional and international human rights norms.[104] Moreover, the Court generally adopts treaty bodies' interpretations of international norms, frequently deriving authority from Article 29(b) even though treaty bodies' views usually do not bind even States Parties to those treaties.[105]

4.2 *Application of Saramaka to Future Cases by Persons with Disabilities*

Adjudicating challenges to guardianship by petitioners with disabilities in a manner that is consistent with the CRPD implies a logical extension of the IACtHR's indigenous rights ACHR Article 3 precedents. The Court's pragmatic approach to the traditional legal personality-capacity distinction, combined with its rationale for protecting the collective legal capacity of indigenous groups, may provide useful grounding for legal capacity protection claims brought by persons with disabilities. CRPD Article 12 only reinforces its

100 *In Vitro Fertilization v Costa Rica* IACtHR Series C 257 (2012) at para 291 (citing *Furlán*, paras 133, 135, and *Ximenes-Lopes*, para 129) (concluding that the denial of access to in vitro fertilization constitutes disability-based discrimination).

101 Article 29(b) ACHR.

102 OC-1/82, *'Other Treaties' Subject to the Advisory Jurisdiction of the Court* (*Article 64 American Convention on Human Rights*) IACtHR Series A (1982) at para 41 (interpreting the ACHR to possess a 'certain tendency to integrate the regional and universal systems for the protection of human rights).

103 OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* IACtHR Series A 16 (1999) at paras 114–15 (internal citations omitted).

104 *Mapiripán Massacre*, para 115 (interpreting Article 29(b) to require the Court to consider Common Article 3 of the Geneva Conventions).

105 *Kichwa Indigenous People of Sarayaku v Ecuador* IACtHR Series C 245 (2012) at n 223; *Saramaka*, paras 93–94 (citing Article 29(b) as its authority to adopt the views of the Committee on Economic, Cultural, and Social Rights and the Human Rights Committee where the State was party to the treaties governed by these bodies).

rationale in those cases for disbanding the traditional legal personality-capacity doctrinal divide.

In *Saramaka*, the IACtHR interpreted the ACHR to protect the legal capacity of indigenous and tribal communities due to (1) their unique, collective manner of exercising legal capacity, (2) the risk of substitute decision-making by others, and (3) the possibility that failure to protect their exercise of legal capacity threatened other rights recognized in the ACHR.[106] Analogously, legal capacity restrictions of persons with disabilities routinely precipitate additional rights violations, while also exposing them to substitute decision-making and failing to recognize the unique manner in which they exercise legal capacity, namely, through supports.

First, CRPD Article 12 at a minimum urges shifting domestic courts' attention when analysing whether persons with disabilities can exercise legal capacity from doing so on their own to doing so with or without the support of others. Persons with disabilities in fact often disrupt classical liberal notions of individual, atomistic autonomy by demonstrating relational autonomy through collective exercise of legal capacity, that is, with support. For the *Saramaka* Court, ACHR Article 3 protects exercising legal capacity collectively if 'individual recognition [of legal personality] fails to take into account the manner in which members of [a protected group] in general, and [these members] in particular, enjoy and exercise a particular right'[107] where the group in question 'fully exercise[s] these rights in a collective manner'.[108] Whether the group could in fact exercise their legal capacity as a collective once institutional barriers were removed did not enter the *Saramaka* analysis. Rather, the Court focused on the additional rights violations that would flow from denying communal groups collective legal personality.[109] The IACtHR additionally and affirmatively required Suriname to permit the Saramaka's exercise of legal capacity as a means to protect against the violation of other rights recognized under international law in a way that accounted for their particular circumstances and needs.[110]

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106 Dhanda, (n 59) at 456–57 (arguing that the CRPD reveals the 'the falseness of the dichotomy between civil-political and social-economic rights' because without a right to exercise legal capacity 'it will not be possible to obtain rights guaranteed under the Convention, such as the right to live in the community or the right to participate in political and public life').

107 *Saramaka*, para 168.

108 Ibid, para 174.

109 *Saramaka*, para 173 (finding that without collective juridical personality, the 'individual [members'] property rights may trump their rights over communal property').

110 Ibid, para 174 (requiring Suriname to adopt 'legislative or other measures that recognize and take into account the particular way in which the people view themselves as a

Although the IACtHR did not question the Saramaka's functional capacity to exercise legal capacity collectively, such questions do often arise with regard to persons with disabilities.[111] However, where a petitioner with disability challenges a legal capacity restriction, the IACtHR should be mindful of the philosophical shift urged by CRPD Article 12(3). Specifically, courts might be tempted to consider the functional limitations of persons with disabilities as analogous to those that drove its concerns regarding children's exercise of legal capacity in *Atala-Riffo* among other cases.[112] But such analogising would only perpetuate paternalistic attitudes about adults with disabilities' inherent vulnerability. By contrast with children, persons with disabilities are not inherently vulnerable to rights violations; rather, legal capacity restrictions create 'circumstances external to the individual that render them "powerless"'.[113] Moreover, even if international law allows for legal capacity restrictions on children, ACHR Article 29 obliges the Court to interpret the ACHR as either co-extensive with or more expansive than the protections recognised in the CRPD as *lex specialis* regarding persons with disabilities.

Moreover, court-sanctioned legal capacity restrictions definitionally expose persons with disabilities to substituted decision-making by others. In *Saramaka*, Suriname's failure to recognize the Saramaka people's collective exercise of legal capacity created circumstances where the interests of individuals could and did easily trump those of the community.[114] By denying the Saramaka the

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collectivity [sic] capable of exercising and enjoying the right to property'.); ibid, para 194(b) (requiring Suriname to 'grant the members of the Saramaka people legal recognition of their collective juridical capacity … with the purpose of ensuring the full exercise and enjoyment of their right to communal property … *in accordance* with their communal system, customary laws, and traditions') (emphasis added).

111 Committee on the Rights of Persons with Disabilities, General Comment No 1 on Article 12: Equal recognition before the law, 19 May 2014, CRPD/C/GC/1 at para 15, <https://undocs.org/CRPD/C/GC/1> accessed 30 August 2020.

112 *Case of Atala Riffo and Daughters v Chile* IACtHR Series C 239 (2012) at para 200 (reaffirming the Court's earlier conclusion that ACHR Article 3 interpreted together with the Convention of the Rights of the Child does not protect children's exercise of legal capacity because the latter endorses individualized assessments for delimiting a child's rights). Article 12 of the United Nations Convention on the Rights of the Child permits 'a representative or an appropriate body' to participate on behalf of a child in a judicial proceeding affecting that child. 1989, 1577 UNTS 3. See also *Juridical Condition and Human Rights of the Child* at para 101.

113 Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 28 July 2008, A/63/175 at para 50, <https://undocs.org/A/63/175> accessed 30 August 2020.

114 *Saramaka*, para 169 (observing that at times individuals' property claims may prevent the community from exercise its right to property 'in accordance with [its] own traditions').

collective exercise of legal capacity, Suriname 'fail[ed] to take into account the manner in which members of … the Saramaka … enjoy and exercise a particular right'.[115]

The Court's concern that failure to protect the Saramaka people's collective exercise of legal capacity would prevent them from making decisions on the basis of their communal will and preferences is analogous to how overly broad or undue legal capacity restrictions prevent persons with disabilities from making decisions in accordance with their own will and preferences.[116] Instead, such restrictions often expressly permit the interests of guardians or representatives may trump their own.[117] Consequently, guardians and others routinely make even the most personal and irreversible decisions about persons with disabilities, with little or no regard for their own preferences,[118] including abortions and sterilizations, medical treatments, parenting,[119] and marriage.[120] In *Gauer v France*, the applicants alleged that without their own consent they underwent sterilization procedures approved by their guardians.[121] Full guardianship orders also allow third parties to commit persons with disabilities against their will or to prolong commitments that may have

115 Ibid, para 168; *Sawhoyamaxa*, para 120 (declining to recognize only traditional, individual-based property ownership because 'holding that there is only one way of using and disposing of property … would render protection under Article 21 of the Convention illusory for millions of persons').

116 *Saramaka*, para 180 (citing a domestic case where an individual successfully claimed title over land located within a Saramakan village over a recognized community leader's objection). Compare this with the ECtHR's observation in *Shtukaturov v Russia* that the applicant's commitment against his will was considered voluntary under Russian law because his mother as his guardian had requested it and thus did not require court approval. *Shtukaturov*, *infra* n 122 at para 21.

117 *DD v Lithuania* Application No 13469/06, Merits and Just Satisfaction, 14 February 2012 at paras 123 and 125 (rejecting the State's arguments that the participation of a district prosecutor and a legal representative appointed by the applicant's adoptive father because the prosecutor did not make the proceedings adversarial and the applicant actively disagreed with her adoptive father and his lawyer).

118 Fiala-Butora, 'Disabling torture: The obligation to investigate ill-treatment of persons with disabilities' (2013) 45 *Columbia Human Rights Law Review* 214 at 265.

119 *X v Croatia*, paras 78–80 (holding that denial of mother to participate in adoption proceeding because of her legal capacity restriction violated her rights to family and to private life).

120 *Delecolle*, paras 12–13.

121 *Gauer v France* Application No 61521/08, Admissibility, 23 October 2012 at paras 1–3 (noting that French law does permits sterilization procedures to be performed on persons with disabilities under legal capacity restrictions with only the guardian's consent).

begun voluntarily.[122] In *Lashin v Russia*, a hospital prevailed in incapacitating and treating the applicant against not only his own but also his father's will.[123] In *A-MV v Finland*, a partial guardian substituted the State's determination of what residence was appropriate for a man with intellectual disability who had expressed a preference to reside in the private home of his willing foster family.[124] While authorized third-party decision-makers may not always fail to respect the will and preferences of persons with disabilities, the rights violations resulting from substitute decision-making evidence the frequent divergence of persons with disabilities and their legal representatives.[125] As the *Saramaka* Court justified its interpretation of Article 3 to protect the Saramaka's collective exercise of legal capacity on the inadequacy of relying on individuals to respect the will and preferences of the group,[126] it should also inform its Article 3 analysis in a guardianship case on the peril of relying on others to make personal and irreversible decisions regardless of the will and preferences of persons with disabilities, as many guardians are permitted to do.[127]

Finally, *Saramaka* was concerned by the likelihood that others' rights 'may trump the[] rights' of persons placed 'in a vulnerable situation' due to their lack of legal capacity.[128] Specifically, the IACtHR recognised that the lack of legal capacity prevented the Saramaka from seeking 'judicial protection against

122 *Shtukaturov v Russia* Application No 44009/05, Merits, 27 June 2008 at para 21 (noting the applicant's mother's authority as guardian for committing him to a psychiatric hospital against his will; under domestic law, her consent to his hospitalisation rendered it voluntary, obviating the need for court approval).

123 *Lashin*, paras 9–19 (the father even sued the public notary after an unsuccessful bid to confer power of attorney to another person); ibid, paras 22–31 (municipal parties replaced the applicant's father as guardian without the father's participation in the proceedings and prolonged his hospitalization against both the father's and the applicant's will).

124 Application No 53251/13, Merits and Just Satisfaction, 23 June 2017 at para 14.

125 *DD*, para 124 (noting that 'the relationship between the applicant and her adoptive father [and appointed guardian] has not always been positive. Quite the contrary, on numerous occasions the applicant had contacted State authorities claiming that there was a dispute between the two of them, which culminated in her being deprived of legal capacity and her liberty').

126 *Saramaka*, para 168, 171 (observing that while the juridical personality of individual members of the Saramaka is necessary for their individual rights, the recognition of their collective exercise of legal capacity is 'a way … to ensure that the community, as a whole, will be able to fully enjoy and exercise their right to property, in accordance with their communal property system').

127 Dhanda, (n 59) at 436 ('Once a person is found to be incompetent, a consequent effect is that the person's own choices and preferences will be ignored and other people will decide for them.')

128 *Saramaka*, para 173.

violations of their [other] rights'.[129] While permitting the Saramaka people to exercise legal capacity collectively was not sufficient to protect these rights as recognised in the ACHR, it was a necessary pre-condition for doing so.[130] The Court's observation that failure to allow a person to exercise and enjoy rights that he or she is recognised to have impermissibly 'places the person in a vulnerable position in relation to the State or third parties' holds equally true in cases involving persons with disabilities subject to guardianship.[131]

Similarly, legal capacity restrictions frequently block persons with disabilities from legal remedies for such incursions, thereby not only exposing them to violations of other rights but depriving them of the means to protect themselves from the violations to which they are exposed. Restrictions lead to unreasonable judicial delays[132] and prevent persons with disabilities from contesting the legal capacity restrictions[133] or liberty deprivations that further remove them from relief.[134] Courts routinely consider disability, sometimes alongside other factors, to justify foregoing the testimony of persons with disabilities,[135] dispensing with procedural safeguards,[136] denying court

129 Ibid, paras 173 and 171.

130 Ibid, paras 171 and 174 (signalling that the reparations incumbent on Suriname would be sufficient insofar as they guaranteed the exercise of communal property rights and access to the judicial system).

131 Ibid, para 166.

132 *Matter v Slovakia* Application No 31534/96, Merits, 5 July 1999 at para 60 (finding that the first instance court's twenty-month delay in requesting a medical examination in a guardianship proceeding was unreasonable).

133 *Mikhaylenko v Ukraine* Application No 49069/11, Merits and Just Satisfaction, 30 May 2013 at paras 13–14 (describing how the applicant in seeking to restore her legal capacity challenged Ukrainian law for failing to recognize the right of persons subject to guardianship to apply for restoration, only for her restoration submission to be declared inadmissible, with the court citing the same provision she had challenged).

134 *Stanev v Bulgaria* Application No 36760/06, Merits and Just Satisfaction, 17 January 2012 at para 13 (finding the applicant had been placed in a social care home by a public guardian and could not leave).

135 *Sýkora*, paras 10–11 (describing how the applicant not only never received notice of his guardianship hearing, and therefore did not appear, but also that the trial court relied on the report of an expert who had never personally examined him).

136 *DD*, para 122 (finding that Lithuania failed to provide basic procedural safeguards during successive court proceedings where the applicant was incapacitated without her participation, or the presence of her medical examiners or other witnesses, and then appointed a guardian that she vocally opposed without the participation of a lawyer on her behalf despite her request for one).

appearances,[137] or denying access to the criminal justice system.[138] Additionally, legal capacity restrictions may bar persons with disabilities from contesting, judicially, sales of their property.[139] Relatives and residential facilities often initiate full guardianship proceedings in order to stake uncontested title claims on the property of persons with disabilities.[140] For example, in *Shtukaturov v Russia*, the applicant's mother perversely relied in part on his failure to assert his property rights to justify his full guardianship.[141] In *Mikhaylenko v Ukraine* , the applicant had no legal recourse under domestic laws to seek restoration of his capacity.[142] In *Salontaji-Drobnjak v Serbia*, the court deemed the applicant's appearance in the final stage of his legal capacity restoration proceedings to be useless.[143] In *DD v Lithuania*, the applicant was completely barred from participating in her full guardianship proceedings.[144] Courts sometimes justify preventing persons with disabilities from initiating or participating in capacity-related proceedings so long as legal representatives for the person participate.[145] In a similar vein, Suriname unsuccessfully argued

137 *Salontaji-Drobnjak v Serbia* Application No 36500/05, Merits and Just Satisfaction, 13 October 2009 at paras 127–28 (finding an access to justice violation where the applicant was denied the opportunity to appear in the final stage of his legal capacity restoration proceedings 'on the basis of an arbitrary prediction of its hypothetical "uselessness"').

138 *X and Y v Netherlands* Application No 8978/80, Merits and Just Satisfaction, 26 March 1985 at paras 8–12 (describing how an appellate court held that the criminal complaint of a father of a 16-year old girl with intellectual disability alleging that she was raped could not function in lieu of a complaint lodged by the girl herself, even though the police had regarded her as incapable of doing so and had instructed the father to make the complaint in his own name).

139 *Zehentner v Austria* Application No 20082/02, Merits and Just Satisfaction, 16 October 2009 at paras 54 and 65 (ruling that the State impermissibly interfered with the right to respect for the home where an appeals court held that the applicant's plenary legal capacity restriction justifiably barred her from proceedings leading to the judicial sale of her apartment).

140 *Shtukaturov*, para 8 (applicant's mother obtained guardianship over him after he had inherited an apartment and a house with a plot of land from his grandmother).

141 Ibid, para 10 (indicating 'that he was incapable of leading an independent social life and thus needed a guardian').

142 *Mikhaylenko*, para 39 (finding that Ukraine's 'general prohibition on direct access to a court by that category of individuals does not leave any room for exception').

143 *Salontaji-Drobnjak*, para 127 (reasoning that the applicant's absence, far from 'useless,' would have allowed him to challenge the experts' report recommending the partial deprivation of his legal capacity).

144 *DD*, para 102 (finding that the applicant was not only barred from her interdiction hearings but could not object to the guardian appointed by the court in her absence who subsequently barred her from appealing her interdiction order).

145 *Lashin*, para 32 ('[T]he District Court closed the proceedings because the hospital, as the applicant's only legitimate guardian, had revoked its request for authorisation of his

that the ability of members of the Saramaka community to access the justice system individually precluded their right to judicial protection claim as a matter of law.[146] As the *Saramaka* Court justified its interpretation of ACHR Article 3 to protect the Saramaka's collective exercise of legal capacity on their need to avail this right to protect against other ACHR rights violations, in future cases the IACtHR should also consider how persons with disabilities subject to legal capacity restrictions may be similarly barred from accessing the justice system.

Thus, in cases involving persons with disabilities challenging legal capacity restrictions, the IACtHR can apply its implicit three-prong test from *Saramaka* to achieve an ACHR Article 3 interpretation progressively so as to safeguard their rights under CRPD Article 12. By finding ACHR Article 3 violations where persons with disabilities rely on others' support to exercise legal capacity, are at risk of substitute decision-making by others, and may be impeded from protecting themselves against resultant rights violations, the IACtHR will be poised not only to ensure that its jurisprudence evolves alongside international legal and societal norms, but also to innovate a heuristic for resolving the thorny legal issues presented by such challenges.

5 Following the IACtHR'S *Saramaka* Jurisprudence

The rationale undergirding the IACtHR's *Saramaka* jurisprudence can also reverberate beyond the Americas. Increasingly, judges are turning to supranational and peer courts to resolve pressing legal questions. Often described as 'judicial dialogue', judges of regional and national courts frequently have recourse to non-binding precedents from adjudicative bodies in other jurisdictions either to bulwark their reasoning, to legitimise their conclusions, or to seek harmonious interpretations of similar normative provisions.[147] However, forceful critiques of transnational judicial dialogue scholarship finger the directionality of transmission, suggesting that in many cases 'dialogue' may be

confinement. The applicant's confinement was thus considered to be "voluntary", and therefore did not require court approval.'); ibid, at para 24 (psychiatric examiners cited the applicant's multiple attempts to restore his legal capacity as justification for continuing his interdiction).

146 *Saramaka*, para 5.

147 Seibert-Fohr, 'Judicial dialogue from an inter-regional perspective', in Inter-American Court of Human Rights, (n 150) at 180.

euphemistic or illusory.[148] For example, even though many IACtHR judgments contain abundant references to ECtHR decisions,[149] the ECtHR appears more circumspect regarding IACtHR jurisprudence. That said, the ECtHR has increasingly 'drawn inspiration'[150] from compelling IACtHR decisions on issues of first impression, including enforced disappearances[151] and amnesties.[152] Further, the establishment of a 'Permanent Forum of Institutional Dialogue' suggests that the ECtHR will increasingly look to IACtHR judgments for guidance,[153] especially where relevant ECtHR precedents are sparse.

Relatively underexplored are questions of whether and how United Nations human rights treaty bodies incorporate regional and national court decisions in their resolution of individual communications. Nevertheless, non-binding 'Views' adopted by human rights treaty bodies have judgment-like qualities that contrast with other vehicles for normative guidance, namely, General Comments and Concluding Observations on States parties' reports.[154] Arguably, the adjudicative nature of individual communication procedures renders Views more influential in guiding States parties' courts. Yet, these bodies, whose members frequently lack formal judicial experience, have been criticised for improvising heuristics to explicate States parties' treaty obligations.[155]

148 Toufayan, 'Identity, Effectiveness, and Newness in Transjudicialism's Coming of Age' (2010) 31 *Michigan Journal of International Law* 307; Law and Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 *Washington Law Review* 523.

149 Ferrer Mac-Gregor, 'What Do We Mean When We Talk about Judicial Dialogue?: Reflections of a Judge of the Inter-American Court of Human Rights' (2017) 30 *Harvard Human Rights Journal* 89.

150 Judge Raimondi, Remarks, in IACtHR, *Dialogue Between Regional Human Rights Courts* (2020) 51 at 52, <http://www.corteidh.or.cr/sitios/libros/todos/docs/dialogo-en.pdf> accessed 30 August 2020.

151 *Varnava and Others v Turkey* Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 6071/90, 16072/90 and 16073/90, Merits and Just Satisfaction, 18 September 2009 at para 147.

152 *Marguš v Croatia* Application No 4455/10, Merits and Just Satisfaction, 27 May 2014 at paras 131 and 138.

153 Article 1 Joint Declaration of the Presidents of the African Court on Human and Peoples' Rights, the European Court of Human Rights and the Inter-American Court of Human Rights on the occasion of the 40th Anniversary of the entry into force of the American Convention on Human Rights and the creation of the Inter-American Court of Human Rights (2018), <https://echr.coe.int/Documents/San_Jose_Declaration_2018_ENG.pdf> accessed 30 August 2020.

154 Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Alston and Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 15.

155 Melchem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905.

Specifically regarding the task facing the CRPD Committee, the failure of other human rights treaty bodies to crystalise States parties' obligations towards persons with disabilities has left a yawning normative gap compared to other groups.[156] Particularly for the right to legal capacity, which the CRPD Committee both has prioritised and interpreted expansively in both its Concluding Observations on States parties' reports and its first General Comment, identifying innovative judicial approaches to remedy vexing human rights violations is critical to the CRPD Committee's aims of promoting effective CRPD implementation.

5.1 *The ECtHR*

Post CRPD, a notable body of guardianship-related case law has emerged from the ECtHR. Even though the European Convention on Human Rights (ECHR) lacks an analogue to ACHR Article 3, the ECtHR has 'been inching its way toward' recognizing a CRPD-style right to legal capacity.[157] Indeed, most challenges to legal capacity restrictions by persons with disabilities before the ECtHR have done so indirectly—by attacking either defective guardianship proceedings (*Stanev*), or concomitant restrictions of other substantive rights recognized by the ECHR, such as rights to vote (*Kiss*), marry (*Delecolle*), liberty (*DD*), or private life (*Shutkaturov*) and parental rights.[158] Although some may argue that the ECtHR's jurisprudence has gone far enough so as to establish a limited right to legal capacity,[159] a recent guardianship case, *A-MV v Finland*, where the Court affirmatively ruled a guardianship order based on a domestic court's factual finding that the applicant was unable to understand a decision regarding his residence,[160] suggests that these indirect challenges' approach to CRPD Article 12 may be asymptotic. Worryingly, the ECtHR has even endorsed

156 Quinn et al., *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 (2002), <https://www.ohchr.org/Documents/Publications/HRDisabilityen.pdf> accessed 30 August 2020; Rosenthal, 'The Right of All Children to Grow Up with a Family under International Law: Implications for Placement in Orphanages, Residential Care, and Group Homes' (2019) 25 *Buffalo Human Rights Law Review* 65.

157 Flynn, 'The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?' (2014) 32 *Berkeley Journal of International Law* 134 at 150.

158 *Kocherov and Sergeyeva v Russia* Application No 16899/13, Merits and Just Satisfaction, 12 September 2016, at paras 16–54.

159 Email from Janos Fiala-Butora to authors (25 August 2020).

160 *A-MV*, para 14.

appointing a guardian for an applicant with disability.[161] Thus, the prospective limits of indirect challenges to guardianship orders in the ECtHR has led at least one observer to suggest that such claims might be more favourably adjudicated on discrimination rather than right to private life grounds.[162] Instead, the three-factor test implicit in *Saramaka* can provide an effective tool for the ECtHR to decide head on challenges to legal capacity restrictions under ECHR Article 8. Indeed, training its totality-of-the-circumstances approach to legal capacity restrictions on these three factors may assist the ECtHR to harmonise its jurisprudence with CRPD precepts.

Take *Stanev v Bulgaria*, which concerned a 46-year old with schizophrenia living in his own apartment who was placed under guardianship without notice of the proceeding.[163] He was subsequently involuntarily committed to an institution and held in degrading conditions.[164] Bulgarian law prevented him from challenging either his commitment or the guardianship order itself.[165] While the ECtHR found a violation of his rights to freedom from ill-treatment, liberty and a fair trial under the ECHR, it did not rule directly on whether the legal capacity restriction violated Mr Stanev's ECHR Article 8 right to respect for private life—an omission for which some commentators have criticised the Court. One observer in particular has speculated that the Court may have declined to consider Mr Stanev's disproportionate interference arguments due to the availability of alternative grounds or the Court's reluctance to incur upon the 'margin of appreciation' generally extended to States subject to its jurisdiction.[166] Because the ECtHR generally finds that interferences with the right to private life are justified if they accord with domestic law, pursue a legitimate aim, and both are proportionate to that aim and address a 'pressing social need',[167] it might have been wary of engaging in a totality-of-the-circumstances-style scrutiny of a heavily fact-based trial court inquiry. A workable heuristic *à la Saramaka*, however, might have emboldened the Court to scrutinise the legal capacity restriction itself, not merely the downstream rights violations it caused.

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161 *B v Romania* (*No. 2*) Application No 1285/03, Merits and Just Satisfaction, 19 May 2013, at para 98.

162 Flynn, (n 157) at 140–142.

163 Lewis, '*Stanev v. Bulgaria*: On the Pathway to Freedom' (2012) 19 *Human Rights Brief* 2 at 2.

164 *Stanev*, paras 209–212.

165 Ibid, para 239.

166 Lewis, (n 163) at 5.

167 E.g. *A-MV*, para 81.

Under a *Saramaka*-style three-factor test, Mr Stanev would have had to show that: (1) prior to the order he did in fact make decisions with others' support, (2) the order in fact authorized a third party to make decisions on Mr Stanev's behalf that he opposed, and (3) the order deprived him of meaningful opportunities to defend other substantive rights. Taking these factors in order, although it is unclear from the ECtHR's decision whether Mr Stanev argued that he did in fact make decisions with others' support,[168] this might provide sufficient grounds to question the trial court's factual findings, especially if it had relied on Mr Stanev's individual cognitive or adaptive functioning without considering how he may have availed of supplemental supports. The *Stanev* facts seem to easily satisfy the second and third factors. The fact that Mr Stanev's guardian did make decisions for Mr Stanev that he opposed—namely, to commit him[169]—would have satisfied the second *Saramaka* factor. Also, the ECtHR's findings with regard to Mr Stanev's inability to defend himself in Bulgarian courts against his commitment and the degrading conditions of his detention[170] would easily have satisfied the third factor. In this way, the Court might have had a clearer path for scrutinising what might have been a heavily fact-based inquiry by the trial court consistent with its customary deference to first-instance factual findings.

Similarly, a *Saramaka*-inspired analysis might have altered the outcome of *A-MV v Finland*. The *A-MV* Court held that a guardianship order did not violate an intellectually disabled man's ECHR Article 8 right to respect for private life. The man's foster family challenged the guardianship order after the court-appointed public guardian removed him from the foster family's residence and placed him in a 'special living unit' managed by the State over the applicant's objections.[171] The ECtHR ruled this form of State interference justified because the domestic court had properly based its order on the applicant's inability to understand stakes of his move, and also because the appointed guardian was authorized by Finnish law to make personal decisions for the applicant if he failed to understand and appreciate the specific decision to be made.[172] But if the ECtHR had considered not only whether the domestic court had found that the applicant was unable to appreciate the implications of his placement on his own, but further, and consistent with *Saramaka*, whether the court's

168 Judge Kalaydjieva in her partially dissenting opinion noted that 'Mr Stanev's capacity to perform ordinary acts relating to everyday life and his ability to enter validly into legal transactions with the consent of his guardian were recognized.'

169 *Stanev*, para 13.

170 Ibid, paras 213 and 246.

171 Ibid, para 12.

172 Ibid, paras 30, 85, and 87–89.

finding considered whether the applicant was able to understand placement-related decisions with others' support, then it might have had grounds for ruling the domestic court's factual findings insufficient to justify the restriction. Moreover, and consistent with *Saramaka*, if the ECtHR had considered that the guardianship order either authorized others to make decisions for the applicant that he himself opposed (e.g. his placement in a public facility rather than a private home[173]), or prevented the applicant from defending his right to freedom of movement (e.g. his application to replace his guardian with another on the basis of his opposition to his placement in a public facility had been denied[174]), then it might have had sufficient basis for ruling the State's interference disproportionate and in violation of ECHR Article 8.

5.2 *The CRPD Committee*

Like the ECtHR, the CRPD Committee can and should look to the IACtHR's *Saramaka* judgment. Although CRPD Article 12 has prominently driven the treaty body's agenda, it has been criticized for beating the same drum without developing workable tools to encourage States parties to implement its transformative vision for persons with disabilities' legal capacity right.[175] While the CRPD Committee may have been justified in focusing its General Comment No 1 on legislative measures to dismantle proceedings stripping persons with disabilities of that right,[176] it neglected to provide a heuristic for adjudicating individual complaints regarding CRPD Article 12 violations. Such guidance might have been critically useful in early CRPD Article 12 judgments by both national and regional courts. Indeed, the ECtHR is more inclined to reference the views of quasi-judicial international treaty bodies when presented with novel human rights issues.[177]

Moreover, the CRPD Committee sidestepped tackling the issue head-on in an individual communications procedure the year prior. *Zsolt Bujdosó and five others v Hungary* presented an opportunity to rule on a categorical bar to

173 Ibid, para 12.

174 Ibid, paras 15–18.

175 Critics include Szmukler, '"Capacity", "best interests", "will and preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18 *World Psychiatry* 34, and Dawson, 'A realistic approach to assessing mental health laws' compliance with the UN-CRPD' (2015) 40 *International Journal of Law and Psychiatry* 70. For a balanced assessment of the Committee's guidance, see Series and Nilsson, 'Article 12 CRPD: Equal Recognition before the Law' in Batenkas, Stein, and Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* 339 (OUP 2018).

176 General Comment No 1, (n 111) at para 26.

177 Nußberger, 'The ECtHR' Use of Decisions of International Courts and Quasi-Judicial Bodies' in Müller (ed), *Judicial Dialogue and Human Rights* (2017) 419 at 428.

voting by persons with intellectual disabilities subject to guardianship orders.[178] The communication followed on the ECtHR's *Kiss v Hungary* judgment which left open the possibility for States to disenfranchise persons with disabilities based on individualized assessments of their voting capacity so long as the assessments passed its proportionality test.[179] The treaty body framed its decision as a legal capacity restriction-triggered political participation right violation, despite being urged by the Harvard Law School Project on Disability (HPOD), a third-party intervener, 'to decide the present case beyond the narrow issue of the violation of the human rights of the authors' and instead 'to rule explicitly on the other question raised by this case, namely, that subjecting persons with disabilities to individualized assessments of their voting capacity' itself violates the CRPD, in order to 'influence the understanding of the [ECtHR] and other regional and national courts and tribunals, all of whom are likely to be approached on this same issue, and thereby strengthen the protection of rights of persons with disabilities worldwide'.[180] Although the CRPD Committee did criticize the individualized assessments of capacity adopted by Hungary following *Kiss*, liberally utilising the HPOD brief, it failed to reinforce its conclusion with compelling reasoning.[181]

A clear rule for deducing Article 12 violations might have allowed the CRPD Committee to strengthen the resolve of its Views on the *Zsolt Bujdosó* communication regarding legal capacity. Notwithstanding the authors' assertions that their rights to both legal capacity and political participation had been violated, the treaty body merely found a violation of the latter, when read together with the former.[182] The CRPD Committee declared that 'a restriction pursuant to an individualized assessment' of a person with intellectual or psychosocial disabilities' functional capacity to exercise the right to vote 'constitutes discrimination on the basis of disability', but crucially, it did not explain why.[183] Implicitly, the treaty body appeared to be influenced by Hungary's failure to provide civic education or requested forms of assistance to disenfranchised persons with disabilities.[184] However, it might have increased the instructional value of its decision by reasoning analogously to the IACtHR in *Saramaka* that Article 12 had been violated due to the unique, relational manner of certain

178 *Zsolt Bujdosó and five others v Hungary* (4/2011), CRPD/C/10/D/4/2011 at para 2.
179 Ibid, para 5.4.
180 Ibid, para 5.5.
181 Ibid, para 10.2(b).
182 Ibid, paras 9.5 and 9.7.
183 Ibid, para 9.4.
184 Ibid, para 7.3.

persons with disabilities' exercise of legal capacity (i.e. with support), the risk of substitute decision-making by others (here, impliedly by other voters), and the possibility that failure to protect their exercise of legal capacity threatened other rights recognised in the CRPD (i.e. the Article 29 right to political participation). Thus, the CRPD Committee missed an important opportunity to instruct other adjudicatory bodies on their role in furthering CRPD implementation.

Similarly, in *Noble v Australia* the CRPD Committee concluded that the Australian government's determination that Mr Noble, an indigenous man[185] who had been charged with sexual offences, was 'unfit to plead' due to 'intellectual and mental disability'.[186] Subsequently, he was denied bail and imprisoned for over 10 years—had he been convicted, he stood to serve a sentence of less than 3 years.[187] The government's 'unfit to plead' determination prevented Mr Noble from standing trial, 'despite his clear intention to do so'.[188] The treaty body held that Australia had violated Article 12 because the government based its determination on his disability,[189] but its reasoning was scant. For example, the CRPD Committee did not apply General Comment No 1 to the legislative criteria used to find Mr Noble incapable to stand trial, thus declining to rebut Australia's contention that this form of differential treatment was justified and therefore non-discriminatory.[190] Nor did it contend with vexatious facts such as the author's history of increasingly serious infractions suggesting that the author would likely continue his conduct.[191] Instead, the treaty body assumed self-evident that the Australian government's incapacity determination impermissibly discriminated on the basis of disability.

A *Saramaka*-inspired three-prong test might have helped bridge this syllogistic gap. First, there was evidence suggesting that Mr Noble could exercise legal capacity in a 'unique' manner, that is, with 'appropriate assistance'.[192] Further, the risk of substitute decision-making by others was clearly manifest in

185 Harpur and Stein, 'Indigenous Persons with Disabilities and the Convention on the Rights of Persons with Disabilities: An Identity without a Home?' (2018) 7 *International Human Rights Law Review* 165 at 192–195 (criticising the CRPD Committee for overlooking Mr Noble's Aboriginal identity).

186 *Noble v Australia* (7/2012), CRPD/C/16/D/7/2012 at paras 2.1 and 8.5–6.

187 Ibid, para 2.4.

188 Ibid, para 8.6.

189 Ibid.

190 Ibid, paras 4.3 and 4.20.

191 Ibid, paras 4.4–5.

192 Ibid, para 2.6.

his subjection to a Review Board's progress reviews regarding the continued need for his detention.[193] Last, as the CRPD Committee implied in its conclusions, the failure to protect Mr Noble's right to legal capacity endangered other rights, namely, his rights to access to justice, liberty and freedom from cruel, inhuman and degrading treatment.[194] By marshalling these facts, the CRPD Committee could have not only strengthened its own decision but also present a model approach for other adjudicatory bodies facing similar questions.

Coming full circle, explicit adoption of a *Saramaka*-inspired heuristic for adjudicating legal capacity-related disputes might inform the work of the CRPD Committee. Its categorical proclamations on the incompatibility of legal capacity restrictions and Article 12 have arguably been more effective at inspiring civil society advocacy to promote supported decision-making and undergirding legislative reforms than empowering individuals subject to such restrictions to overturn them in court. Without overlooking these laudable successes, the slow pace of attitude-shifting and legislative reform projects may not immediately serve the interests of persons with disabilities today experiencing legal capacity restrictions' far-reaching and drastic consequences.

Thus, the importance of signalling to other adjudicatory bodies how to resolve specific cases and controversies despite entrenched domestic normative frameworks that run afoul of Article 12. Indeed, not all courts are empowered to consider normative conflicts; even for courts who are, the absence of judicial heuristics can impede rulings that the treaty body might seek to inspire.[195] More frequently, judges may be empowered to decide whether individuals' right to legal capacity under the CRPD has been violated. But because the CRPD Committee's General Comment on Article 12, despite decrying all legal capacity restrictions premised on disability, provides few workable tests that adjudicators might apply to the facts before them, many judges may struggle to harmonise their decisions with the CRPD's normative content.

6 Conclusion

Inter-American disability rights litigants—as well as their European peers, adjudicators, and treaty body members—should be attuned to utilising the jurisprudential opportunities carved out by indigenous and other minority groups, both in general, and specifically in *Saramaka.* Strikingly, the IACtHR's ACHR

193 Ibid, paras 2.4, 2.5, 2.7, 2.9, 4.12 and 4.13.

194 Ibid, paras 8.6–9.

195 Smith and Stein, (n 68) at 343–344.

Article 3 interpretative shift transposed between *Yakye Axa* in 2005 and *Saramaka* in 2007, during the apogee of the paradigm-altering CRPD Article 12 negotiations. Although this article might be the first to draw a connection between these events, inevitably and consistent with intersectionality tenets, diverse communities of activists have much to contribute to the advances of their peers.

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